



المركز العربي للأبحاث ودراسة السياسات
Arab Center for Research & Policy Studies

Case Analysis | 12 March 2024

The Consequences of Israel's Failure to Implement Provisional Measures to Prevent Genocide in Gaza

Nizar Ayoub

The Consequences of Israel's Failure to Implement Provisional Measures to Prevent Genocide in Gaza

Series: **Case Analysis**

12 March 2024

Nizar Ayoub

Nizar Ayoub

Human Rights Lawyer with a doctorate in International Law, currently Director of the Observatory - Arab Center for Human Rights in the occupied Syrian Golan. He worked as a lawyer and legal researcher with the Palestinian Al-Haq Foundation in Ramallah from 2000-2013 and has published widely on the legal status of the 1967 occupied Arab territories (Palestine and the Golan), especially the legal status of Jerusalem and its Palestinian citizens. From 2014-2015, he was accredited as a consultant and researcher for the United Nations Conference on Trade and Development (UNCTAD).

Copyright © 2021 Arab Center for Research and Policy Studies. All Rights Reserved.

The Arab Center for Research and Policy Studies is an independent research institute and think tank for the study of history and social sciences, with particular emphasis on the applied social sciences.

The Center's paramount concern is the advancement of Arab societies and states, their cooperation with one another and issues concerning the Arab nation in general. To that end, it seeks to examine and diagnose the situation in the Arab world - states and communities- to analyze social, economic and cultural policies and to provide political analysis, from an Arab perspective.

The Center publishes in both Arabic and English in order to make its work accessible to both Arab and non-Arab researchers.

The Arab Center for Research and Policy Studies

Al-Tarfa Street, Wadi Al Banat

Al-Dayaen, Qatar

PO Box 10277, Doha

+974 4035 4111

www.dohainstitute.org

Table of Contents

| | |
|---|---|
| Introduction | 1 |
| I: Why South Africa Requested Additional Provisional Measures | 2 |
| II: Repercussions of the ICJ's Rejection of South Africa's Request, in Light of Israel's Non-Compliance with Provisional Measures | 5 |
| Conclusion | 7 |

Introduction

On 12 February, the Republic of South Africa submitted an urgent request to the International Court of Justice, asking it to impose additional interim measures against Israel to prevent further atrocities against Palestinians in Israel's war on the Gaza Strip, ongoing since 7 October 2023.¹ This request came in response to Israel's failure to implement the interim measures the ICJ had already ordered on 26 January, following a previous South African request to oblige Israel to respect its obligations under the 1948 Convention on the Prevention and Punishment of Genocide, and to prevent Israel committing acts of genocide against Palestinians in the Gaza Strip.²

However, the court refrained from indicating additional measures, instead reaffirming Israel's immediate obligation to implement the temporary measures the court had already indicated on 26 January. It also emphasised that these measures apply to the entire Gaza Strip, including the Rafah area. The court noted the grave developments taking place on the ground and said that Israel must fully carry out its obligations in accordance with the Genocide Convention, to ensure the safety and security of the Palestinian population in Gaza.³

Despite all of this, the Israeli government appears to remain determined to storm the Rafah area of southern Gaza, ignoring international demands to refrain from doing so due to the unprecedented humanitarian catastrophe it would entail. Rafah is currently host to some 1.5 million Palestinians, the majority of whom have been forcibly displaced by occupation forces from other areas in the Gaza Strip.

