The South African application and the question of genocide inside a warfare context

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1. Introduction

The ICJ's provisional measures judgment on the South Africa application puts forth a number of interesting issues on the table, holding that Israel does not have to halt its Gaza military operations, yet has to allow more humanitarian assistance into the Strip and address the statements of its high-ranking officials which can be interpreted as denoting a genocidal intent. At the same time, the Court stopped short of stating that Israel committed genocide in Gaza. Prudently from the Court's perspective, the Court hailed to clarify in para.30 that the aim of the provisional measures was not to examine whether any of the Genocide Convention articles had been breached.

Accepting that Israel's actions happened in the course of military operations, the Court understood that any Israeli violations of international law should not necessarily be construed as genocide but can constitute war crimes, depending on whether any military necessity existed for these operations in the first place. The Court further understood that such a military necessity finding would require judges to hear from military experts, something not feasible in the provisional measures phase. So, from this perspective, the Court correctly avoided to make any categorical pronouncements.

The Court was not equally ready to accept that the extreme statements made by high-ranking Israeli officials should immediately constitute proof that Israel commits genocide. Taking though a Solomonic approach, the Court condemned the fact that such statements could provide indications of genocidal intent if interpreted towards this direction and thus Israel should take measures and criminalize them.

Equally, quite interestingly, the Court did not altogether deny any role of the Genocide Convention to the case in question. Even without holding that Israel's actions constitute genocide, the Court held that the Genocide Convention was applicable and put forth obligations for Israel. Here the question which the Court did not clarify is, how it is possible for the Genocide Convention to apply in a given situation where genocide has not been unequivocally pronounced.

In the current article I examine this question in conjunction with its procedural repercussions regarding the question of the use of military experts in international trials and how in the provisional measures phase where such experts are not called to testify, any pronouncement on whether genocide has taken place in the course of military operations, cannot take place. The article proceeds as follows: whereas the next section briefly discusses the issue of genocide in the realms of the Gaza post October 7 operations, the analysis further proceeds to examine the use of experts in the phase of provisional measures before the Court. To the extent that recourse to such experts does not take place during the phase of provisional

measures, the article argues that the ICJ should have abstained from pronouncing that genocide took place-as it correctly did abstain from making such a statement. The difference between the stance ultimately taken by the Court and the one advocated in this article is that the inability to pronounce on the question of genocide in this point of the trial, should altogether lead the Court to toss out the provisional measures request on non-justiciability grounds. By holding that the South African request was justiciable and that the Court would not pronounce on whether genocide took place on policy grounds, leaving such a pronouncement for the main proceedings, the Court created the impression that it fiddled with the notion for policy rather than for doctrinal reasons. This created in turn the image of a policy-oriented rather than norms-oriented Court, to the detriment of international justice.

2. The pronouncement of genocide in the context of the current Gaza war

On October 7th, Israel was attacked by Hamas. The Israeli army (IDF) responded with a military operation in Gaza which has admittedly led to significant loss of civilian life and damage or destruction to physical property in Gaza. South Africa points to these unfortunate consequences of ongoing hostilities between the IDF and organized armed groups in Gaza (paras.43-100) as evidence that corroborates the alleged genocidal intent manifested by statements made by Israeli politicians. However, the South African application does not provide details of how each civilian death was inflicted, the overall ratio of enemy fighter to civilian casualties or the relevant framework of the wider destruction. Moreover, the application does not acknowledge enemy casualties and assumes every death in Gaza is that of a civilian. Indeed, from the oral arguments of South Africa and Israel before the ICJ, it is easy to understand the vast difference in the way the two countries view the post October 7th Israeli operations in Gaza.

South Africa neither in its written application nor in its oral pleadings ever mentioned anything about the rocket attacks from Gaza that preceded and followed the October 7th attack, giving the impression to any reader unaware of the greater facts, that Israel's military expedition should not be linked to any national security concerns. On the other hand, Israel has highlighted the Gaza rocket attacks and the wider background of Gaza attacks before and after October 7th. Such South African lack of reference to any of these attacks should be read as part of the South African team's efforts to present the Palestinian Gaza residents as innocent victims of Israeli aggression, detaching the Israeli Gaza operations from any warfare context and seeing them as part of genocide. For Israel on the other hand, the warfare context should be seen as negating on its own any genocide claims.

