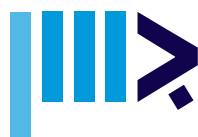


**INTERNATIONAL COURT OF JUSTICE  
ORDER OF 26 JANUARY 2024  
FOR PROVISIONAL MEASURES IN  
*SOUTH AFRICA V ISRAEL***



المعهد العالمي للدراسات الاستراتيجية  
GLOBAL INSTITUTE FOR STRATEGIC RESEARCH

# INTERNATIONAL COURT OF JUSTICE ORDER OF 26 JANUARY 2024 FOR PROVISIONAL MEASURES IN *SOUTH AFRICA V ISRAEL*

**Paul Porteous**

“*In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the plausible rights in question in these proceedings, namely the right of Palestinians in the Gaza Strip to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention ... are of such a nature that prejudice to them is capable of causing irreparable harm...*”<sup>1</sup>

Paragraph 66, International Court of Justice Order of 26 January 2024 for Provisional Measures in *South Africa v Israel*

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# Summary

As a signatory, Israel is already bound by the 1948 Genocide Convention. The question is whether their actions currently constitute Genocide. The International Court of Justice (ICJ) Order for Provisional Measures makes clear that Israel must abide by the Convention and specifically calls on Israel to ensure it does not commit killing, serious bodily or mental harm, imposition of life conditions to bring about physical destruction or imposing of measures to prevent births with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The ICJ Order provides yet another leverage point for highlighting the human toll of the Gaza violence. It is a direct outcome of the failure of the UN system, especially the UN Security Council, to respond to the aggression in Gaza. However, in the absence of practical outcomes resulting from the ICJ Order, the Gaza conflict will continue to undermine trust in the international system. Without the political will to halt arms shipments, recognise Palestinian statehood and human rights, an increase in regional instability with potentially apocalyptic outcomes remains.

# International Court of Justice

More than a week after the ICJ Order, it is difficult not to feel despondent about the practical outcomes. Israel has not reduced its bombardment of Gaza and in some cases has even expanded both the intensity and areas under attack<sup>2</sup>. At the same time, the conflict is expanding to neighbouring countries and, combined with reports that Hamas is re-establishing control over areas of northern Gaza<sup>3</sup>, demonstrates the overall failure of Israeli policy more than any Court finding. Reactions to the ICJ Order are mixed and predictable – with both sides claiming victory. South Africa argues the Order implies a “ceasefire” while Israel continues to argue that all the killings are without Genocidal intent, which is a key component of Article II of the Genocide Convention. This is a conflict mired in propaganda and spin from emotional rhetoric on one hand to wordsmithing legal jargon on the other. However, the killing continues.

While there has been significant criticism of the ICJ’s failure to call for a “ceasefire”<sup>4</sup>, there are important aspects of the decision which provide some leverage for progress. In 2022, the ICJ ordered Russia to suspend military operations in Ukraine<sup>5</sup> and expectations were raised that the decision might provide a precedent for this case. However, this was a less likely outcome in the *South Africa v Israel* case for three key reasons. Firstly, the *Ukraine v Russia* case is legally different. Ukraine asked for Provisional Measures on the basis of Russia falsely claiming its invasion was due to a Ukrainian Genocide against Russians living in Eastern Ukraine. The case was essentially about abuse of the Genocide Convention by Russia. In contrast, South Africa accused Israel directly of Genocide. In response, Israel continues to argue it has the right to “self-defence” and ordering a “ceasefire” would preclude preventative military action.<sup>6</sup> Secondly, the ICJ was called upon to consider only the Genocide Convention, not broader International Humanitarian Law breaches. Thirdly, in geopolitical terms, a call for an outright ceasefire would almost guarantee its rejection at the UN Security Council. The ICJ has no independent enforcement mechanism and previous rulings, such as in the case of Ukraine, have been simply ignored.<sup>7</sup>

The State of Israel seems to be taking a similar position, with explicit statements saying the ruling will have little effect on their attacks in Gaza<sup>8</sup>, and in practice that seems to be the case. Importantly, the ICJ Order was not in any way a final judgement on whether Israel is in breach of the Genocide Convention but rather provided provisional measures on the basis that the rights of the Palestinians to be protected from genocidal acts are plausible, with any final judgement potentially years away.

