VERDICT

LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

The World Court Lacks Any Plausible Basis for Directing Provisional Measures Against Israel Under the Genocide Convention

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On December 29, 2023, referencing the ongoing conflict between Israel and Hamas in the Gaza Strip, South Africa instituted proceedings against the State of Israel in the International Court of Justice ("ICJ"). In its Application to the ICJ, South Africa alleged that Israel, through its acts and omissions, breached and continues to breach the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). South Africa's Application also contained a Request for the indication of provisional measures "pending the [ICJ's] determination of the case on the merits." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), 2024 I.C.J. 82, ¶ 144 (South Africa's Application and Request for the Indication of Provisional Measures of Dec. 29, 2023)). On January 26, 2024, the Court issued an Order indicating six provisional measures against Israel, including requiring it to "take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 24-26, ¶ 86 (January 26)).

The World Court in this case improperly directed provisional remedies against Israel because, in disregard of its own precedents, it lacked even a plausible basis for concluding (even preliminarily) that Israel's actions in Gaza—responding to a massive, unprovoked Hamas murder, rape and kidnapping of mostly Israeli civilians on October 7, 2023—evidenced the required specific intent to commit genocide against the Gazan/Palestinian people as such. As Germany observed in its statement of January 12, 2024, "This accusation [of genocide against Israel] has no basis whatsoever." (Statement by the Federal Government on the Proceedings of the International Court of Justice (Press release 10 of the Press and Information Office of the Federal Government of Germany, Jan. 12, 2024)).

The Crime of Genocide

Article II of the Genocide Convention provides that:

> Genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
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> - (a) Killing members of the group;
> - (b) Causing serious bodily or mental harm to members of the group;
> - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> - (d) Imposing measures intended to prevent births in the group;
> - (e) forcibly transferring children of the group to another group.

It is undisputed that Article II requires a *specific intent* , or *dolus specialis*, meaning that the acts enumerated in paragraphs (a) through (e) must be committed "with the intent to destroy in whole or in part[the protected] group as such." (Convention for the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277). The ICJ has determined in prior cases that it is not enough to establish specific intent under Article II by demonstrating that "deliberate unlawful killings of members of the group have occurred," and nor is it sufficient to demonstrate that "members of the group are targeted because they belong to that group"—both not even true in this case. (Application of Convention on Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb./Montenegro), Judgement, 2007 I.C.J. 82, ¶ 187 (February 26)). Rather, "in order to infer the existence of [specific intent] from a pattern of conduct…it is necessary and sufficient that this is *the only inference that could reasonably be drawn from the acts in question*." (Application of Convention on Prevention and Punishment of Genocide (Croat. v. Serb.), Judgement, 2015 I.C.J. 67, ¶ 148 (February 15) (emphasis added)).

Because of this high burden of proof, the ICJ did not find the required existence of specific intent in either of the two previous cases alleging genocide that reached the merits. In Bosnia and Herzegovina's case against Serbia and Montenegro, the Court was "not convinced…that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent on the part of the perpetrators." (Application of Convention on Prevention and Punishment of Genocide (Bosn. & Herz. v. Serb./Montenegro), Judgement, 2007 I.C.J. 155, ¶ 277 (February 26)). Similarly, in Croatia's case against Serbia, the Court held that while the guilty acts, or *actus reus*, of genocide had

been demonstrated through evidence of a large number of killings, torture, sexual violence and rape, the intent associated with the acts "was not to physically destroy the members of the protected group, as such, but to punish them because of their status as enemies in a military sense." (Application of Convention on Prevention and Punishment of Genocide (Croat. v. Serb.), Judgement, 2015 I.C.J. 120, 126, ¶¶ 408, 430 (February 15)).

Framework for Provisional Measures

The burden of proof for the applicant at the provisional measures stage is lower than it is at the merits stage. "It is not necessary, at this stage, to convincingly show the *mens rea* of genocide," however, there must be sufficient evidence to demonstrate "that the acts complained of by the Applicant are, prima facie, capable of falling within the scope of the Genocide Convention." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 2, 6, ¶ 18 (January 26) (dissenting opinion by Sebutinde, J.)).

Article 41 of the Statute of the Court provides that the ICJ "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." (Statute of the International Court of Justice, art. 41, ¶ 1). The Court has enumerated three "circumstances" that must be present for the indication of provisional measures. First, the "Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded." Second, the rights claimed by the Applicant must be "at least plausible" and "a link must exist between the rights whose protection is sought and the provisional measures being requested." Third, the Court must establish that "irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences." (Application of Convention on Prevention and Punishment of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 9, 18, 24, ¶¶ 16, 44, 64 (January 23)). This article focuses on the second circumstance—that the violation of the rights claimed be "at least plausible," and maintains that because South Africa did not demonstrate the existence of genocidal intent on Israel's part ven on a prima facie basis—under its own precedents, the Court should not have indicated provisional measures against Israel.

Are the Claims Against Israel "At Least Plausible"?