One question thus that the ICJ judges were called to decide upon, was what weight should be given to this warfare context when it comes to the genocide allegations. Per Article I of the Genocide Convention, genocide can be conducted also in the context of war. Thus, it is not enough for a warring party to claim that because of its belligerency status, it cannot ipso facto commit genocide. Yet, as the existence of war is not on its own enough to nullify any genocide accusation, the adverse consequences of combat operations cannot justify the unequivocal conclusion that genocide has been committed. Rather, hostilities add an important dimension to the *context* in which these consequences occur and provide the proverbial canvas upon which judicial bodies must inquire any genocide claims.

The failure to consider the cause, context, and efforts to avoid civilian casualties and physical destruction during the conduct of hostilities in Gaza and to examine whether these consequences have been consistent with IHL, reflects what appears to be a calculated effort to downplay or obscure the fact that the Israeli actions took place in the course not only of warfare, but more specifically of urban warfare. Scholars have noted the immense risks urban warfare poses for civilians, and how that risk is exacerbated by enemy tactics that seek to exploit the presence of civilians and civilian property for cover, concealment, and a shielding effect.[1] The importance of these considerations is reflected in the European Court of Human Rights decision in Georgia v. Russia (II) in which the court stressed, how the 'fog of warfare' creates new realities which do not permit the application of IHRL.[2]

It is therefore apparent why the question of *what, where, when, how, and why* attacks resulted in adverse consequences is such a critical aspect of assessing alleged genocidal intent. And, in a military campaign, assessing those questions involves critique of military operational judgments, a critique necessitating expertise in military operations. Such assessments should therefore be fully informed by military experts experienced in the immense challenges of urban warfare against enemy forces who deliberately exploit the presence of civilians. Such vital opinion evidence cannot though be presented to the ICJ at the phase of provisional measures.

3. The ICJ and the resort to experts in the proceedings for provisional measures

The ICJ does not generally resort to the assistance of experts in the main proceedings. This is even more the case in the stage of provisional measures and it is consistent also with the practice of other judicial bodies. For example, arbitration panels normally do not rely on experts in provisional measures requests.[3] So far, the ICJ has issued provisional measures in 15 cases and in none of them it has relied on the opinion of experts. Nonetheless, the Court has in such cases relied on critical factual context provided by external assessments of the situation at issue, such as reports of Fact-Finding Missions or UN General Assembly Resolutions. For example, in the case of Gambia v Myanmar, concerning the Rohingya genocide, the Court inferred the genocidal intent from the Report compiled by the UN Fact-Finding Mission.[4] Similarly, in the case of Canada v Syria, the Court relied on UN General Assembly and the Commission of Inquiry instituted by the UN Human Rights Council to order provisional measures.[5] This suggests the Court may rely on similar sources in this matter to support a finding of genocidal intent.

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[1] Nathalie Durhin, Protecting civilians in urban areas: A military perspective on the application of international humanitarian law, 98 Int'l. Review Red Cross 177, 178-179 (2016)

[2] ECtHR, Georgia v Russia (II), Judgment, 21 January 2021, para.137

[3] David Goldberg, Yarik Kryvoi & Ivan Philippov, Empirical Study: Provisional Measures in Investor-State Arbitration (British Institute of International & Comparative Law, 2023) 13 available at 157_provisional-measures-in-investorstate-arbitration-2023.pdf (biicl.org)

[4] Mona Rishmawi, The Plausibility Test in the Recent Provisional Measures Orders of the International Court of Justice, EJIL!Talk, 18 December 2023 available at The Plausibility test in the Recent Provisional Measures Orders of the International Court of Justice – EJIL: Talk! (ejiltalk.org)

[5] Application of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and The Netherlands v Syrian Arab Republic), Judgment of 16 November 2023, paras.73-75

But like a court decision itself, the probative value of such reports as they relate to the legality of the conduct of operations during armed conflict is contingent on the expert foundation upon which they are based. Unfortunately – and especially with regard to conflicts involving Israel and Palestinian armed groups – these reports have rarely reflected the type of careful expert military considerations so important to credible assessments of compliance with international humanitarian law during the conduct of hostilities. As a result, it would be unfortunate for the court to assume that such reports are adequate substitutes for opinions informed by extensive military operational experience.

