On 26 January 2024, the International Court of Justice issued an interim order in response to South Africa’s application instituting proceedings against Israel alleging violations of the Genocide Convention for its actions in the Gaza Strip since 7 October 2023 (South Africa v Israel). The Court found that, in light of the evidence presented by South Africa, and citing numerous Special Rapporteur reports and statements by various UN officials and agencies, there was plausibility that Israel was committing acts that constitute genocide and other prohibited acts under the Convention (para. 54), and that there existed a real and imminent risk of irreparable harm to the rights protected under the Convention (para. 74). The Court ordered six provisional measures as a result. The purpose of this post is to analyze the implications of the issuance of these provisional measures, and more importantly the Court’s recognition of the plausibility of genocide, for third-states, particularly state parties to the Genocide Convention.
The Court’s provisional measures have a number of important legal implications. First and foremost, they bind Israel. In the 2001 LaGrand case (Germany v. United States of America), the Court affirmed that its “orders on provisional measures… have binding effect” (para. 109). Israel is legally obligated to comply with the provisional measures. It is important to note that the court found Israel’s stated actions to minimize harm to civilians and to respond to incitement did not sufficiently remove the risk of irreparable harm (South Africa v Israel, para. 73); hence, Israel cannot continue to claim that they are abiding by their obligations and must do more.

The Genocide Convention, independent of the interim order, creates obligations upon the state parties. As the Court clarified in its interim order:

\[\text{... all the States parties to the Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. Such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations } \text{erga omnes partes}, \text{in the sense that each State party has an interest in compliance with them in any given case.}\]

\text{para. 33}

The prohibition of genocide more generally is considered a \text{jus cogens} norm, and is one of the crimes that falls under the jurisdiction of the International Criminal Court (Article 6 of the Rome Statute). Regarding peremptory norms, the ILC affirmed that states have the duty to “bring to an end through lawful means” the breach of a peremptory norm, and that States shall not “recognize as lawful” a situation created by that breach “nor render aid or assistance in maintaining that situation.” (Conclusion 19, paras. 1-2) The legal consequences of breaches of peremptory norms, particularly the prohibition of genocide, have been discussed previously.

The Bosnia and Herzegovina v. Serbia and Montenegro (“Bosnia v Serbia”) judgment in 2007 is illuminating in terms of its explication of state responsibility regarding the prevention of and complicity in the commission of genocide. First, the Court specified that states have the responsibility “to employ all means reasonably available to them, so as to prevent genocide so far as possible,” (Bosnia v Serbia, para. 430), particularly those states with “the capacity to influence effectively the action of persons likely to commit, or already committing, genocide,” (para. 431). Responsibility is incurred “if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide,” (para. 430). Hence, a state can be held responsible when it omits to act with the available lawful means when it could have. There is heightened responsibility for states that have the capacity to influence the state committing genocide due to, inter alia, the strength of their political ties. In finding responsibility for failing to prevent
genocide, the Court saw that the FRY was in a position to influence the perpetrators of the Srebrenica genocide “owing to the strength of the political, military and financial links,” (para. 434).

The responsibility, moreover, is to act to prevent genocide, regardless of whether these actions are likely to succeed or not. States may not rely on the assumption that their actions “would not have sufficed to prevent the commission of genocide” since that cannot be known; on the contrary, if all states acted individually “the combined efforts of several States, each complying with its obligation to prevent” (para. 430) may avert the commission of genocide.

Second, in addition to employing all means available to prevent the genocide, states must not be complicit in the commission of the genocide itself. Complicity as defined in the Bosnia v Serbia case “includes the provision of means to enable or facilitate the commission of the crime,” (para. 419). It must include a positive action. What is crucial here is that the state in question should be aware of the intent to commit genocide. Indeed, the ICJ held that Serbia was not guilty of the crime of complicity to genocide because “it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken,” (para. 423). The obligation to refrain from being complicit through aid or assistance begins the moment the state becomes aware of the existence of a serious risk that genocide will be committed.

Initially, in response to South Africa’s application, a number of states issued statements claiming that the accusations were “baseless”, “unfounded”, and “unjustified”. However, the provisional measures issued by the Court due to finding a plausible risk of the commission of genocide, and the many collected public statements indicating genocidal intent, change matters in this case. It would be difficult for states to argue simply that they did not know. The Court stated in Bosnia v Serbia that the state is responsible for complicity when it is,

\[
\text{aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.}
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para. 432

For failure to prevent, on the other hand,
a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.

para. 432

In finding that Serbia was guilty of failure to prevent genocide, the Court stated that Serbia “could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave,” (para. 436).

While the ruling on the merits of the case will take many more years, and the issue of whether there was complicity in or a failure to prevent genocide will depend upon that judgement, the mere issuance of provisional measures by the Court, detailing the destruction (South Africa v Israel, paras. 46-49) and dehumanizing language (paras. 50-53) that make the risk of genocide plausible, triggers at the very least the duty to prevent since all states are now aware of the serious risk of genocide and the urgency of the case. There is even greater responsibility for states, like the US and others, that have strong political ties to Israel and provide financial aid and weapons. With regards to the latter, while the bar has been higher for finding complicity in genocide due to the requirement of awareness that genocide is being/will be committed, this is also one of the rare times, as many experts have noted, that the statements indicating genocidal intent have been very public and explicit.

States’ verbal responses to the provisional measures order have varied, but it is their subsequent actions in particular that may implicate them in failure to prevent and possible complicity, if genocide is found to have been committed. Nine states, including the US, the UK, Canada, and others, announced on 27 January 2024, the suspension of funding to the UN Relief and Works Agency (UNRWA), which provides support for almost 2 million people in Gaza, due to Israeli allegations that 12 UNRWA staff took part in the 7 October attacks. These allegations were brought to UNRWA the same day the provisional measures were ordered, and UNRWA immediately terminated the contracts of nine of the individuals (one is deceased and the other two have yet to be identified) and asked for a transparent independent investigation. UNRWA is currently sheltering over 1 million people and providing basic food and healthcare. It should be noted that genocide is not solely killing members of the group, but causing serious bodily or mental harm to members of the group, as well as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (Genocide Convention, Articles 1b, 1c); hence, states can be responsible when they fail to prevent or are complicit in the aforementioned acts. The dire humanitarian condition detailed by the South African application and numerous reports, including evidence of deliberate starvation and risk of famine, are now further exacerbated due to the intended suspension of funding to UNRWA. In fact, defunding directly assists in inflicting bodily and mental harm to members of the group, as well as helping to inflict
conditions that bring about the physical destruction of the group. Those providing aid and assistance to Israel, while announcing that they will cut off aid to the primary provider of assistance to Palestinians in Gaza, will have to contend with the mounting evidence in this case.