Yet despite the grim conditions facing Gazans and stark international warnings over the war, the United States went through with threats to veto a new resolution, presented by Algeria in the United Nations Security Council, calling for an immediate humanitarian ceasefire in Gaza.⁴ This was the third time that Washington had used its veto power to block any UNSC resolution demanding a ceasefire in Gaza, on the pretext that such a resolution could disrupt negotiations over hostages in Gaza.⁵ Algeria's permanent representative to the Security Council said that Washington's move amounted to consent to the use of starvation as a means of war against the Palestinians.⁶

This paper analyses the consequences of the court's rejection of South Africa's request to order additional provisional measures in light of Israel's failure to implement those already indicated in its 26 January ruling to prevent the crime of genocide. It also examines the grave repercussions of

1 "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip 'South Africa v. Israel', Urgent Request for Additional Measures under Article 75 (1) of the Rules of the Court of the International Court of Justice," accessed on 14/2/2024, at: <https://bit.ly/3SITiyF>

2 "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip 'South Africa v. Israel,' Order 26 January 2024, Para. 86, pp. 24-26, accessed on 14/2/2024, at: <https://bit.ly/3ShVuwU>

3 "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip 'South Africa v. Israel', Urgent Request for Additional Measures under Article 75 (1) of the Rules."

4 Nils Adler & Usaid Siddiqui, "Israel's War on Gaza Updates: People Desperate for Aid as Crisis Worsens," *Al Jazeera*, 18/2/2024, accessed on 18/2/2024, at: <https://bit.ly/3l4fu1p>; "Fito 'amriki yufshilu mashrū' qarār Jazā'iri li-waqf iṭlāq al-nār fi Ghazzah," *Al-Jazeera*, 20/2/2024, accessed 22/2/2024, at: <https://bit.ly/49HRahG>.

5 "U.S. Vetoes Security Council Cease-Fire Resolution," *The New York Times*, 20/2/2024, accessed on 21/2/2024, at: <https://bit.ly/3ldTZLv>.

6 "Al-wilāyāt al-muttaḥidah tastakhdim al-fito ḍidd mashrū' qarār yatālab bi-al-waqf al-insāni li-iṭlāq al-nār fi Ghazzah," *UN News*, 22/2/2024, accessed 13/2/2024, at: <https://bit.ly/3wsmLWf>.



Israel's continued war of revenge on the Gaza Strip and its determination to invade the Rafah area, threatening to further exacerbate the suffering of the Palestinians.

I: Why South Africa Requested Additional Provisional Measures

During the 110 days between the start of Israel's vengeful war against Gaza on 7 October 2023 and the International Court of Justice's ruling on 26 January 2024, in which it indicated provisional measures to prevent genocide, Israel killed 26,083 Palestinians and wounded a further 64,487, mainly children, women and the elderly.⁷ The violence also displaced 1.7 million residents of the Strip, equivalent to 85% of the total population, and destroyed 60% of the territory's housing, completely or partially, along with 378 educational facilities and schools, 122 ambulances, three churches, at least 161 mosques, and 12 bakeries.⁸ According to the World Health Organization, 14 out of 36 hospitals in Gaza were partially operational, while the rest of the hospitals were out of service.⁹

Noting the scale of the catastrophe caused by the war, the court responded to South Africa's request with a ruling that imposed six provisional measures, calling on Israel to fulfil its obligations under the Genocide Convention, which protects the Palestinians as a group. The court ordered Israel to limit the devastating consequences of the fighting, and the resulting massive, unjustified loss of life and damage to residential buildings and infrastructure, part of a systematic Israeli plan to completely isolate the Gaza Strip from the world, wipe it out, deprive its residents of food, water, electricity, and fuel,¹⁰ and forcibly transfer them to Egypt.¹¹

The order compelled Israel to immediately to prevent its army from committing any genocidal act against the Palestinians, whether through killing or inflicting serious bodily or mental harm on them, or intentionally subjecting them to living conditions intended to cause their physical destruction, in whole or in part, or implementing measures to prevent them from having children. It also ruled that Israel must prohibit and punish any incitement to commit genocide against the Palestinians, as well as taking immediate and effective measures to provide basic services and humanitarian aid, to tackle the catastrophic living conditions in Gaza, as well as doing everything necessary to preserve evidence of genocide in the Gaza Strip. Finally, it ordered Israel to submit a report to the court within a month – that is, by 26 February 2024 – indicating all the steps it had taken to implement these orders.¹²

7 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Hostilities in the Gaza Strip and Israel: Day 111," 26/1/2024, accessed on 15/2/2024, at: <https://bit.ly/3T0fZQp>.

