

GENEVA INTERNATIONAL CENTRE FOR JUSTICE (GICJ)

# SOUTH AFRICA v. ISRAEL

UNDERSTANDING THE INTERNATIONAL  
COURT OF JUSTICE LAWSUIT



FEBRUARY 2024





*South Africa v. Israel:*

**Understanding the Most Significant Legal Challenge for Palestinian Rights to Date**

**Geneva International Centre for Justice (GICJ)**

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## Introduction

The ongoing humanitarian crisis in Gaza is among the most devastating in recent history. Following the events of 7 October 2024, the State of Israel has waged a brutal military campaign in the region, showing no indication of relenting. As of 12 February 2024, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimates that over 28,000 Palestinians have been killed, with a further 67,000 injured, and over 1.7 million displaced from their homes.<sup>1</sup> Over 70% of these fatalities have been of women and children. Conditions are so dire that representatives of international humanitarian organisations have claimed to “have seen nothing like what they have seen today in Gaza”, according to the United Nations (UN) Secretary-General.<sup>2</sup> The Executive Director of the United Nations International Children’s Emergency Fund (UNICEF) has further stated that the region is “the most dangerous place in the world to be a child”.<sup>3</sup>



As the world watches this devastation unfold, many onlookers have wondered whether Israel’s actions, widely believed to violate international law, would be adequately challenged. The Republic of South Africa was the first to answer the call. On 29 December 2023, South African President Cyril Ramaphosa announced that his country had filed a lawsuit to the International Court of Justice (ICJ) claiming that Israel had committed crimes amounting to genocide against the Palestinian people. The 84-page document officially requested “an expedited hearing for its request for the indication of provisional measures” and that “the Court should order Israel to cease killing and causing serious mental and bodily harm to Palestinian people in Gaza, to cease the deliberate infliction of conditions of life calculated to bring about their physical destruction as a group, to prevent and punish direct and public

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<sup>1</sup> OCHA: Hostilities in the Gaza Strip and Israel - reported impact | Day 125.

<sup>2</sup> South Africa: Application instituting proceedings and Request for the indication of provisional measures, para. 40.

<sup>3</sup> UNICEF Geneva Palais briefing note - Gaza: The world’s most dangerous place to be a child.

incitement to genocide, and to rescind related policies and practices, including regarding the restriction on aid and the issuing of evacuation directives”.<sup>4</sup>

South Africa and Israel each presented their cases before the Court on 11-12 January 2024. Millions worldwide followed the hearings online, eager to witness one of the most important and publicised cases in recent memory. Two weeks later, the Court revealed its decision: a recognition that a genocide may be underway in Gaza, and an order for Israel to cease all military operations deemed to contribute to it. In many ways, this case has marked a pivotal point in the ongoing conflict, and in the history of the Israeli occupation of Palestine more broadly. Understanding it is critical to capturing the legal dimension of this situation. To this end, this report provides an overview of *South Africa v. Israel*. It begins with an analysis of the South African lawsuit, delving into its main arguments, as well as the relief sought from the Court. It then examines the hearings held at The Hague on 11-12 January 2024, providing insights into the arguments presented by both parties. Finally, it discusses the significance of the Court’s decision to grant provisional measures, and its potential implications for the ongoing crisis.



## **Understanding South Africa’s 29 December 2023 Lawsuit**

### *Jurisdiction and Relevant International Law*

South Africa’s central claim to the ICJ is that Israel’s operations in Gaza violate several articles of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’ or ‘Convention’). In particular, the lawsuit cites the following:

- a) *failing to prevent genocide in violation of Article I;*
- b) *committing genocide in violation of Article III (a);*
- c) *conspiring to commit genocide in violation of Article III (b);*

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<sup>4</sup> South Africa: Application instituting proceedings and Request for the indication of provisional measures, para. 6.

- d) *direct and public incitement to commit genocide in violation of Article III (c);*
- e) *attempting to commit genocide in violation of Article III (d);*
- f) *complicity in genocide in violation of Article III (e);*
- g) *failing to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, in violation of Articles I, III, IV and VI;*
- h) *failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide, conspiracy to commit genocide, incitement to genocide, attempted genocide, and complicity in genocide, in violation of Article V; and*
- i) *failing to allow and/or directly or indirectly impeding the investigation by competent international bodies or fact-finding missions of genocidal acts committed against Palestinians in Gaza, including those Palestinians removed by Israeli State agents or forces to Israel, as a necessary and corollary obligation pursuant to Articles I, III, IV, V and VI.<sup>5</sup>*

