# WAR IN UKRAINE, ACROBATICS AT THE PEACE PALACE. PROVISIONAL MEASURES BETWEEN POLITICAL CORRECTNESS AND LEGALITY

# *GUERRA EN UCRANIA, ACROBACIA EN EL PALACIO DE LA PAZ. MEDIDAS PROVISIONALES, CORRECCIÓN POLÍTICA Y LEGALIDAD*

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## ABSTRACT

The provisional measures adopted by the International Court of Justice in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) are considered by the legal community at large as a crossroads. Any difference of opinion regarding whether the "special military operation" set in motion by the Russian Federation on 24 February 2022 constituted a breach of international law seems to have been settled on 16 March 2022; though, strictly speaking, the Court never pronounced on the legality of the use of force itself. Still, the International Court of Justice ordered the Russian Federation to bring all military operations in which it may be involved to an immediate halt, and the lack of compliance with this order is generally understood as a breach of international law on its own.

After looking at the content of the measures dictated against Russia, their main features and peculiarities, I will delve into how the Court tackled provisional measures in the past, paying special attention to those entailing the use of force in order to assess how the ones under study resemble or differ from previous ones. In this way, I will be able to tell whether they constitute a continuation of or a departure from the Court's tradition.


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The following step of my analysis will focus on the inherent difficulties provisional measures entail when it comes to the use of force by states and how their effects pose a paramount challenge, both from a theoretical and a practical standpoint.

In the final and most controversial part of this work, I will build on the previous findings and offer some insights on the legal underpinnings of the provisional measures adopted on March 2022, especially when trying to reconcile them with the judgment passed on the preliminary objections in the same case.

**Key words:** International Court of Justice / jurisdiction / provisional measures / Russian Federation / Ukraine / use of force.

## *RESUMEN*

*Las medidas provisionales que la Corte Internacional de Justicia adoptó el 16 de marzo de 2022 en el seno del caso relativo a las Acusaciones de Genocidio en virtud de la Convención para la Prevención y Sanción del Delito de Genocidio (Ucrania c. Federación Rusa) fueron recibidas por la comunidad internacional con gran optimismo. Toda discusión acerca de la legalidad de la "operación militar especial" iniciada por la Federación Rusa el 24 de febrero de 2022 pareció quedar zanjada por más que, estrictamente hablando, la Corte no se refirió en ninguna parte de su pronunciamiento a la legalidad del uso de la fuerza como tal. No obstante, esta indefinición no impidió que la Corte ordenara a la Federación Rusa el cese inmediato de todas sus operaciones militares en y contra Ucrania; y la falta de cumplimiento con esta orden es generalmente considerada una violación del derecho internacional en sí misma.*

*Luego de tratar el contenido de las medidas en sí, sus principales características y singularidades, indagaré en el modo en que la Corte ha decidido a través de los años los pedidos de medidas provisionales que le han sido efectuados, poniendo particular énfasis en aquellos casos en que el uso de la fuerza fue objeto de debate. De este modo, surgirán de manera palmaria aquellos aspectos en que la Corte ha sostenido sus precedentes y aquellos otros en que se ha apartado de los mismos.*

*A continuación, abordaré las dificultades intrínsecas de toda medida provisional tendiente a lidiar con el uso de la fuerza por parte de los estados y exploraré los desafíos que sus efectos pueden traer aparejados, tanto desde un punto de vista teórico como desde una perspectiva práctica.*

*La parte final y más polémica de este trabajo avanza sobre las conclusiones parciales alcanzadas e intenta rever las implicancias legales de las medidas provisionales adoptadas, a cuyos efectos cobra particular relevancia la decisión emitida, en el seno de este mismo caso, a propósito de las objeciones preliminares oportunamente planteadas por la Federación Rusa.*

***Palabras clave:*** *Corte Internacional de Justicia / jurisdicción / medidas provisionales / Federación Rusa / Ucrania / uso de la fuerza.*

## 1. INTRODUCTION

Categorical assertions as the one I am about to make might be at variance with scientific rigor; but I anyhow need to state clearly, earlier rather than later, that from my personal point of view, the "special military operation" initiated by the Russian Federation (Russia) in and against Ukraine, in late February 2022, constitutes a blatant violation of article 2.4 of the Charter of the United Nations (UN Charter); and, if the definition of an act of aggression was legal and not political in nature, it would also fall under the scope of its article 39. Furthermore, I believe that the ongoing military campaign is a clear example of the acts described in Resolution 3314 (XXIX) and Article 8bis.2 of the Rome Statute.

In recent years, international law has showed signs of regression with the comeback of the use of force to the forefront of the debates. After decades of being a topic on which the international community seemed to show at least a basic consensus, in the present day it constitutes the cornerstone of the most complex disputes. Through the lens of the provisional measures dictated by the International Court of Justice (ICJ) against Russia in March 2022, the main goal of this work is to assess whether the "the principal judicial organ of the United Nations" (Charter of the United Nations, article 92) is capable of contributing to reinvigorate some of the faith in international law that has been lost since the beginning of this century.

Having stated the aforesaid, I can proceed to describe the legal analysis I intend to pursue, which in the end is meant to deal with one of the most pressing questions the international community is faced with today: can the ICJ prevent Russia from using its military force against Ukraine? Despite the fact that years have elapsed since the Court ordered its provisional measures, peace only seems increasingly elusive. By now, it is clear that in political terms the ICJ does not have that power; otherwise, the Russian "special military operation" would have come to an end as early as March 2022. A more critical problem, which I seek to address in the following pages, is whether the Court has the legal power to so demand.

Taking the legal complexities underlying the jurisdiction of the Court to adopt the provisional measures requested by Ukraine as my starting point, I will attempt to cover the various topics implied in the order issued on 16 March 2022. For this purpose, comparing the provisional measures at stake with those previously dictated by the Court, as well as identifying those features that make this decision unique, might be of invaluable help.

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**"Does the Court have the legal power to adopt provisional measures against a state that is allegedly exercising its right to self-defense?"**

The following stage of my analysis will deal with the effects of provisional measures in general, trying to find how these come into play in the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) case. This will necessarily lead me to one of the most crucial questions implied in this paper: does the Court have the legal power to adopt provisional measures against a state that is allegedly exercising its right to self-defense?

The judgment passed on 2 February 2024 in relation to the preliminary objections, almost two years after the provisional measures had been ordered, helps significantly in terms of understanding the Court's approach to the case. Still, there are many aspects that remain unresolved and claim for further clarification, as it will be demonstrated in the last part of this piece.

In order to build my arguments, I will mainly have recourse to the ICJ's precedents, referring to treaties or resolutions issued by different United Nations organs for very specific purposes. Far from constituting a weakness, I see this as a seminal aspect of my reasoning, one of its most compelling features. Limiting my analysis to what the Court actually said, its pronouncements as an institution and as a source of public international law in strict legal terms -and not what scholars might have interpreted or even wished the tribunal meant- keeps the argument pristine and, most importantly, authoritative.

Cognizant that the ivory tower of academia makes it somehow easy to adopt certain positions and say what should and should not be done, I acknowledge that those litigating the case and, most importantly, those deciding it, are subject to constraints I am not. In this sense, my conclusions are strictly legal and pass no judgment on either the capacity nor the integrity of any of the individuals intervening. Far from that, I intend to point out the strengths and weaknesses in the Court's interventions in this particular case in order to be able to draw conclusions on whether it was the consequence of a particular political context or it was meant to set a precedent that should shape the future conduct of states and, more importantly, the ICJ.

## 2. TO THE RESCUE: THE INTERNATIONAL COURT OF JUSTICE'S INTERVENTION

Being the maintenance of international peace and security the foundation of the United Nations (UN) since its inception, the "special military operation" launched by Russia on 24 February 2022 evidenced, once again, the impotence of the organization to offer answers to the most serious challenges posed against the international legal order it aims to uphold.

Taking into account that the lack of unanimity of its permanent members hindered

the Security Council (SC) from exercising its primary responsibility, "the maintenance of international peace and security" (Charter of the United Nations, article 24.1); it was agreed to call for an "emergency special session of the General Assembly" (UNSC 2022). As a result the General Assembly (GA), honoring its residual responsibility (Charter of the United Nations, articles 10 and 11.2), deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" (UNGA 2022, paragraph 2); leaving no space for ambiguity in terms of who was to blame for the beginning of the armed conflict.

