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March 7, 2024

Evaluating Security Assistance to Israel Following ICJ Provisional Measures Order

The provisional measures order recently published by the International Court of Justice (ICJ) in the ongoing dispute between South Africa and Israel has widely been characterized as a warning to States that they risk violating the order and eventually being held complicit in genocide for continuing to provide security assistance to Israel.

A legal advisor for the Middle East and North Africa program of the International Commission of Jurists, for example, reportedly told Al Jazeera that the ICJ “considers there to be a serious risk of genocide in Gaza.” This seemingly triggers the duty of all States that have ratified the Genocide Convention “to take concrete steps to prevent genocide, including by ceasing arms sales and exports and other assistance that could facilitate genocidal acts.”

In a recent blog post here on EJIL: Talk!, Yussef Al Tamimi likewise concludes that States providing security assistance to Israel “will now have to be particularly cautious of” possibly violating certain obligations reflected in the Genocide Convention such as failure to prevent genocide or even potential complicity in committing genocide themselves. This recent analysis begins by presenting commentary from a number of sources reaching similar conclusions.

Given the ongoing debate regarding the provision of security assistance to Israel, what effect will the ICJ provisional measures order have domestically regarding compliance with international law obligations? Do States providing security assistance to Israel genuinely risk complicity in genocide if they continue providing security assistance to Israel?

In short, no—at least, not based on the ICJ provisional measures order alone. That is, the order does not present an elevated risk that States will be complicit in genocide or will violate the obligation to prevent genocide by supplying weapons and other security assistance to Israel as a matter of international law. This is the case primarily for two separate reasons.

First, the “plausibility” determination at the provisional measures stage is situated so low on the standard of proof spectrum that the order is not alone a sufficient basis to find a serious risk exists genocide is being committed and that States must take action to prevent it.

Second, concluding it is plausible that some rights claimed by the applicant must be protected does not involve the same legal methodology utilized to determine whether an offender is committing genocide.
Another factor to consider regarding the practical effect of the ICJ provisional measures order is that the Court merely—and seemingly rather deliberately—reiterates and reinforces Israel’s existing international law obligations. If calling for Israel to implement the provisional measures order means precisely the same as saying Israel must comply with obligations that existed before the order was published, then the ICJ provisional measures order has no actual effect in practice.

Each of these considerations is addressed in greater detail below, starting with clarifying the standard of proof required to support a determination that a State party to the Genocide Convention has failed to comply with the obligation to prevent genocide.

**Comparing Standard of Proof for Provisional Measures and Merits at ICJ**

Judges at the ICJ have gradually developed different standards of proof for various legal requirements. Because the standards are derived from the bench, they can be adjusted when necessary. However, significant methods of assessment or standards of proof generally remain static unless a compelling reason for adjustment is identified.

In response to a request from a party to issue provisional measures, the Court has determined that it may do so “only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible” (para. 35, emphasis added). This standard was applied in the recent ICJ provisional measures order in the ongoing South Africa v. Israel case (para. 54).

Assuming the dispute eventually reaches the merits stage and the Court renders a decision regarding South Africa’s claim that Israel is committing genocide, the requirement for inferring specific intent will be inordinately higher. As Justice Georg Nolte of Germany noted in his individual declaration, the intent to destroy a group in whole or in part a protected group “can only be inferred from ‘a pattern of conduct’ if this is the ‘only reasonable inference that can be drawn’ therefrom” (para. 8, emphasis added).

The chasm between “at least plausible” at the provisional measures stage and “only reasonable inference” is vast. To put the gap into perspective, it is useful to visualize conceptually how the two relate to some common standards of proof utilized in the domestic context.

**Situating Relevant Requirements on a Typical Standard of Proof Spectrum**

Although different jurisdictions utilize slightly different terminology or standards for various legal applications, generally the spectrum can include standards such as (from least demanding to most): some credible evidence, reasonable suspicion, probable cause, preponderance of the evidence, clear and convincing evidence, and beyond reasonable doubt.
If the two standards of proof developed in ICJ jurisprudence that are relevant to the present inquiry were grafted onto this spectrum, “at least plausible” would be included slightly before “some credible evidence,” while “only reasonable inference” would appear no lower than “beyond reasonable doubt.”