8 Ibid.

9 United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Hostilities in the Gaza Strip and Israel: Flash Update # 103," 26/1/2024, accessed on 15/2/2024, at: <https://bit.ly/49j4UQ5>.

10 "Galant: 'A total blockade will be imposed on the Strip; we are fighting human animals,'" *Yediot Ahranot*, 9/10/2024, accessed 16/2/2024 (in Hebrew): <https://bit.ly/3OMOrf0>.

11 "Netanyahu in a special statement: We will take revenge on Hamas for this black day," *Channel 7*, 7/10/2023, accessed 16/2/2024 (in Hebrew), at: <https://bit.ly/3OM8tpD>.

12 "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip 'South Africa v. Israel,'" Order 26 January 2024.

However, even after the court indicated these provisional measures, the situation rapidly deteriorated due to Israel's failure to implement them. Occupation forces continued to target the civilian population, residential areas and infrastructure, causing growing numbers of civilian casualties and ever-widening destruction. Data from the Palestinian Ministry of Health in Gaza and the UN's Office for the Coordination of Humanitarian Affairs (OCHA) in the Occupied Palestinian Territories indicate that as of 22 February 2024 – that is, after 139 days of fighting – the war had left 29,410 Palestinians dead, some 3,372 of them since the ICJ's ruling. The number of wounded reached 69,465, about 5,000 of them since before 26 January, and as many as 2.2 million people now faced the imminent threat of famine. Twelve hospitals were partially out of service and three were operating at the bare minimum level,¹³ while 22 were not operating at all. Meanwhile, 184 mosques had now been completely or partially destroyed, up from 161.¹⁴

These figures reflect the Israeli government's absolute determination to press on with its retaliatory war on the Gaza Strip, in order to achieve its declared goals of wiping out Hamas and freeing the 134 hostages in the group's captivity.¹⁵ But the facts on the ground do not suggest that either of these goals is any closer to being achieved. The war appears to have been limited to exacting vengeance, inflicting massive loss of life, causing widespread destruction of residential areas and infrastructure, and displacing the vast majority of the population to the south of the Gaza Strip, where they are in immediate danger of famine. So far, Israel has not achieved its other goal, repeated in statements by government and military leaders, of cleansing the Gaza Strip of its Palestinian population and transferring them to Egyptian territory, whether temporarily or permanently.¹⁶

These conditions led South Africa turned again to the ICJ with an urgent request for additional provisional measures to protect Palestinians in the Gaza Strip from the risk of genocide, noting that the Israeli government had not implemented the measures already imposed by the Court, but was continuing to bombard the Gaza Strip from the land, air and sea, and apparently remained determined to invade the Rafah area, posing a grave danger to tens of thousands of Palestinians there. South Africa argued that these grave developments required the court's urgent attention, especially following an announcement by the Israeli Prime Minister's office on 9 February that a large-scale operation in Rafah was needed in order to eliminate Hamas, indicating a need to evacuate the civilian population from areas where the fighting was taking place.¹⁷ However, the court did not

¹³ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Hostilities in the Gaza Strip and Israel: Day 139," 2/22/2024, accessed on 16/2/2024, at: <https://bit.ly/3OT09Vp>.

¹⁴ Ibid.

¹⁵ Azar Gat, "The Aims of the War in Gaza—and the Strategy for Achieving Them," The Institute for National Security Studies, 26/2/2024, <https://www.inss.org.il/publication/gaza-war-targets/>.

¹⁶ Yuval Abraham, "Expel all Palestinians from Gaza, Recommends Israeli gov't Ministry," *+972 Magazine*, 30/10/2023, accessed on 18/2/2024, at: <https://bit.ly/3SK02fN>.