With both countries being signatories of the Genocide Convention, South Africa is within its rights to submit complaints of violations of its articles to relevant international legal bodies. In this case it has opted to do so with the International Court of Justice, the highest court of the United Nations. In brief, the ICJ is tasked with settling legal disputes between states and giving advisory opinions on legal questions referred to it by the UN General Assembly, the UN Security Council, or other specialized UN agencies and bodies. On occasions such as this, it can also take on cases filed directly by one state against another, provided that both parties are UN members. South Africa contends that the ICJ holds jurisdiction over this case on the basis of Article 36, para. 1 of the Statute of the Court and Article IX of the Genocide Convention. Article IX of the Genocide Convention provides:

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<sup>5</sup> Ibid., para. 110.



*“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”<sup>6</sup>*

It should be noted that the decisions of the Court are binding to the parties involved, but cannot be directly enforced by it. Rulings can nonetheless be brought to the UN Security Council in an attempt to have them implemented. Irrespective of the enforceability of its decisions, the ICJ is widely recognised as an important institution. Its judgments carry weight due both to its existence as a revered forum for the peaceful settlement of international disputes, and to its status as a symbol of justice in the current global order.

#### *South Africa’s Argument*

The jurists behind the lawsuit begin the substantive portion of the case with an outline of its facts. They first provide the context behind the conflict, extensively tracing the long history of occupation the Palestinian people have suffered at the hands of Israeli authorities. Drawing from decades of official UN investigations, reports, statements, and resolutions, they highlight the terrible conditions under which generations Palestinians have lived: forced to leave their homes as Israeli forces increasingly seized their territory, prohibited from accessing the same rights to education, labour and healthcare as the Jewish population, and victimized by a legally enshrined system of discrimination that relegates them to second-class citizenship. In essence, South Africa argues, a system of apartheid. South Africa also documents the thousands of casualties Palestinian civilians – women and children especially – have suffered at the hands of the Israeli Defense Forces (IDF) long prior to the events of 7 October 2023.

With this context established, the lawsuit turns its attention to the conditions that have unfolded since 7 October 2023. South Africa is clear to unequivocally condemn Hamas’ attacks on that day, specifying that any such violence targeted toward civilians is unacceptable – both in terms of the murder

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<sup>6</sup> Ibid., para. 10.

of over 1,200 Israelis and the capture of another 240 as hostages. Its main contention is that the Israeli military response that followed was disproportionate in scale, and has indiscriminately and unjustly targeted Palestinian civilians. The annihilation not only of over 28,000 lives, but of Palestinians' very way of being for generations to come, is the overarching crime South Africa argues amounts to genocide.

For the ongoing military campaign in Gaza to be recognized as genocidal, the South African case aims to establish that it has been conducted in such a way as to bring about the total destruction of the Palestinian people. To that end, eight conditions pointing to a finding of genocide are presented: 1) the killing of Palestinians in Gaza in large numbers; 2) the imposition of serious bodily and mental harm to Palestinian in Gaza, including children; 3) expulsions from homes and mass displacement, alongside the large-scale destruction of homes and residential areas; 4) the deprivation of access to adequate food and water; 5) the deprivation of access to adequate medical care; 6) the deprivation of access to adequate shelter, clothes, hygiene and sanitation; 7) the destruction of the life of the Palestinian people in Gaza; and 8) the imposition of measures intended to prevent Palestinian births.<sup>7</sup>

South Africa offered extensive evidence, based primarily on UN special reports and investigations into the crisis, along with statements from leading international NGOs present in Gaza, to substantiate these claims. The lawsuit addresses in great detail the destruction of thousands of Palestinian families and their homes, as well as institutions key to the functioning of Palestinian life. Among others, these include schools, hospitals, medical facilities, cultural and religious sites, and various bodies of governance. The lawsuit also places significant emphasis on the harm done to thousands of Palestinian children, whose lives have either been ended or completely uprooted at the hands of Israeli forces. Given the scale of the carnage,



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<sup>7</sup> Ibid., para. 43.

any attempt to rebuild the fabric of civilian life in the region will take generations – a task that will unfortunately be left to the Palestinian children now scarred, mentally and physically, by this conflict.

A core element of the argument presented is that the actions of the Israeli military forces constitute collective punishment against the Palestinian people. South Africa notes that the vast majority of the casualties that have occurred thus far are not of Hamas militants, but overwhelmingly of Palestinian civilians. The lawsuit also references a report from a fact-finding mission conducted in Gaza in 2009, in which UN officials determined that the actions of the Israeli military at the time repeatedly failed to distinguish between combatants and civilians, which is prohibited under international humanitarian law.<sup>8</sup> South Africa argues that what is occurring today is an even more egregious case of this violation.