The “only reasonable inference” and the “beyond reasonable doubt” standards must be compared by analogy since the former has been developed for the particular purpose of determining, at the merits stage, whether the specific intent exists that is required for a determination that genocide is being committed, while the latter is a prescribed standard of proof that is required for a finding of guilt in a criminal case (see, for example, Rule 87(A) of the ICTY RPE and Article 66(3) of the Rome Statute).

Before comparing the “only reasonable inference” and “beyond reasonable doubt” requirements, it should be noted that some controversy remains regarding the precise meaning of “beyond reasonable doubt” as a standard of proof in International Criminal Court jurisprudence. This controversy largely reflects divergent approaches in national jurisdictions from a comparative perspective.

**Comparing “Beyond Reasonable Doubt” and “Only Reasonable Inference” Standards**

In ICTY jurisprudence, the meaning of “beyond reasonable doubt” requires a finding “that there is no reasonable explanation of the evidence other than the guilt of the accused” (para. 220, emphasis added). This formulation is similar to the “only reasonable inference” standard developed by the ICJ in the non-criminal context of an affirmative finding for the specific intent to commit genocide.

Whatever the precise meaning of “beyond reasonable doubt” in the international criminal law context, then, the “only reasonable inference” method of determining intent can be conceptualized by analogy as no less demanding. Even if the standards are considered to be conceptually equivalent, they are both situated on the opposite end as “some credible evidence” on the standard of proof spectrum.

Though it is almost certain that a final decision will not be rendered by the ICJ until long after the current stage of the conflict in Gaza is over, a finding on the merits that the requisite intent is the “only reasonable inference” would unquestionably put States on notice of a potential breach of the obligation to prevent genocide.

Currently, the ICJ has determined that “at least some of the rights” for which South Africa is seeking protection in relation to the population of Palestine “are plausible” (para. 54). All States are on notice of this determination reflected in the ICJ provisional measures order, but this is about as far away on the standard of proof spectrum as conceptually possible from a finding that Israel is in fact committing genocide in Gaza.

**Standards of Fault for Complicity or Failure to Prevent Genocide**
The ICJ has developed two separate standards of fault that could potentially apply to States providing security assistance to Israel—one for being complicit in genocide and another for failing to prevent genocide. As the Court observed in the *Bosnia v. Serbia* judgment when distinguishing between the two, “complicity results from commission” of genocide, while “violation of the obligation to prevent results from omission” (para. 432).

Of the two, complicity is more difficult to establish since it requires the accomplice to be “aware of the specific intent (*dolus specialis*) of the principal perpetrator” to commit genocide. Regarding the prevention of genocide, the Court has determined this obligation is activated “at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”

A provisional measures order from the Court is not alone a sufficient legal basis upon which to assert there is a “serious risk” that Israel is committing genocide in Gaza, thus potentially activating the obligation for other States to prevent genocide, for at least two primary reasons.

First, the finding at the provisional measures stage is on the protection of rights rather than the commission of genocide. Analyzing these standards requires divergent methodology. The process for determining whether rights must be protected is centered on the affected population, while evaluating whether genocide has been committed focuses on the (specific) intent of the alleged perpetrator. Therefore, finding that “at least some of the rights” South Africa claims must be protected on behalf of Palestinians in Gaza “are plausible” at the provisional measures stage does not in itself constitute a “serious risk” that persons taking action on behalf of Israel demonstrate the specific intent required for an affirmative finding that genocide is being committed.

The conceptual distinction between the plausibility that some rights must be protected at the provisional measures stage and a determination that genocide has in fact been committed at the merits stage is emphasized in the provisional measures order and in several separate individual opinions. On this account, the explanation Judge Nolte provides for his vote in favor of all provisional measures is particularly concise.

As Judge Nolte describes, he is “not persuaded that South Africa has plausibly shown that the *military operation* undertaken by Israel, as such, is being pursued with genocidal intent” (para. 13, emphasis added). Nonetheless, in light of select statements of Israeli government officials and the conditions on the ground in Gaza, Judge Nolte expresses the view that South Africa has “shown that some, but not all, of the *rights* which it has alleged are plausible at the present preliminary stage of the proceedings” (para. 17, emphasis added) (referencing para. 54 of the Order).
The provisional measures indicated by the Court, as Judge Nolte emphasizes, respond “to
certain plausible risks for the rights of Palestinians in the Gaza Strip deriving from the
Genocide Convention” (para. 17, emphasis added). This conceptual switch, from the intent to
commit genocide to the protection of rights, occurs only at the provisional measures stage.

