Implications of the ICJ Order (South Africa v. Israel) for Third States

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The Order of 26 January 2024 by the International Court of Justice in the case of South Africa v. Israel established that there is a real and imminent risk of irreparable damage to some of the rights asserted by South Africa. Whether Israel will comply with the Order is an important question but by no means the only one. The impact that the Order will have on third States, especially those facilitating the Israeli operations in Gaza, is just as important since public and internal pressures by these States will shape Israel’s actions. Therefore, what are the legal implications of the ICJ Order for third States?

Legal opinions

South Africa complained that acts committed in the Israeli military campaign may constitute genocide, the incitement to commit genocide, and the failure to punish those responsible. The ICJ ruled that “at least some of the rights claimed by South Africa and for which it is seeking protection are plausible” (para. 54). The finding of plausibility based on the Palestinian civilian population being “extremely vulnerable” (para. 70) points to a further development of a doctrine of humanitarian stasis (a willingness to grant interim relief based on human vulnerability) in the case law of the ICJ. In paragraph 74 of the Order, the ICJ held that “there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible.” A note on terminology: the Order uses the term ‘plausibility’ to predicate some of the rights asserted by South Africa (some of the rights are plausible), while ‘real and imminent’ predicates the risk of irreparable prejudice to these rights (the risk is real and imminent).

The risk established by the Order is important for determining whether the Order engages the responsibilities of third States. Following the Order, several legal commentators and institutions have argued that third States have come under an obligation to prevent violations of the Genocide Convention in Gaza. The foreign ministry of South Africa stated that third States must now “act independently and immediately to prevent genocide by Israel and to ensure that they are not themselves in violation of the Genocide Convention, including by aiding or assisting in the commission of genocide.” Professor Adil Haque argues that the ICJ Order puts third States on notice that if they provide military or other support to Israel, this potentially could implicate their own obligations under the Genocide Convention as well. In a
similar vein, Professor Janina Dill writes that all Parties to the Convention have duties of prevention and that governments that supply Israel with arms are potentially assisting in serious internationally wrongful acts.

Professor Oona Hathaway gives a more specific account of what these obligations could mean in practice:

“A number of States are going to have to look closely at whether they can continue to provide security assistance to Israel. The Court’s finding that there are plausible claims of violations of the Genocide Convention puts it to States that are providing support to Israel whether they might themselves be in violation of the Genocide Convention by virtue of continuing to provide support to Israel in the conflict. The Genocide Convention, after all, not only creates an obligation not to aid and assist violations of the Genocide Convention by providing assistance to a State that is maybe itself committing genocide, but it also creates an affirmative obligation to act to prevent genocide. This is an even stronger obligation than we see in most international agreements.”

Legal basis for the obligations of third States

The obligation of third States to give effect to the ICJ Order flows directly from the Genocide Convention itself. Article I of the Convention requires States to undertake to prevent and punish genocide. Article III lists five acts that are prohibited by the Convention: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. The Order in South Africa v. Israel reaffirmed the *erga omnes partes* principle, which entails that the obligations under the Genocide Convention “are owed by any State party to all the other States parties” (para. 33). All States, therefore, have three duties under the Genocide Convention: prevent genocide, punish genocide, and not commit any of the acts listed in Article III.

Of these obligations, third States will now have to be particularly cautious of possible violations on their part of the following:

*First*, there is cause to believe that third States now have a heightened responsibility to prevent genocide. The ICJ, in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), made important observations about the timeframe during which State responsibility for preventing genocide is incurred. Referring to Article 14(3) of the *Articles on State Responsibility*, the ICJ held:

“This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise 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. From that moment onwards, if the State has available to it means likely to
have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit.” (para. 431)

The “serious risk” threshold thus determines the moment when the duty to prevent genocide is triggered. So as not to confuse matters, there are two thresholds at work here: the “serious risk” threshold that triggers the duty to prevent under the Genocide Convention, and the “real and imminent risk” threshold that must be met for provisional measures to be indicated under Article 41 of the ICJ Statute. The relationship between these thresholds is open to debate, but it seems unlikely that they can be disconnected, particularly when the ICJ based its finding of urgency on an extensive account of the scale of suffering in Gaza. Such a reading is further supported by the declaration of Judge Nolte, who voted in favor of the Order based on certain statements by Israeli officials plausibly giving rise to a real and imminent risk of irreparable prejudice. Judge Nolte writes that “such statements may contribute to a “serious risk” that acts of genocide other than direct and public incitement may be committed, giving rise to Israel’s obligation to prevent genocide” (Judge Nolte’s parentheses). This suggests that assisting States need to take into serious consideration that the real and imminent risk established by the Order may solidify the case that the threshold of serious risk is now met.

In Bosnia v. Serbia, the ICJ explained that the duty to prevent requires States “to employ all means reasonably available to them” to prevent genocide (para. 430). This obligation is one of conduct and not of result, meaning that it is not about whether the State achieves the result of preventing genocide, but whether it took all measures which were within its power and which might have contributed to preventing the genocide. The ICJ adds that “the notion of “due diligence”, which calls for an assessment in concreto, is of critical importance” (para. 430). Due diligence thus demands that States make concrete assessments about the provision of military and other assistance and how it is employed by Israeli forces on the battleground. Following the ICJ Order, States that provide financial, intelligence and military assistance to Israel's campaign are likely under a stricter obligation to afford less leeway to Israeli assurances about compliance, demonstrate higher scrutiny when approving export and transit of military assistance, and set up more stringent regulation as provided under Article V of the Convention.