¹⁷ Israeli Prime Minister's Office, "a message from the office of the Prime Minister regarding an operation in Rafah," 9/2/2024, accessed 13/2/2024 (in Hebrew) at: <https://bit.ly/4bCTqZk>; Zvi Barel, "The escape route of the residents of Gaza could damage relations between Egypt and Israel," *Haaretz*, 12/10/2024, accessed 19/2/2024, at: <https://bit.ly/3wglNVo>; "The IDF in a message to the residents of Gaza: Leave the Strip for Egypt," *Srugim News*, 10/10/2024, accessed 19/2/2024 (in Hebrew) at: <https://bit.ly/3T2vWW9>.



approve South Africa's request to impose additional, urgent temporary measures, merely noting the need for immediate and effective implementation of the measures it had previously imposed.

There is no doubt that South Africa's request for the Court to impose additional urgent measures has merit in international law. During a press conference on 17 February, Israeli Prime Minister Benjamin Netanyahu reaffirmed his determination to continue the war until the end. "The essence of our policy to release the hostages is strong military pressure and very tough negotiating," he said. "Up to this very moment, Hamas's demands have been delusional and signify only one thing: The defeat of Israel. Clearly, we will not agree to them. But when Hamas drops these delusional demands we will be able to move forward."

He added: "On [15 February] I spoke with US President Joe Biden. I speak with world leaders every day. I tell them decisively: Israel will fight until we achieve total victory. And indeed, this includes action in Rafah... Whoever wants to prevent us from operating in Rafah is telling us in effect to lose the war."¹⁸

These statements coincided with intensive preparations by the Israeli army for a large-scale invasion of the Rafah area, located in the far south of the Gaza Strip along the border with Egypt, despite the international community's warnings of the catastrophic and unjustified impact of such an operation.¹⁹ More than a million Palestinians have sought refuge in Rafah, most of them having been forcibly displaced there by fighting, or on orders by the occupation army.²⁰ A military operation in the area would have devastating consequences for civilians and infrastructure,²¹ as well as seriously damaging Israel's relationship with Egypt and the US²²

Despite Washington's determination to back Israel with weapons and money, and to use its veto power at the UN Security Council to prevent the passage of any resolution calling for an end to the war in Gaza, including for humanitarian reasons, there are widespread reports that the Biden administration's patience with Netanyahu is running thin. This narrative appears to be an attempt to stem Biden's collapsing popularity ahead of the upcoming US elections, and to absorb international anger, both among the public and governments, at the continued crimes of the occupation.

This anger was reinforced by the US shooting down a draft UNSC resolution tabled by Algeria, while simultaneously claiming that it was drafting its own resolution warning of the potential repercussions of an Israeli ground incursion into Rafah and calling for a temporary ceasefire as soon

¹⁸ Israeli Ministry of Foreign Affairs, "Statement by PM Netanyahu," 17/2/2024, at: <https://cutt.ly/5w0hNgVe>.

¹⁹ "The world is warning against an operation in Rafah. Netanyahu: 'Whoever tells us this - wants us to lose the war'"; *Yediot Ahranot*, 11/2/2024, accessed 13/2/2024, at: <https://bit.ly/3woneJ9>.

²⁰ United Nations Office for the Coordination of Humanitarian Affairs (OCHA), "Hostilities in the Gaza Strip and Israel: Flash Update #107," 31/1/2024, accessed on 18/2/2024, at: <https://cutt.ly/GwMONjCx>.

²¹ "Gaza: Increased Armed Hostilities in Rafah Pose a Disastrous Risk to Civilian Lives and Infrastructure," ICRC, 14/2/2024, accessed on 18/2/2024, at: <https://bit.ly/49If6Yl>.

