ARI 26/2024 (English version)
27 February 2024

Prospects and implications of the International Court of Justice (ICJ) ruling in the case of South Africa against Israel

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Theme

The International Court of Justice has issued an Order regarding provisional measures requested by South Africa against Israel for the possible violation of its obligations in accordance with the Convention on the Prevention and Punishment of Genocide.

Summary

The International Court of Justice has confirmed, by an overwhelming majority of its judges, that it is plausible that Israel is violating its obligations in Gaza under the Genocide Convention. The Order of provisional measures issued by the Court on 26 January requires Israel to take all measures within its power to prevent the commission of acts that could constitute the criminal actions defined by the Genocide Convention, ensuring with immediate effect that its army does not commit such acts. It also requires Israel to take all necessary measures to prevent and punish direct, public incitement to commit genocide, and to take effective measures to enable the immediate provision of basic services and humanitarian aid that the population of Gaza urgently requires. Furthermore, the Court requires Israel to present a report within one month on all measures taken to give effect to the Order.

Analysis

On 26 January, amid great expectation, the President of the International Court of Justice (ICJ) read the Order on provisional measures requested by South Africa on 29 December 2023 together with its application against Israel for violation of its obligations in accordance with the Genocide Convention. The Order was adopted by 15 votes to two (Sebutinde and Barak, judge *ad hoc*) in four of the six parts of the operative clause; and by 16 to one (Sebutinde) in the other two parts. Three judges (Xue, Bhandari and Nolte) appended declarations to the Order; Judge *ad hoc* Barak, appended a separate opinion; Judge Sebutinde appended a dissenting opinion.

South Africa condemned the events of 7 October 2023, but placed Israel's response in the context of the ongoing violation of the rights of Palestinians since the 1948 war and the foundation of the State of Israel.

Israel refused to discuss events prior to 7 October, the greatest planned massacre of Jews on a single day since the Holocaust, with more than 100 hostages still held by

Hamas, who bears full responsibility. According to Israel, South Africa is distorting the facts by presenting them as a confrontation between a defenceless population and a genocidal army; the real conflict is between a genocidal Hamas and the Israeli armed forces, which respect international humanitarian law. Israel accused South Africa of complicity with Hamas but did not go so far as to argue that the applicant is itself in violation of the Genocide Convention.

The Court made a brief reference to the events of 7 October and the consequences of the 'large-scale military operation' in response to it, to establish the context for the case and its awareness of the human tragedy that has unfolded. The Court noted that various organs and agencies of the United Nations have addressed the conflict (citing in particular the relevant resolutions of the General Assembly and of the Security Council) and pointed out that the intervention of the Court is limited to the application of the Genocide Convention.

Requiring judges to issue rulings with regard to situations that have been poisoned by 'politics' is inevitable, indeed imperative, when 'politics' has led to crimes being committed, and even more so when the crime in question is that of genocide. Judge Sebutinde argued, in her dissenting opinion, that South Africa is using its case against Israel as a pretext to have the Court address a conflict that must be resolved by diplomatic and political means. However, while there is obviously no question that the Court's decision will resolve a complex and multi-faceted situation such as the one that exists in the Middle East, if crimes are committed and these come within the competence of the Court, this body should not evade its responsibilities.

The active legitimation of South Africa

South Africa justified its case on the basis of the right and duty it has, as a party to the Genocide Convention, to prevent and suppress this extremely serious crime. Any other state that is a party to the Convention and has not formulated a reservation to article IX (which includes the clause under which disputes regarding the interpretation and application of the Convention may be submitted to the court) could have done so. The fact that South Africa is the applicant evokes the time, 50 years ago, when South Africa, under the apartheid system of racial segregation and white domination, was the subject of a case brought by two other African countries –Liberia and Ethiopia– to a Court which denied the legitimacy of the suit due to the fact that the claimants had no direct interest that had been damaged by the defendant. This 'denial of justice', as Judge Xue notes in her opinion, produced huge indignation and sullied the reputation of the Court, with the result that it was ostracised for several years. Now, South Africa is paying homage to its own history, bringing a case against a country that it considers to be infringing the fundamental human rights of the Palestinian people, whose territory it occupies or controls. In doing so, South Africa is assuming a leadership role that others, closer to the Palestinians, have sidestepped.

