Diakonia International Humanitarian Law Centre

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ICJ ORDER ON PROVISIONAL MEASURES IN SOUTH AFRICA V. ISRAEL

Legal Consequences for Third States

On 26 January 2024, the International Court of Justice (ICJ) rendered an order for the indication of provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. This legal note elaborates on the legal consequences for third States emanating from this order on provisional measures.

Preliminary definitions

At the outset, it may be helpful to outline the meaning of the term **non-compliance** in international law. A breach of an international legal obligation – such as the duty to comply with an order on provisional measures – has been defined as an act by a State that 'is not in conformity with what is required … by that obligation' (ARSIWA, Art. 12). This is dependent 'on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case'.

Thus, when assessing Israel's compliance with the Court's order, both the specific purpose of a particular measure and the overall context should be taken into consideration.

- Most of the provisional measures ordered by the Court impose a certain conduct, not result. Nonetheless, it should be noted that the qualifiers are **very stringent** (e.g., Israel must 'take *all measures within its power*' to prevent genocide and incitement to genocide, and 'take *immediate and effective* measures' to ensure the delivery of humanitarian assistance).
- Furthermore, in light of the humanitarian 'object and purpose' of the measures and the 'facts of the case' – which concerns some of the most fundamental precepts of international law – particularly **heightened scrutiny** should be applied when evaluating Israel's compliance with the order.

Enforcement in turn refers to avenues for ensuring the compliance of States with their international obligations.

1. Consequences emanating from the order on provisional measures

Orders on provisional measures 'have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed', as the Court recalled in the order (para 83).

In this case, since all the provisional measures indicated by the Court were addressed to Israel, it is bound to comply with them. Furthermore, other States should respect the integrity of the Court and, accordingly, refrain from any actions that undermine the provisional measures so indicated by the Court. In this case, since the Court specifically ordered Israel to allow for the 'immediate and effective' provision of humanitarian assistance as a necessary measure to avert urgent risk of irreparable harm, third States should arguably not take actions, such as the suspension or withdrawal of funding for 'vital humanitarian operations', that would risk exacerbating adverse conditions of life.

The Court itself has a supervisory function in relation to compliance with orders on provisional measures; it has the power to request information from Israel on any matter connected with its implementation of any provisional measures it indicated (ICJ Rules of Court, Art. 78). However, there are some complexities around how orders on provisional measures can be enforced, and the role of third States in this regard. The following outlines some of these legal considerations, notwithstanding political will required by States to avail themselves of such possibilities.

First of all, as a party to the ongoing proceedings, South Africa could have recourse to the Security Council if Israel 'fails to perform the obligations incumbent upon it under a judgment rendered by the Court' (UN Charter, Art. 94(2)). On a textual reading, this recourse is available only for 'judgments' (for example, decisions taken on the merits of a case), and not for an order on provisional measures, which is not a judgment *per se*. However, it is submitted that Article 94(2) should be interpreted to include orders on provisional measures, since they are part of the Court's adjudicatory function (*LaGrand* judgment, para 102), of a binding nature, and indicated because they are deemed necessary for the effectiveness of a future judgment.

For all third States that are UN member States, it is also possible to bring to the attention of the Security Council or the General Assembly 'any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security' (UN Charter, Arts. 34 and 35). This is the very mandate of the Security Council, which not only has investigative powers but also enforcement powers. Given the veto powers of the Council's permanent members, alternative course of action via the General Assembly might be more practicable. That being said, the latter has a more limited scope of action – it can discuss questions brought before it and may issue recommendations (UN Charter, Arts. 11 and 12), but lacks enforcement powers.

For any UN member State to avail itself of recourse to the Security Council or General Assembly, its contention with Israel regarding Israel's alleged (non-)compliance with the provisional measures must qualify as a 'dispute or situation', which is plausible in this case. Furthermore, since the subject matter is specifically the alleged commission of genocide, there are other repercussions for third States, which will be elaborated in the following sections.

2. Consequences emanating from the Genocide Convention and the prohibition of genocide in customary international law

The order for the indication of provisional measures has legal consequences not only for Israel and South Africa, but also for third States. These consequences emanate not from the terms of the order *itself*, strictly speaking, but rather from the provisions of the Genocide Convention and the prohibition of genocide in customary international law. Furthermore, these consequences may be divided into **obligations** (*mandating* that third States take certain steps) and **entitlements** (which confer a *prerogative* on third States to act, but not a duty). Both sets of consequences will be examined in turn.

A. Obligations

i. Obligation to prevent stemming from the Genocide Convention

All State parties to the Genocide Convention have an obligation to prevent and to punish genocide (Art. I). The **obligation to prevent genocide and the corresponding duty to act** arises 'at the instant that the State learns of, or should have normally learned of, the existence of a serious risk that genocide will be committed' (*Bosnia and Herzegovina v. Serbia and Montenegro*, para 431).

It must be underlined that this obligation is independent of the ongoing proceedings themselves, i.e., these treaty obligations apply whether or not there is a case before the ICJ concerning the alleged commission of genocide. All the same, the fact that the ICJ has confirmed that violations of the Genocide Convention are at least plausibly taking place means that States undeniably know that there is a risk of genocide and are consequently obliged to take action to comply with their obligation to prevent genocide. Arguably, States should have become aware of the risk already prior to the ICJ's order, based on publicly available information derived from the early and persistent reports on the devastating impact of Israel's military operation; the indications of genocidal rhetoric in pronouncements of senior Israeli officials; and the statements of alarm by various UN bodies regarding genocidal and dehumanising language and the risk of genocide, which were also referenced by the ICJ in its observations in the order (paras 46-54). At the latest since 29 December 2023, when South Africa instituted proceedings sounding such concern, States should have been aware of the risk of genocide.