In fact, the South African legal team claims that recent statements from top Israeli politicians and military leaders indicate a clear and demonstrable punitive intent toward the Palestinian people as a whole. Take, for instance, the following statement by Israeli President Isaac Herzog in relation to Palestinians in Gaza, over one million of whom are children:

*“It’s an entire nation out there that is responsible. It’s not true this rhetoric about civilians not aware [and] not involved. It’s absolutely not true. ... and we will fight until we break their backbone.”<sup>9</sup>*



In another alarming statement, Israeli Defence Minister Yoav Gallant announced that Israel would be “imposing a complete siege on Gaza. No electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals, and we are acting accordingly.” He followed this by claiming that Israel had “removed every restriction” on its forces, and that

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<sup>8</sup> Ibid., para. 30.

<sup>9</sup> Ibid., para. 101.

“Gaza won’t return to what it was before. We will eliminate everything. If it doesn’t take one day, it will take a week. It will take weeks or even months, we will reach all places”.<sup>10</sup>

Taking all these elements together – the number of casualties, the scale of the destruction, and the apparent genocidal intent of top officials in its government – South Africa argues that Israel has satisfied the conditions necessary for the ICJ to reach the conclusion that it is guilty of committing genocide in Gaza. Of these points, the matter of intent is particularly salient. Any proclaiming a genocide to be underway must come with the recognition that the actions of the Israeli government in Gaza have been conducted with the intent to bring about the destruction of the Palestinian people, in whole or in part. As will be shown in later sections, arguments over this point proved central to each legal team’s case at the January 2024 hearing.

### *The Relief Sought*

In concluding its lawsuit, South Africa requested that the ICJ adjudge and declare that the State of Israel has breached and continues to breach its obligations under the Genocide Convention. In its plea for urgent provisional measures, it seeks for the Court to call Israel to immediately cease its military onslaught in Gaza to the extent that it contributes to the genocide of the Palestinian people. South Africa also requests that the ICJ demand assurances from Israel of “guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI”.<sup>11</sup>

### **The Hearing: South Africa’s Case**

On 11-12 January 2024, the ICJ hosted its first hearing on the case in order to determine whether it should grant the provisional measures sought by South Africa. This hearing was not about the merits of the case as a whole. A complete ruling from the Court for such applications, as in *Ukraine v. Russian Federation* (2022), takes years to be released. This session was specifically aimed at determining whether

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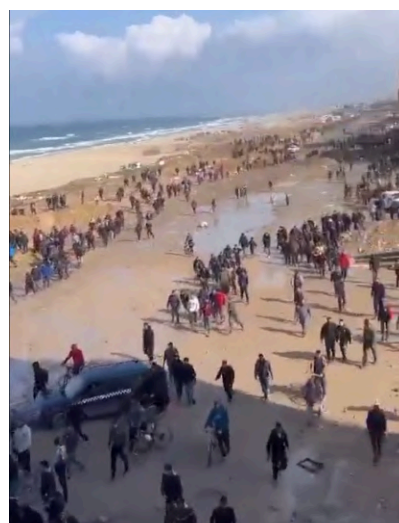
<sup>10</sup> Ibid..

<sup>11</sup> Ibid., para. 111.

the provisional measures sought should be awarded. It is in this context that the two legal teams took turns, one day after the other, to present their arguments to the Court. The filing party went first. This section focuses on the three central themes of South Africa's oral statements: the standard of proof required for the granting of provisional measures; the demonstration of genocidal intent; and the nature of the provisional measures sought.

### 1. *The standard of proof*

Upon demonstrating that the ICJ has jurisdiction over this case, as was described in the lawsuit itself, the South African legal team at The Hague worked diligently to establish the standard of proof required by the Court to issue provisional measures. As explained by Prof. Max Du Plessis, to be granted urgent interim provisional measures, an applicant need not definitively prove its case. It must merely demonstrate to the Court that the rights in dispute are *at least plausible* in a reading of the Genocide Convention, that said measures are urgent and linked to those rights, and that their absence would result in irreparable harm to the group in question. Du Plessis further argued that, in accordance with Article I of the Convention, South Africa also need not demonstrate that Israel has committed genocide (covered in Article III), but that it has merely failed to uphold its commitment to the Convention of preventing genocide. A finding confirming the indiscriminate targeting of Palestinians, making no distinction between militants and civilians, satisfies this criterion. It should be noted that South Africa indeed claims that Israel is committing genocide in Gaza. This additional specificity regarding its burden of proof was meant primarily to make the country's case more difficult for the Court to dismiss.