Although Israel did not challenge South Africa's active legitimation, the Court noted that in *The Gambia v Myanmar* (Order of 23 January 2020) it had already ruled that the obligations entered into under the Convention are *erga omnes partes* and as a result the common interest in preventing, suppressing and punishing genocide means that any

State party may, where applicable, invoke the responsibility of another State party and apply to the Court under the terms permitted by article IX of the Convention (so long as this has not been the object of reservation by the respondent). In other words, this issue has been jurisprudentially resolved.

The existence of a dispute between South Africa and Israel

The operation of article IX of the Convention takes as its starting premise the existence of a dispute between the parties on the date of deposition of the application, which in this case was 29 December 2023. For the layperson, this point does not seem to be in doubt. How could one deny that South Africa has denounced Israel for genocide and that Israel, in turn, has rejected this in categorical terms? But the question is a little more complex at the legal level, offering the respondent a tempting escape route. The question is one of substance, not simply of form or procedure. If there was no dispute on that date, both the application for provisional measures and the claim itself would immediately fail. Myanmar attempted such a strategy against Gambia, but without success. In this case, Israel also played this card skilfully, but to no avail.

The argument refuting the notion that there was a dispute before 29 December 2023, as South Africa argued, revolved around the fact that bilateral diplomatic correspondence on the issue had been belated, only beginning on 21 December, eight days before the application was lodged, and there had been no opportunity to seek to resolve the disagreements through a meeting of the parties. The Judge *ad hoc* Barak, in his separate opinion, raised the suspicion that South Africa was not acting in good faith.

The Court, however, did not accord particular importance to the specific bilateral exchange, effectively dismissing it by omission. It attended to the public declarations of the parties, some of which were made at multilateral bodies by their authorised representatives and ruled that the dispute existed on 29 December 2023.

Conditions regarding the application of provisional measures

Having confirmed the existence of the dispute between the parties, the Court went on to examine the conditions that allow it to adopt provisional measures, namely: (1) that it has *prima facie* jurisdiction over the issue; (2) that the existence of the rights for which protection is sought and their relationship to the requested measures is *plausible*; and (3) that there is a risk of irreparable prejudice if urgent action is not taken.

1. The prima facie jurisdiction of the Court

To satisfy the first condition –the apparent jurisdiction of the Court– it is not enough simply to invoke article IX of the Convention. This jurisdiction is linked, by virtue of the subject, to the prevention, suppression and punishment of genocide, a crime which requires the identification of a *dolus specialis* or specific intention: to destroy at least a substantial part of a national, ethnic, racial or religious group.

South Africa notes in Israel's actions a systematic pattern of behaviour that, linking the facts to the types of action listed in article II of the Convention, allow an inference of

genocide. The statements of prominent Israeli representatives confirm this. South Africa understands that, at this stage of the proceedings, it is sufficient that genocidal intention is not excluded as a hypothesis. Israel argued that a more demanding standard must be applied and directed its efforts at convincing the Court that this hypothesis was unconvincing, and that its conduct had in fact been virtuous.

The Order, in line with South Africa, applies a very low standard: 'at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention'.

2. The plausibility of the rights to be protected and their relationship to the measures proposed: the question of genocidal intent

The standard of *dolus specialis* also affects the second condition: the plausibility of the rights to be protected is intrinsically linked to the genocidal intent of actions that, in the absence of such intent, would be crimes but would not constitute genocide.

In light of this consideration, the Court observed that the Palestinians of the Gaza Strip form a substantial part of a protected group (the Palestinians), and that the Israeli military operation has produced a large number of deaths and injuries, the massive destruction of homes, the forced displacement of the vast majority of the population and extensive damage to civil infrastructure.