²² "If Israel Invades: Hell Looms in Rafah," *The Economist*, 13/2/2024, accessed on 17/2/2024, at: <https://bit.ly/49h9luU>.

as possible in order to secure the release of all the hostages held in Gaza²³ – even while arguing that it was in no hurry to put such an initiative to a vote, thus giving Israel an opportunity to prolong the war and commit more crimes, including that of genocide.²⁴

II: Repercussions of the ICJ's Rejection of South Africa's Request, in Light of Israel's Non-Compliance with Provisional Measures

The ICJ did not accept South Africa's request to impose additional and urgent provisional measures on Israel. Instead, it opted to reaffirm, in a statement published on 16 February 2024, that recent developments in the Gaza Strip, particularly in Rafah, risked exponentially increasing what UN Secretary-General Antonio Guterres had described as “a humanitarian nightmare with untold regional consequences”. However, the court emphasised that this grave situation demanded the immediate and effective implementation of the interim measures in the court's ruling of 26 January, which it said “are applicable throughout the Gaza Strip, including in Rafah” and that there was no need for additional interim measures. It also emphasized that Israel remains obliged to comply fully with its obligations under the Genocide Convention and the 26 January ruling, ensuring the safety and security of Palestinians in the Gaza Strip.²⁵

The ICJ's reticence to stipulate additional urgent provisional measures does not relieve Israel of its obligation to comply with the provisional measures already indicated in the court's earlier ruling, issued under the court's statutes on parties' compliance with its rulings.²⁶ In this sense, those provisional measures are already binding on Israel, as occupying power, which must comply with them and make every effort to prevent a genocide against Palestinians in the Gaza Strip and to spare them from further suffering and irreparable damage.

Israel's failure to comply with the provisional measures ordered by the court gives South Africa the right to resort to the Security Council to implement the ruling.²⁷ In this regard, there is a debate among experts on international law over the interpretation of Article 94 (1) of the United Nations Charter, which stipulates that each state member of the world body pledges to comply with the court's rulings in any case to which it is a party. There are those who argue that the Charter only mentions mandatory force in the case of final rulings issued by the court, without explicitly stating that provisional decisions have such force. Other experts believe that provisional measures are

²³ Richard Roth & Tara John, “US Proposes a ‘Temporary Ceasefire’ in Gaza in Draft UN Resolution,” CNN, 19/2/2024, accessed on 20/2/2024, at: <https://bit.ly/3wjDJGh>.

²⁴ Ibid.

²⁵ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip ‘South Africa v. Israel’, the Decision of the Court on South Africa's Request for Additional Provisional Measures,” International Court of Justice, Press Release, no. 2024/16, 16/2/2024, accessed on 16/2/2024, at: <https://bit.ly/3UJrOXz>.

²⁶ Statute of the International Court of Justice, Article 59, <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice>.

²⁷ United Nations Charter, Article 94 (2), <https://www.un.org/en/about-us/un-charter/full-text>.



indeed binding on parties to cases at the court, just like final rulings issued by the court, as they essential to the litigation process. Moreover, the Article 94 mentions states' obligations to comply with "the decision" of the court in each case to which it is a party, without specifying whether this refers to provisional measures or only to final rulings.²⁸

The court has previously ruled on the issue of parties' compliance with rulings on provisional measures, in the LaGrand case over two German nationals who were executed in the state of Arizona. In this case, the court was asked for the first time to determine the legal consequences arising from non-compliance with provisional measures, in a dispute arising between Germany and the US over the latter's violation of an ICJ order stipulating provisional measures, whose interpretation has been widely debated. In its interpretation of Article 41 of the Statute, the court ruled that these orders were indeed binding. Accordingly, in its ruling in 2021, it found that the measures mentioned in Article 41 had binding force on the parties to the dispute, and that both Germany and the US must comply with them. The court thus concluded that interim measures are binding on the parties, in order to guarantee and avoid jeopardising the rights to be determined by the final ruling.

