29 JANUARY 2024 / Israel at the International Court of Justice

[HALF SECOND OF SILENCE]

[BILLBOARD]

SEAN RAMESWARAM (host): The International Court of Justice isn’t typically the most exciting place on earth.

<SCORING IN> Crashing planets (APM)

MOLLY QUELL (reporter, *Courthouse News*): The ICJ does a lot of stuff that, like for individual states, may be quite important, like maritime boundary delimitation, but that the broader public is often very not interested in.

SEAN: But then the war between Israel and Hamas appeared on the docket.

MOLLY: I think it is fair to say that this has been the wildest and most kind of unhinged experience I have ever had covering a case at the ICJ.

*<CLIP> AL JAZEERA:*

*PRO-PALESTINE PROTESTERS: Free, free Palestine!*

*OSAMA BIN JAVAID, REPORTER: People here who believe that there needs to be a ceasefire, Israeli need to, stop its hostilities in Gaza*

MOLLY: The interest, the media attention, the number of protesters, counter-protesters, sort of outside of the court has nothing like I have ever seen in my five years covering the court.

SEAN: Coming up on *Today, Explained*: a provisional ruling from the ICJ.

[THEME]

SEAN: *Today, Explained*. Sean Rameswaram, here with Molly Quell from *Courthouse News*. She covers the International Court of Justice, where there was big news on Friday:

MOLLY: I think the biggest takeaway from what we saw on Friday when the court issued a ruling on provisional measures, which is sort of like an emergency order, or like an injunction, is that the court sees that there is a plausible risk of genocide being committed in Gaza, and has told Israel that it has to do everything that it can to prevent genocide. It has to allow in humanitarian aid, and it has to report back to the court within a month. And that will probably be sort of extended into a regular reporting period. About what it is doing, yeah, to prevent, and punish, genocide that may be occurring.

SEAN: Before we talked about this particular dispute, can you just tell us about the International Court of Justice? Like what is this court? How do cases there usually work?

MOLLY: The International Court of Justice, sometimes it gets dubbed as the ‘World Court’. It's the highest judicial organ of the United Nations. It was established as a way to sort of keep countries from settling their disputes with military action and instead to take their disputes to a court and have judges settle them instead. It's based in The Hague, so it often gets confused for the ICC, which is the International Criminal Court, where you sort of put actual people on trial, individuals on trial for crimes of genocide or crimes against humanity.

SEAN: So let's talk about this case. How did this all get started?

MOLLY: So in December, South Africa announced that it was going to file proceedings against Israel under the 1948 Genocide Convention. That's a post-World War Two treaty, outlawing genocide. The reason that South Africa brought this case, is because any country that is a party to the Genocide Convention can bring a case under the Genocide Convention. And what South African politicians say is they feel a particular kinship to the experiences of the Palestinians in Gaza because they are experiencing what they say is apartheid. And of course, South Africa very famously had this apartheid state situation for a long time. And so they say that there is, like, a relationship there.

*<CLIP> SOUTH AFRICAN PRESIDENT RAMAPHOSA: Nelson Mandela famously declared that our own freedom as South Africans is incomplete without the freedom of Palestinians.*

SEAN: And why is it another country? Why is it not Palestine? Why is it not the people of Gaza?

MOLLY: Well, Palestine has a, what I like to call, an “it's complicated” relationship with statehood. Palestine is a party to the Genocide Convention. It's a little unclear if Palestine could bring a case at the court, because Palestine is not completely recognized as an independent state. Various different international bodies recognize Palestine in various different ways. And so it's legally untested, basically is what lawyers will tell you. I think that that is, you know, one argument that we would have spent a lot of time, kind of, dragging out whether or not Palestine had standing to bring a case. I think, also, that, yeah, I mean, Palestine clearly has a lot going on at the moment. And that…what South Africa will say is, is that all parties to the Genocide Convention have an obligation to prevent genocide wherever it is happening in the world.

SEAN: Genocide is a big word. How is South Africa arguing its case?

MOLLY: The Genocide Convention outlaws more than just genocide, and this is like sometimes a common misconception. It also outlaws incitement to commit genocide, complicity in genocide, failing to prevent genocide. So there's like, kind of, a longer list of sort of genocide related crimes that are outlawed by the convention. Genocide isn't a numbers game, basically. I mean, this is…it's not about how many people you kill. It's that, if your intention is to kind of wipe a population, a subset of a population, an ethnic group, a religious group, or whatever kind of off the map, that that is enough to be considered genocide. What South Africa says is that it's clear from the Israeli military action post-October 7th, or in response to the Hamas attacks on October 7th, that what Israel is trying to do is destroy it in whole or in part, an ethnic and national ethnic group, the Palestinians.