In this case, it is clear that third States party to the Genocide Convention have a treaty obligation to act. This is an obligation of means, and not of result. Third States, and especially those that enjoy close diplomatic and economic relations with Israel since they have greater capacity for influence, should use their leverage and employ all lawful means at their disposal to influence Israel to refrain from acts in breach of the Genocide Convention. This includes means such as the withholding, reduction, or suspension of any and all forms of assistance, or the suspension or review of trade negotiations and agreements.

States party to the Genocide Convention should, *at the very least,* conduct due diligence to ensure that any assistance provided will not be used to contribute to a violation of the Genocide Convention. Since there is a plausible risk of violation of the Genocide Convention, any assurances given that assistance would not contribute thereto have to be commensurate to the gravity of the risks, if at all possible. Where certain forms of assistance, such as weapons transfers, have a heightened risk of contributing to such violations, third States should arguably refrain from providing such assistance altogether.

Should the ICJ find a violation of the prohibition of genocide in its final judgment, third States could also be determined to have failed in the discharge of their responsibility to prevent genocide if they manifestly

failed to take all appropriate measures notwithstanding the early warning signs of the risk of genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*, para 430).

ii. Obligations stemming from the prohibition of genocide as a peremptory norm

Legal obligations for third States also follow from the **prohibition of genocide in customary international law**, which is a peremptory norm (*jus cogens*) – i.e., a norm binding upon all States from which no derogation is permitted – that exists alongside the obligations enshrined in the Genocide Convention. In case of a 'serious breach' by a State of a peremptory norm – i.e., a 'gross or systematic failure' to comply with the obligation in question (ARSIWA, Art. 40) – special provisions apply. It has been recognised that genocide by its 'very nature require[s] an intentional violation on a large scale', thus fulfilling the elements of seriousness and systematicity.

There is no prescribed mechanism or procedure for determining the existence of a serious breach of a peremptory norm. However, it has been noted that such violations will 'likely … be addressed by the competent international organizations, including the Security Council and the General Assembly'. In this case, the ICJ determined in its order on provisional measures, for purposes of establishing *prima facie* jurisdiction, that '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 [Genocide] Convention' (para 30). Furthermore, the Court found that 'at least some of the rights' invoked by South Africa – namely, of Palestinians in Gaza not to be subjected to genocide or any of the other proscribed acts enumerated in the Genocide Convention, and of South Africa as a State party to the Convention to invoke Israel's responsibility for any alleged breaches of the Convention – are plausible (para 54).

At the very minimum, this should have put third States on notice of a **potential serious breach of a peremptory norm** (i.e., genocide) and compelled them to assess whether they are in compliance with their legal obligations. In case there is a serious breach of a peremptory norm, legal obligations follow for third States (ARSIWA, Art. 41), which range from not recognising as lawful a situation created by the breach and not rendering any aid or assistance in its maintenance (such as the transfer of financial or military assistance), to cooperating to bring the breach to an end by lawful means (such as 'a joint and coordinated effort by all States' to address the violation in question, for example within the framework of the UN system).

B. Entitlements

Obligations *erga omnes* and *erga omnes partes*

The prohibition of genocide enshrined in customary international law constitutes an obligation *erga omnes*, which is owed to the international community as a whole (ARSIWA, Art. 48(1)(b)), while the Genocide Convention gives rise to obligations *erga omnes partes*, which are owed to all State parties to the Convention (ARSIWA, Art. 48(1)(a)).

In the first instance, this means that any State, regardless of whether it is directly injured or specially affected by the conduct in question, is entitled to **invoke the international responsibility of another State** that is alleged to have violated the prohibition of genocide. As regards the specific, wider duties to *prevent and punish* genocide and other related acts, such as incitement, the prerogative to invoke the international responsibility of a transgressor State appertains *at least* to the more than 150 State parties to the Convention.

Specifically, the claimant State may demand from the injuring State a 'cessation of the internationally wrongful act, and assurances and guarantees of non-repetition' (ARSIWA, Art. 48(2)(a)), and arguably also that the latter make full reparation for injury 'in the interest of the injured State or of the beneficiaries of the obligation breached' (ARSIWA, Art. 48(2)(b)). Reparation for injury may take the form of restitution (i.e., re-establishing the situation that existed prior to the breach), monetary compensation, or satisfaction (for example, 'an acknowledgement of the breach, an expression of regret, [or] a formal apology') (ARSIWA, Arts. 35-37).

One avenue for invoking the international legal responsibility of another State is the **institution of proceedings before the ICJ, or a request for permission to intervene in existing proceedings**, provided that a legal interest can be demonstrated. In the order on provisional measures, the Court confirmed in line with its previous jurisprudence that South Africa, like any State party to the Genocide Convention, has a 'common interest in [ensuring] compliance' with its provisions (para 33) and *erga omnes partes* standing (i.e., a legal interest) to bring a case before the Court against Israel for any alleged breaches of the Convention.

Another mechanism for seeking the enforcement of international legal obligations is the **adoption of countermeasures**, though its availability on the part of States acting on the basis of *erga omnes (partes)* norms is contested (ARSIWA, Art. 54). Countermeasures are otherwise unlawful acts taken in response to a breach by a State of its international obligations for purposes of forcing it to comply (ARSIWA, Art. 22), such as asset freezes, travel restrictions, embargoes, and suspensions of bilateral agreements.

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