While implementation of ICJ decisions depends entirely on the will of states, this in no way relieves them of the responsibility to abide by and implement them, under all circumstances. The ICJ must notify state parties, the Secretary-General of the UN and the Security Council of its rulings, and the aggrieved party has the right to ask the Security Council to put the decision into effect.²⁹ Given that the court does not have the necessary authority and tools to compel states to implement their obligations, including provisional measures, the task of enforcing the court's rulings falls to the Security Council, in accordance with Article 41 (2) of the court's statute, which stipulates that rulings of provisional measures are automatically sent to the UN Security Council. Since the court does not have its own military force or any special body charged with implementing its rulings, their implementation is largely subject to the discretion of the Security Council, based on its evaluation of the threat it poses to international peace and security.³⁰

The Security Council intervenes in a variety of situations, including when the continuation of a conflict poses a threat to international peace and security, or when the party that is subject to provisional measures refuses to comply. Then the injured party has the right to appeal to the Security Council, which alone has the discretionary power to determine whether the matter requires its intervention or not. However, the use of the veto by permanent members, usually for political considerations, often prevents the Security Council from enforcing these rulings. Indeed, this has been the case with the temporary measures imposed by the court in the South Africa vs. Israel case, which has been impeded by the veto of the US, which thwarted Algeria's draft resolution calling for an end to the war for humanitarian reasons.

²⁸ "Al-quwwah al-ilzāmiyah lil-tadābir al-mu'aqqatah li-Mahkamat al-'Adl al-Dawliyah," *Majallat al-ʿuqūq wa-al-'Ulūm al-Siyāsīyah*, Volume 13 (2017), Pages 162-171, <https://www.asjp.cerist.dz/en/article/38289>.

²⁹ "International Court of Justice: Rules of Court," Article 77, <https://www.icj-cij.org/rules>; "Statute of the International Court of Justice," Article 41 (2), <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice>.

³⁰ United Nations Charter, Articles 39-41, <https://www.un.org/en/about-us/un-charter/full-text>.

Conclusion

The fact that the ICJ refrained from approving South Africa's request for additional, urgent provisional measures does not absolve Israel from implementing the provisional measures previously indicated by the court. The court's ruling includes a firm emphasis on the pivotal role of international law in preventing and punishing genocide, as well as protecting victims of war crimes and crimes against humanity. The ruling also sends a clear message to the international community that it must not stand idly by but must force Israel to stop its unprecedented war against the people of Gaza.

However, the ruling has done little to end the tragedy facing the Palestinians, despite disturbing indications that a genocide is underway, given Israel's disregard for international law and the international community's failure to meet its obligations to force Israel to stop the war and to protect the Palestinians. Instead of Israel immediately complying with the court's ruling and the international community fulfilling its obligations under international law, Israel has been able to continue its war of vengeance. Indeed, it remains determined to launch a large-scale military operation in Rafah. Meanwhile, member states of the European Union, the US and the United Kingdom continue to ignore the court's decision, failing to do everything in their power to meet their obligation to prevent genocide. This situation continues to weaken the credibility of international law.

In light of all this and the complicity of major world powers, it is important to reiterate Amnesty International's warning that a genocide could unfold in Gaza unless the court's orders are implemented,³¹ given the spiralling number of Palestinian deaths and the widespread destruction being caused by Israel's ongoing bombing and withholding of humanitarian aid, an extension of an illegal siege it has imposed since 2007, which is causing horrific suffering to civilians. It is also important to note the racist and dehumanising statements by Israeli government officials, which provide stark warnings of the danger of a genocide, as well as Israel's history of oppression and discrimination against the Palestinians under the Israeli-imposed apartheid system. In conclusion, international law demands that all countries work to confront the threat of genocide in Gaza and make every effort to prevent such an outcome.

³¹ Amnesty International, "Israel must Comply with Key ICJ Ruling Ordering it do all in its Power to Prevent Genocide against Palestinians in Gaza," 26/1/2024, accessed on 22/2/2024, at: <https://bit.ly/49M8qIO>.