Third Provisional Measures in South Africa v Israel

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On March 28, 2024, the International Court of Justice (ICJ) issued its third provisional measures order in *South Africa v Israel*. The ICJ did not accept South Africa's request to order a complete ceasefire, although several individual judges indicated they would have done so. Nevertheless, the ICJ did order further, more pointed, measures towards Israel to ensure the provision of humanitarian aid throughout Gaza. In this blog post, I consider that the right to be heard in the course of this third order has not been fully guaranteed since the ICJ based its ruling on the international reports which were not provided, known, and considered by either of the parties. Moreover, I argue that the ICJ underscored its decision on humanitarian law rather than obligations to prevent genocide.

The third provisional measures

The third round of provisional measures indicates the ICJ's increased concern over a deteriorating humanitarian situation in Gaza, thereby tightening Israel's conduct in the Israel-Hamas war. In particular, the ICJ ordered Israel to take all necessary and effective measures to ensure, without delay, the unhindered provision of urgently needed basic services and humanitarian assistance, as well as medical supplies and medical care to Palestinians throughout Gaza. Furthermore, Israel must increase the capacity and number of land crossing points and maintain them open for as long as necessary. Additionally, it must ensure with immediate effect that its military does not violate any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention.

This round of provisional measures indicates that the ICJ is growingly concerned over the humanitarian situation in Gaza. In the words of the Court: "The catastrophic living conditions of the Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip have been subjected."

Procedural fairness and the facts underlying the provisional measures

The ICJ had already established its prima facie jurisdiction and the plausibility of some of South Africa's claimed rights in its first provisional measures order on January 26, 2024. Accordingly, to order further measures, the ICJ only needs to analyze whether there is a risk of irreparable prejudice to South Africa's plausibly claimed rights, and there is an urgency to order further measures prior to the final judgment on the merits (para. 26, third order).

To justify the ordering of additional measures, the ICJ referenced the findings of several international organizations and initiatives. As Judge ad hoc Barak pointed out, several of these were not presented by the parties, and some were even published after Israel had submitted its written observation (para. 23). The Court was convinced that the case's circumstances require modifying its decision concerning provisional measures indicated in the Order of 26 January 2024, since they no longer fully address the consequences arising from the deterioration of the humanitarian situation in Gaza.

I wish to evaluate this decision from the perspective of procedural fairness. The right to be heard (*audiatur et altera pars*) is a fundamental principle of procedure, both in domestic law and in international law. V.S. Mani explained this principle as one that "covers each party's right to know, with sufficient notice, what is up against it". When a court refers to documents or legal arguments which were not considered or were even unknown to the parties, the principle is undermined, if not outright violated. The right to be heard is not simply symbolic. It enhances the quality of the decision since it allows the parties, often best placed to gather the facts, to enlighten the court (see, for example, Judge Anzilotti's remarks in the *Decrees* advisory opinion, p.66).

It seems that the ICJ did not grant sufficient, and warranted, attention to this fundamental principle of law. Of notice, the ICJ cited a report of the Integrated Food Security Phase Classification Global Initiative (IPC) (a multi-stakeholder international initiative aimed at enhancing food security), in order to establish the factual situation on the ground (para. 19 of its order). The IPC report was published on March 18, 2024 – three days after Israel was required to submit, and indeed submitted, its written comments on South Africa's third request (para. 9-10). By relying on this report which was released after the given deadline, Israel was denied its right to be heard concerning a document which proved pivotal in the Court's order. We can speculate that if Israel had been given an opportunity to be heard, the Court would have reflected on certain fundamental factual and methodological errors in the IPC report, as noted in a document released by COGAT (Coordination of Government Activities in the Territories), the Israeli Ministry of Defense body tasked with coordinating humanitarian efforts, issued on March 29, 2024. For example, the IPC report relies mostly, if not in whole, on data provided by local bodies, and the report itself admits it suffers from information gaps.

To the best of my knowledge, the only other instance the ICJ relied on information which was not provided by the parties to establish facts on contested issues for the purpose of rendering a decision – whether judgment or provisional measures order – was in the *Nuclear Tests* case. Several judges severely criticized the majority for precisely that reason (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, para. 23; Dissenting Opinion of Judge Sir Garfield Barwick, p. 439). It should be noted, though, that this incident is a bit limited in terms of precedential value. In the *Nuclear Tests* case, the new information "merely supplement[ed] and reinforce[d] matters already discussed in the course of the proceedings" (para. 33). After all, the new information in that precedent was subsequent statements of high-ranking French officials which added further gloss to a communiqué of the President of France expressing the intention

to cease atmospheric nuclear tests in the south Pacific region, which was known to the parties at the time of oral proceedings (para. 34). Also significant is the fact that the information included statements made by a non-appearing party (France) which went towards achieving the object of the applicants' submissions. Finally, to further safeguard any prejudice to the applicants, the ICJ added the following proviso in the parallel judgments: "If the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance" (para. 60; para. 63; and see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case*).

Elsewhere, the right to be heard on issues of new information has been rigorously applied in investment arbitration. For example, the *Fraport (I)* ICSID annulment committee (presided by Judge Peter Tomka of the ICJ) annulled the tribunal's award on the basis of its failure to respect the right to be heard. In that case, the tribunal placed central reliance on evidence produced by the Philippines following the closure of proceedings, while the tribunal was deliberating. Although the tribunal gave the claimant an opportunity to comment on the evidence, it created an impression that it was merely seeking to complete its evidentiary record. On this basis, the annulment committee stated that the tribunal's course of action was "incompatible with the fundamental obligation on the Tribunal to permit both parties to present their case in relation to the new material" (para. 230).

