

Jurisdiction

The Order of the International Court of Justice on the Gaza War: Significance and Limitations¹

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Expectations and fears were high (Wintour, 2024): Would the International Court of Justice (ICJ) put an end to the Israeli military operation in the Gaza Strip – a reaction to the Simchat Torah Massacre? Would legal means (be able to) stop violence and suffering as well as the looming conflagration? Would Israel be denied self-defense or the population of Gaza denied humanitarian protection? ICJ, Order of 26/1/2024, South Africa v. Israel, General List No. 192, demonstrates the importance and limits of jurisdiction and the danger of its misinterpretation and disregard. It did not stop the fighting. It required compliance with the 1948 Genocide Convention and humanitarian relief, yet it lacks effective enforcement mechanisms. More important is an internationally coordinated and guarded political approach for an immediate truce and a durable solution.

Key Words:

International Court of Justice, Gaza, Israel, South Africa, Order

1 Context

The ICJ summarises the context of the decision:

“On 7 October 2023, Hamas and other armed groups present in the Gaza Strip carried out an attack in Israel, killing more than 1,200 persons, injuring thousands and abducting some 240 people, many of whom continue to be held hostage. Following this attack, Israel launched a large-scale military operation in Gaza, by land, air and sea, which is causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza” (ICJ, 2024a: para. 13).

At the time of the Court's decision, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimated 25,700 Palestinians had been killed and 63,000 injured, more than 360,000 housing units destroyed, and 1.7 million people displaced (ICJ, 2024a: para 46). The shelling of Israel by Hamas is also continuing. Israel claims to be resorting to self-defence. The casualty figures for both parties to the conflict are continuously updated by OCHA (OCHA, n.d.).

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The wider context is the Middle East conflict. At the end of the 19th century, Jews immigrated to then Ottoman Palestine seeking protection from persecution in Europe at a historically and religiously familiar site (Krämer, 2015: 121-151). The experience of the murder of around 6 million Jewish people by Nazi Germany between 1933 and 1945 (United States Holocaust Memorial Museum, 2023) accelerated immigration. In 1881, there were around 442,000 Arabs and 13,000-20,000 Jews living in Palestine (Johannsen, 2017: 16); by 1947, there were around 1.4 million Arabs and 600,000 Jews. Struggles over land and resources, contradictory British promises to Arabs (Husain-McMahon correspondence 1915-1916) and Jews (Balfour Declaration 1917) of independence and a homeland in Palestine (Schneer, 2011) contributed to violence between the population groups as well as between them and the British Mandate (Johannsen, 2017: 14-16). In the course of the British withdrawal, the United Nations General Assembly (UNGA) presented a partition plan in 1947 (UNGA, 1947), which provided for an Arab state with 42.88% and a Jewish state with 56.47% ownership of the territory as well as an international zone in Jerusalem (Johannsen, 2017: 20). While the Jewish side largely accepted the plan as favourable and made it the basis for the proclamation of the new state of Israel, it was rejected by the Arab population and the Arab states as a colonial project directed against the indigenous population (Albanese & Takkenberg, L., 2020: 28-29). The result was armed conflict (Johannsen, 2017: 21-44), flight and expulsion (Albanese & Takkenberg, 2020: 35-36), occupation, and terrorism. The peace process of the 1990s (Johannsen, 2017: 45-76), which was based on mutual recognition in the 1993 Declaration of Principles on Interim Self Government (DOP) (UNGA & United Nations Security Council [UNSC], 1993) and aimed for a two-state solution, failed by the early 2000s, if not earlier. The minimal autonomy achieved for Palestine was eroded by the power struggle between the secular Palestine Liberation Organization (PLO) and radical Islamists, respectively Hamas, for supremacy in the Palestinian territories, ongoing Israeli urban sprawl, the construction of the wall, and asymmetric power relationships (Johannsen, 2017: 67). The international community largely neglected the conflict in the hope of a normalisation process of Israel's relations with the Arab states, from which the Palestinians were excluded (Ephron, 2020).

The United Nations addressed the conflict in numerous resolutions. UN General Assembly Resolution 194 (III) of 11 December 1948 (UNGA, 1948) requests that

"refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest possible date and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible."

UN Security Council Resolution 242 (1967) (UNSC, 1967) calls on Israel to withdraw from the occupied territories. In its Advisory Opinion of 9 July 2004 (ICJ, 2004), the International Court of Justice considered the Israeli settlements in the occupied territories (including East Jerusalem) to be in violation of international law (ICJ, 2024a: para. 120) and the construction of the wall on the West Bank, together with previous measures, to be a violation of the Palestinian people's right to self-determination, international humanitarian law and the Human Rights Covenants (ICJ, 2024a: paras. 122-137).