Still, if one were to determine in strict legal terms who is the aggressor state and, consequently, who is internationally responsible for the ongoing bloodshed in Ukraine; absent a resolution by the SC under article 39 of the UN Charter to this end, the ICJ constitutes the last bastion of hope the international community has. Indeed, it was the Court itself the one who explicitly acknowledged "its responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter of the United Nations and the Statute of the Court" (ICJ 2024a, paragraph 108).

For this reason, only two days after the beginning of the "special military operation", Ukraine instituted proceedings against Russia before the ICJ.

### A. The basis for jurisdiction

According to the Ukrainian viewpoint, the Court's jurisdiction was justified in the interplay between its Statute and the Genocide Convention. In consonance with this position, the compromissory clause contained in Article 9 of the latter would allow to infer the parties' consent to submit the situation to the ICJ as a matter "specially provided for in [...] treaties and conventions in force" (Statute of the ICJ, article 36.1).

From Ukraine's perspective,

> the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpo-

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> se of preventing and punishing purported acts of genocide that have no basis in fact. On the basis of this false allegation, Russia is now engaged in a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people (Ukraine 2022a, paragraph 2).

Moreover, the Applicant requested the ICJ to adopt provisional measures, based on the fact that

> Ukraine is currently facing catastrophic and wholly unprovoked military attacks, and every day that these actions continue, the human rights of the Ukrainian people are gravely violated [...]. Russia's claims of both genocide and a right to take action to prevent and punish such genocide are legal claims governed by the Genocide Convention. The parties' dispute over Russia's claims should be resolved by this Court or through other lawful, peaceful means. Until this Court is able to finally resolve that dispute, the Court should preserve the status quo and protect the people of Ukraine by ordering Russia to suspend its senseless military operation, which is based expressly on Russia's false and absurd claim to be taking action to prevent and punish acts of genocide (Ukraine 2022c, paragraph 4).

These allegations prompted Russia's response, which came to oppose the Ukrainian claims in the following terms:

> [n]owhere in the Convention may one find any reference to the use of force between States or recognition of States, which are regulated by the United Nations Charter and customary international law. To read them into the Convention by implication would be to substantially amend and distort the object and purpose of the Convention. This is what Ukraine's submissions are aiming at. In the practice of the Court disputes arose as to whether the use of force by one State against other States in itself may be qualified as a crime of genocide under the Convention, but this is clearly not the case of Ukraine (Russian Federation 2022, paragraph 12. Footnotes omitted).

Interestingly enough, despite the fact that both parties refer to one same incident, the applicability of one same treaty to that particular situation and the jurisdiction of one same tribunal to find in relation to it; the transcriptions of their respective arguments seem to suggest that each of them is discussing a completely different topic.

On the one hand, Ukraine understands that under the aegis of the Genocide Convention the Court should pronounce on the legality of the Russian recognition of Donetsk People's Republic and Luhansk People's Republic, as well as the Russian use of force against Ukraine.

On the other hand, Russia does not seem to question that the ICJ would have jurisdiction over the matter if the Genocide Convention were applicable; the core argument put forward is that none of the aspects pointed out in the previous paragraph falls under the scope of this treaty. Therefore, as there would be no grounds to apply the Genocide Convention to these topics, there would be no basis for the Court to exercise its jurisdiction.

### B. Provisional measures and its diffuse requirements

According to its Statute, the ICJ "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party" (article 41.1). Besides, in accordance with its Rules, the Court "may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request" (Rules of Court 1978, article 75.2).

In its almost eight decades of existence the ICJ has established, through its own pronouncements, a set of prerequisites which need to be met in order to enable the adoption of provisional measures. These, as interpreted by the Court, are discussed in the following paragraphs.

To start with, provisional measures can be dictated "only if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision" (ICJ 2008b, paragraph 66). Today, this mere likelihood has been replaced by a more stringent standard requiring a "real and imminent risk that irreparable prejudice will be caused *to the rights in dispute*" (ICJ 2017b, paragraph 50. Emphasis added).

"Urgency" and "real and imminent risk of irreparable prejudice" aside, it is logical that "a link must [...] be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court" (ICJ 2008b, paragraph 58).[1] In this regard, the ICJ has stated that it "must be concerned to preserve by such [provisional] measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent" (ICJ 1993, paragraph 34); a criterion systematically upheld since the early nineties, though subsequently rephrased in the following terms:

> [t]he 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

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1) For a more recent application of this requirement, see ICJ 2017a, paragraph 64; ICJ 2017b, paragraph 42 and ICJ 2023b, paragraph 28.

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> such measures are at least plausible (ICJ 2014, paragraph 22).[2]

To put it briefly, at the provisional measures stage, the ICJ is not to determine in a definitive manner the existence of the rights sought to be protected, but only whether these claimed rights are plausible, giving rise to the so called "plausibility test".

The Court's likeliness to decide the merits of the case constitutes another requirement of paramount significance. In this sense, the ICJ used to be of the opinion that when provisional measures are requested, it "need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest" (ICJ 1972, paragraph 15).

The standard cited above paved the way for the adoption of a new test, which is still currently applied: *prima facie* jurisdiction. In the Court's own words:

> on a request for provisional measures [it] need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded (ICJ 1984, paragraph 24).[3]

Slightly differently, but still following the same criteria, it later on stated that provisional measures may only be indicated "if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case" (ICJ 2017a, paragraph 17).[4]

Despite the apparent clarity in the distinction, the boundaries between the jurisdiction to indicate provisional measures (*prima facie* jurisdiction) and that required to pronounce on the merits (be it *ratione materiae, ratione temporis* or *ratione locis*) are hard to delimit in practical terms. For instance, it was the ICJ itself the one stating that "[i]n order to determine whether it has jurisdiction — even *prima facie* — the Court must also ascertain whether such a dispute is one over which it might have jurisdiction *ratione materiae*" (ICJ 2017b, paragraph 30); an idea that should be reconciled with the fact that a decision adopted in relation to provisional measures "in no way prejudges the question of the jurisdiction of the

2) See, among others, ICJ 2016, paragraph 71; ICJ 2017a, paragraph 63; ICJ 2018a, paragraph 43; ICJ 2020a, paragraph 43; ICJ 2023a, paragraph 52; ICJ 2023c, paragraph 31; ICJ 2023d, paragraph 19 and ICJ 2024b, paragraph 35.

3) In almost identical terms see ICJ 1973a, paragraph 14; ICJ 1979, paragraph 15; ICJ 1998, paragraph 23; ICJ 1999, paragraph 13; ICJ 2000, paragraph 33 and ICJ 2003, paragraph 38.

4) Also see ICJ 2018a, paragraph 14; ICJ 2020a, paragraph 16; ICJ 2021a, paragraph 15; ICJ 2022, paragraph 24; ICJ 2023a, paragraph 20 and ICJ 2024b, paragraph 15).

Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves" (ICJ 2003, paragraph 58). It is, beyond doubt, a matter of degree; but the definition of this limit, with its resultant predictability, would at least contribute some transparency when the jurisdiction of the Court is under discussion. *Prima facie* jurisdiction is not just complex to define as one of the ineluctable requirements the Court must satisfy in order to adopt provisional measures; the way it interacts with jurisdiction ratione materiae entails intricacies that the Court is still to unravel. Nevertheless, I will try to elucidate some of these in the following sections of this work.

The correlation between the alleged rights at the provisional measures stage and the rights on which the Court will actually pronounce when deciding the dispute resemble, in some way, the connection that exists between *prima facie* jurisdiction and jurisdiction to decide the merits of the case. This is one of the key elements to be examined in order to fully comprehend some of the problems in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* case.

In order to bring some clarity to these seemingly insurmountable difficulties, it is pertinent to return to the case under scrutiny to point out that

> [t]he statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention (ICJ 2022, paragraph 45).

Consequently, after establishing "*prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention" (ICJ 2022, paragraph 47), the ICJ concluded that "*prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case" (ICJ 2022, paragraph 48) and that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" (ICJ 2022, paragraph 60).