# Background

The ICJ is the principal judicial organ of the United Nations (UN). International law regulates relationships among states and non-state actors in the international arena, especially in relation to security, political, economic, social and human rights. All nations have an obligation to protect and promote human rights<sup>9</sup>. One branch of the law, International Humanitarian Law (IHL – also known as the laws of war), provide certain protections specifically during war. IHL consist of the four 1949 Geneva Conventions, their two Additional Protocols of 1977, the Hague Conventions of 1899 and 1907, in addition to specific weapons conventions. As an occupying power, Israel must comply with all of IHL. For example, IHL forbids:

- ▶ Targeting of civilians
- ▶ Collective punishment
- ▶ Indiscriminate area bombing
- ▶ Obstruction of humanitarian relief including medical, water, food, shelter
- ▶ Forceable transfer of civilian populations
- ▶ Attacks on hospitals and relief organisations
- ▶ Attacks on cultural and religious buildings
- ▶ Systematic destruction of homes and infrastructure

Although Israel has claimed their actions are consistent with International Law as self-defence, the UN has argued these actions disproportionately affect civilians in a clear breach of IHL which leaves Israel vulnerable to future legal cases<sup>10</sup>. Indeed, the current ICJ Order states that IHL applies to all parties to a conflict<sup>11</sup>, which may lead to further cases in the future, including through the International Criminal Court.

However, South Africa’s case is limited only to breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)<sup>12</sup>. This confers the ICJ direct jurisdiction over the dispute, in contrast to IHL which does not provide the ICJ with the same direct jurisdiction. This distinction limited the ICJ to only examining the actions of Israel under the Genocide Convention. Article II of the 1948 Convention defines genocide as specified acts “...committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...”<sup>13</sup>

Generally, the ICJ will consider two aspects of a case: (1) Jurisdiction and (2) Judgement on the merits of the case. These can take many years to decide. In the meantime, South Africa sought and was granted an urgent Order for “Provisional Measures” which can be made by the Court “to remove the risk of irreparable harm”<sup>14</sup>. That is, the Court was satisfied that without the Order, irreparable prejudice will be caused to the plausible rights of the Palestinians to be protected from genocidal acts.



# The Orders for Provisional Measures

The ICJ found “*the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment*”<sup>15</sup> and there was a “*real and imminent risk*”<sup>16</sup> that violations of the Genocide Convention could plausibly occur. It ordered the following<sup>17</sup>.

- 1. THE STATE OF ISRAEL SHALL, IN ACCORDANCE WITH ITS OBLIGATIONS UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, IN RELATION TO PALESTINIANS IN GAZA, TAKE ALL MEASURES WITHIN ITS POWER TO PREVENT THE COMMISSION OF ALL ACTS WITHIN THE SCOPE OF ARTICLE II OF THIS CONVENTION, IN PARTICULAR:**
  - ▷ **KILLING MEMBERS OF THE GROUP;**
  - ▷ **CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP;**
  - ▷ **DELIBERATELY INFLICTING ON THE GROUP CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS PHYSICAL DESTRUCTION IN WHOLE OR IN PART; AND**
  - ▷ **IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP;**
  
- 2. THE STATE OF ISRAEL SHALL ENSURE WITH IMMEDIATE EFFECT THAT ITS MILITARY DOES NOT COMMIT ANY ACTS DESCRIBED IN POINT 1 ABOVE;**

The importance of these two Provisional Measures should not be underestimated. If the ICJ Order is not complied with, it falls to the UN Security Council to address enforcement. An Order calling for a full “ceasefire” may not have survived a likely US veto. However, measures calling on Israel to ensure its military does not commit killings and harm under the Genocide Convention makes it more likely the UN Security Council may support the ICJ Order. As has been pointed out by many commentators, it would be difficult for Israel to comply with these Provisional Measures without cessation, or at least a major strategic change, to its widespread attacks in Gaza.<sup>18</sup>

