# Provisional Measures as Tools of American Empire

**Itamar Mann**

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One could feel the weight of history on her shoulders, as Judge Joan Donoghue, President of the International Court of Justice, read the provisional measures order in South Africa v Israel. Her hand reached several times for the glass of water. Carefully, and with an occasional sip of water, she walked her viewers on the ICJ's streaming service from one provisional measure to the next. To name just the most important ones here: "to prevent and punish the direct and public incitement to commit genocide"; "to enable the provision of urgently needed basic services and humanitarian assistance"; to "submit a report to the Court on all measures taken to give effect to this Order within one month". As she proceeded something that no Israeli commentator predicted gradually became clear: The President herself had signed all of the orders against Israel.

By first zeroing in on the role of the American judge, this post describes how the provisional measures decided upon, ultimately correspond to a larger project of global American governance. As I will argue the US Executive Branch is likely to take a lead role in interpreting the provisional measures, further cementing their place as tools of empire.

## Israel's Turn East

At least part of the history on Donoghue's shoulders was that of Washington's fraught partnership with Jerusalem. To appreciate how this may influence the implementation of the provisional measures order, one must first go back a few years. Around 2018, the Trump administration advanced the "Deal of the Century" – an ostentatious peace plan, also designed to tighten American hold in the Middle East. In this context, Trump sought to end American contributions to the UN Palestinian refugee agency, UNRWA. At the time, this had nothing to do with terrorism allegations, but rather reflected an embrace of a long-held Israeli position: UNRWA had preserved the Palestinian refugee problem, and thus became an obstacle to peace in the Middle East. Biden subsequently reversed Trump's decision, but the agency's resources nevertheless diminished.

Yet, against the backdrop of a perceived decline of American empire, Jerusalem did not seem impressed by Trump's Middle Eastern policies. As early as 2015, the Shanghai International Port Group concluded a concession agreement to run a new extra-territorial port in the northern Haifa bay. Plans progressed, and in December 2018, rumors had it that the White House was quite upset about Israel's reorientation eastward. According to reports, the United States Sixth Fleet planned to avoid Haifa altogether, supposedly wary of Chinese espionage.

Prime Minister Naftali Bennett's short-lived "government of change" signaled, rather, a continued quest for new allies. The trend reached its peak when in late February 2022 Israel rejected an American request to vote against Russia and its invasion of Ukraine at the UN, and support an immediate ceasefire. Old guard national security establishment experts warned that these adventures were unnecessary and dangerous. But in an era of waning American power, others perceived them as a prudent diversification of the country's national security investment portfolio.

## Back to Client Dimensions

Then came October 7, and quickly dispelled any illusions of Israeli national security independence. In the first weeks of the war, Biden emerged as a father figure for the orphaned Israeli people. The American fleet quickly arrived in the Eastern Mediterranean. But at its tail end, the fleet also delivered two demands, that were since largely left unheeded: that Israel minimizes harm to civilians, and that it works to devise a diplomatic plan for "the day after". Towards the end of

January, this dual approach of military support alongside a call for restraint solidified into three rather dramatic measures, which I would like to read as mutually reinforcing: first, a major military aircraft deal, to further arm the Israeli air force (January 25); second, the International Court of Justice decision imposing provisional measures amounting to a framework of counter-genocidal governance upon Israel (January 26); and third, an American decision to freeze funding to UNRWA (January 26).

But is it not completely misguided to see the International Court of Justice provisional measures order as one of the pillars of American policy in the region? 17 judges of very different backgrounds and orientations heard the arguments, several writing dissenting or separate opinions. Why make it sound like the Court is somehow captured by American interests?

By linking Israel to genocide, but not insisting on a ceasefire, the ICJ wrote an opinion that may quickly become a critical aspect of Biden's foreign policy. To be sure, I do not intend to suggest that President Donoghue led to this result consciously, nor do I want to say that her independence was compromised, or any similar conspiracy. But in reaching an agreement among a majority of judges that may prove useful for the Biden administration — and maybe even beyond — it is likely that she had a key role. It is safe to assume that in doing so, Judge Donoghue upheld her deepest convictions. She thus reflected what the French sociologist Pierre Bourdieu called her "habitus", namely, assumptions and preferences that reflect her background and social embeddedness. In her previous role, Judge Donoghue was the legal advisor at the US State Department. As Harold Koh said in an interview on PBS, following the provisional measures decision, the International Court of Justice "says only what we have been saying to the Israelis anyway [...]" Koh succeeded Judge Donoghue at the State Department before she left her position for the ICJ.