### 2. *Genocidal intent*

Finding a plausible intent to commit genocide from Israel was essential to any ruling in South Africa's favor. In *Yugoslavia v. Belgium* (1999), the Court rejected Yugoslavia's request for provisional

measures compelling Belgium to “cease immediately its acts of use of force”. It reasoned that the applicant ultimately did not demonstrate that Belgium and its allies had shown a clear and demonstrable intent to commit genocide against the Yugoslav people, thereby failing to meet the criteria of the Genocide Convention. Aware of this precedent, South Africa focused on showing that Israel indeed exhibited, from its highest-ranking government and military officials to the soldiers carrying out operations in Gaza, an intent to bring about the destruction of the Palestinian people.

The issue of genocidal intent was heavily emphasized in the speech given by Mr Tembeka



Ngcukaitobi before the Court. South Africa repeatedly presented evidence indicating that the IDF’s operations could not be interpreted as anything but the targeting of Palestinians’ way of life. Ngcukaitobi argued that the relentless bombing of family homes and civilian infrastructure, coupled with the withholding of access to humanitarian aid, pointed to a genocidal intent “systematic in its character and form”.

That intent became only more apparent as Ngcukaitobi cited multiple statements from Israeli officials suggesting a “language of systemic dehumanisation” that made no distinction between militants and civilians.

In addition to these, South Africa presented several videos it believed to demonstrate the internalisation of such a belief in Israeli soldiers. One involved a group chanting in unison for the erasing of Gaza as a whole, while another showed them gleefully recording entire neighborhoods being turned to rubble. One soldier even posted a video to social media against the backdrop of the ruins of Al Azhar University, with the caption: “Once upon a time, there was a university in Gaza, in practice, a school for murderers and human animals”. Such widespread and hateful rhetoric does not manifest from nowhere. It comes from a powerful narrative, disseminated at the highest levels of government, that proclaims that the preservation of Israel must come at the expense of the lives of those it has occupied. That this narrative

would lead to the genocidal intent South Africa argues for is reprehensible, but unfortunately, unsurprising.

### 3. *The provisional measures sought*

As previously discussed, ICJ cases such as this one typically take years to reach a verdict. The timeliness of this hearing therefore derived from the Court's ability to quickly deliver provisional measures requiring the cessation of military activities deemed to contribute to genocide. To this end, the oral statement of Professor Lowe addressed the relief South Africa sought from the Court in relation to Israel's operations in Gaza. He began by first identifying how the case, as argued by his preceding colleagues, satisfies the criteria for ordering provisional measures. These are:

1. That the Court has *prima facie* jurisdiction over this matter.
2. That South Africa has standing to submit the dispute with Israel.
3. That the rights claimed plausibly exist, and that there is a link between those rights and the measures requested.
4. That there is a risk of irreparable prejudice to the rights in question, and that there is urgency in relation to said risk.

With these established, Professor Lowe next explained why South Africa requested an order of provisional measures so urgently from the Court. The first reason has to do with the sheer scale of the destruction occurring in Gaza, which he argued only be seen as an attempt to destroy the region and its citizens. This, he claimed, is unlikely to change, as Israel has publicly asserted that it will not scale back its military operations. The magnitude of the ongoing destruction – estimated currently at over 28,000 casualties – has thus compelled South Africa to fulfill its obligation to prevent genocide under the Convention by petitioning the Court to call for an immediate end to the violence. The second reason concerns South Africa's belief that the Court needed to issue orders to safeguard the integrity of its proceedings and the final efficacy of its ruling. The ICJ has previously issued similar orders in the Bosnian genocide case, where it had demanded the cessation of actions that contributed to its genocide at

the time. Without such non-aggravation orders, Professor Lowe argued, there is a risk that the respondent will rush to complete its unlawful conduct before the Court's final ruling, rendering it and the institution itself irrelevant.

Keeping these considerations in mind, South Africa requested nine provisional measures from the Court, listed below. Among these are: the order that Israel immediately suspend its military operations in and against Gaza; that South Africa and Israel each fulfill their obligations under the Genocide Convention; and that Israel shall not to kill the Palestinian people, cause serious bodily harm to them, or deliberately inflict conditions calculated to bring about their destruction in whole or in part. South Africa also called on the Court to demand that Israel no longer deprive Palestinians of access to humanitarian resources, and that it ceases their expulsion and forced displacement from their homes. To ensure compliance with the requested orders, the lawsuit also called for Israel to submit specific reports on what it is doing to implement them. As Professor Lowe claimed, general assurances are not enough. Reports published via the Court are an essential element of accountability.