- 3. THE STATE OF ISRAEL SHALL TAKE ALL MEASURES WITHIN ITS POWER TO PREVENT AND PUNISH THE DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE IN RELATION TO MEMBERS OF THE PALESTINIAN GROUP IN THE GAZA STRIP;**

A strong part of the South African case relied on quotes directly from senior Israeli government officials ranging from calling for the total destruction of Gaza to references to Palestinians as “human animals”.<sup>19</sup> This order calls out the language of Genocide and should at least make Israeli politicians more cautious in encouraging and celebrating human rights violations in Gaza by the Israeli Defence Force. However, since the ICJ Order, senior Israeli government Ministers have continued to make inflammatory statements.<sup>20</sup>

- 4. THE STATE OF ISRAEL SHALL TAKE IMMEDIATE AND EFFECTIVE MEASURES TO ENABLE THE PROVISION OF URGENTLY NEEDED BASIC SERVICES AND HUMANITARIAN ASSISTANCE TO ADDRESS THE ADVERSE CONDITIONS OF LIFE FACED BY PALESTINIANS IN THE GAZA STRIP;**

This order is marked by calling on Israel to “enable” basic services and humanitarian assistance. This places a positive duty on Israel to ensure such assistance occurs, not just stop preventing the movement of humanitarian aid. This is a recognition that Israel effectively controls and

occupies Gaza – something the UN General Assembly had already re-asserted in its resolution of 30 December 2022<sup>21</sup> and referred to the ICJ for an advisory opinion. However, since this most recent ICJ Provisional Order, Israel has promoted the suspension of funds for UNRWA, which is the only agency effectively delivering basic services and mass humanitarian assistance to over 2 million Palestinians.<sup>22</sup>

**5. THE STATE OF ISRAEL SHALL TAKE EFFECTIVE MEASURES TO PREVENT THE DESTRUCTION AND ENSURE THE PRESERVATION OF EVIDENCE RELATED TO ALLEGATIONS OF ACTS WITHIN THE SCOPE OF ARTICLE II AND ARTICLE III OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE AGAINST MEMBERS OF THE PALESTINIAN GROUP IN THE GAZA STRIP;**

The Court was clearly concerned about the destruction of evidence, which has been a feature of previous conflicts in the world. In Gaza, recent reports of massacres and mass graves<sup>23</sup> could form part of any future cases by the International Criminal Court.

**6. THE STATE OF ISRAEL SHALL SUBMIT A REPORT TO THE COURT ON ALL MEASURES TAKEN TO GIVE EFFECT TO THIS ORDER WITHIN ONE MONTH AS FROM THE DATE OF THIS ORDER.**

The period of one month to report back on measures is a relatively short time frame, highlighting the urgency with which the Court expects action.

## What next?

In light of the continuing hostilities and breaches of the ICJ Order, one wonders what Israel intends to report to the Court in just a few weeks' time? With the ICJ having no enforcement mechanism independent of the UN Security Council, might Israel simply ignore them? It is possible, as Israel's political elite continue to display a myopic obsession with unrealistic demands about permanent control over all of Gaza. Partly this is to do with:

- ▶ Netanyahu's domestic political problems. Thousands of people were demonstrating to demand he step down prior to the 7 October attacks. Added to this are his legal woes around corruption which may come into play once he is no longer Prime Minister.<sup>24</sup>
- ▶ The agenda of the most far-right wing coalition government in Israel's history<sup>25</sup>
- ▶ The ongoing hostage situation both in terms of those Israelis held by Hamas and the thousands of Palestinian prisoners held by Israel
- ▶ Israel's criticism of mediators involved in trying to broker any cessation of hostilities<sup>26</sup>
- ▶ A deteriorating domestic security situation including widening hostilities in the West Bank and continuing to permit and support Settler violence

However, there are significant risks to Israel (and the rest of the world):

