

The Effect of the Nature of the Rule Prohibiting Genocide in Issuing Provisional Measures: The Lessons of the Gambia against Myanmar Case

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Abstract

Can a State that has not been Injured by the violation invoke the responsibility of the responsible state? This is a question that was discussed years before the final approval of the Draft of State Responsibility in 2001, and was eventually reflected in the wording of Article 48 of the Draft. Accordingly, the Gambian instituted proceedings against the Myanmar in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide with a request for provisional measures on 11 November 2019 at the International Court of Justice. On 23 January 2021, the Court issued the provisional measures. This decision contains significant aspects, including the effect of the nature of the asserted rights on having a position in the litigation and the threshold for qualifying for provisional measures. In this paper, in the light of the Court's case-law and doctrine, we examine these two important consequences in the light of the impact of the nature of the rights claimed in the proceedings before the Court in general and the provisional measures in particular.

Keywords: International Court of Justice; State other than the injured State; Genocide Convention; Provisional Measures; Determination Threshold.

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Bibliography

A) Books & Article

- Azizi, Sattar. "Elements of the Crime of Genocide in the Jurisprudence of the International Court of Justice and Ad Hoc International Criminal Courts", *International Law Review* 24, (Spring and Summer 2007): 9-34. [In Persian]
- Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2008.
- Gaja, Giorgio. "Standing: International Court of Justice (ICJ)", In *Max Planck Encyclopedia of International Law*, edited by Rudiger Wolfrum, 2018.
- Iwamoto, Yoshiyuki. "The Protection of Human Life through Provisional Measures Indicated by the International Court of Justice", *Leiden Journal of International Law* 15, (June 2002): 345-366.
- Khosrohani, Hasan. "The Role of Provisional Measures of International Judicial and Quasi-Judicial Bodies in Protection of International Human Rights", PhD Thesis in International Law, Qom: University of Tehran (Farabi Campus), 2019. [In Persian]
- Kolb, Robert. "Digging Deeper into the "Plausibility of Rights"-Criterion in the Provisional Measures Jurisprudence of the ICJ", *The Law & Practice of International Courts and Tribunals* 19, (November 2020): 365-387.
- Lando, Massimo. "Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice", *Leiden Journal of International Law* 31, (May 2018): 641-688.
- Lendman, Steve. "Israel's Slow-Motion Genocide in Occupied Palestine", In *The Plight of the Palestinians*, edited by William A. Cook (Berlin: Springer, 2010).
- Miles, Cameron A. *Provisional Measures before International Courts and Tribunals*. Oxford: Oxford University Press, 2017.
- Momtaz, Jamshid, Massoud Alizadeh, and Shahram Zarneshan. "The Obligation to not Render Aid or Assistance so as to Maintain a Situation Created by the Breach of a Peremptory Norm of General International Law", *Comparative Law Researches* 22, (Spring 2018): 135-154. [In Persian]
- Oellers-Frahm, Karin, and Andreas Zimmermann. "Article 41", in *The Statute of the International Court of Justice: A Commentary*, eds. Tams Zimmermann, and Tomuschat Oellers-Frahm. 3rd Edition. Oxford: Oxford University Press, 2019.
- Pauwelyn, Joost. "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?" *European Journal of International Law* 14 (November 2003): 907-951.
- Rosenne, Shabtai. *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*. Oxford: Oxford University Press, 2005.

Schabas, William. *Genocide in International Law: The Crime of Crimes*. 2nd edition. Cambridge: Cambridge University Press, 2009.

Sicilianos, Linos-Alexander. "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", *European Journal of International Law* 13, (February 2008): 1127-1145.

Zyberi, Gentian. "Provisional Measures of the International Court of Justice in Armed Conflict Situations", *Leiden Journal of International Law* 23, (July 2010): 571-584.

B) Documents

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *The Gambia v. Myanmar*, ICJ Reports (2020).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ Reports (2007).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Croatia v. Serbia*, ICJ Reports (2015).

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* (2017).

Arbitral Award of July 31, 1989, *Guinea-Bissau v. Senegal*, Provisional Measures, ICJ Reports (1990).

Armed Activities on the Territory of the Congo, New Application 2002, Democratic Republic of the Congo v. Rwanda, ICJ Reports (2006).

Convention on the Prevention and Punishment of the Crime of Genocide, 1948, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4.

Declaration of Judge ad hoc Kress (2020).

Draft Articles on Responsibility of International Organizations (2011).

Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001).

LaGrand, Germany v. United States of America, Provisional Measures ICJ Reports (1999).

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

Oil Platforms, Islamic Republic of Iran v. United States of America, ICJ Reports (2003).

Questions relating to the Obligation to Prosecute or Extradite (2012). (*Belgium v. Senegal*).

Questions relating to the Obligation to Prosecute or Extradite, Belgium v. Senegal, Provisional measures (2009).

Separate opinion of Judge Cançado Trindade (2020).

Separate opinion of Vice-President Xue (2020).

Statement by the Ministry of Foreign Affairs of the Russian Federation on the Beginning of Domestic Procedures for the Withdrawal of the Russian Federation from the Treaty on Open Skies, January 15, 2021, https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4522563.

Yearbook of the International Law Commission, Vol. II (1958).