*<CLIP> TEMBEKA NGCUKAITOBI, SOUTH AFRICAN LAWYER: Prime Minister Netanyahu, in his address to the Israeli forces on 28th October 2023, preparing for the invasion of Gaza, urged the soldiers “to remember what Amalek has done to you.” This refers to the biblical command by God to Saul for the retaliatory destruction of an entire group of people known as the Amalekites.*

MOLLY: And also that they are allowing Israeli officials to go unpunished for committing acts of genocide, for committing incitement. So by saying things that sort of, you know, seem genocidal, that they are failing to do what they can to prevent civilian deaths and protect civilians and civilian infrastructure like hospitals and schools. And all of this sort of, when taken together, is tantamount to genocide.

*<CLIP> ADILA HASSIM, SOUTH AFRICAN LAWYER: And as they try to find food and water for their families, they have been killed if they failed to evacuate. In the places to which they have fled, and even while they attempted to flee along Israeli declared safe routes.*

MOLLY: What you, sort of, see in South Africa's 84 page filing, is a lot of evidence from international observers, you know, different UN bodies about, kind of, how Palestine's who live in the Gaza Strip are treated, the ways, the things that they are experiencing currently. So food shortages, water shortages, lack of access to medical care. You saw a lot of statements from Israeli officials kind of saying things that seem like they could be incitement to genocide. You saw a lot of things in their application about showing video of IDF soldiers, maybe like celebrating civilian deaths, this kind of stuff, which sort of puts together this package that kind of South Africa says shows that that Israel is is committing genocide.

SEAN: And how many times has this court said there's been an attempted genocide? A genocide was committed?

MOLLY: Once. The only other time that the court has ruled that there was a genocide that has occurred, was in a case brought by Bosnia against Serbia. This had to do with the breakup of the former Yugoslavia. And in that case, there was a specific incident that happened where 8000 Muslim men and boys were killed in the town outside the town of Srebrenica. So this gets called this gets called the Srebrenica Genocide or that Srebrenica Massacre. And in that case with the court found, was is that the government of Serbia had failed to prevent non-state actors—there's a lot of militias operating or sort of quasi militias operating—from committing genocide.

SEAN: So what was the defense that Israel's legal team mounted?

MOLLY: So what Israel said, during hearings two weeks ago over provisional measures, is that it has a legal right to defend itself, that the attacks of October 7th by Hamas were horrific and that it has an obligation to respond, to protect its citizens and that. Its actions in Gaza do not amount to genocide, that the threshold for genocide, legally speaking, is quite high, and that this does not meet that threshold.

*<CLIP> TAL BECKER, LEGAL COUNSEL OF THE MINISTRY OF FOREIGN AFFAIRS OF ISRAEL: The key component of genocide—the intention to destroy a people, in whole or in part, is totally lacking. What Israel seeks by operating in Gaza is not to destroy a people, but to protect a people. Its people.*

MOLLY: And it asked the court to chuck the case out in its entirety …  
  
SEAN: Hm!  
  
MOLLY: … And said that there was no need for any provisional measures.

*<CLIP> DR. OMRI SENDER, ISRAELI LAWYER: Consistent case law suggests that assurances of the kind offered by Israel may well render the indication of provisional measures unnecessary.*

SEAN: But the court did not chuck it out.

MOLLY: The court did not. This isn't particularly surprising. The threshold for provisional measures is pretty low at the court, for obvious reasons. Right? These cases take a long time. The idea of provisional measures is to sort of like, calm the situation down a little bit, keep you know, the people in question as protected as much as possible. While the judges are sort of deciding kind of on the underlying issues, the judges only have to think that there's like a plausible risk, that the rights protected by the convention are being violated so that, you know, that there's a plausible risk that genocide is occurring or could occur, in Gaza.

SEAN: Okay. And on Friday, we got a provisional ruling.  
  
MOLLY: Yes.  
  
SEAN: What does it say?

MOLLY: So basically what it ordered, the court ordered, Israel to adhere to six provisional measures.

*<CLIP> ICJ JUDGE JOAN E. DONAGHUE: The State of Israel shall, in accordance with its obligations under the convention on the Prevention and Punishment of the Crime of Genocide…*

MOLLY: It's maybe worth noting that South Africa had asked for nine things. And basically what they said is that, you know, they sort of reiterated this obligation that Israel has to prevent, and punish acts of genocide.