The Court drew on statements by high-ranking officials of the United Nations Secretariat, the World Health Organisation (WHO), and the United Nations Reliefs and Works Agency for Palestine Refugees in the Near East (UNRWA) to show that Gaza has become an uninhabitable place where the sense of humanity has been extinguished, and linked them to statements by Israeli representatives, such as President Herzog, the Minister of Defence, Galant, and the former Minister for Energy and Infrastructure, Katz, which would be incriminating. The Court also mentioned the concern expressed by the United Nations Committee on the Elimination of Racial Discrimination over the sharp increase in odious proposals of a racist and dehumanising nature towards Palestinians since 7 October, and took note, above all, of the press release issued by 37 special rapporteurs, independent experts and members of working groups part of the Special Procedures of the United Nations Human Rights Council, alarmed by the 'discernibly genocidal' rhetoric of senior Israeli government officials.

On this basis, the Court concluded that 'at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.' And, by their very nature, at least some of the measures requested by South Africa relate to the rights that the Court has deemed plausible, as the Order confirms.

The Israeli pleadings had no effect on this preliminary stage of the procedure. Israel argued that civilian damage in an urban conflict –resulting from the fighting methods used by Hamas– is inevitable and legitimate when such a conflict is imposed by military

necessity, while also claiming to have done everything possible to mitigate such damage and to alleviate hardship by providing humanitarian assistance. Israel regretted that its mitigating actions, such as issuing evacuation warnings to civilian populations for their own protection, have been distorted and represented as forced displacements prohibited by the Convention. Israel argued that its military operations, conducted in legitimate self-defence, are respectful of international humanitarian law in so far as is possible and that its conduct and wishes are very far from embodying genocidal intent. It argued that there is a risk of trivialising genocide. How can it be argued that Israel, a state governed by the rule of law, born out of the Holocaust under the slogan 'never again', is genocidal? If other crimes have been committed, these do not fall within the jurisdiction of the Court, whose framework is international humanitarian law applied in armed conflicts and, in any case, Israel has created the necessary legislation and institutions to prosecute and punish such crimes.

In addition, Israel argued that the incendiary declarations of Israeli leaders have been manipulated and decontextualised; they cannot be imputed to the nucleus of those responsible for the action in Gaza. The Public Prosecutor's Office began to act against those inciting genocide on 9 January. The lawyers of Israel accorded great importance to the declaration of Mr Netanyahu on 10 January 2024, intended to repudiate any genocidal intent, a declaration that could well be interpreted as a legally binding promise of conduct (indeed, I have been struck by the fact that, unless I am mistaken, neither the Court nor the judges in their declarations and opinions made mention of this).

The issue of plausibility does not appear to have been definitively decided in the legal debate. Judge Cançado Trindade, who would have been a member of the panel of judges had he not died in May 2022, detested the application of this criterion to extremely serious acts that violate life, integrity and human dignity. It is possible that some judges, shocked by the scale of the human tragedy before them, have *de facto* set aside the standard of plausibility. For example, it is my understanding that this is what Judge Bennouna did in the case of *Ukraine v Russia*, where he expressed his doubts as to the satisfaction of a minimum standard of appreciation. This could also be Judge Xue's case on this occasion (not in *Ukraine v Russia*, where she argued, if my interpretation is correct, that at this stage of the procedure the applicant must provide evidence, however weak it may be, that genocidal intent is something more than a mere hypothesis). Judge Bhandari also took this position. When the underlying issues are to be resolved in the merits, the existence of a *dolus specialis* requires the conviction that this is the only inference that can be drawn from the actions in question. But here, the nature of the military campaign, the extensive destruction of lives and property, and humanitarian need are in themselves capable of satisfying the plausibility of the rights recognised in article II of the Convention.

Judge Nolte voted in favour of the measures, but he explained in his declaration that the plausibility of genocidal intent must already be based on the facts and circumstances submitted at this stage of the proceedings. He believes the Court should apply the plausibility criterion to distinguish between cases where it invokes the principles that support its jurisprudence on provisional measures, and he pointed to the differences between the current issue and that of *The Gambia v Myanmar.* Judge Nolte was not

persuaded that South Africa had plausibly demonstrated that Israel's military operation, as such, implies genocidal intent, but the declarations of senior Israeli officials, including members of its military, offer support to a possible incitation to genocide and it was this that determined the vote of the German judge, once a measure to suspend military operations had been excluded from the Order.