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> **“The ICJ instructed the Respondent to 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”**

### 3. 16 March 2022: the hour calls for political correctness

Despite Russia’s challenge to the jurisdiction and any personal appraisals one could make on the matter, the ICJ has already ascertained its *prima facie* jurisdiction, a prerequisite for the adoption of provisional measures. Needless to say, such finding indicates that the Court saw there were prospects to uphold its jurisdiction to decide the merits of the case in relation to those topics the provisional measures aimed to deal with.

In its order dated 16 March 2022, the ICJ reminded of its power “to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court” (ICJ 2022, paragraph 79); adding that “[w]hen 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” (ICJ 2022, paragraph 82).

Accordingly, while Ukraine requested that Russia should “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” (Ukraine 2022c, paragraph 20.a); the Court directed the Defendant to “immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine” (ICJ 2022, paragraph 86.1).

In a similar vein, even though it was petitioned that Russia should ensure that any military or irregular armed units directed or supported by it, or 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” (Ukraine 2022c, paragraph 20.b); the ICJ instructed the Respondent to “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” (ICJ 2022, paragraph 86.2).

It becomes clear, after comparing the two main requests with the corresponding provisional measures actually adopted by the Court, that despite the limited nature of the Ukrainian petition, in which

the use of force was strictly connected with the prevention and / or punishment of an alleged genocide, the orders were issued in an unqualified manner: the military operations should be brought to an end, and no reference to genocide was made in this regard. To a certain extent, the all-encompassing prohibition to use force explains why the provisional measures were widely celebrated as an indication of the illegality of the Russian invasion. Somehow disagreeing with such optimism, I will point out a number of issues that the ICJ left unresolved, be it that it could not or did not want to address them.

First and foremost, if there is something outstanding in the order of 16 March 2022, this is the absence of precision when dealing with the use of force. The terms used in the UN Charter are so many, and their interrelation so unclear, that there is hardly any agreement on the exact definition of any of these: malleability is the norm. Nevertheless, it is remarkable how the ICJ managed to avoid all of these concepts when referring to the use of force by Russia, be it "war" (Charter of the United Nations, preamble), "threat to the peace" (Charter of the United Nations, articles 1.1 and 39), "act of aggression" (Charter of the United Nations, articles 1.1 and 39), "threat or use of force" (Charter of the United Nations, article 2.4), "breach of the peace" (Charter of the United Nations, article 39) or "armed attack" (Charter of the United Nations, article 51). Mentioning any of these terms would allow to legally frame the matter, unleashing a wide array of legal consequences. Still, the Court only alluded to Russia's use of force as "military actions" (ICJ 2022, paragraph 42) and "military operations" (ICJ 2022, paragraphs 60, 74, 81, 86.1 and 86.2), departing significantly from the terminology used in the UN Charter to classify the use of force by states. However, it did affirm that the military campaign was "capable of causing irreparable harm" (ICJ 2022, paragraph 74). As a matter of fact, the Court did take a stance on the use of force when ordering Russia to suspend the military operations in Ukraine in the broadest terms; though this should not overshadow that it shied away from associating it with any of the several categories available in the UN Charter and, in consequence, impeding the legal consequences attached to each of them.

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It could easily be argued that the Court cannot determine the nature of the use of force in Ukraine, as this would exceed the limits of its jurisdiction by far: the ICJ is not supposed to decide the merits of the case in such an early stage of the proceedings. Furthermore, and this is a genuine cause for concern, the Court had only found elements "sufficient at this [provisional measures] stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention" (ICJ 2022, paragraph 47), exercising its *prima facie* jurisdiction "pursuant to Article IX of the Genocide Convention to entertain the case" (ICJ 2022, paragraph 48). Still, the hard stance adopted in the provisional measures under analysis, which departs not from some but from each and every provisional measure adopted in the history of the ICJ, needs to be justified in solid legal grounds, giving credit to the idea that the Court decides in accordance with law, and not as a result of the particular political environment.

Since the binding character of its provisional measures was determined (ICJ 2001, paragraphs 109 and 110), the instances in which the Court has addressed the use of force by states in an open and direct manner were extremely rare. Still, these very few orders have always presented certain common patterns which, in the provisional measures dictated in March 2022, seem to have been left aside.

In one of these exceptional cases, which involved Cambodia and Thailand, the Court provided that "[b]oth Parties [had to] immediately withdraw their military personnel [...] present in the provisional demilitarized zone [...] and refrain from any military presence within that zone and from any armed activity directed at that zone" (ICJ 2011b, paragraph 69.B.1). It is important to highlight that, notwithstanding that in the end the Court found that "Thailand was under an obligation to withdraw from that territory [the promontory of Preah Vihear] the Thai military or police forces, or other guards or keepers, that were stationed there" (ICJ 2013, paragraph 108.2), the provisional measures were indisputably two-sided.

Even in a pre-2001 order in which the Court unanimously decided that both the Democratic Republic of Congo and Uganda "must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case" (ICJ 2000, paragraph 47.1);[5] it was later recalled that this order "created

5) The use of the term "must" was certainly novel.

legal obligations which both Parties were required to comply with" (ICJ 2005, paragraph 263). Despite the fact that the ICJ ended up determining that Uganda had "violated the principle of non-use of force in international relations and the principle of non-intervention" (ICJ 2005, paragraph 345.1), as well as the provisional measure quoted (ICJ 2005, paragraphs 264 and 345.7), this does not undermine the bilateral nature of the Court's order.

When enquiring into even older precedents, it becomes patent that most of the provisional measures seeking the cessation of armed activities have been two-sided. For example, the ICJ unanimously stated that both Cameroon and Nigeria "should ensure that no action of any kind, and particularly no action by their armed forces, [was] taken which might prejudice the rights of the other in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before it" (ICJ 1996, paragraph 49.1).

Even in the landmark case involving Nicaragua and the United States, where the ICJ ended up determining that the latter had breached "its obligation under customary international law not to use force against another State" (ICJ 1986, paragraph 292.4);[6] the provisional measures adopted two years earlier established that the United States "should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines" (ICJ 1984, paragraph 41.B.1); and then made a general reference to Nicaragua's right to sovereignty and political independence, which "should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law" (ICJ 1984, paragraph 41.B.2). It cannot be stressed enough that when creating a legal duty for the United States specifically, the use of force is not mentioned openly; while the reference to military and paramilitary activities seems to enunciate a general principle, not to create a binding obligation for the United States in particular to comply with.

With regards to the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, it is irrefutable that the provisional measures commanding Russia to suspend the military operations in Ukraine were specifically targeted at one of the parties; an aspect stressed by Judge Xue (ICJ 2022, Declaration of Judge

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6) Also see 292.3.

**"With regards to the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), it is irrefutable that the provisional measures commanding Russia to suspend the military operations in Ukraine were specifically targeted at one of the parties; an aspect stressed by Judge Xue"**

Xue, paragraph 6). There is also an "additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute" (ICJ 2022, paragraph 82), which is reflected in paragraph 86.3 and has even been subject to comment by Judge *ad hoc* Daudet on grounds that sound more political than legal (ICJ 2022, Declaration of Judge *ad hoc* Daudet, paragraph 7). Still, the inclusion of such standardized clause cannot be enough to make the overall content of the order two-sided. It is evident that even though the ICJ abstained from formally classifying Russia's "special military operation", a stance on the legality of the use of force was adopted.

In another case which has many similarities to the one under analysis, the ICJ ordered that

> [t]he Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide (ICJ 1993, paragraph 52.A.2).

Unquestionably, the instruction quoted above was not directed to bringing the armed activities to an end, but to prevent a genocide. Therefore, the two-sided character of provisional measures calling for the cessation of armed activities remains unscathed, irrespective of factual and legal differences and similarities.

Even after the provisional measures against Russia had been adopted, the ICJ ordered Israel, in the context of the ongoing armed conflict in the Gaza Strip, to "ensure with immediate effect that its military does not commit any acts [within the scope of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide]" (ICJ 2024b, paragraph 86.2), making no reference whatsoever to the use of force.

Since then, South Africa has persistently requested the modification of the provisional measures in question, and the Court even acknowledged that "the provisional measures indicated [...] do not fully address the consequences arising

from the change in the situation" (ICJ 2024c, paragraph 30).