South Africa's full list of requests for provisional measures from the Court is as follows:

1. *That the Republic of South Africa and the State of Israel each have a duty to act in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Palestinian group, to take all reasonable measures within their power to prevent genocide; and*
2. *That the State of Israel:*
  - a. *has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Article I, read in conjunction with Article II, and Articles III (a), III (b), III (c), III (d), III (e), IV, V and VI;*
  - b. *must cease forthwith any acts and measures in breach of those obligations, including such acts or measures which would be capable of killing or continuing to kill Palestinians, or causing or continuing to cause serious bodily or mental harm to*



- Palestinians or deliberately inflicting on their group, or continuing to inflict on their 72 group, conditions of life calculated to bring about its physical destruction in whole or in part, and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI;*
- c. must ensure that persons committing genocide, conspiring to commit genocide, directly and publicly inciting genocide, attempting to commit genocide and complicit in genocide contrary to Articles I, III (a), III (b), III (c), III (d) and III (e) are punished by a competent national or international tribunal, as required by Articles I, IV, V and VI;*
- d. to that end and in furtherance of those obligations arising under Articles I, IV, V and VI, must collect and conserve evidence and ensure, allow and/or not inhibit directly or indirectly the collection and conservation of evidence of genocidal acts committed against Palestinians in Gaza, including such members of the group displaced from Gaza;*
- e. must perform the obligations of reparation in the interest of Palestinian victims, including but not limited to allowing the safe and dignified return of forcibly displaced and/or abducted Palestinians to their homes, respect for their full human rights and protection against further discrimination, persecution, and other related acts, and provide for the reconstruction of what it has destroyed in Gaza, consistent with the obligation to prevent genocide under Article I; and*
- f. must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III (a), III (b), III (c), III (d), III (e), IV, V and VI.<sup>12</sup>*

The South African legal team during this first hearing worked extensively to show that Israel had demonstrated, through its actions and statements from its officials, a clear genocidal intent toward the Palestinian people. As his colleagues had explained, South Africa needed only prove that the rights for

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<sup>12</sup> Ibid., para. 111.

which it seeks protection are “at least plausible” under the Convention. This threshold does not require the Court to determine whether the rights South Africa wishes to see protected exist. They must merely be granted in a possible interpretation of the Convention. According to Professor Lowe, contrary to Israel’s claim that its war is on Hamas and not the Palestinian people, the country’s military operations suggest an indiscriminate attack on the entire population of Gaza, with no regard to questions of innocence or guilt. Such a state of affairs merits the Court’s imposition of the requested orders. As Lowe would later put it:

*“This is not a moment for the Court to sit back and be silent. It is necessary that it assert its authority, and itself order compliance with the obligations under the Genocide Convention. It is hard to think of a case in recent history which has been so important for the future of international law and of this court.”*

## **Israel’s Defense**

Israel presented its arguments before the Court on the second day of the hearing. The country’s legal defense for its actions in Gaza relied on two key points: first, that it was operating in self-defence following the attacks of 7 October 2023; and second, that its military activities were not conducted with genocidal intent. The Israeli legal team reasoned that if it could convince the 17-judge bench of these notions, it could not be found to violate the Genocide Convention, and would therefore avoid the provisional measures South Africa sought.

### *1. Self-defence*

Much of Israel’s case throughout the hearing involved harkening back to the events of 7 October 2023 in order to justify the country’s destruction of Gaza. Several jurists on the country’s behalf claimed that the violence perpetrated against civilians that day justified a full-scale operation to erase Hamas from existence and prevent such action in the future. They further claimed that the ongoing hostage situation required continued military advances in the region, and that Israeli leadership had made clear its intention to order them until all captives were returned.