It is these connections that UN Secretary-General António Guterres (2023) referred to on 9 October 2023 with his controversial statement that "[t]his most recent violence does

not come in a vacuum. The reality is that it grows out of a long-standing conflict, with a 56-year long occupation and no political end in sight.”

2 Decision

Against this backdrop, South Africa filed an application with the ICJ instituting proceedings against Israel for alleged violations of the Genocide Convention on 29 December 2023 (ICJ, 2024a: para. 1). Due to the expected length of the main proceedings, South Africa also applied for the adoption of provisional measures (Art. 41 ICJ Statute, Art. 73-75 ICJ Rules of Procedure). These were aimed, inter alia, at ordering the immediate cessation of the Israeli military operation; requiring Israel from acts prohibited under the Genocide Convention; ensuring the prevention of displacement and forced resettlement; guaranteeing access to food and water, humanitarian aid and medical care, as well as Palestinian life in Gaza; establishing a ban on the destruction of evidence; and instituting a reporting requirement to the ICJ (ICJ, 2024a: para. 11).

The ICJ Order of 26 January 2024 is limited solely to these provisional proceedings. Therefore, no final decision was required, but only a decision on the capability of falling within the jurisdiction for the main proceedings (ICJ, 2024a: paras. 15, 30) and the plausibility of South Africa's rights to be protected in the main proceedings (ICJ, 2024: paras. 35, 36). In the present case, these rights relate to the assertion of compliance with the Genocide Convention in favour of the Palestinians (ICJ, 2024a: para. 43). The Convention imposes an obligation to prevent and punish the crime of genocide (Art. I). According to Art. II, this is understood to mean

"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (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 within the group;
- (e) Forcibly transferring children of the group to another group."

Art. III extends criminal liability beyond genocide (a) to conspiracy to commit genocide (b), direct and public incitement to commit genocide (c), attempt (d), and complicity (e).

The Court first recognises Palestinians as a national, ethnic, racial or religious group (ICJ, 2024a: para 45). Relying on the effects of the military strikes described above (ICJ, 2024a: para. 46) as well as publicly available testimonies and reports (ICJ, 2024a: paras. 47-53), the Court concludes that at least some of the asserted rights are plausible (ICJ, 2024a: para. 54). In support of the requisite intent to destroy, the Court refers to a series of statements by senior Israeli officials that exacerbate the conflict in dehumanising language, speaking of “human animals” to be destroyed (Minister Gallant), or of an entire nation that is responsible, knowledgeable and involved, that could have defended itself against Hamas, and that is having its backbones broken now (President Herzog). Calls to “[a]ll the civilian population in [G]aza” to leave immediately, and that “they” would not receive a drop of water or a single battery “until they leave the world” (Minister Katz) are referred to (ICJ, 2024a: paras. 51-53). It was disputed within the Court whether the conclusion could be based on this alone, contrary to the strict standards of previous decisions regarding the proof, specifically the plausibility of intent, and despite Israeli

protective measures for the population of Gaza (Sebutinde, 2024: paras. 17-23; Barak, 2024: paras. 39-41).

Finally, the ICJ recognises a sufficient connection to the requested measures (ICJ, 2024a: para. 59), the risk of irreparable damage and the urgency of a provisional order. In this respect, it refers to the “extreme vulnerability” of the population of the Gaza Strip, the “catastrophic humanitarian situation” and Israel's inadequate countermeasures (ICJ, 2024a: paras. 65-74).

The ICJ (2024: para. 86), therefore, orders Israel to

1. take all measures within its power to prevent the commission of all acts prohibited by Art. II of the Genocide Convention;
2. ensure with immediate effect that its military does not commit any of these prohibited acts;
3. take all measures 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;
4. take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life in the Gaza Strip;
5. take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of relevant acts;
6. submit a report to the Court on all measures taken to give effect to the order within one month.

The Court also emphasises that Hamas and other armed groups are also bound by international humanitarian law and demands the immediate and unconditional release of the abducted hostages (ICJ, 2024a: para. 85).

A request by South Africa for additional provisional measures was answered by the ICJ by referring to the order already taken requesting full compliance by Israel “including by ensuring the safety and security of the Palestinians in the Gaza Strip” (ICJ, 2024b).