- ▶ Even being accused of "genocide" at the ICJ has resulted in enormous moral damage
- ▶ Increasing impatience by neighbouring countries trying to mediate including Qatar, Egypt and Jordan
- ▶ Falling domestic political support for Israel among voters in countries such as the US and UK<sup>27</sup>
- ▶ A restless US Congress which is challenging President Biden's continuing transfer of weapons to Israel in breach of their own Leahy laws which restrict such transfers where there are human rights violations<sup>28</sup>
- ▶ Nations providing material support to Israel risk finding themselves complicit in breaches of the Genocide Convention – 800 senior officials in the US and EU recently signed a joint statement criticising this complicity<sup>29</sup>
- ▶ The UK Foreign Minister is already flagging the possibility of formal UK recognition of a Palestinian state<sup>30</sup> with the US State Department "*actively pursuing the establishment of an independent Palestinian state*"<sup>31</sup>
- ▶ The suspension of funding for UNRWA has been called out as "collective punishment"<sup>32</sup> and has been met with significant pushback around the world, with only close allies of Israel halting funding
- ▶ The conflict now has the potential to spin out of control into regional areas with apocalyptic outcomes
- ▶ Inter-generational trauma will potentially fan the flames of global terrorism for decades to come

The ICJ Order for Provisional Measures is a direct response to the failure of the UN system, especially the UN Security Council, to respond to the aggression in Gaza. The mood shift was well represented by the UN General Assembly Resolution on 12 December 2023 “*Protection of civilians and upholding legal and humanitarian obligations*”<sup>33</sup>, calling for an immediate humanitarian ceasefire and supported by 153 nations. Even at that time, the issue of proportionality was stark with one delegate stating “*Israel has dropped 25,000 tons of explosives on Gaza, nearly the equivalent of the atomic bombs dropped on Hiroshima and Nagasaki*”<sup>34</sup>.

There is a new boldness by nations in the Global South which are now openly critical of the Western bias of the international system<sup>35</sup> and can be expected to push the UN to support the ICJ decision. It will be difficult for the US or UK to reject such a motion which is simply a statement of upholding international law and abiding by a legal directive<sup>36</sup>. The risk of rejecting this damages the whole “international order”. While the UN system is not perfect, it is the only one we have. If the UN did not currently exist, any attempt to create it in the current international geo-political environment would be doomed to failure. There is much at stake if the UN is seen to fail, especially for mitigating conflicts worldwide.

Moving forward requires an immediate ceasefire and recognition of Palestinian statehood. In addition to territorial integrity, there needs to be a human development dimension that directly acknowledges the basic human rights of Palestinians and their identity. The ICJ highlighted current rhetoric and action which dehumanises Palestinians. Recognition of Palestinian human rights immediately triggers the right to all human basic needs which are not currently being met. Many of these are also outlined in the UN Sustainable Development Goals (SDG) which were adopted by all UN Member States in 2015<sup>37</sup>. Applying the SDGs to Palestine covers all key areas including alleviation of poverty, health, education, energy, water, industry and infrastructure etc. It puts Palestine in the mainstream of world development rather than treating it as an outlier because of the occupation. This builds the capacity to put the Palestinian people in the driver’s seat of development to engage with a challenging future.

# Conclusion

Historically, the terms apartheid, collective punishment and settler-colonial state have been used regularly in international forums such as the UN to describe the actions of the State of Israel in Gaza and the West Bank. Now the term “Genocide” joins these ranks, providing both moral and political embarrassment for Israel. The lack of any back down by its political elites means continuing external political pressure will be required from its main supporters, especially the US and UK. While the ICJ processes are too slow for modern conflicts, they do provide an important backstop when the rest of the system fails. The ICJ Order for Provisional Measures provides yet another leverage point for highlighting the human toll of the Gaza violence. Israel continues to operate seemingly with impunity, while claiming it respects international law. That will be tested in a few weeks’ time when they will need to report back to the ICJ on actions they have taken to enable the Provisional Measures. However, the only real impact will be when weapons shipments are stopped, Palestinian statehood is recognised and there is an international commitment to the human rights of the Palestinian people.

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#### **DECLARATION OF COMPETING INTEREST**

The author declares that he has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.



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