Any harm done to civilians, as on 7 October 2023, is unacceptable and should be condemned. The issue in this case is the lack of proportionality to the country's military response, which has escalated beyond the point of reasonable self-defence. In addition to the fact that Israel is an occupying power that has displaced Palestinians for over 75 years, which experts in international law believe disqualifies it from claiming self-defence against the territory it controls, it has conducted its operations in Gaza with such violence that civilians, the majority of whom are women and children, have disproportionately suffered by its hand. The scale of the destruction is so great that the international community, aware of Hamas' own violent attacks, has overwhelmingly expressed its concern over Israel's attempt to "defend itself". On 12 December 2023, the UN General Assembly passed a resolution calling for an "immediate humanitarian ceasefire in Gaza". The vote saw 153 countries in favor, with 23 abstentions and only 10 votes against. That the international community so thoroughly recognized that what is unfolding in Gaza is nothing short of a humanitarian crisis needing immediate respite is suggestive of the disproportionate scale of Israel's retaliation. The claim of self-defence can only go so far, and Israel has long passed that breaking point.

## *2. The lack of genocidal intent*

Israel's second and most prominent line of defense at this hearing was that the ongoing military operations in Gaza lack the genocidal intent required for there to be a violation of the Genocide Convention. It advanced this claim by arguing that its goal was to destroy Hamas, not the Palestinian people.



It noted that the IDF specifically targets sites believed to be in use by the group, and avoids places with civilians wherever possible. According to the Israeli jurists, if any such places are destroyed, it is ultimately because they are being used as cover by Hamas.

This policy simply has not been realised. Reports from locals and international onlookers in Gaza show that thousands of neighborhood homes with no apparent Hamas presence have been destroyed since

October. In fact, OCHA estimates that as of 12 February 2024, over 360,000 of the strip's housing units have been damaged or destroyed. That represents over 60% of the total prior to 7 October 2023.<sup>13</sup>



This is in addition to the hundreds of schools, sites of worship, and cultural centres turned to rubble – places that make up the heart of Palestinians' way of life. Over 90% of school buildings in the region have sustained significant damage, leaving all 625,000 of its students with no access to

education. Only 13 of Gaza's 36 hospitals are even partially functional. Hundreds of local health workers, UN relief staff and journalists have been killed. The IDF claims to precisely target sites of Hamas activity. Why, then, have they conducted such a widespread attack akin to an indiscriminate and full-scale carpet bombing of the region? Hamas embedding itself in civilian buildings and infrastructure constitutes a violation of international humanitarian law. However, that does not absolve Israel of following its own obligations to distinguish between civilian and military targets. It is apparent that it has failed to do so.

Israeli jurists also pointed to warnings of strikes and the passage of humanitarian resources to Palestinians as evidence that their country did not exhibit genocidal intentions through its military conduct. They argued that the millions of SMS messages and leaflets shared with civilians prior to IDF operations sufficiently demonstrated that Israel was fulfilling its obligations to minimise casualties and limit its targeting to Hamas operatives. This claim has been thoroughly rebuffed over the past months, as South Africa showed on several instances at the hearing. On numerous occasions, thousands of Palestinians have been shuffled to designated safe zones, only for those to be attacked without warning. The spaces within which civilians are expected to find shelter have become increasingly narrow. With Gaza already being one of the most densely populated regions in the world, living conditions in these areas, assuming they are not also bombarded, are untenable. Thousands have understandably opted not to leave their homes. Many are incapable of doing so for health reasons, while others have chosen not to due

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<sup>13</sup> OCHA: Hostilities in the Gaza Strip and Israel - reported impact | Day 125.

to their awareness of the conditions that await them, and their natural human desire to stay in the places where they have built their lives. Some never even receive the warnings, as communications and electricity are often cut off. Even if Israel's intention truly has been to warn and mitigate harm to civilians, it has done a poor job of it.

Similarly, Israel's claim that allowing humanitarian aid into Gaza demonstrates the absence of genocidal intent is also insufficient. As reported by OCHA, the humanitarian situation in Gaza is so dire that over 2.2 million people are at imminent risk of famine, with 378,000 at catastrophic levels (Phase 5) and another 939,000 at emergency levels (Phase 4).<sup>14</sup> The UN agency also reports critical shortages of drugs, blood products and other medical supplies. Some doctors have even stated that they had to perform amputations and other severe procedures without anesthetics, because they could not obtain them from outside sources ready to deliver them if not for Israeli restrictions on aid imports. Such restrictions have not been uncommon since Israel's campaign in Gaza. Crossings of humanitarian supplies into the region have been heavily policed. In the first two weeks of January 2024, the Israeli military has denied access to most aid missions to the north of Wadi Gaza, one of the principal places of entry during the military assault. Similar situations have been reported at crossings with Israel and Egypt. While the country has allowed some humanitarian aid to move through, it has not done so at even close to the scale required to ensure the wellbeing of the hundreds of thousands at serious health risk. Again, Israel's legal defense proves questionable at best.



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<sup>14</sup> Ibid..