The tools that third States can meaningfully employ to urge compliance with the ICJ Order are no different from those they already use in this and other conflicts. Some of these measures were called for by the then Minister of Social Rights of Spain as early as October 2023:

1. Enact targeted sanctions on officials directing, carrying out, inciting and promoting violations of the Convention (in line with existing EU and S. policy), including through asset freezing and travel restrictions;
2. Apply diplomatic pressure, through reviewing trade agreements, summoning ambassadors, and ultimately suspension of diplomatic relations;
3. Implement an arms embargo;

4. Refer, or support referrals, of international misconducts to the relevant international courts.

Second, third States have to be acutely aware that their assistance to the military campaign in Gaza may put them at a legal and moral risk of being complicit in genocide. The fault threshold for complicity is higher than for prevention. Nonetheless, the risk of future litigation is objective and concrete, particularly once the ICJ decides on the merits of South Africa’s complaint. Such future litigation will involve the question of State responsibility under Article 16 of the Articles on State Responsibility, in particular whether continued support to the operation involved sufficient safeguards to avoid violating the plausible rights of the Palestinian people under the Genocide Convention. The position of a number of third States has arguably become more problematic with their decision to suspend funding to the largest humanitarian relief body in Gaza, seemingly defying the ICJ’s urgent call to enable basic services and humanitarian assistance and raising concerns about collective punishment.

**Example: F-35 parts deliveries to Israel by the Netherlands**

As discussed previously and extensively on this blog, three human rights organizations brought a case against the Dutch government in November 2023 challenging the continued delivery of F-35 fighter jet parts from the Netherlands to Israel. The organizations argued, based on the Genocide Convention, the Geneva Convention, and customary international law, that the Dutch government is required to reevaluate the permit (originally granted in 2016) to export and transit F-35 parts to Israel. These fighter jets are contributing, the organizations argued, to the commission of serious violations of international law in Gaza. On 15 December, the provisional-measures judge of the Regional Court of The Hague agreed with the plaintiffs that the international commitments of the Netherlands, including Article I of the Genocide Convention, compel the State to reevaluate the use of the original permit in the light of the new circumstances and events of the war (para. 4.13 of the decision, in Dutch). As this earlier post points out, this finding is important not only for establishing the State’s duty to reevaluate but also for determining the applicable legal standard since each of these international conventions contains its own threshold that triggers the respective obligation.

Next, the question was whether the “broad assessment” conducted by the Minister of Foreign Trade satisfied this requirement. The Minister had considered, among others, that a clear risk of violations of international (humanitarian) law could not be established with the currently available information, and that ceasing the delivery of military goods would weaken the relationship and influence of the Netherlands vis-à-vis its allies (paras. 4.19-26). Based on this broad assessment, the Dutch government decided to continue delivery of the parts and the provisional-measures judge ruled that the Minister could have reasonably come to her conclusion. The plaintiffs have appealed the decision. A ruling on appeal is expected on 12 February.
The Appeals Court must now decide under changed circumstances. The ICJ recognized key facts on the scale of destruction and suffering, the use of dehumanizing language by senior Israeli officials, the plausibility of at least some of the rights protected under the Genocide Convention, and the real and imminent risk of irreparable prejudice to these rights. The key issue is whether a “broad assessment,” including ordinary (geo)political, strategic and policy concerns, is still adequate to satisfy the reevaluation requirement under the Genocide Convention under these circumstances. As this post argued, “[r]ather than a blanket acceptance of the State’s “currently insufficient information”-argument, the appeal judges should clearly define the applicable legal standards under Article 1 of the Genocide Convention (...), and then strictly apply those standards to the information that is available.”

There is reason to believe that the evaluation will now have to factor in the duty of States “to employ all means reasonably available to them” to prevent genocide. The ICJ requires that States act the moment they learn about the existence of a serious risk of genocide. The finding of a real and imminent risk of irreparable harm to plausible Convention rights in Gaza arguably provides an unambiguous learning moment. This impacts how States should assess the risks related to assisting the military operations in Gaza. Similar obligations under Common Article 1 of the Geneva Conventions and the UN Arms Trade Treaty, which arguably incorporate risk thresholds that are easier to satisfy than genocide, will likely also be impacted by the ICJ's findings. The upcoming decision by the Dutch Appeals Court should give an indication of how these obligations might take shape.

Conclusion

Since the ICJ handed down its provisional measures Order on 26 January, Israeli forces have reportedly killed hundreds of Palestinians as per UNOCHA’s daily briefings, civilians waiting to receive humanitarian aid were shot and injured, hospital staff have been killed, and government ministers called for the displacement of Palestinians from Gaza at a far-right conference. These events underscore the real and imminent risk of irreparable damage facing rights plausibly protected under the Genocide Convention. At a time when the credibility of international law hangs in the balance, the ICJ demonstrated the enduring relevance of its guidance by issuing a firm ruling in front of an expectant legal and non-legal community. States are now called upon to ensure, beyond assurances and words, that they are ready to take action to ensure compliance.