



HISTORY IS NEITHER WRONG NOR RIGHT

DEAR MADAM,

The article in the April 2024 edition of *Advocate*, titled “The Right Side of History: SA at the ICJ, again” and much of the other commentary in the edition on the ICJ’s decision in the case of South Africa versus Israel refer.

The core findings of the ICJ in the case read thus:
“At least some of the acts and omissions **alleged by South Africa** to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.”¹

Further 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.”²

These findings are at the very epicentre of the decision. Justice Donoghue has recently said that the court did not find that Israel had committed genocide or was plausibly doing so. It was perhaps as a result of an avalanche of overly slanted post-judgment comments that in her BBC interview of 26 April 2024,³ Justice Donoghue pointed out that the court “decided that the Palestinians had a plausible right to be protected from genocide and that South Africa had the right to present that claim in the court ... But it did not decide – and this is something where I’m correcting what’s often said in the media – it didn’t decide that the claim of genocide was plausible ... the [media] shorthand that often appears, which is that there’s a plausible case of genocide, isn’t what the court decided.”

While authorial intent does not find a place in the basket of *Endumeni*⁴ interpretative considerations, Justice Donoghue’s clarifications are both plainly correct and significantly important. In contrast, much of this journal’s April’s edition reduced the ICJ judgment (and its context) to a triumph over Zionism and Israel both. It is thus perhaps unsurprising that the edition contains several inaccurate statements to the effect that the Court found that it is plausible that Israel is committing genocide. From this inaccuracy it is but a short polemical leap for the author of “*The right side of history: SA at the ICJ, again*” to declaim as a fact that the basis of South Africa’s case is the fact that Israel has and is committing genocide against the Palestinian people.⁵

In furthering the above inaccuracy both the title and tenor of the article make much use of that tired and slightly Orwellian phrase, “the right side of history”. It is noteworthy that Dr Martin Luther King himself despite offering hope that an arc of history bends towards justice recognised “that human progress never rolls in on wheels of historical inevitability”.⁶

An ideology of history as moral progress is profoundly problematic. The claim that history renders moral verdicts is a hollow one. On occasion, morality improves over time, as with the collapse of apartheid and Eastern European Communism in the 1980s. That demise nonetheless was no more on the right-side of history’s corridor, any more than that the global resurgence of neo-fascism and authoritarianism represents history’s Trumpian verdict on the first quarter of the 21st century. As an American commentator has noted: “*The problem isn’t the belief in moral right and wrong but the belief that history manifests and reveals them in some natural way.*”⁷

An inherent assumption underlying much of the edition’s critique of the ICJ’s decision, is that the State of Israel is existentially sunken in the mire of history’s wrong side. That assumption is troublingly Manichean. It is falsely simplistic to characterise the massacre of 7 October 2023 and its horrifying aftermaths as a battle between morally good victims (Palestinians) and evil oppressors (Israelis). The history of conflict between Israel and Palestine is, to put it at its mildest, highly contested. The best and most humane insights on that conflict require nuanced understanding and judgment.

As I write the merits of South Africa’s case (in particular its allegations of genocide) have yet to be adjudicated. There have been no factual findings by the ICJ as to whether the State of Israel’s conduct in the war of 7 October 2023 transgressed from self-defence to something far, far worse. The reductionist equating of the State Israel to an apartheid genocidaire entity nonetheless permeates so much of April’s edition. That mischaracterisation is ahistorical, lacking in any nuance and is unworthy of the space given to it in the April edition. **A**

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Notes

- 1 Paragraph 30 of the order of the ICJ dated 26 January 2004, **bolding** added
- 2 Paragraph 36 of the Order.
- 3 On the BBC program “Hard Talk”.
- 4 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
- 5 *Advocate* (April 2024) at p 56.
- 6 Dr. Martin Luther King, Jr., from *Letter from a Birmingham Jail* (April 16, 1963).
- 7 Jacob T. Levy, in *VOX* (April 3, 2019) [“*The idea of a “wrong side of history” will be considered unthinkable 50 years from now*”].