*<CLIP> ICJ JUDGE JOAN E. DONAGHUE: A, killing members of the group. B, causing serious bodily or mental harm to members of the group. C, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and D, imposing measures intended to prevent births within the group.*

MOLLY: That it needs to allow in humanitarian assistance, that it has to report back to the court about the measures that it is taking, that it needs to punish, examples of genocide as they are occurring. And that also can mean things like incitement to commit genocide or failing to preserve evidence of genocide. This kinds of stuff.

SEAN: But this was not a ruling. Most importantly, on whether or not some genocide has been committed.

MOLLY: No, Israel did not convince the court that there's not a plausible risk that genocide is occurring in Gaza. So the court says that there is a risk of this happening, and that Israel has obligations to not allow it to happen, or stop it if it is doing it. But we won't get a ruling as to whether or not there is a genocide occurring until much, much later. I mean, it will be years before we, before we have a definitive verdict on that.

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SEAN: And that's just how it goes at the International Court of Justice.

MOLLY: That is how the wheels of international justice turn.

SCORING BUMP  
  
SEAN: You can read and follow Molly Quell’s work at *Courthouse News* dot com. When we return on *Today, Explained*, what this provisional ruling means for Israel and Gaza.

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[BUMPER]

SEAN: *Today, Explained* is back.

We wanted to find out what this preliminary ruling means for the ongoing war in Gaza, so we reached out to Robert Blecher from the International Crisis Group. He and his outfit are big proponents of peace. Robert’s spent years focusing on the Middle East.

We started with expectations going into this case at the ICJ:

ROB: There are some expectations going into the case, because of the enormity of the events on the ground. So I think on the Palestinian side, you had people hoping that they would get the ultimate outcome for them, which would have been, the court ordering a cease fire. That was always extremely unlikely. And I think most people knew that, even among Palestinians. But I think especially for Palestinians who are in Gaza now, who are living in some appalling conditions, and who really are just absolutely at the end of or beyond the end of their coping capacities, the prospect of anything short of a ceasefire was going to be a disappointment. And sure enough, that indeed is what happened for the people who are living in the worst of conditions. Anything short of, what one of them referred to as a ‘red card’, for Israel was a disappointment. And he said, in the end, ‘They got a yellow card instead of a red card. We wanted them to get a ‘red card.’ I think most people were expecting something along the lines of of what we saw in the end, which was moving forward with it because the bar for plausibility, even though when it comes to something like genocide, you would think it would be fairly high, but like the bar for, for plausibility in this kind of extreme war situation is actually not that high.

SEAN: How consequential is the yellow card?

ROB: It's politically consequential. And, you know, I think you can you can see that it's that there's a change in the international discourse around Israel/Palestine, you can see already during this war, how in the days after October 7th, there was enormous international sympathy with Israel, after the horrendousness of, of those attacks and all the people that were murdered. But we very quickly moved into the war, where in the, what, three plus, months, almost four months since, the balance of victimhood has shifted, right? This is, this is like we frequently see this in Israel, Palestine, and in other places where there's sort of a competition over who's the biggest victim. And this case is going to go on for years, and for years now you're going to have Israel and genocide connected, in, in, in media, in public conversation, and things like that have effects.

SEAN: So, Rob, since we're talking about the politics of this provisional ruling from the International Court of Justice, let's talk about political responses, starting with those in, let's say, Gaza, Palestine.

ROB: Yeah. So in Gaza, people are, people are happy that the case is moving forward and that the case wasn't stopped as it could have been. It could have been thrown out. Even at this early stage. But I think in Gaza, for the people who are suffering most, they wanted to see a further step by the court. They wanted to see a cease fire ordered, you know, for other Palestinian leaders. It's a victory of sorts. It's a recognition of the fact that, Israel's campaign, has…is being seen now as incredibly violent. Its potential as potentially or plausibly in the language of the court, plausibly being, seen as a genocide. And so that's a win in terms of the global narrative.

SEAN: So something akin to a win here on the Palestinian side. What about the Israeli side?