Acknowledging the ICJ does not resort to expert witnesses in the stage of provisional measures and is not expected to do so also in the current case, does not mean that the Court does not examine the plausibility of the claim, even on a prima facie basis. Yet, because the determination of whether it is plausible to believe that genocide took place is inseparable from the military operational context in which the cited civilian suffering has been inflicted, the plausibility assessment demands assessment of military considerations. And, if information as to those considerations is not feasible, the ICJ must weigh against the plausibility determination.

In the past, the ICJ has underlined the emphasis it places to limitations in evidentiary issues and the need for experts to be consulted. For example, in the provisional measures it issued in the Frontier Incident case, the Court noted that the two warring parties should retreat to lines which should be marked by experts and whose marking the Court could not undertake in the provisional measures framework.[6] In Ukraine v Russia, the Court noted that it was holding that Russia did not have the right to invade Ukraine, notwithstanding difficulties in asserting whether genocide took place in Eastern Ukraine.[7] The Court decided not to stay on these difficulties only because it held that the Russian invasion was not lawful irrespective of the genocide question.

Along these lines, in the realms of urban warfare where these genocide allegations are brought forth, the question of whether the number of alleged civilian casualties or the extensive destruction of infrastructure is due to a genocidal plan or as a result of military operations which involve the concept of military necessity, is an assessment that must be fully informed by military operational experts[8] who are to opine on the reasonableness of each IDF attack. To the extent that these military experts cannot be called as witnesses in the provisional measure stage, the ICJ should have acknowledged the inability to adequately assess any military considerations behind Israel's Gaza activities. Accordingly, the Court should have held that at the phase of provisional measures, it did not have the capacity to firmly assert that genocide has taken place. The low evidentiary threshold pertinent in the provisional measures stage should not be seen thus as a leeway for the ICJ judges to issue dubious conclusions and determinations but rather that the extraction of any conclusions-which still have to be though firm-can be relied upon less evidence. When it comes to the genocide pronouncement, absent any military expertise, the judicial pronouncement on whether any Israeli attacks took place

[6] ICJ, Case Concerning the Frontier Dispute (Burkina Faso v Mali), Provisional Measures, Order of 10 January 1986, para.27

[7] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures, Order of 16 March 2022, para.59

[8] Geoff Corn, 'Rules of War' are Complicated, not only in Gaza, 9th January 2024, The Cipher Brief available at 'Rules of War' are Complicated, not only in Gaza (thecipherbrief.com)

out of a legitimate military necessity or as part of a genocidal plan, remains always a hypothesis, a projection largely of the judge's own views to the facts on the ground. This should not mean that any inability of the ICJ to pronounce that genocide took place should mean a wider inability of the Court to respond to the South African requests and issue an order on the issues which can be detached from the genocide pronouncement.

4. Beyond the Genocide Pronouncement: Quo Vadis for the ICJ?

By tagging the Israeli military operations as 'genocide', South Africa placed the threshold too high for the Court. If it abstained from ordering any measures, it would not constrain the Israeli military operations. If it instead ordered provisional measures, it risked confronting a genocide assertion, which might prove utterly false.

The inability of the ICJ to pronounce on genocide in the provisional measures stage should uphold it altogether from issuing an order in the provisional measures phase. Yet, the Israeli operations have indeed caused substantial damage to Gaza's civilian and infrastructure and irrespective of the genocide question, the Court wanted to issue an order that calls for greater caution from Israel's part and for more robust humanitarian relief efforts without negating Israel's right to accomplish the military objectives needed to fulfil its right of self-defence.

The South African application brought forth the relief sought. Some of the points raised by South Africa were directly linked with the genocide allegations to the extent that if these allegations were not valid, also these requests could not be satisfied. Other though points of relief that South Africa raised can be seen as standing also independently of the genocide allegations. They thus did not require an absolute genocide conclusion from the Court's part in order for the Court to order Israel to pay heed to these points even from this phase of provisional measures. For examples, points 1, 2 and 5 containing the South African requests for the Israeli operations to be halted or for these operations not to lead to the expulsion of the Palestinians from their homes or the deprivation of access to food and water, can be related also to a laws of war debate. Whereas South Africa tried to link these consequences with the genocide narrative it puts forth before the Court, such linkage is not unequivocal. Indeed, the Court refused to see such linkage when it did not proceed to order any complete halt of the Israeli operations despite having held that acts which may potentially lead to genocide may have occurred and Israel must abstain from them.