## **Implications of this Case for Palestine and the State of International Law**

### *The Court's decision*

On 26 January 2024, the Court announced its acceptance of South Africa's request for provisional measures. Then-ICJ President Joan E. Donoghue began her address on behalf of the bench with a discussion of the criteria necessary to reach such a decision. As stated previously, these are:

1. That the Court has *prima facie* jurisdiction over this matter.
2. That South Africa has standing to submit the dispute with Israel.
3. That the rights claimed plausibly exist, and that there is a link between those rights and the measures requested.
4. That there is a risk of irreparable prejudice to the rights in question, and that there is urgency in relation to said risk.

President Donoghue explained how the evidence South Africa provided satisfied the above requirements, one by one. On the whole, the 17-person bench, composed of 15 permanent judges and another two nominated "ad-hoc" by the parties in dispute, found an urgent and tangible possibility that Israel is committing genocide against the Palestinian people, and that it is necessary to impose orders to prevent further violations of the Genocide Convention. It also determined that there exists a real threat of genocidal incitement on the part of Israeli leadership that must be immediately curtailed. To support its ruling, the Court cited multiple UN body reports highlighting the existential dangers faced by the Palestinian people. It also pointed to several statements from top Israeli officials demonstrating that a plausible intent to commit genocide may underlie the calamitous violence of the military assault on Gaza. The very possibility that a genocide is underway, the Court reasoned, necessitated immediate intervention in the form of the provisional measures granted.

The six provisional measures in question, along with the vote tallies in their favor, are listed below. All votes were overwhelmingly in South Africa's favor. Only two judges ever dissented: Judge

Sebutinde of Uganda, who voted against every measure, and the Israeli representative, Judge Barak, who voted against four of them.

1. **By vote of 15-2:** *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:*
  - 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;*
2. **By vote of 15-2:** *The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;*
3. **By vote of 16-1:** *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;*
4. **By vote of 16-1:** *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;*
5. **By vote of 15-2:** *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;*

6. **By vote of 15-2:** *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.*<sup>15</sup>

These provisional measures should not be confused with an order for a ceasefire. The Court specifically called for Israel to stop all military activities that may contribute to genocide – where the distinction between that notion and a full ceasefire lies is as yet unclear. While international onlookers have denounced the ICJ for failing to make such an explicit order, it remains difficult to separate any of violence against civilians in Gaza from that which is aimed at committing genocide. Thus far, nearly everything about Israel’s onslaught appears to have been done with the intent to bring about the destruction of the Palestinian people, in whole or in part. For Israel to satisfy the provisional measures would require it to curtail its assault so significantly that it no longer kills any civilians, effectively approximating the conditions of a ceasefire. It may be that the Court aimed to allow the country to respond to attacks from Hamas on the condition that it not harm civilians. However, given the indiscriminate nature of the Israeli response to this point, and the broad and hateful stroke with which it has painted the entire Palestinian people, such an outcome is difficult to conceive.

#### *Implications of the ruling*

The verdict in South Africa’s favour represents a significant win for the Palestinian cause. While the granting of provisional measures does not guarantee a final finding of genocide once the case is fully adjudicated in the years to come, it demonstrates at present an acknowledgment of the inhumane conditions Israeli forces have subjected the Palestinian people to. It is a recognition of the intent to commit genocide apparent in the manner Israel has ravaged Gaza, as well as in the dozens of hateful statements of government leaders, now deeply internalised at all levels of the country’s forces. Such a conclusion from the Court serves to vindicate the already internationally held belief that Israel has enacted near-indiscriminate collective punishment against Palestinian civilians who have known nothing but decades of occupation and systematic discrimination. In short, it is a victory for human rights globally.

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<sup>15</sup> ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), para. 86.



In addition to this, the decision is a success for the ICJ itself. Much of the Court's influence today stems from its status as a preeminent symbol of international law and the rules-based international order. Denouncing the genocide unfolding in Gaza constitutes a profound realisation of its aims to uphold the rule of law and prevent aggression and conflicts, even amid the incredibly tense geopolitical context of this particular case. Israel is a powerful occupying force, backed by some of the world's most influential states. For the Court to resist those considerations, ruling overwhelmingly against a government whose people have themselves suffered a genocide, but which now fails to recognise the wrongdoing of its actions, may prove momentous in the long fight to protect human rights for all.