In this sense, South Africa asked the ICJ, among other things,

> to order the State of Israel, as a State party to the Genocide Convention and as a [P]arty to these proceedings, to: (1) immediately, and further to its obligations under the Court's previous Orders of 26 January 2024 and 28 March 2024, cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip (ICJ 2024c, paragraph 17);

adding that an "explicit order that Israel 'cease its military activities' is required to 'protect what is left of Palestinian life in Gaza'" (ICJ 2024c, paragraph 37).

Despite the broad terms of the South African petition, which includes bringing the Israeli military use of force in Gaza to an end, the Court ordered Israel, "*in conformity with its obligations under the Convention on the Prevention* and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate" (ICJ 2024c, paragraph 57.2. Emphasis added) to "[i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part" (ICJ 2024c, paragraph 57.2.a).

Taking due regard of the precedents cited in this section, it is possible to infer that when the ICJ tried to stop armed activities by dictating provisional measures, its orders were usually targeted at all the parties involved in the dispute. In those few cases in which the Court has directed its orders to one specific party, it is usually the case that the use of force is closely connected to allegations of genocide; and in these particular situations, the orders were strictly circumscribed to the application of the Genocide Convention from a preventive perspective.

Far from suggesting that the Court cannot outdo itself and build on its past courses of action, it is nevertheless important to highlight the peculiarities of the provisional measures indicated against Russia and how they contrast not with some, but each and every pronouncement; not with regards to ancillary aspects, but the most fundamental ones; not only with previous orders, but also those that followed.

From this standpoint it becomes apparent that, while dictating its provisional measures against Russia in March 2022, the ICJ has broken with a consistent tradition

**"Taking due regard of the precedents cited in this section, it is possible to infer that when the ICJ tried to stop armed activities by dictating provisional measures, its orders were usually targeted at all the parties involved in the dispute"**

**"The Court would not clarify this point in these proceedings, as later that year Paraguay decided to discontinue them and requested the removal of the case from the Court's list"**

it had developed throughout the years. Furthermore, the ensuing provisional measures adopted by the Court significantly depart from the order of March 2022, leaving it as an isolated precedent rather than a paradigm shift in terms of how these situations should be tackled.

## 4. THE EFFECTS OF PROVISIONAL MEASURES

As pointed out above, until the early years of the current century the binding nature of provisional measures indicated by the ICJ was widely debated. Fortunately, these discussions seem to have come to an end after the Court itself shed some light on the topic. A series of decisions dealing with very similar contexts and even involving one same party as Respondent helps better understand the path trodden by the ICJ to establish the binding character of its provisional measures. To this aim, I will briefly mention three cases in which provisional measures were adopted, leading to very dissimilar outcomes but, still, providing relevant precedents that would significantly contribute to setting the matter.

On 14 April 1998 Breard, a national from Paraguay, was executed (Amnesty International 1998) in spite of the provisional measure unanimously adopted by the ICJ in the following terms: "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings" (ICJ 1998, paragraph 41.1). The term "should" in the order, when read in conjunction with "indicate" in the Statute of the ICJ (article 41.1), seems to have given enough reasons to doubt whether the measure was binding at all. The Court would not clarify this point in these proceedings, as later that year Paraguay decided to discontinue them and requested the removal of the case from the Court's list.

In 1999, the ICJ similarly decided that "[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings" (ICJ 1999, paragraph 29); using once again words that did not allow to draw any definite conclusion. The difference, this time, was that the Court explicitly acknowledged the novelty of the matter, stating that "[n]either the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute" (ICJ 2001, paragraph 98). In consequence, while deciding on the merits of the case, it established that "the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 is not an argument against the binding nature of such orders" (ICJ 2001, paragraph 107). As "orders on provisional measures under Article 41 have binding effect" (ICJ 2001, paragraph 109), the ICJ concluded that the provisional measure adopted "was not a mere exhortation

… and created a legal obligation for the United States" (ICJ 2001, paragraph 110), who failed to comply with the same when proceeding with the execution of Walter LaGrand (ICJ 2001, paragraphs 115 and 128.5).

After this turning point, the last case of the series incorporated some of these innovations. Thus, the Court decided once again unanimously that "[t]he United States of America shall take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings" (ICJ 2003, paragraph 59.1.a). The difference entailed in the substitution of "should" for "shall" cannot be stressed enough. Indeed, in the judgment on the merits of the *Avena* case, the ICJ at no point suggested that the United States had breached the obligations arising from the provisional measures indicated; and additionally expressed, some years later, that it was "fully aware that the federal Government of the United States ha[d] been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the Avena Judgment" (ICJ 2008b, paragraph 75).

### A. Provisional measures in limbo

Up to this point, it is safe to state that there is broad agreement on the binding character of provisional measures adopted by the Court in accordance with Article 41 of its Statute. But, as far as my understanding goes, this conclusion can only make sense if the ICJ then determines that it has jurisdiction to decide the merits of the case. What would happen if the Court found that its *prima facie* jurisdiction does not correspond to its jurisdiction to pronounce on the merits? Can provisional measures be legally justified in the former, irrespective of the inexistence of the latter? If the answer were for the negative, should the effects of the decision determining the lack of jurisdiction to entertain the merits operate over the measures *ex nunc* (towards the future exclusively) or *ex tunc* (both retroactively and towards the future)? As the Court has found in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* case that it had *prima facie* jurisdiction to adopt provisional measures (ICJ 2022, paragraph 48), but at the preliminary objections judgment affirmed that the use of force was a matter beyond its jurisdiction (ICJ 2024a, paragraph 146), it is important to elucidate this intricate problem.

In the following sections I will discuss some of the most salient aspects of this

**"What would happen if the Court found that its prima facie jurisdiction does not correspond to its jurisdiction to pronounce on the merits? Can provisional measures be legally justified in the former, irrespective of the inexistence of the latter?"**

**"Despite the existence of a principle universally accepted by international tribunals and likewise laid down in many conventions prescribing that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given"**

issue and delve into the justifications offered by the ICJ, though in a very diverse set of contexts, to corroborate the binding effects of provisional measures irrespective of the jurisdiction *ratione materiae*.

### B. The interplay between *prima facie* jurisdiction and jurisdiction to decide the merits

A unique case in which the government of Pakistan had made a request for the indication of interim measures and then asked the ICJ to postpone its consideration motivated a very peculiar pronouncement setting that "in the circumstances of the present case the Court must first of all satisfy itself that it has jurisdiction to entertain the dispute" (ICJ 1973b, paragraph 16). As the Court moved forward to consider the jurisdiction instead of waiting until Pakistan decided what to do with the case filed, this could be interpreted to suggest that in order to indicate provisional measures, the Court should start by enquiring whether it has jurisdiction to decide the merits of the case. Still, it would be impossible to draw this conclusion based on what the ICJ has consistently said on the matter. Without misconstruing the statement, a close connection between *prima facie* jurisdiction and jurisdiction on the merits becomes evident. This is only logical when considering that

> [t]he essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party pendente lite. In cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render (ICJ 1976, Separate Opinion of President Jiménez de Aréchaga, page 15).

Despite the existence of a principle "universally accepted by international tribunals and likewise laid down in many conventions" prescribing that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given" (PCIJ 1939, page 199); there is an undeniable tension underlying the question of how certain should the Court be about its jurisdiction in order to adopt provisional measures meant to bind the parties.

One of the most articulate reflections on this topic was formulated in a separate opinion by Judge Lauterpacht, according to whom

> it is one thing to say that action of the Court under Article 41 of the Statute does not in

> any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection. Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits (ICJ 1957, Separate Opinion of Judge Lauterpacht, page 118).

The best, though by no means sufficient, way to grasp the fragile balance between these jurisdictions is to explore different pronouncements through which the Court has attempted to explain the rationale behind this complex assessment.

The first and maybe one of the most important decisions that need to be referred to in order to see the practical implications of this tension dates back to the early years of the ICJ. In that occasion, when the Court found at the preliminary objections phase that it had no jurisdiction to decide the merits of the case -even though provisional measures had already been dictated-; it explicitly stated that "the provisional measures were indicated 'pending its final decision in the proceedings instituted [...]'. It follows that this Order ceases to be operative upon the delivery of this Judgment and that the Provisional Measures lapse at the same time" (ICJ 1952, paragraph 114). The succinctness of this assertion does not undermine its depth: it offers precise answers to the main questions I pose. By stating that the provisional measures stop being operative, their binding nature is implied; and the affirmation that they lapse allows to infer that such declaration only impacts towards the future. Having been so clear in its stance, it is hard to understand why the Court departed from this precedent, making things complicated and uncertain.