South Africa contends that Israel has commissioned acts capable of falling within Article II (a), (b), (c), and (d) of the Genocide Convention by "killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting upon them conditions of life calculated to bring about their physical destruction." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), 2024 I.C.J. 1, ¶ 1 (South Africa's Application and Request for the Indication of Provisional Measures of Dec. 29, 2023)). As Judge Sebutinde noted in her dissenting opinion to the ICJ's January 26 Order, however, "[w]hat distinguishes the crime of genocide from other grave violations of international human rights law (including those enumerated in Article II, paragraphs *(a)* to *(d)*, of the Genocide Convention) is the existence of the 'intent to destroy, in whole or in part…a group as such.'" (Application

of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 2, 6, ¶ 17 (January 26) (dissenting opinion by Sebutinde, J.)). South Africa argued that Israel's military campaign in the Gaza Strip combined with "expressions of genocidal intent against the Palestinian people by Israeli State Officials," provided sufficient evidence to establish a prima facie finding of genocidal intent. (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), 2024 I.C.J. 59, ¶ 101 (South Africa's Application and Request for the Indication of Provisional Measures of Dec. 29, 2023)).

To combat the accusation that it is committing genocide, Israel emphasized that its only military objectives are the rescue of Israeli hostages, and the protection of Israeli citizens from future attacks by Hamas "by neutralizing Hamas' command structures and machinery." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 2, 7, ¶ 20 (January 26) (dissenting opinion by Sebutinde, J.)) As the dissent determined, any allegations of genocidal intent are negated by "(1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning civilians through leaflets, radio messages, and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance." Israel contended that "the statements relied upon by South Africa as containing genocidal rhetoric were all taken out of context and in fact were made in reference to Hamas, not the Palestinian people as such."

In its January 26 Order, the ICJ ruled there was sufficient evidence to "conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 18, ¶ 54 (January 26)). To reach its conclusion, the ICJ relied on fatality figures provided by the Gaza Ministry of Health, various statements made by United Nations and World Health Organization Officials regarding the humanitarian crisis in Gaza, and statements made by senior Israeli officials that South Africa relied on in its Application. (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 15, 17, ¶¶ 46, 47-53 (January 26)). The Court made no mention of Israel's evidence in its conclusion on plausibility. In her dissent, Judge Sebutinde criticized the Court's failure to examine the evidence presented by Israel, noting that "South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel…were committed with the necessary genocidal intent." She concluded that Israel's efforts to mitigate civilian harm and "a careful examination of Israel's war policy and of the full statements of the responsible government officials further demonstrates the absence of a genocidal intent." (Application of Convention on Prevention and Punishment of Genocide (S. Afr. v. Isr.), Order, 2024 I.C.J. 2, 6-7, ¶¶ 17-18, 21 (January 26) (dissenting opinion by Sebutinde, J.)).

The Court in this case also used a methodology that was a marked departure from the approach it has had used in previous cases brought under the Genocide Convention. For example, in its 2020 Order on the indication of provisional measures in *Gambia v. Myanmar*, the ICJ relied in substantial part on the 2018 and 2019 UN Independent International-Fact Finding Missions on Myanmar to establish an inference of genocidal intent. The Factfinding Mission was an exhaustive two-year investigation where "more than 1,000 victims and witnesses were interviewed, and a vast amount of documents, photographs and videos were analy[z]ed." The report concluded that "[t]he actions of those who orchestrated the attacks on

the Rohingya read as a veritable check-list" of what a State would have done had it "wished to destroy the target group in whole or in part." (Application of Convention on Prevention and Punishment of Genocide (Gam. v. Myan.), Verbatim Record, ¶ 6 (Dec. 12, 2019, 4:30pm), https://www.icj-cij.org/sites/default/files/case-related/178/178-20191212-ORA-02-00-BI.pdf). These actions included "mass murder, rape, and other forms of sexual violence, and…the systemic destruction by fire of Rohingya villages, often with inhabitants locked inside burning houses, with the intent to destroy the Rohingya group." (Application of Convention on Prevention and Punishment of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 11, ¶ 21 (January 23)). Unlike the facts in *South Africa v. Israel*, there were no actions taken by Myanmar to mitigate civilian harm, nor was Myanmar acting in self-defense in response to an attack.

Conclusion

While South Africa did not at this stage have to convincingly demonstrate that Israel committed acts within Article II of the Genocide Convention with the required specific intent, it had to show at least a plausible basis for inferring Israel's specific intent to violate that the rights it asserted to the ICJ. But from South Africa's showing, it is not plausible, even on a prima facie basis, that Israel's military operation in Gaza was or is being conducted with the specific intent to destroy in whole or in part the Gazan/Palestinian people.

Samuel Estreicher

Samuel Estreicher is the Dwight D. Opperman Professor, Director, Center for Labor and Employment Law and Co-Director, Institute of Judicial Administration, NYU School of Law.

Klara Nedrelow

Klara Nedrelow is a J.D. candidate at NYU.

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