3 Impact

The request for an immediate end to the military operation was not granted. The first two orders merely repeat obligations under the Genocide Convention, as ad hoc Judge Barak points out in his separate opinion, too (Barak, 2024: para. 43). At first sight, the fifth order seems to be of little significance given the extent of the destruction and the isolation of the Gaza Strip but might serve as a powerful tool for potentially shifting the burden of proof in the main proceedings.

The Court itself has no enforcement mechanisms. Implementation depends on compliance by Israel and pressure from the international community. International reactions to the Court's decision do not show any immediate effects: While Israel appears outraged and unimpressed, relying on self-defence and pointing to its protective measures (warnings ahead of military actions, flight corridors, zoning in safer and contested zones, etc.), the international community in general supports it, but no concrete implementation measures can be discerned (Al Jazeera, 2024). Instead, the UN is being discredited on the basis of Israeli intelligence allegations of the following day that local UNRWA staff

might be linked to Hamas and some even to the Simchat Torah Massacre. Important donor countries temporarily suspended funding to the aid organisation (Bergman, & Kingsley, 2024; Williams & Tétrault-Farber, 2024), which was criticised by NGOs as an irresponsible move, worsening the humanitarian situation (Kim, 2024).

All of this shows the limitations of jurisdiction (if not the law) during ongoing military conflicts. The accusation of genocide, however, is a sharp sword in the long term. Genocide has so far been neither confirmed nor dispelled. It can be prosecuted not only by the International Criminal Court (Art. 5 ICC Rome Statute), but also by states in accordance with the principle of universal jurisdiction. Germany has enshrined criminal liability in the German International Criminal Code (§ 6 VStGB) and is a pioneer in several proceedings (Amos, 2022). At the latest since the issuing of the arrest warrant against Putin (Khan KC, 2023), it should be clear that proceedings do not stop at high representatives of states.

Complicity in genocide is a criminal offence, too (Art. III lit. e Genocide Convention). On 1 March 2024, the Republic of Nicaragua has instituted proceedings against the Federal Republic of Germany before the International Court of Justice for alleged violations by Germany of its obligations deriving from the Genocide Convention, the Geneva Conventions of 1949 and their Additional Protocols, "intransgressible principles of international humanitarian law" and other norms of general international law in relation to the Occupied Palestinian Territory, particularly the Gaza Strip, and asked for provisional measures. While a conviction seems to be unlikely, the international community is well advised to constantly reflect on the development of the conflict and its own role in it.

All the more irritating is the participation of 11 Israeli ministers and 15 members of parliament in a "Covenant of Victory and Renewal of Settlement" just two days after the ICJ ruling, in which Police Minister Itamar Ben-Gvir called for the resettlement of the Gaza Strip and the northern West Bank as well as "encouragement" for the voluntary emigration of Palestinians, and Communications Minister Shlomo Karhi even presented coercion for encouraged voluntary emigration as legitimate (Sharon, 2024).

There is no hope for an acute judicial resolution of the conflict. The judgement in the main case might take years. This means that the international community's political efforts to fulfil its collective responsibility in the Middle East conflict must be all the greater. This requires a clear vision and attitude towards a final and just settlement as well as appropriate measures in this regard. Germany must fulfil its own historical responsibility for Israelis and Palestinians alike, the latter's self-determination, life chances and human rights have been curtailed for more than seven decades as an indirect consequence i.a. of the Holocaust.

The binding resolutions of the UN General Assembly 194 (III) (UNGA, 1948) and the UN Security Council 242 (1967) (UNSC, 1967), which were recognised by the parties to the conflict in the DOPs (UNGA & UNSC, 1993), should be the crucial yardstick for everyone. The acute fighting has to be immediately stopped; hostages released; humanitarian aid delivered; mediation initiated; trust built; Arab States included; terrorist groups disarmed; rehabilitation, reconstruction and reconciliation started; the peace process revived; a framework and timeline for negotiations aiming at a two-state solution laid out. Collaborative initiatives like *A Land For All* and the *Holy Land Confederation* (Husseini et al., 2022), calling for two confederate states in one homeland – whether joined by Jordan

as a third partner or not (Ben-Meir, 2022) – seem to be the most realistic and ambitious option on the table. Setbacks are to be expected, while any progress has to be firmly defended against expected attacks from different sides. This calls for a robust international mandate from the UN Security Council. Anyone should know by now: There will be no living in peace and security in the region if the conflict drags on.

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