In one of its most controversial decisions the Court, after finding it had *prima facie* jurisdiction, indicated provisional measures related to the interpretation or application of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (ICJ 2008a, paragraph 117) binding both parties to the proceedings (ICJ 2008a, paragraph 149.A).

**"The first and maybe one of the most important decisions that need to be referred to in order to see the practical implications of this tension dates back to the early years of the ICJ"**

**"Have any states ever consented that prima facie jurisdiction would be, in itself and regardless the lack of jurisdiction to decide on the merits, enough to make provisional measures binding?"**

After considering that the requirements included in article 22 CERD had not been complied with, the ICJ concluded that this provision could not "serve to found the Court's jurisdiction" (ICJ 2011a, paragraph 184). In consequence, it was then decided that the order adopting provisional measures would cease "to be operative upon the delivery of [the] Judgment"; notwithstanding the duty of the parties to comply with their obligations under CERD (ICJ 2011a, paragraph 186). Interestingly enough, the Court did not say that these measures should be considered void *ab initio*; on the contrary, it suggested that the judgment would only have *ex nunc* effects, operating towards the future.

As these specific provisional measures aimed to uphold the respect for CERD's tenets, no state would dare to claim for a right to go against them; but practical implications aside, there is still a fundamental theoretical problem: if the parties had allegedly consented to article 22 CERD as triggering the ICJ's jurisdiction, and this proved to be inapplicable, where would the legitimacy of the Court to impose provisional measures come from? Have any states ever consented that *prima facie* jurisdiction would be, in itself and regardless the lack of jurisdiction to decide on the merits, enough to make provisional measures binding?

Dealing with a similar topic though involving different parties, the Court dictated provisional measures in the understanding that it had *prima facie* jurisdiction "pursuant to Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the 'interpretation or application' of the said Convention" (ICJ 2018a, paragraph 41). The provisional measures indicated, binding the United Arab Emirates, dealt with the application of some of CERD's principles to the situation being litigated (ICJ 2018a, paragraph 79.1).

After accepting the first preliminary objection raised by the United Arab Emirates, the Court found "it [did] not have jurisdiction ratione materiae [...] under Article 22 of the Convention" (ICJ 2021b, paragraph 114) and therefore lacked jurisdiction "to entertain the Application filed by the State of Qatar on 11 June 2018" (ICJ 2021b, paragraph 115.2). Besides enquiring on the legitimacy of the ICJ to adopt the provisional measures, I cannot overlook that the Court did not leave without effect the provisional measures it had adopted, departing in this respect from the precedent referred to above. It is hard to find any compelling legal reasons explaining this difference in treatment.

When it comes to the provisional measures requested by the United Arab Emirates in these same proceedings, the analysis is far simpler: as the Court found that the conditions for their indication were not met (ICJ 2019, paragraph 30), the request was rejected (ICJ 2019, paragraph 32).

To sum up, it is impossible to ascertain that *prima facie* jurisdiction provides by itself enough legal support to make provisional measures binding irrespective of the findings in relation to the jurisdiction to decide the merits of a case.

## C. Incidental jurisdiction

Another possible source of the Court's power to dictate provisional measures before the jurisdiction to decide the merits is determined emanates from its incidental jurisdiction. According to this theory, the jurisdiction to adopt provisional measures "is one which the Court is called upon to exercise as an incident of proceedings already before it"; and the legal justification would be that Article 41 of the ICJ's Statute "is a provision which has been accepted by all parties to the Statute and in such acceptance lies the element of consent by States to this special form of jurisdiction" (ICJ 1976, Separate Opinion of President Jiménez de Aréchaga, page 15).

This argument seems plausible in light of article 36.6 of the Statute of the ICJ, according to which "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". Still, I personally believe there is one problem that remains unresolved: if *prima facie* jurisdiction is merely incidental, then absent jurisdiction *ratione materiae*, there would be no legal basis to uphold the binding nature of the measures.

In consequence, the most that incidental jurisdiction can achieve is to act as a temporary ground to justify the binding character of provisional measures until a decision on the jurisdiction to decide the merits is reached.

## D. Contradictory assessments over one same fact in different stages of the proceedings

In a completely different context, though still setting an interesting precedent, the ICJ indicated provisional measures by unanimously ordering that

> France shall, pending a final decision [...], take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention on Diplomatic Relations, in order to ensure their inviolability (ICJ 2016, paragraph 99.I).

After asserting its jurisdiction to decide the merits of the case (ICJ 2018b, paragraph 153), the Court found that "the building at 42 avenue [sic.] Foch in Paris has never acquired the status of 'premises of the mission' of the Republic of Equatorial Guinea in the French Republic within

**"the most that incidental jurisdiction can achieve is to act as a temporary ground to justify the binding character of provisional measures until a decision on the jurisdiction to decide the merits is reached"**

**"Conflicting findings in the different phases of the process are only possible if jurisdiction is found in both variants; and this can only foster doubts on the effects of the provisional measures, not the power to indicate them"**

the meaning of Article 1 (i) of the Vienna Convention on Diplomatic Relations" (ICJ 2020b, paragraph 126.1).

The distinction between "treatment equivalent to" and "acquired the status of", when it comes to the building at 42 Avenue Foch in Paris, is clear; and the legal implications that follow it are straightforward too. But it is also evident that the ICJ did not state, in its judgment on the merits, that the provisional measures would be left without effect, or that the order indicating them would no longer be operative, though this could be taken for granted.

Still, this precedent is interesting from another angle. If a legal explanation justifying the situation described had to be offered, it could be argued that, despite making a different assessment of one same circumstance, the Court actually had jurisdiction to decide on it. This has nothing to do with those cases in which the ICJ adopts provisional measures on topics over which it later finds it lacks jurisdiction; which far from constituting a simple problem in the evaluation of a situation, could amount to a pronouncement beyond what the law allows.

In relation to this, a case that claims for special mention is the one dealing with the *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)*. Here, the ICJ determined in its judgment of January 2024 that Russia had violated its order indicating provisional measures though, as paradoxical as it may appear, it also found that this same conduct did not itself constitute a breach of Russia's obligations under CERD (ICJ 2024d, paragraph 392).

Even though the Court reached this conclusion after explicitly stating that "obligations arising from provisional measures bind the parties independently of the factual or legal situation which the provisional measure in question aims to preserve" (ICJ 2024d, paragraph 391); the truth is that this last quote was made alluding to the judgment on the *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)* cases (ICJ 2015), in which it was found that the same conduct going against the order indicating the provisional measures motivated an adverse pronouncement on the merits, as it will be later on showed.

It is at least hard to believe that the Court ignored this difference when, in the context of the *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)* judgment, it made reference to the decision in the *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)* cases.

To be precise, despite the complexities these situations might trigger, the problem is not one of jurisdiction. Indeed, conflicting findings in the different phases of the process are only possible if jurisdiction is found in both variants; and this can only foster doubts on the effects of the provisional measures, not the power to indicate them. It is important to keep this distinction in mind, as the problem with the provisional measures adopted against Russia in March 2022 does not come as a consequence of the different appraisal of one same situation in different stages of the proceedings; it is the product of a divergence in how the ICJ successively perceived its authority to intervene in the matter.

### E. Requests for interpretation

A very peculiar case in which provisional measures were indicated and then it was determined that there was no jurisdiction to decide on the merits dealt with the interpretation, under Article 60 of the Statute of the ICJ, of a decision which by now should at least sound familiar: *Avena and other Mexican Nationals (Mexico v. United States of America)*. Herein, Mexico requested the Court to interpret its 2004 judgment and to adopt provisional measures to prevent the execution of Medellín Rojas.

In these proceedings, it was set that "the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case" (ICJ 2008b, paragraph 44); and that it "may entertain a request for interpretation of any judgment rendered by it provided that there is a 'dispute as to the meaning or scope of [the said] judgment'" (ICJ 2008b, paragraph 46). Furthermore, the ICJ stated that "[t]he United States of America shall take all measures necessary to ensure that [...] [Mr.] José Ernesto Medellín Rojas [...] [is] not executed pending judgment on the Request for interpretation submitted by the United Mexican States" (ICJ 2008b, paragraph 80.1.II.a). Nevertheless, this did not stop the United States from executing Medellín Rojas on 5 August 2008 (Amnesty International 2008).