At the same time, Judge *ad hoc* Barak in his separate opinion considered that 'some proof' of genocidal intent is necessary for the charge of genocide to be plausible; Barak understands that this proof is conspicuous by its absence in this case, being in no way comparable to the proof submitted in the case of *The Gambia v Myanmar*, and he challenged the scant evidence which supports the Court's conclusion. Barak expressed his surprise that the Court has not taken into account Israel's arguments denying any genocidal intent.

Judge Sebutinde also took the view that the Court, at this preliminary phase, should have examined the proof available to identify evidence of genocidal intent, as it is not sufficient to allege the serious violations classified in article II of the Convention to establish the plausibility of the protected rights; the judge does not see signs of such intent in this case; on the contrary, the evidence submitted by Israel disproves it. The Israeli argument has, in the Ugandan judge, a firm if isolated supporter. It is particularly noticeable that, in *Ukraine v Russia*, she voted in favour of the provisional measures ordered against Russia, which included the more drastic measure of suspending military operations, without such delicate attention to the standards of plausibility.

3. Irreparable prejudice if urgent measures are not taken

After endorsing South Africa's position on the plausibility of the rights of the Palestinian people in Gaza, the Court found there was a real risk that these rights might suffer irreparable prejudice if urgent measures were not adopted. The condition of urgency is met when the acts that could cause irreparable prejudice might occur 'at any moment' before the Court gives its final decision. The Court considered this to be the case here, '[i]n view of the fundamental values sought to be protected by the Genocide Convention'. To this effect, it referred to the assessment made by senior representatives of the United Nations, starting with the Secretary General, regarding the risk of the intensification of a humanitarian situation that was already catastrophic; all the more so when the Israeli military operation is ongoing and the Prime Minister had announced on 18 January that the war would continue for many months.

The consequence of this position was the rejection of the Israeli request to dismiss the South African application due to it being unfounded. The data are overwhelming, and without urgent measures the damage will be irreparable. Thousands of dead and injured civilians, women and children. Destruction of infrastructure and services. Hunger, thirst and poverty of a population caught between gunfire and starvation.

The proceedings continue. Only Judge Sebutinde and Judge *ad hoc* Barak dissented, although the latter, taking a more pragmatic line, voted in favour of two sections of the operative clause, based on his humanitarian convictions and in the hope of reducing harmful tensions and rhetoric.

Timely provisional measures

South Africa has argued that the Palestinians do not deserve less protection than that already granted by the Court to other groups. Failure to adopt measures would be very serious for the Palestinians, the integrity of the Convention and the reputation of the Court. South Africa believes that Israel's incapacity to recognise that it has already done wrong in destroying Gaza is not the best point of departure. In any case, any commitment it makes would be unilateral, precarious and reversible, while its operations render the effective distribution of aid impossible.

The Court has definitely been sensitive to these considerations, but it has also been sensitive to those of Israel's lawyers, who have taken time to contest, one by one, the measures proposed by South Africa. As there is no second round, South Africa was not able to respond. In its opposition to the measures requested, Israel introduced a number of significant ideas. The measures: (1) cannot be unilateral; (2) must not prejudge the underlying issue; and (3) must be duly justified. Of particular interest is the criticism of the first measure requested (the suspension of military operations): the measures must balance the rights of both parties. Israel went so far as to formulate a list of 10 considerations to ensure this balance. In particular, it argued that ordering the suspension of Israel's military operations would restrict its right to self-defence, causing irreparable prejudice to its rights, producing an impression of partiality and giving rise to a perverse situation. Israel argued that it has already taken concrete measures to guarantee the existence of Palestinian civilians in Gaza, that it is prepared to follow the recommendations of the Security Council and that its agents have given guarantees to respect its international obligations.

The Court did not adopt the measures requested by South Africa either word for word or in their entirety. It reaffirmed its power to indicate measures which differ either totally or partially from those requested. Acting on this basis, it suppressed some and modified others, attending to the objections of the respondent, although without offering any explanation of its behaviour. The scant page dedicated to its reasonings serves only as an introduction to the actual operative clause.