By adopting such approach, the Court succeeded in delivering a Solomonic solution; on one hand it avoided branding the Israeli operations as 'genocide' absent further concrete evidence, adhering though also to the South African calls for Israel to conduct its military operations in a more restrained way. Most importantly, when it comes to international law and the law of evidence, the Court signalled in a clear manner that reliance on written documents cannot be enough to prove issues related to the conduct of warfare which calls for presence on the ground and for expert assessments.

5. The birth of a teleological court?

The question of whether courts should rule more based on a grammatical or teleological interpretation of law is something that has been open also in domestic legal orders, most

notably in the realms of the US jurisdiction. So far, on an international level, the ICJ had been careful to stick to grammatical interpretations on issues relating to the application of armed force. For example, in the Nicaragua case, in a stance repeated also in other instances such as the Oil Platforms case or the Wall advisory opinion, the Court resorted to a strict reading of article 51 of the UN Charter and held that the right to self-defence can be relevant only against States. The fact that nowadays also non-State actors can wage attacks, begets the question of whether the Court should also adapt its self-defence pronouncement to the exigencies of our times.

Whereas in the particular question of non-State actors and the right to self-defence the Court did not explicitly state in this latest ruling that Israel did have the right to self-defence against the Hamas attack, the fact that the Court equally did not state the opposite speaks worlds of the Court's readiness to possibly revise its stance in the future, in the main proceedings judgment. This willingness from the Court's part to adapt to the exigencies of the situation and maximize the protection awarded to harmed parties can be seen also in the current provisional measures ruling in the way the Court comes to read the Genocide Convention's role in the wider international law structure.

Having before it the question of an application of a convention which ordained the protection of certain rights and values which the Court believed merited protection in the case of the Gaza Palestinian population, the Court did not want to deny altogether application of the Convention, in order to be able to provide satisfaction of these rights. Along these lines the Court said how Israel must respect for example the right to life of the Palestinians as stipulated in article III of the Genocide Convention without the Court though saying that this Israeli obligation should be seen as a call for the country to stop committing genocide. Rather, the Court's ordeal should be seen as efforts to protect the civilian Gaza population as a result of warfare. The Genocide Convention becomes thus a platform for the Court to entrench the rights of civilians during warfare.

6. The Genocide Convention: Should/Can it be placed under the laws of war?

If that is correct, that brings us to a larger doctrinal question. The prohibition against genocide is a crime which can take place independently of warfare. In that sense, genocide is an autonomous legal field not subjugated to the laws of war. By viewing the Genocide Convention as just a platform for protecting civilian rights during warfare, the Court may practically have awarded a much needed protection to the Gaza civilians, but doctrinally, the way this has been done through recourse to the Genocide Convention, ultimately belittles the latter and portrays it as subjugate to the laws of war and documents like the IV Geneva Convention which from their inception were meant such civilian protection.

If the Genocide Convention becomes the lens through which civilian protection in warfare is to be provided, this is a novel argument and viewing of the Convention that the Court should do more to doctrinally justify. In the past, courts like the ICJ in the Advisory Opinion on the Legality of Nuclear Weapons and the European Court of Human Rights in the Hassan case have ruled that international human rights law should be read under the lens of international humanitarian law but never has any court stepped forward to reach a similar conclusion on how the Genocide Convention provisions should be also read under the laws of war lens. The question becomes even more demanding given that the prohibition against genocide is a jus cogens norm.

On one hand it could be argued that exactly because the prohibition against genocide is a jus cogens norm, all the protection that is associated with the Genocide Convention can find application even beyond the Convention's realms. Along these lines, the international lawmaker's wish would not be for the Genocide Convention to limit, but to broaden its application scope. On the other hand, the question of how a jus cogens norm can be read under the lens of other international law rules instead of being the opposite, namely other international law rules to be read under the jus cogens lens, is equally demanding. On this, the ICJ latest ruling is unique and paves the way for interesting discussions regarding the interaction of legal regimes in international law.

7. Conclusion

The South African application to the ICJ has put the bar high for the ICJ. It has equally tried to portray any genocide claims as bereft of any warfare considerations. Yet, the fog of warfare renders such allegations more difficult to be proved and necessitates the introduction of military analysts as expert witnesses in the main proceedings. This may turn out to be challenging for the ICJ which has traditionally relied on written evidence and files to shape its view. Yet, if one thing the current case has rendered clear is how cautious States and Courts should be in coming to resort to the concept of genocide. The latter should not become an alternative for war crimes. The South African application renders the Court the opportunity to make such clarification also in the phase of the main proceedings.