## The U.S.'s Role in Interpreting and Implementing the Provisional Measures

In his 2021 book "Humane", Samuel Moyn characterized American foreign policy as an endless war, which is "humanized" and therefore tolerated due to the legitimation effect of law. It is easy to surmise, along with him, that an endless war will be the practical outcome of the ICJ provisional measures order. This is the image of a reality in which an arms deal and the International Court of Justice decision fit together as hand in glove. But perhaps this is too easy an argument. Contrary to Moyn's endless war, the nature of adjudication is that it establishes a finite timeframe – perhaps roughly three or four years until a judgment on the merits. Within this timeframe, Washington's new embrace will probably not be offered to Israelis out of love, but to prevent the deviation eastward and reestablish American power in the Middle East.

Among the "third states" who will end up interpreting the provisional measures order, it is already apparent that the US will have the central role. After October 7, the US is by far the most influential state on Israel, its client state. One may not accept my speculation that Judge Donoghue's background in American foreign policy influenced the form of the provisional measures order. Even so, American foreign policy will surely shape how and to what extent they are actually implemented.

To name two examples: first, it is not at all clear that in terms of third states' obligations, defunding UNRWA at this timing is consistent with the order "to enable the provision of urgently needed basic services and humanitarian assistance". To be sure, the involvement of 12 UNRWA personnel in terrorist or military activity cannot be tolerated. And yet, UNRWA provides the most effective and necessary infrastructure for the provision of assistance to 2.2 million Gazans in dire need. This includes 600,000 at risk of hunger, according to World Health Organization numbers, and 1.2 million displaced people to whom UNRWA is providing shelter.. But Washington's decision to suspend funding to UNRWA, made in close conjunction with the order for provisional measures, sends a message that the

U.S. believes the decision aligns with the provisional measure. This has created a domino effect among allies, including Germany (UNRWA's second-largest funder after the U.S.), the UK, Italy, Finland, and Japan, who have all followed suit.

In a month's time, when Israel may submit its report on the implementation of provisional measures, South Africa may argue that the decision to defund UNRWA violated the measures. But with the different states that have joined the U.S., getting the ICJ to follow this argument may be difficult, despite its dire humanitarian effects.

Second, NBC has reported that the Biden administration is "discussing slowing some weaponry deliveries to pressure Netanyahu". The discussion of weaponry will inevitably involve the question of possible complicity in genocide, or perhaps war crimes or crimes against humanity. Questions of interpretation that U.S. Executive Branch lawyers will consider, may have wider implications on how other countries, including their courts, consider legal limitations on arms deals with Israel. Such limitations will, of course, be framed in terms of relevant domestic law provisions, but also in terms of the ICJ's provisional measures.

## Adjudication as Timeframe for a Two-State Solution

This implementation, and the process of interpretation that it requires, will span the duration of the ICJ adjudication process. Interpretation and implementation will thus provide a platform through which the bilateral relationship between the U.S. and Israel may be cast in multilateral terms. This is also the timeframe in which the United States seems to have set the goal of a top-down, more or less imposed, two-state solution. Biden has embraced Israel's security interests at a time when Israel started slowly drifting away. My guess is that if Biden remains in office, we will witness the provisional measures gradually evolve into tools for facilitating a two-state solution. It will be the return the administration will expect for saving Israel in an existentially threatening moment.

It is unclear if demanding a two-state solution, as a command backed by the sanction of being held responsible for genocide, will succeed. Right-wing messianic forces in Israel are quite influential and are determined to reject any such outcome. Furthermore, it is far from clear that an imposed two-state solution will bring any real relief to the region, let alone materialize a form of justice acceptable to its inhabitants.

And of course, it also remains highly uncertain that Biden will remain in the White House after the elections in November. Israeli policymakers, some of whom seem determined to ignore the ICJ's provisional measures order, are surely banking on Trump.

By doing so, they are betting on a wild card. A Trump administration may quickly become busy with domestic issues, including perhaps an attempt to destroy the American legal system. This may distract it from any attempt to utilize the provisional measures as instruments of foreign policy, whatever the goal may be. But one must also remember that Trump was the person who had started the process of closing UNRWA, which Biden may now be concluding. For better or worse, Trump may choose to carry on with Biden's imperial project, cast as it now is, within the timeframe of international adjudication.

## ABOUT THE AUTHOR

**Itamar Mann**

Itamar Mann is an NWO Tulip funds researcher at VU Amsterdam and a visiting professor at the Faculty of Law at Humboldt University, Berlin.Itamar Mann is an NWO Tulip funds researcher at VU Amsterdam and a visiting professor at the Faculty of Law at Humboldt University, Berlin.

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