On the merits, the specific intent to commit genocide must be found to be the only
reasonable inference that can be drawn from the factual record presented to the Court. That
inquiry will not involve a conceptual switch from the intent of Israel to the rights of
Palestinians, which means indicating provisional measures does not alone put States
providing security assistance on notice of a “serious risk that genocide will be committed” by
Israel in Gaza.

The second reason the ICJ provisional measures order does not alone present a “serious
risk” that States providing security assistance to Israel may now be violating the obligation to
prevent genocide as a matter of international law is the disparity between standards of proof
utilized at the provisional measures and merits stages. As analyzed above, because the
determination that it is plausible that at least some rights must be protected is situated so far
down on the standard of proof spectrum, asserting this qualifies as a “serious risk” that Israel
is committing genocide and States now have an obligation to intervene is unsustainable.

Therefore, the assertion that States risk a future determination that they are violating the
obligation to prevent genocide for continuing to provide security assistance to Israel because
the ICJ has now issued a provisional measures order is not supportable as a matter of
international law.

Comparing Provisional Measures Directed by ICJ with Those Requested by South
Africa

The provisional measures order published by the ICJ in the ongoing dispute between South
Africa and Israel has been widely hailed as a landmark decision that puts all States “on
notice” of the prospect of being complicit in genocide for providing security assistance to
Israel. However, this assertion does not withstand critical scrutiny.

Comparing the provisional measures actually directed by the Court (para. 86) with the
measures requested in the initial application (para. 144) suggests that this order from the ICJ
should be genuinely regarded as a diplomatic setback for South Africa. Instead of the
measures requested by South Africa, the Court merely reinforced the status quo that existed
before the provisional measures order was published.

Provisional measures 1, 2, and 3 reaffirm obligations that already exist pursuant to the
Genocide Convention. The ICJ has previously determined the content of provisional
measure 5 (regarding preservation of evidence) to be by its “very nature…aimed at
preserving rights” that are already reflected in the Genocide Convention.
Measure 4 reiterates obligations on all parties established by UN Security Council Resolution 2720 (2023), and this Resolution is cited as a reference in the introduction to the ICJ provisional measures order. Aside from provisional measure 6, requiring a report within 30 days of publication (that was reportedly recently submitted by Israel), all obligations directed by the Court existed prior to publication of the order.

Calls for Israel to comply with the ICJ provisional measures order—and for other States to pressure Israel to do so—have been a fixture of public discourse since the order was published (for example, here, here, and here). If the order merely reinforces obligations that existed before it was published, demands for Israel to “comply” with the provisional measures order are precisely equivalent to calling on Israel to fulfil obligations that existed before the order was published.

Although an official for the governing African National Congress of South Africa has hailed the decision as “the first step to end the violence… against the innocent Palestinian people,” in reality the ICJ order has had no practical effect on the ongoing hostilities since the provisional measures directed impose no new obligations—aside from filing the 30-day report.

In light of the provisional measures requested by South Africa but not adopted by the Court, and considering that the published measures simply reinforce the status quo, the most favorable light for South Africa that can be realistically cast on the order is that the ICJ elected not to grant Israel’s request to dismiss the application altogether. Advancing a claim across the initial threshold and into court is something, but it is nowhere near a final determination on the merits that Israel is in fact committing genocide in Gaza.

**Conclusion**

Notwithstanding the high profile status of the International Court of Justice and the gravity of the accusations made by South Africa against Israel, the recent provisional measures order published by the Court does not alone increase the risk that a State may be deemed complicit in genocide for providing security assistance to Israel.

Separating policy preferences from legal requirements, and fostering an accurate understanding of the doctrinal application of actual legal obligations, is vitally important for encouraging a productive and balanced debate regarding the advisability of continuing to provide security assistance to Israel. This is especially true in light of the undeniable humanitarian catastrophe that persists as a result of the conflict in Gaza.

There are many important considerations to weigh as the debate continues regarding the advisability and permissibility of continuing to supply weapons to Israel as the conflict in Gaza rages on. Because of the extraordinarily low standard of proof utilized and the actual
substance of the provisional measures order recently published by the ICJ in the ongoing dispute between South Africa and Israel, this ICJ order should be regarded among the least of these concerns.