

Opinion – The Broader Significance of the ICJ’s Ruling on Genocide in Gaza

Written by Thomas Obel Hansen

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THOMAS OBEL HANSEN, JAN 30 2024

Perhaps the most powerful moment in the reading of the 26 January ICJ Order in the South Africa v Israel case concerning alleged violations of the Genocide Convention involved the Court’s President, Judge Joan Donoghue of the U.S., citing statements made by senior Israeli officials. The Court had paid particular attention, she said, to remarks made by Israeli Defense Minister Yoav Gallant, including the now infamous assertion that “we are fighting human animals” and “we will eliminate everything”, along with various statements made by Israel’s President, Isaac Herzog, including an also widely distributed comment that “it is an entire nation out there that is responsible [...] it is not true this rhetoric about civilians not aware, not involved” (para 52). Judge Donoghue’s reference to these statements counters a narrative endorsed by the Biden administration – echoed by several other governments in the West – that Israel acts with good intentions and that its actions should be viewed through the lenses of legitimate self-defense in a “hunt for Hamas”.

It brings no comfort for Israel, as Fionnuala Ni Aolain suggests, “seeing those words quoted in a provisional measures decision of the ICJ”. Neither does it bring any comfort to Israel’s closest allies, many of whom fiercely opposed South Africa bringing the case. While the U.S. and other allies of Israel have at times levelled critique at Israel’s methods in Gaza, any suggestion that the broader purpose of that campaign is illegitimate have been dismissed. That Israel’s actions could possibly constitute genocide was recently rejected by many members of the U.S. Congress as “grossly unfounded”, triggering their “disgust”. The ICJ’s holding that allegations of crimes under the Genocide Convention are being committed by Israel in Gaza are “plausible” (para 54) necessarily confronts and contradicts suggestions that the allegations of genocide brought by South Africa, are “meritless” and “completely without any basis in fact whatsoever”, as White House National Security Council spokesman John Kirby had insisted, or “completely unjustified and wrong”, as British Prime Minister Rishi Sunak argued through his spokesperson.

Going forward, the ICJ concluding that some of Israel’s acts and omissions in Gaza “appear to be capable of falling within the provisions of the [Genocide] Convention” (para 30) are words that will continue to be uncomfortable and hard to digest not only for Israel’s political and military leadership but also for the governments that have stood by their side in their response to the October 7th attack. That the ICJ judges ruled almost unanimously with only ad hoc Judge Aharon Barak (appointed by Israel) and Judge Julia Sebutinde of Uganda disagreeing on some of the conclusions and measures ordered is a critical point. The fact that the Court’s President, Judge Donoghue of the U.S., was in agreement with the majority on all issues is equally significant – a point not lost in early X commentaries and blog posts. Add to that the fact that the Judge appointed by Israel voted in favor of imposing some provisional measures on Israel, including that Israel must take “immediate and effective measures to ensure the provision of urgently needed basic services and humanitarian assistance” (para 86). Taken together, this makes it, as one commentator notes, “significantly harder for the Israeli government to delegitimize the Court’s orders” – and, I would add, for Israel’s allies too.

At the same time there’s some apparent relief in Israel and in the U.S. that the provisional measures ordered by the Court did not include ordering a suspension of Israel’s military operations in Gaza, as had been requested by South Africa. Perhaps these are factors that help explain why the U.S. and several of Israel’s other closest allies have

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remained relatively quiet about the ICJ Order, opting instead to sanction another UN body in the wake of the ICJ ruling. In announcements made almost simultaneously with the issuing of the ICJ’s Order, the U.S., the UK and a limited number of other close U.S. allies stated they will halt funding of the UNRWA, the main organization providing humanitarian aid in Gaza. This move – which follows from allegations made by Israel that some UNRWA staff members took part in the 7th October attack – is widely understood as an “attempt to distract” from the ICJ ruling. Many read it too as a form of “collective punishment”.

Commentators have noted how South Africa bringing the ICJ case amounts to “effectively indicting the United States as an accomplice”. That’s a relevant perspective given Washington’s near unlimited diplomatic support for Israel and the continued supply of military equipment in the face of evidence that these are used in ways that breach international law. Already, domestic legal suits relating to supplying Israel with weapons have been brought in some jurisdictions, including the U.S., the UK and The Netherlands. Prosecutors in some countries, including Switzerland, are currently determining whether to proceed with investigations on the basis of criminal complaints filed against Israeli leaders for alleged crimes in Gaza. The ICJ’s Order will likely be cited extensively by litigants in existing and future legal suits, in effect adding an additional layer of pressure on the relevant governments.

Importantly, by ruling as it did the ICJ is not only helping confront the position and actions of Israel’s closest allies on an individual basis. The Court’s Order also confronts the conditions of the global order these countries subscribe to – the so-called “rules-based international order” – a concept coined in Washington, perhaps best explained by John Dugard in his 2023 Leiden Journal of International Law essay, to replace the more solid, clear and firm expression of “international law”. That’s to say, efforts made to legitimize Israel’s actions and de-legitimize accountability for these actions are not just acts by individual states. These are symptoms of more systemic challenges associated with the idea of a “rules-based international order” and the power-relations between States and international organizations implicit to that global order.

The ICJ legal process brings to the attention of the global public that the “rules-based international order” is one that seeks to disguise itself as an expression of international law, while in reality being one that supports a highly selective, policy-based, application of the rules that international law is made up of, to serve the interests of countries that designed that order. It’s an order – increasingly seen around the world for what it is – which is less concerned with the actual rules and their stated objectives but more with how the rules can be utilized to target foes only to be sidelined or forgotten when they ought to apply to friends. The most obvious – and probably by now most widely cited – example of this concerns attempts by the U.S. and other countries in the West to reject the legitimacy of the ICC Palestine investigation, while simultaneously embracing the investigation of the same Court in Ukraine to target Russians.

The ICJ ruling empowers countries seeking a global order defined by international law and by extension challenges the narrative of the “rules-based international order”. For once Israel is not treated as being exempted from accountability norms, as a sui generis case. For once, an international court is not backing off (at least for now) in the face of pressure from the U.S. and other countries in the West. That it was the ICJ challenging the basic conditions of the “rules-based international order” creates a paradox for the states that subscribe to this global order because they tend to claim that the ICJ as “a key part of”, or “an important building block”, of the rules-based international order. Unlike the ICC, however, the ICJ has never itself endorsed this framing..

It is possible that the ICJ case could trigger more sustained calls for “a new dawn in international law”, one where the West can no longer claim monopoly of its institutions and seek to manage outcomes they deliver through the vague and highly selective concept of justice endorsed by the alternate vision of the “rules-based international order”. The Court’s Order presents a significant step towards more responsive justice for serious crimes by actors aligned with the Western-led global order. Yet, the ICJ is only one piece of the larger global accountability architecture, much of which continues to be mostly impotent in the face of resistance by the West. As Nesrine Malik wrote in The Guardian, “at its heart, the case was about something wider: closing the gap between Palestinian reality and how the dominant political forces describe it”. The ICJ sought to close that gap – and by extension to challenge the basic premises of the global order.

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