ROB: On the Israeli side, there's outrage. You know, the fact that, Israel which was, you know, born in the ashes of the Holocaust and, you know, for whom that the Holocaust, you know, was, the event which led to the, the Genocide Convention. So for the idea that Israel would be connected to genocide is, just wrong and offensive, for many in Israel,

*<CLIP> FORBES:*

*ISRAEL PRIME MINISTER BENJAMIN NETANYAHU: The charge of genocide leveled against Israel is not only false, it’s outrageous and decent people everywhere should reject it. On the eve of Holocaust Remembrance Day, I pledge as Israel’s prime minister: Never again.*

ROB: And so there's a good deal of, there's a good deal of consternation about the fact that the court would have gone this way. But among the leadership, it was also expected that I think everybody was thinking that the court was going to take some kind of middle ground here. They were not going to order a cease fire, but they were not going to throw out the case. And so they were somewhere in the middle with these provisional measures, and even the Israeli, ad hoc justice, you know, each, each of the sides gets to appoint a justice, to sit with the rest of the justices of the, of the ICJ. Even the Israeli justice, voted with the vast majority on two of the provisional measures. One of them was the necessity of increasing humanitarian aid and basic goods and essential services. So, you know, when you even have the Israeli justice voting on positively or voting affirmatively on that issue, you know, you can see how among the establishment in Israel, they knew what was coming.

SEAN: So how does the International Court of Justice enforce its ‘yellow card?’ How does it make sure that people in Gaza get more humanitarian aid, that that Israel prevent a genocide?

ROB: It doesn't. There is no enforcement mechanism for the ICJ. If there were to be an enforcement mechanism, it would be the UN Security Council. So the Security Council would need to follow up, and pass a resolution which would be binding, and there would be the potential for enforcement. That's extremely unlikely to happen in this case because of the political shield, the veto that the US has at the Security Council. And it will use, to prevent any kind of follow up. But I think it's worth adding here that even though most people are looking at this and saying, well, there's no enforcement mechanism, it's interesting to look at what's happened in Israel over the last couple days.

SEAN: Okay, so not a lot of teeth here from the International Court of Justice, which we've covered on the show before. And yet we get this provisional ruling on Friday. And by Sunday we're seeing news that there might be a two month ceasefire between Hamas and Israel. Is that related, Rob?

ROB: You know, I would say that the ICJ ruling is coming together with a bunch of other factors that is creating pressure on Israel to change the way that it's conducting this campaign. So it's the ICJ ruling. It's also the fact that there is growing frustration in Washington with the fact that Washington has been pushing for more humanitarian aid, for figuring out how to get to a cease fire, or for figuring out what a day after in Gaza officially would look like. Obviously there's a lot of international pressure from other, addresses, not just from the U.S. So when you put the ICJ together with a bunch of other stuff, there's a lot of pressure on Israel. And I would say this just ups the ante. I think if you want to look for specific consequences, you could look on a slightly smaller scale. Over the past week. There have been protesters in Israel blocking the access of even the small amount of humanitarian aid that Israel has been letting in. There have been Israeli protesters, right. People on the far right, and also some of the hostage families blocking those trucks from moving into Gaza. Israel was not preventing those protests until the ICJ decision came down. After the ICJ decision came down, requiring more humanitarian access, more humanitarian goods, the next day, Israel cleaned out those protesters so the trucks could go in. That's not a coincidence. So, you know, I think you can say that even if Israel rejects officially and the Prime minister stands up and rails against how outrageous the judgment is. When you look at what's happening on the ground, they don't want to do things now that are going to be used as evidence or leverage against them later in the process.

SEAN: Do you think ultimately that's what this was all about? If, if, if everyone knew going into this that a genocide ruling would take years, that, that the International Court of Justice doesn't have teeth, that that any enforcement would have to come through the UN Security Council on which the United States sits and would certainly veto any such decision, that this ultimately was just about putting more pressure to get humanitarian aid into Gaza, to put more pressure to get a ceasefire between Hamas and Israel?

ROB: That could have been one motivation. I think, I think it probably was one of South Africa's considerations, but I think more broadly, you're seeing the shift in the international or global discourse around Israel-Palestine, and actors in the so-called global South, are becoming more assertive.

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ROB: They've seen, what, leaving, the supposed peace process to the U.S., and in other traditional actors has yielded, which is not much. And, when you look around the world now increasingly a lot of middle powers, as they're often called outside of the West, are exerting, exerting their, their, you know, whether its moral authority or their, or their are their or the power of their arms industry or their economic power. I think you're you're seeing that happen in a number of different consequences. And one of the, one of the, one of the weapons, I suppose you could say, or one of the capacities or, of South Africa, is is a moral one is a moral credibility on the basis of the fight against apartheid. And they're mobilizing that in the international sphere in a way which they have not before. And they're trying to change the way people talk about Israel/Palestine.

SCORING BUMP

SEAN: That was Rob Blecher. He’s the ‘Future of Conflict’ director at the International Crisis Group. Our program today was put together by Haleema Shah and Victoria Chamberlin with lots of help from Isabel Angell, Amanda Lewellyn, Matthew Collette, Laura Bullard and Patrick Boyd. It’s *Today, Explained*.

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[10 SECONDS OF SILENCE]