Since "the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, [were] not matters which ha[d] been decided by the Court in its Judgment of 31 March 2004" (ICJ 2009, paragraph 61.1), the Court found that it was beyond its jurisdiction to pronounce on the Mexican request. In

**"the Court's jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case"**

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an attempt to reconcile this conclusion with the binding character of the provisional measures previously adopted, the ICJ determined that these were grounded on Article 60 of its Statute, and not "on the basis of prima facie jurisdiction" (ICJ 2009, paragraph 15). Needless to say that this example is unique, as the other precedent that I could trace in which the Court has adopted provisional measures in the context of an interpretation proceeding (ICJ 2011b, paragraph 69.B), jurisdiction to pronounce on the merits was thereafter ascertained (ICJ 2011b, paragraph 108.1).

A particularly interesting aspect of the whole situation is that, through an additional claim, Mexico requested the Court to declare that the execution of Medellín Rojas amounted to a violation of the 2004 judgment, to which the ICJ replied that "the only basis of jurisdiction relied upon for this claim in the present proceedings [was] Article 60 of the Statute, and that that Article [did] not allow it to consider possible violations of the Judgment which it [was] called upon to interpret" (ICJ 2009, paragraph 56). In sum, it dismissed the claim (ICJ 2009, paragraph 57). But still, the most surprising part of the decision came when this same Court unanimously determined that "the United States of America [had] breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas" (ICJ 2009, paragraph 61.2).

One may understand the rationale behind this conclusion, and the somehow stretched distinction between the duty under the 2004 judgment and the 2008 provisional measures, as well as the difference between *prima facie* jurisdiction and jurisdiction under Article 60 of the ICJ's Statute. Still, it is hard to comprehend how the Court can determine it has no jurisdiction to decide whether the execution went against its prior judgment, but it has jurisdiction to temporarily stop it and find this latter obligation has been breached. To put it in other words, the ICJ has established that the provisional measures it may dictate in the realm of a request for interpretation are binding notwithstanding its lack of jurisdiction to pronounce on the request itself. The problem with this precedent is that Article 60 of the Statute could be used to justify any provisional measures, no matter how clearly departed from the interpretation of a judgment their request is, as long as the requirements for their adoption are complied with.

## 5. PROVISIONAL MEASURES AND THE USE OF FORCE

I have already shared my skepticism on the binding character of provisional measures when *prima facie* jurisdiction is not followed by an affirmative jurisdiction to decide on the merits of a case; and these doubts might be bolstered up when the

measures deal with the use of force by states.

It is important to recall that the ICJ can indicate provisional measures "to preserve the respective rights of either party" (Statute of the ICJ, article 41.1); but particular care should be taken when it comes to restraining a state's power to use force. Suffice to mention, at this point, that the use of force by states is not necessarily illegal.

In terms of *jus* ad *bellum* –the legal justifications states may have to wage war against another state–, it cannot be ignored that according to Russia's official position, as communicated to the ICJ, "[t]he special military operation conducted by Russia in the territory of Ukraine is based on the United Nations Charter, its Article 51 and customary international law" (Russian Federation 2022, paragraph 15). To put it concisely, from a Russian perspective, the use of force against Ukraine is justified as a legal exercise of the right to self-defense.

From the point of view of *jus in bello* -how force is actually employed, how hostilities are conducted-, international law has recognized the principle of military necessity, which "as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (Lieber Code, article 14). In this regard, it was the Court the one explicitly referring to the scale of the Russian military operation in Ukraine and the ensuing "loss of life, mental and bodily harm, and damage to property and to the environment" (ICJ 2022, paragraph 74).

When it comes to the war between Russia and Ukraine, it is hard to assert where the authority to pronounce on the legality of the military campaign –both in terms of *jus ad bellum* and *jus in bello*– resides. The only certainty in this morass is that as a consequence of the SC's silence, the GA condemned the illegality of the military campaign in Ukraine. For its part the ICJ, while avoiding to classify the use of force and to pronounce on its legality, ordered only one of the parties to the conflict to stop its military actions, leaving the other one seemingly unimpeded.

As stated by the ICJ,

> [t]he context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding (ICJ 2001, paragraph 102).

**"When it comes to the war between Russia and Ukraine, it is hard to assert where the authority to pronounce on the legality of the military campaign -both in terms of jus ad bellum and jus in bello- resides"**

**"The provisional measures adopted on 16 March 2022 were a bit ambitious; if not from a legal standpoint, at least in practical terms"**

This is to say, the binding character of provisional measures is inferred from the object and purpose of the Statute, which forms an integral part of the UN Charter (Charter of the United Nations, article 92). No matter how the relation between the UN Charter and the Statute of the ICJ is to be interpreted, the law justifying the binding nature of the Court's provisional measures has, at best, the same hierarchy as the UN Charter and can never be above it. The implications behind this simple conclusion are superlative.

The phrase "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence" (Charter of the United Nations, article 51. Emphasis added) seems to stress categorically enough the unqualified nature of the right of self-defense, provided that the set of requirements demanded by Article 51 of the UN Charter and customary international law are complied with. As examining these requirements would not contribute in any significant way to the current work, it is enough to focus on the term "nothing" and the absurdity of trying to find different meanings in it. As a matter of fact, the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention on the Law of Treaties , article 31.1) seems clear enough: the right of self-defense cannot be hindered by any other provision of the UN Charter.

In addition, the supplementary means of interpretation might not be applicable, considering it was the ICJ the one saying that "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself" (ICJ 1948, page 63);[7] unless the interpretation "leads to a result which is manifestly absurd or unreasonable" (Vienna Convention on the Law of Treaties , article 32.b). Arguing that the preparatory work of the UN Charter and the circumstances of its conclusion allow to deduce that the right of self-defense is subordinated to what the Court might say acting on the sole basis of its *prima facie* jurisdiction can only be the consequence on an overly expansive interpretation of the role of the tribunal.

## 6. 2 FEBRUARY 2024: THE TIME HAS COME FOR LEGALITY

As already suggested earlier, the provisional measures adopted on 16 March 2022 were a bit ambitious; if not from a legal standpoint, at least in practical terms.

It is hard to deny that years have passed since the Court found it had *prima facie* jurisdiction to instruct Russia to suspend all military operations in and against Ukraine in which it may be involved, making no pronouncement whatsoever in relation to the legality of the use of force.

In sharp contrast, when deciding in February 2024 the preliminary objections put forward by Russia, the ICJ established that "[t]here are two aspects of the dispute submitted to the Court by Ukraine, the essential characteristics of which are dis-

7) Also see ICJ 2001, paragraph 104.

tinct and which the Court therefore considers it necessary to examine separately and in turn" (ICJ 2024a, paragraph 53).

"The first aspect of the dispute arises from Ukraine's request that the Court declare that, contrary to the allegations of the Respondent, the Applicant has not committed genocide", adding that

> [b]y such a request, Ukraine does not seek to invoke the international responsibility of the Russian Federation for an internationally wrongful act attributable to that State; it seeks a judicial finding that it has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine's view, imputed to it in public statements (ICJ 2024a, paragraph 54).

Regarding the second aspect, it is based on Ukraine's claim

> "that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine" on the basis of its false claims that genocide has been committed [...]; that the Russian Federation's recognition of the independence of the two "republics" of Donetsk and Luhansk has no basis in the Convention [...]; finally that the "special military operation" carried out by the Russian Federation also "has no basis in the Genocide Convention" (ICJ 2024a, paragraph 55).

After determining that "[t]hrough these submissions [those included in the second aspect], Ukraine seeks to invoke the international responsibility of the Russian Federation by imputing internationally wrongful conduct to it" (ICJ 2024a, paragraph 56), the Court found that "even if it were shown that the Russian Federation had invoked the Convention abusively (which is not established at this stage), it would not follow that it had violated its obligations under the Convention" (ICJ 2024a, paragraph 143). This reasoning allowed the Court to conclude that those acts that comprise the second aspect of the dispute "fall outside the scope of the compromissory clause of Article IX" (ICJ 2024a, paragraph 147); therefore lacking jurisdiction *ratione materiae* to examine them.