Given the symbolic weight of this verdict, *South Africa v. Israel* will likely put serious diplomatic pressure on Israel and its supporters. The ICJ is widely respected as an impartial body of international law. The large majority of its bench acknowledging the genocidal threat posed against the Palestinian people only confirms many countries' stance on the matter, and may compel others to think the same. It may also lead to additional motions at the UN General Assembly and Security Council to call for an immediate ceasefire. As it stands, Israel is unlikely to end its campaign in Gaza in response. It may, however, alter its military strategy in the face of widespread international condemnation, including from its allies, who may grow weary of supporting a state found to be putting millions at risk of genocide. While the Court's decisions are binding to the parties involved, it does not have the ability to enforce them. However, international onlookers may present this ruling for South Africa to various UN bodies as evidence of the need for immediate action to prevent the ongoing violence. A Security Council resolution demanding the cessation of violence in the region may also come of this. Applying diplomatic pressure to Israel is crucial to preventing further atrocities. The Court's decision could prove the turning point in search of this goal.

## **Conclusion**

*South Africa v. Israel* is among the most significant and highly publicized cases in recent international law. It is to date the most concerted legal challenge to Israel's unlawful and systematic

oppression of the Palestinian people, and the first instance where such a challenge has proven unquestionably successful. In many ways, it is a microcosm of Palestinians' decades-long fight to see their plight acknowledged by the international community. The charge of genocide is reserved for only the most serious crimes committed against a group. As the ICJ has acknowledged, it entirely is appropriate in these unfortunate circumstances.

Israel has already shown itself to be in violation of the Court's order. As of the publication of this report on 12 February 2024, its forces have continued to wreak havoc in Palestine, killing and injuring thousands since the ICJ revealed its ruling. Most recently, the IDF have launched deadly assaults on the city of Rafah, one of the last available refuges for Palestinian civilians. Hundreds of innocents, many of whom are children, have been killed by its hand. Tens of thousands more are being subjugated to inhumane conditions in yet another site falsely promised to them as a safe haven. There appears to be no end in sight to Israel's systematic and intentional collective punishment. The international community must immediately step in to ensure compliance with the Court's order, and pursue all available mechanisms to prevent the occupying power from continuing its merciless genocide of the Palestinian people.



**Geneva International Centre for Justice (GICJ)** supports the use of international bodies of justice like the ICJ in seeking resolutions to the suffering of vulnerable groups. It emphasizes the importance of pursuing such mechanisms of redress to acknowledge the hardships the Palestinian people face in their search for recognition of their struggle. In light of the ongoing destruction of Palestinian lives, it calls for the following:

1. Security Council resolutions calling for the enforcement of the Court's order, and the end to Israel's occupation of Palestine.

2. Significant increases in financial and logistical support for the United Nations Relief and Works Agency (UNRWA) to meet the humanitarian needs of the Palestinian people.
3. Sanctions and other diplomatic instruments to compel Israel to cease its violations of the rights of the Palestinian people.

The international community cannot stand idly as this genocide unfolds. It must bring an end to Israel's brutal assault on Gaza, in addition to its illegal occupation of all Palestinian territories. The Palestinian people will never be truly free if forced to live under this historically violent occupying power. Immediate and tangible action must be taken to ensure their right to self-determination and deliverance from decades of oppression. Only then will they find true justice.

## **Geneva International Centre for Justice (GICJ)**

GICJ is an independent, non-profit, international non-governmental organisation dedicated to the promotion and reinforcement of commitments to the principles and norms of human rights.

**GICJ** is headquartered in Geneva, Switzerland and is governed by the Swiss Civil Code and its statutes. Basing its work on the rules and principles of International Law, International Humanitarian Law and International Human Right Law, GICJ observes and documents human rights violations and seeks justice for their victim through all legal means available.

### **MISSION:**

GICJ's mission is to improve lives by tackling violations and all forms of violence and degrading or inhumane treatment through the strengthening of respect for human rights; reinforcing the independence of lawyers and judiciaries; consolidating the principles of equity and non-discrimination; ensuring rule of law is upheld; promoting a culture of awareness on human rights; and combating impunity.





### **WORK:**

GICJ has been tackling issues of justice and accountability since it was established. The United Nations and corresponding human rights mechanisms are pivotal to our work. GICJ participates extensively with these mechanisms, in particular the Human Rights Council (HRC) and the Universal Periodic Review (UPR).

### **NETWORK:**

GICJ maintains a partnership with various NGOs, lawyers and a vast civil society network around the world. Through these channels, GICJ is able to receive documentation and evidence of human rights violations and abuses as they occur in several countries. GICJ continues to bring this information to the attention of relevant UN bodies in order to gain justice for all victims.





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