

When the Reasons are More Telling than the Ruling: The Order of the ICJ in South Africa v. Israel

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By Enzo Cannizzaro

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A veil of discontent wraps the order of the ICJ of January 26. The Court disappointed those who consider that the determination *prima facie* of the violation of the Genocide Convention should have logically entailed the more radical measure of the cessation of military actions, as in the *Ukraine v. Russia* case; they presented the operative part of the ruling as a political compromise if not even an act of judicial cowardice. Conversely, those who considered it blasphemy to exchange an action in self-defence for genocide disappointingly constate that the Court has admitted the plausibility of “at least some of the rights claimed by South Africa”, namely of genocidal acts (para 54). So, where is the truth?

Hard to say. The techniques of international law are, perhaps like all the techniques of social sciences, highly imprecise. After all, the uncertainty principle also permeates modern physics after the demonstration offered by Werner Heisenberg in 1927.

Being definitively futile in the search for the truth, my point – an obvious point, perhaps – is that the operative part of the ruling, at first sight, seems to be uncoherent with the reasons. This may be due, partly at least, to the highly controversial legal regime of genocide: a crime which can be committed by individuals, States or both; which overlaps in its material part with other equally heinous international crimes, but different in nature; whose specific feature is a mental element which, notoriously, is arduous to determine for a State. All these elements converge, in my mind, toward the conclusion that the reasons given by the Court are more important than the measures it took or abstained to take.

Let me explain why the provisional measures decreed by the Court are problematic. The first two measures concern the order to Israel to prevent genocidal acts under Art. II of the Genocide Convention, and prevent the same genocidal acts committed by its military. It is unclear the reason which led the Court to order distinct measures for the same conducts. Who else can commit these genocidal acts if not its military? And, if its military commits genocidal acts which Israel has the duty to prevent, to whom else could these acts be attributed in interstate relations, if not to the State of Israel?

Analogous questions are raised by the obligation imposed on Israel to prevent and punish the crime of incitement of committing genocidal acts. The incitements mentioned by the Court came from the President of Israel and from two Ministers of the Israeli Cabinet. At least the President is an organ which, for its political prominence, is commonly included in the s.c. *troika*, namely the three organs which have individually the power to wage a war of aggression. To whom should be attributed, in interstate relations, the incitement to commit genocide by these persons if not to their State?

In addition, a further measure concerned the obligation of Israel to provide humanitarian assistance to address the adverse conditions of life faced by Palestinians in Gaza. This measure seems to assume that these “adverse conditions” have been caused by genocidal acts, otherwise they would not come within the purview of the Court. And who else could have created these adverse conditions if not Israel?

All in all, the operative clauses seem to presume that the plausible breach of the obligations flowing from the Genocide Convention must be attributed to Israel and to the war waged by that State. If this were the case, it would be hard to explain why the Court did not order Israel to cease the military actions which are the cause of these plausible genocidal acts.

However, the reading of the reasons does not uphold this assumption. It rather seems to disprove it. Strangely enough, after describing the harsh situation of the Palestinian populace, the indiscriminate bombardments (paras 47, 49, 73), the forcible displacements of the populace (para 49) deprived of the essential means of living, subject every day to the spectre of famine and starvation (para 47), the destruction of homes, schools, medical

facilities and other vital infrastructures (para 80), and after connecting these situations with the plausible genocidal acts, the Court did not draw what could appear the logical consequence, namely attribute this situation to the State of Israel.

This impression emerges also from para 54, the centre of gravity of the Order. In this paragraph, the Court determined that “the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible”. It further pointed out that “(t)his is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention”. Strangely enough, the Court identified the right to be protected and the holders of these rights, namely “the Palestinians in Gaza” and the Applicant, namely South Africa. However, it failed to identify the entities which endangered these rights.

The simplest, perhaps the most simplistic, explication is that the Order is the outcome of a compromise among the judges, which made possible the quasi-unanimity. But there are other possible explanations. In particular, the Court seems to be not fully convinced that the plausible genocidal acts should be automatically attributed to Israel.

In order to transform these potential genocidal acts into genocide, the Convention requires, it is well known, a specific intent (*dolus specialis*). It is also known that proving the specific intent is a difficult exercise. But it is perhaps more difficult to prove it for States than for individuals. So difficult to the point that the Court decided, in the case of *The Gambia v. Myanmar*, not to determine it at the preliminary stage of the provisional measures. And in the only case concerning an interstate dispute on the Genocide Convention which reached the stage of the merits, (*Bosnia and Herzegovina v. Serbia and Montenegro*, decided on 26 February 2007), this difficulty played a significant role also in the final ruling of the Court.

In that case, the difficulty was accentuated by the fact that the conduct of the individuals who had materially committed the genocidal acts could not be attributed to the respondent State. But the difficulty persists even if the genocidal conduct of individuals could be attributed to the State, in particular, if these individuals are organs of the State. This is precisely the case of Israel and its soldiers on the ground.

Under international law of State responsibility, as codified by the ASR the “conduct” of an organ is automatically attributed to its State. But are we sure that the attribution of the conduct of an organ to its State is sufficient to attribute genocidal acts to the State? Or the attribution to the State requires the demonstration that the specific intent must be transferred as an element independent from the conduct?

In the Genocide ruling of 2007, it is again well known that the ICJ devoted much space to the link which must exist between a State and individuals who cannot qualify as its organ for the purpose of attributing their conduct to that State. One could speculate that the inherent premise of this enquiry was that the specific intent is automatically transferred with the genocidal conduct. In most cases, it is certainly so, but this cannot be lightheartedly presumed.

This is not, or not only, a question of proof. The real difficulty is the ontological diversity of the specific intent respectively possessed by individuals and by a State. Individual organs, when committing genocidal acts, could believe that, by doing so, they contribute to destroying a protected group. The specific intent of a State is different. The genocidal acts must be committed in an organized framework of conducts that aim at destroying a protecting group. Of that difference, the ICJ could be aware (see paras 371, 373 and 376 of the ruling of the Court in the Genocide Convention case).

These difficulties are probably due to the original conception of genocide as an individual crime. This may explain why this issue remained long under track. The multiplication of interstate litigations on the basis of the jurisdictional clause enshrined in Art. IX of the Convention brought that problem to the surface. Yet it is not by accident that in these litigations, the ICJ has determined, finally or provisionally, the violation of the duty to prevent genocide, a violation which does not seem to require any specific intent.