In other words, in the judgment quoted above the ICJ upheld its jurisdiction *ratione materiae* with regards to the first aspect of the dispute but rejected it in relation to the second. This means that, when the time comes to decide the merits of the case, the Court will only pronounce on the veracity of the Russian accusations of a genocide allegedly perpetrated by Ukraine, leaving the recognition of states and, most importantly, the use of force, outside its purview.

When comparing this decision with the one adopted in March 2022 it is evident that, if not a disjunction, there is at least

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a divergence between the *prima facie* jurisdiction and the one required to decide on the merits: the provisional measures order was chiefly about the use of force -notice should be taken that none of the measures adopted included the term "genocide" in the text- while the judgment on the preliminary objections set this topic beyond the reach of the Court.

### A. A legal loophole

As mentioned above, the fundamental problem to be addressed surrounds the effects of the provisional measures dictated on 16 March 2022. There is no doubt that, when directing Russia to immediately suspend its military operations in the territory of Ukraine, the Court intended to make its decision binding. Notwithstanding, Russia's lack of compliance means that "[t]he armed conflict between the Russian Federation and Ukraine continues to this day" (ICJ 2024a, paragraph 35). Based on the ICJ's own assessment of the situation one can only conclude that, so far, Russia has blatantly disregarded the provisional measures indicated.

This incontrovertible situation allowed Ukraine to request the Court to determine that

> by failing to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine, and by failing to 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 these military operations, the Russian Federation violated the independent obligations imposed on it by the Order indicating provisional measures issued by the Court of 16 March 2022 (Ukraine 2022b, paragraph 178.e).

In its latest judgment on the preliminary objections of this particular case, the ICJ abstained from addressing this point, and no mention was made in the decision regarding Russia's responsibility for this breach.

It goes without saying that lacking jurisdiction *ratione materiae* to decide on the merits of the second aspect of the dispute, which contains the use of force, the only legal basis to support the measures would be the *prima facie* jurisdiction.

As this intricate topic has not been explicitly furthered by the Court, the best one can do is to look for some guidance in its precedents. For this purpose, I find particularly relevant the *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)* case, in which the ICJ concluded that it could not entertain Mexico's request for interpretation (ICJ 2008b, paragraph 61.1). Nevertheless, within the context of the interpretation proceedings,

it did adopt provisional measures against the United States, as requested by Mexico. As already pointed out, a clear distinction was drawn by the ICJ between its *prima facie* jurisdiction and the one based on Article 60 of its Statute (ICJ 2008b, paragraph 15) in order to justify the measures. Furthermore, it was stated that

> [t]he Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60 (ICJ 2008b, paragraph 51).

This very limited scope of action led the Court to conclude that even though it did not have jurisdiction to affirm that the execution of Mr. José Ernesto Medellín Rojas constituted a violation of its 2004 judgment (ICJ 2008b, paragraphs 56 and 57), it was still enabled to determine that it amounted to a breach of the 2008 order indicating provisional measures (ICJ 2008b, paragraph 61.2).

A close examination of the ICJ's reasoning allows to infer, a *contrario sensu*, that if it were not for Article 60 of its Statute, the Court would have lacked the power to determine that the defiance of its provisional measures constituted a breach of international law. Following this same line of thought, it could be argued that the ICJ does not have the authority to determine whether the provisional measures it ordered have been violated unless it has jurisdiction *ratione materiae* to pronounce on that particular aspect. As far as my knowledge goes the ICJ has never stated explicitly that *prima facie* jurisdiction necessarily entails the incidental jurisdiction to make findings about alleged violations of provisional measures, even in the absence of jurisdiction to decide the merits.

On the contrary, it seems that this topic has been consistently left aside, encouraging the idea that provisional measures, when the Court finds that it has no jurisdiction *ratione materiae*, fall in some sort of legal vacuum.

The complexity of the problem might lead to think of it in very abstract terms. Nevertheless, an appraising glance at the catastrophe on the ground is enough to feel the overwhelming despair to which Ukraine has fallen prey. This reality calls for definitions, and the optimism that followed the March 2022 provisional measures cannot give way to legal nihilism. If the ICJ chooses, to its discredit, not to address this legal inconsistency openly, then the credibility of international law will pay for the consequences.

### B. The sounds of silence

One of the most urgent outcomes of this legal mess is the uncertainty it creates. If the Court were to explain what the fate of

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provisional measures is once jurisdiction *ratione materiae* is declined, it becomes imperative to add whether or not those measures were binding during the time elapsed between their adoption and the finding of lack of jurisdiction to entertain the merits; as well as the ICJ's power to find whether those orders were complied with or breached.

Based on my deeply rooted belief in the pacific settlement of disputes and the high esteem I have for the International Court of Justice, I feel inclined to argue in favor of the binding nature of provisional measures; and I would even dare to say that *prima facie* jurisdiction provides, by itself and until the jurisdiction to decide the merits of the case is sorted, a solid legal basis for this. In this sense, there is a very interesting precedent in which, regardless finding that "there [was] no need to indicate interim measures of protection" (ICJ 1957, page 112), the ICJ ascertained its jurisdiction based on Article 41 of its Statute; though this understanding led Judge Lauterpacht to issue a separate vote which has already been quoted extensively.

But, to make sure there are no misunderstandings and that my assertion is not misinterpreted, my suggestion is that *prima facie* jurisdiction can only temporarily justify the adoption of provisional measures. Once the Court passes a judgment on the jurisdiction to decide the merits of a case, this finding prevails and the *prima facie* jurisdiction has to accommodate to its terms. In this sense, if the Court were to conclude that it has jurisdiction *ratione materiae*, then the binding effects of the provisional measures would be ratified; while the opposite scenario would mean that the provisional measures remain without legal basis. The similarity in this regard with the theory of the incidental jurisdiction is palpable.

For this to be true, the least the international community could expect is to read that the Court, once it has decided it lacks jurisdiction *ratione materiae*, leaves without effect the provisional measures adopted. Furthermore, it should also determine if the effects of the judgment operate *ex nunc* or *ex tunc*. Needless to say, the former constitutes the desired outcome; otherwise, the whole purpose of provisional measures would be put in jeopardy.

To a certain extent, the ICJ has given a hint of a possible solution to these challenges, though it was as faint as isolated. While rejecting its jurisdiction to decide on the merits of the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* case, the ICJ stated that the order indicating provisional measures "ceases to be operative upon the delivery of this Judgment" (ICJ 2011a, paragraph 186).

In this way, despite the fact that the Court did not explain the legal reasons leading

to this conclusion, it nevertheless gave accurate answers to my two main concerns. On the one hand, by saying that the order would cease to be operative, it reasserted its interim binding nature. On the other hand, by holding that the effects of the order would cease with the judgment, it made it clear that the results would be limited to the future and would not act retroactively.

"The nub of the matter appears to be that, while in deciding whether it has jurisdiction on the merits, the Court gives the defendant the benefit of the doubt, in deciding whether it has jurisdiction to indicate provisional measures, the Court gives the applicant the benefit of the doubt" (ICJ 1984, Dissenting opinion of Judge Schwebel, page 207). Reasonings as the one expressed in this dissenting opinion cannot be the ultimate justification to uphold the binding nature of provisional measures before a final decision is reached with regards to the jurisdiction to decide the merits of a case. There has to be an argument based in law beyond mere procedural convenience.

As already mentioned earlier in this work, being the ICJ "the principal judicial organ of the United Nations" (Charter of the United Nations, article 92), it has a very relevant role to play within the structure of the organization. In this sense, it cannot be neglected that first among its purposes the Charter enumerates the maintenance of international peace and security, and that international disputes that could lead to breaches of the peace should be adjusted or settled "in conformity with the principles of justice and *international law*" (Charter of the United Nations, article 1.1. Emphasis added).

Though not exclusively, the Court was entrusted with such pivotal function. In this sense, it goes without saying that it needs to possess the minimum powers required to fulfill its mandate. This means that, if the Court has the power to indicate provisional measures, it is logical that these must be binding and effectual since they are issued. The lack of such implied authority would seriously impair the ICJ's capacity to adequately fulfil its objectives.

The Court stated several decades ago, with regards to the United Nations, that "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties" (ICJ 1949, page 182); following in this sense the rationale that allowed the Permanent Court of International Justice to determine the implicit powers of the International Labour Organization (PCIJ 1926, page 18).