In the case of *South Africa v Israel*, the Court also failed to address a main flaw in the reports of the WHO and the IPC partnership, as previously noted by myself and others. Namely, the allegations that these reports seem to turn a blind eye towards violations of IHL by Hamas, directly contributing to the human suffering in Gaza. Most notably to the starvation and famine that underlined the concern displayed by the ICJ. Finally, the ICJ did not seem to attribute importance to the efforts undertaken by Israel in order to deal with the deteriorating humanitarian situation in Gaza, *inter alia*: the transfer of humanitarian aid into the Gaza Strip (close to 19,000 aid trucks, carrying more than 350,000 tons of humanitarian aid, including almost 250,000 tons of food), the supply of water and electricity from Israel, facilitating the establishment of field hospitals in Gaza, assisting with evacuation of patients out of Gaza, and more.

The fact that the Court failed to deal with the above-mentioned aspects may infer that the Court was also failing to apply its own principles, as set out by its rulings, for example, on the importance of corroborating evidence brought before the Court. Of course, the truncated nature of provisional measures proceedings does not allow the Court to consider evidence in detail. Yet, even a cursory consideration of evidence can reveal that it emanates from a single source – and in this case, most relevant reports on issues concerning available resources, mortality and casualties rely, at the end of the day, on data originating from Hamas.

The legal basis underlying the provisional measures – the obligation to prevent genocide or duties under the Geneva Conventions?

Another line of concern arises when looking at the individual opinions of the Judges. Notably, some of the judges sought to rely on legal rules which fall outside of the ambit of the jurisdiction of the Court, which is limited to the Genocide Convention. For example, Judges Xue, Brant, Gómez Robledo and Tladi stated that the third provisional measures order incorporates the "standard under international law", which can be found in "Articles 55 and 56 of the Fourth Geneva Convention".

It should be stressed, though, that Articles 55 and 56 indeed obligate States to "ensure" the provision of humanitarian aid, a duty of tremendous importance without a doubt (which derives from the general duty to ensure respect to international humanitarian law), which naturally does not form part of the requirements under the Genocide Convention. In addition, it is important to remember that the cited Articles are only applicable in situations of belligerent occupation, while the question of whether Gaza is occupied remains controversial nevertheless. It is puzzling how the Judges reached their decision based on legal duties that fall outside of the jurisdiction of the Court. Notwithstanding, even if we put that aside, *arguendo*, it is not clear how the Judges can invoke Articles 55 and 56 without addressing the Court's own legal test for their application – the existence of an occupation (and while ignoring the influence of other players, *e.g.* Egypt that controls the land border between Gaza and Egypt).

One final thought on the importance of consistency

The ICJ's treatment of evidence in its latest order is not the only cause for concern. An additional cause of concern is some inconsistencies in the judicial approach of individual Judges in *South Africa* v *Israel.* Obviously, judges do sometimes contradict their previously held positions, and indeed opinions can and should change over time. In fact, opinions should indeed change when reality demands it, so long as they follow the lines of interpretation of international law, which undoubtedly encourages the development of the law with time.

Indeed, there is no "precedent" of the ICJ concerning the interpretation of Article 59 of the Statue. Yet, it is nevertheless imperative that Judges provide clear legal reasoning should they change their approach (see, for instance, Judge Abraham's declaration in *Marshall Islands v India*), in order to promote consistency and validity and to allow for dialogue as to the possible development of the law in a certain direction. In the words of Judge Abraham: "It is indeed a judicial imperative which the Court has always recognized, and which in my view is incumbent upon all its Members, that it must be highly consistent in its jurisprudence, both in the interest of legal security and to avoid any suspicion of arbitrariness."

For this reason, it is concerning that Judge Xue Hanqin, who has in previous cases consistently been adamant that *erga omnes* (*partes*) interests do not translate into standing before the ICJ (*Belgium v Senegal*, *Canada & Netherlands v Syria* ("I voted against the Order because of my consistent position on the question of standing in such so-called *actio popularis* cases"), including in a case concerning alleged genocide (*The Gambia v Myanmar*), found an exception in the case at hand, without presenting any legal justification.

Similarly, Judge Abdulqawi Ahmed Yusuf complained recently that the compromissory clause of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was being used to litigate issues under international humanitarian law, leading him to suggest that the ICJ should "put an end to the attempts by States to use CERD as a jurisdictional basis for all kinds of claims which do not fall within its ambit". Notwithstanding, in the *South Africa v Israel* case, Judge Yusuf called for a halt to Israel's "aerial bombardments, the ground assaults on urban areas and refugee camps by the Israeli army, and the removal of the obstacles to the delivery of humanitarian aid".

In doing so, Judge Yusuf seemed to ignore the fact that Hamas has embedded its military operations in densely populated areas (as presented during the oral hearing), Hamas' hijacking of aid (not to mention extrajudicial executions of those cooperating with Israel's distribution of aid), and also the detailed explanations presented by Israel regarding the military necessity of its operations under IHL. It is unclear why the *South Africa v Israel* case does not raise the same concern, as presented by Judge Yusuf in the context of CERD, that the case has nothing with the jurisdiction of the ICJ but – in Judge Yusuf's words –"everything to do with the humanitarian law".