The Court did not decide to order the suspension of Israel's military operations; it omitted this point completely; the Order limits itself, instead, to requiring Israel to take all measures within its power to prevent the commission of acts that could constitute the criminal actions recorded by the Genocide Convention (which imply genocidal intent), striving with immediate effect to ensure that its army does not commit such acts. The Order also requires Israel to take all necessary measures to prevent and punish the direct, public incitement to commit genocide, and to take effective measures to enable the immediate provision of basic services and humanitarian aid (these two points were supported by the Judge *ad hoc* proposed by Israel, Barak).

The Court endorsed South Africa's application regarding the safeguarding of evidence of acts that could be covered by the Genocide Convention (but it omitted the request regarding access by fact-finding missions). Finally, the Court required Israel to present a report within one month on all measures taken to give effect to the Order (South Africa

had suggested one week and, after that, regular intervals). The clause requiring Israel to refrain from any action taken that might aggravate or extend the dispute or make it more difficult to resolve, proposed by South Africa, was also rejected, by omission.

Conclusions. Judicial prospects

In general terms, both parties can feel satisfied. The Court preliminarily accepted that South Africa's application has substance. Israel's request –that no measures be taken, as they are unnecessary, and that the case be definitively cancelled– was rejected. But the measures requested by South Africa were drastically reduced. Israel's military operations can continue. Along with the assessment of 'genocidal intent', this has probably been the most debated point, with a compromise being sought that could enjoy the support of a broad majority of the judges. The skilful criticism of the call for the suspension of operations by Israel's lawyers was effective. And we should also recall that during the hearings Israel argued that its armed forces comply scrupulously with the rules of international humanitarian law. Israel has also stressed its measures to mitigate suffering and its involvement in humanitarian aid. At the same time, the Israeli public prosecutor's office has initiated action to suppress behaviour inciting genocide, thereby restricting freedom of expression.

In sum, Israel has not been asked to do anything that it does not already claim to be doing. The requirement to present a report within one month means that Israel has to submit to the inconvenience of having to justify itself and apply effort to drawing up the report. It may mean, at most, greater moderation in the use of armed force and more intense prosecution of those Zionists who transgress the limits of freedom of expression.

Israel's report, within one month, will be submitted to South Africa for observations and could give rise to legal activity linked to compliance. The Order is compulsory and it is in the Court's interest to expressly declare this.

These measures could be in force for years if the Court does not rule on possible preliminary exceptions of the respondent or, having ruled these out, pronounces on the merits.

If, finally, the Court declares itself not to have competence or rules out infringement of the Genocide Convention, the precautionary measures will have served to put a stop meanwhile to other crimes (war crimes or crimes against humanity) over which the Court lacks jurisdiction.

The final paragraph of the Order, before the operative clause, stresses that all parties to the conflict are bound by international humanitarian law and, in this context, expresses its grave concern for the fate of the people captured during the attack on 7 October 2023 and held since then by Hamas and other armed groups, calling for their immediate and unconditional release. The Judge *ad hoc* Barak highlighted this in his separate opinion, although he would have liked it to have been included in the operative clause in the same way that Israel is required, without delay, to take all effective measures to facilitate humanitarian aid to the population of Gaza, which he voted in favour of. Judge Sebutinde

invited South Africa to exploit the cordial relationship which, according to her, certain organs of its government enjoy with the leadership of Hamas, to seek to persuade them to immediately and unconditionally release the hostages as a gesture of good will. I am unable to say whether this is ironic or a well-meaning suggestion.

On 5 February, four of the current members of the Court will complete their mandate, and a new President and Vice-president will also be chosen from among the Court's members. It is this modified Court that will deal with any future developments. The President will call the agents of both parties to establish a calendar for the written procedure. Memorial (South Africa) and counter-memorial (Israel). Israel may commence procedural hostilities immediately if it allows itself to be carried away by its emotions. But if it acts with cold calculation, it will wait until South Africa has lodged its memorial and, on the deadline established by the Rules of the Court, will put forward preliminary exceptions to the jurisdiction of the Court and the admissibility of the application. Then the phantom of 'genocidal intent' will again appear with more insistence because it will no longer be sufficient to accept a hypothesis but will instead be necessary to prove that it is a fact or the only and necessary inference of other proved facts.