Furthermore, considering that states have agreed that "[i]n the event of a dispute as to whether the Court has jurisdiction, the

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matter shall be settled by the decision of the Court" (Statute of the ICJ, article 36.6); asking the ICJ to explicitly affirm the binding effects of its provisional measures, even if it later on arrives to the conclusion that there is no jurisdiction to decide on the merits of that same case, does not seem to be an overstretched demand.

If the binding character of the ICJ's provisional measures were to depend on the subsequent finding that the Court has jurisdiction *ratione materiae* (be it in a judgment dealing with preliminary objections or the merits), it would be too easy for a state party to a dispute to flout any provisional measure indicated until *prima facie* jurisdiction was confirmed. This would amount, without doubt, to a further challenge to the Court's authority.

## 7. CONCLUSIONS

After the Ukrainian request for provisional measures, it seems that the Court felt obliged to do something to meet the expectations of the international community. Setting itself up as a fervent crusader for international law, it included in its provisional measures against Russia orders which were broad, unprecedented, unique and, from my humble point of view, legally feeble. March 2022 was the time of political correctness, and the widespread optimism that ensued the adoption of the provisional measures shows that the ICJ's assessment of the situation was accurate: the international community needed to see that what it perceived as an act of aggression was punished by law in the harshest terms.

Nevertheless, as the war in Ukraine continued uninterrupted and its atrocities surfaced and came to the knowledge of the international community, the positive feelings started to wane rapidly. If there was any hope that the ICJ would put an end to this cruel war, its judgment passed on the preliminary objections was the final nail on the coffin: February 2024 was the time of strict legality. Even though the Court ascertained its jurisdiction to pronounce on the first aspect of the dispute (the Russian accusations of genocide), the second aspect (the recognition of states and the use of force) was found beyond its reach. Accordingly, one can only expect to read, when the time comes, a declaratory judgment which will make no reference whatsoever to the legality of the use of force by Russia against Ukraine.

This atypical scenario compels me to wonder whether the Court was too progressive in 2022 or too conservative in 2024. After some serious thought, I believe both claims are true. The provisional measures dictated in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation)* are, to say the least, in an awkward position.

The contrast with the provisional measures adopted in the *Application of the*

*Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* case is astonishing. The differences are easy to perceive, as the Court seems to have revisited its approach in relation to genocide and the use of force. This unequal treatment is hard to justify in legal terms. Maybe the ICJ came to realize, after the Russian reluctance to comply with the provisional measures indicated in March 2022, that more than its interpretation of international law, its own authority and prestige were at stake.

Despite the bleak situation in the Gaza Strip and the request made by South Africa, asking the ICJ to order Israel to "immediately suspend its military operations in and against Gaza" (Republic of South Africa 2023, paragraph 144), the provisional measures dictated prescribe that

> [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 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 (ICJ 2024b, paragraph 86.1);

adding that it shall also "ensure with immediate effect that its military does not commit any acts described in point 1 above" (ICJ 2024b, paragraph 86.2). Though South Africa's request to modify these measures was admitted, the new orders dealing with the Israeli use of force were limited in the strictest terms to the realm of the Genocide Convention (ICJ 2024c, paragraph 57.2).

After looking at the Ukrainian and the South African requests, and the provisional measures that they respectively brought about, it seems that they are the exact opposite. Though Ukraine only requested the use of force in relation to the prevention and / or punishment of an alleged genocide to be stopped, the Court's order was all-encompassing: Russia had to stop its military operations in and against Ukraine, and no reference whatsoever was made to genocide. On the contrary, South Africa's request was broad, in the sense that it asked that the military campaign be brought to an end, and still the ICJ limited its order to those uses of force which were related to genocide. Far from overlooking the several factual and legal differences that these cases present, certain aspects cannot be explained through law only.

The appalling situation in Ukraine calls for urgent actions; and considering that both the Security Council and the General Assembly proved impotent to bring peace, it is only logical for international law to seek refuge in the Court. I believe the ICJ missed a golden opportunity when

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deciding the preliminary objections. In the first place, it could have contributed to the cause of peace by establishing in clear terms the obligations of states with regards to the use of force, irrespective of the Genocide Convention. Secondly, it could have also put the law straight by shedding some light on the many uncertainties that permeate provisional measures.

In connection with my first point, the ICJ seems to have shied away from specifically referring to the international law ruling the use of force by states, limiting itself to stating that

> [t]he Court recalls, as it has on several occasions in the past, that there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. States are always required to fulfil their obligations under the Charter of the United Nations and other rules of international law. Whether or not they have consented to the jurisdiction of the Court, States remain responsible for acts attributable to them that are contrary to international law (ICJ 2024a, paragraph 150).

The contrast with one of its already quoted precedents, in which it reminded the parties of their "duty to comply with their obligations under CERD" (ICJ 2011a, paragraph 186) irrespective of the lack of jurisdiction to pronounce on the merits of the case and the cessation in the applicability of the provisional measures, is stark. A brief reference to the applicable law would have at least framed the situation authoritatively.

The most radical contention that I make comes with my second claim, which is based on how the Court dealt with the provisional measures. If the provisional measures never had legal effects because the *prima facie* jurisdiction is not enough in itself for this to happen, then the ICJ should have stated it unequivocally. On the contrary, if the order issued on 16 March 2022 was meant to have legal effects, then the Court should have established in its judgment of 2 February 2024 that the provisional measures have ceased to be operative and, in addition, clarify whether the judgement has retroactive effects or is limited towards the future.

As true as it is that the Court has clearly stated that "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" (ICJ 2015, paragraph 126), it cannot be overlooked that this assertion was made in the context of a proceeding in which the *prima facie* jurisdiction was in consonance with the one required to decide on the merits; and through these pages I aim to enquire into the fate of provisional measures when the ICJ determines it lacks jurisdiction to pronounce on that aspect, exactly as it happened in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation)* case.

From my personal point of view, I do believe that the ICJ's power to dictate binding provisional measures comes from its incidental jurisdiction. Still, it is also true that even the person to coin the idea of incidental jurisdiction in the realm of the ICJ argued in the separate opinion cited earlier that "[t]he Court's specific power under Article 41 of the Statute is directed to the preservation of rights 'sub-judice' and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes" (ICJ 1976, Separate Opinion of President Jiménez de Aréchaga, page 16).

On a similar note, though following a different logic, it was put "beyond dispute that the Court may not indicate provisional measures under its Statute where it has no jurisdiction over the merits of the case. Equally, however, considerations of urgency do not or may not permit the Court to establish its jurisdiction definitively before it issues an order of interim protection" (ICJ 1984, Dissenting opinion of Judge Schwebel, page 206).

I believe that in March 2022 the ICJ, eager as it was to bring the heartbreaking situation in Ukraine to an immediate end, fell victim of the international community's clamor for justice. As a consequence, it ordered provisional measures that were as hard to implement practically as difficult to justify legally. This is why I allow myself to affirm that the Court chose political correctness over legality.

Nevertheless, when deciding the preliminary objections raised by the Respondent, the Court seemed to have returned to the path of law, rectifying some of the legal inconsistencies that plague its March 2022 order.

Being jurisdiction on the merits the absolute cornerstone that defines the legal effects of provisional measures, now that the ICJ has concluded that it lacks jurisdiction to pronounce on the Russian use of force, two extremely important conclusions ensue.

First and foremost, the Court will not be able to pronounce on the legality of the Russian aggression against Ukraine. This is true with regards to the merits, given the lack of jurisdiction *ratione materiae*; as well as in relation to the provisional measures, as there would be no legal basis to do so.

Secondly, as the ICJ did not leave without effect its provisional measures dealing with the use of force when passing its judgment on the preliminary objections, it should do it immediately. According to article 76.1[8] of the Rules of Court, "[a]t the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification". Needless to say that, for this purpose, the finding that the ICJ does not have jurisdiction to pronounce on the use of force by Russia constitutes a change in the situation allowing for this revocation. Ideally, the Court should proceed accordingly by itself, *proprio motu*. Otherwise, it is up to Russia to demand it.

No matter how unpopular this course of action might be, any other path taken by the Court would mean sacrificing international law on the altar of political considerations. ◆

8) With the amendment that entered into force on 21 October 2019.

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