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The ICJ's Provisional Orders: The Genocide Convention Applies to Gaza



Photograph by Nathaniel St. Clair

On January 26, legal experts, policy wonks, activists and the plain curious waited for the order of the International Court of Justice, sitting in The Hague. The topic was that gravest of crimes, considered most reprehensible in the canon of international law: genocide. The main participants: the accused party, the State of Israel, and the accuser, the Republic of South Africa.

Filed on December 29 last year, the South African case focused on its obligations arising under the Convention on the Prevention and Punishment of the Crime of Genocide and those of Israel. Pretoria, in its case, wished that the ICJ adjudicate and declare that Israel had breached its obligations under the Convention, and “cease forthwith any acts and measures in breach of those obligations, including such acts or measures which would be

capable of killing or continuing to kill Palestinians, or causing or continuing to cause serious bodily or mental harm to Palestinians or deliberately inflicting on their group, or continuing to inflict on their group, conditions of life calculated to bring about its physical destruction in whole or in part, and fully respect its obligations under the Genocide Convention”.

The latter words derive from Article II of the Convention, which stipulate four genocidal actions: the killing of the group’s members; the causing of serious bodily or mental harm to those group’s members; the deliberate infliction of conditions calculated to bring about the physical destruction, in whole or in part, of that group and imposing measures to prevent births within the group.

The sheer extent of devastation being wrought by Israeli Defence Forces in Gaza, justified by the Netanyahu government as necessary self-defence in the aftermath of the Hamas attacks of October 7, led the South African team to also seek immediate provisional measures under Article 41 of the Court’s statute. (The review on the case’s merits promises to take much longer.) They included the immediate suspension of the IDF’s military operations in and against Gaza, the taking of all reasonable measures to prevent genocide, and desisting from committing acts within Article II of the Convention. The expulsion and forced displacement of Palestinians should also stop, likewise the deprivation of adequate food, water and access to humanitarian assistance and medical supplies and “the destruction of Palestinian life in Gaza.”

By 15-2, the court accepted that “the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment.” (Over 26,000 Palestinians have been killed, extensive tracts of land in Gaza pummelled into oblivion, and 85% of its 2.3 million residents expelled from their homes.) Measures were therefore required to prevent “real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, before it gives its final decision.”

The grant of provisional measures was, however, more conservative than that sought by Pretoria. Conspicuously missing was any explicit demand that Israel pause its military operations. That said, the judgment did little to afford Israel’s leaders and the IDF comfort from the obligatory reach of the Genocide Convention, an instrument they had argued was irrelevant and inapplicable to the conduct of “innovative” military operations.

To that end, Israel was obligated to take all possible measures to prevent the commission of acts under Article II of the Genocide Convention, including by its military; prevent and

punish “the direct and public incitement to genocide” against the Palestinian populace in Gaza; permit basic services and humanitarian assistance to the Gaza Strip; ensure the preservation of, and prevent destruction of, evidence related to acts committed against Gaza’s Palestinians within Articles II and III of the Convention; and submit a report to the ICJ on how Israel was abiding by such provisional measures within one month.

As is very much the form, the justice from the country in the dock, in this case, Israel’s Aharon Barak, could see nothing inferentially genocidal in his country’s campaign. South Africa, he insisted, had intentionally ignored the role played by Hamas in its October 7 attacks, and “wrongly sought to impute the crime of Cain to Abel.”

Inevitably, the singular experience of the Holocaust survivor, the sui generis Jewish view of trauma, used as solid armour against any possibility that Israel might ever commit genocide, became a point of contention. Genocide “is the gravest possible accusation and is deeply intertwined with my personal life experience.” Israel had a firm commitment to the rule of law, and to accept that it was committing genocide “is very hard for me personally”. Tellingly, he suggested that Israel’s campaign in Gaza be examined, not from the viewpoint of the Genocide Convention but international humanitarian law.

With classic casuistry, Barak did vote for the measure requiring Israel to do everything “within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza strip”. But having identified nothing in the way of such intent, the issue became a moot one. With some relief, Barak could state that certain measures sought by South Africa, including an immediate suspension of military operations, were rejected by the ICJ, which preferred “a significantly narrower scope”.

From the other side of the legal aisle, the South African foreign minister, Naledi Pandor, wished that the ICJ had grasped the nettle to order a halt in military operations. But, with some deft reasoning, she was satisfied that the only way Israel could implement the provisional measures would be through a ceasefire. Much the same view was expressed by the Associated Press: “The court’s half-dozen orders will be difficult to achieve without some sort of cease-fire or pause in the fighting.” That logic is clear enough, but the actions, given the various statements from Prime Minister Benjamin Netanyahu and his officials alleging slander and a blood libel against their country, are unlikely to follow.

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