

The Decision of the Court in The Hague—A Practical Achievement but also a Warning Sign

Pnina Sharvit Baruch and Tammy Caner | February 11, 2024

On January 26, the International Court of Justice (ICJ) gave its decision on the request submitted by South Africa on December 29, 2023, in the case against Israel concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) in the Gaza Strip. The ICJ did not accept Israel's request to dismiss the case and issued provisional measures, pending the court's final judgment on the case. The court also rejected South Africa's main request to order Israel to halt its military operations in Gaza.

The Genocide Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.” The acts include “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; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.” There is also an independent prohibition against incitement to genocide. Under the Convention, the ICJ has the authority to resolve disputes between parties to the Convention on its implementation. Since both South Africa and Israel are parties, the ICJ can consider South Africa's claim against Israel. The rulings of the ICJ are legally enforceable on all parties involved in the case.

In this article we will provide an overview of the court's decision, discuss its significance, and outline recommendations for Israel's next steps.

The Decision

The court found that there was a real and imminent risk of irreparable prejudice to the plausible rights invoked by South Africa and ordered Israel:

To take all measures to prevent the commission of acts of genocide in relation to Palestinians in Gaza;

- To ensure that its military does not commit any acts of genocide in Gaza;
- To take all measures to prevent and punish direct and public incitement to commit genocide of Palestinians in Gaza;
- To take 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;
- To prevent the destruction and ensure the preservation of evidence related to allegations of acts of genocide;
- To submit a report to the court on all measures taken to give effect to the court Order within one month. This report will be sent to South Africa for comment.

The decision to issue these provisional measures was passed by a vast majority of 15 votes to two. Judge ad hoc Aharon Barak from Israel and Judge Julia Sebutinde from Uganda dissented. Judge Barak supported measures 3 and 4, which were consequently passed by a majority of 16 to one.

The court emphasized that, at this stage of the proceedings, for the purpose of its decision on the request for provisional measures, it was not necessary for the court “to establish the existence of breaches of obligations under the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under that instrument.” The majority of judges concluded that provisional measures were warranted. In reaching their decision, they attached significance to statements made by UN personnel, including the UN secretary-general and the director-general of UNRWA. The court also indicated that the crisis in Gaza was compounded by dehumanizing language, referring to statements made by Minister of Defense Yoav Gallant, State President Isaac Herzog, and Minister Israel Katz. As a final note, the court emphasized that all parties to the conflict in the Gaza Strip are bound by international humanitarian law, and that it is gravely concerned about the fate of the hostages abducted by Hamas and held in Gaza and called for their “immediate and unconditional release.” Hamas is not a party to the Convention and therefore the ICJ has no jurisdiction over it.

In a separate declaration, Judge Georg Nolte of Germany, wrote, “I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent.” He also stressed that the court was not authorized to rule on possible violations of other

rules of international law, such as war crimes, and on possible violations of the Genocide Convention by persons associated with Hamas. Judge Nolte explained that his decision to vote in favor of the provisional measures rested on the plausible claim "that certain statements by Israeli State officials, including members of its military, give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention." He was also persuaded by UN officials that Israel may be imposing unjustified restrictions on humanitarian aid, creating an existential danger to the Palestinians in the Gaza Strip. Judge Nolte stressed that the intention of the provisional measures is to remind Israel of its obligations under the Convention. Judge Dalveer Bhandari of India stressed, in his separate declaration, that rendering provisional measures did not indicate the existence of any evidence of Israeli intention to commit genocide, but that the widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it, justified issuing a temporary order to prevent possible breach of the rights protected by the Convention.

In a separate opinion by Judge Barak, which included a personal description of his childhood during the Holocaust and an explanation of the strength and independence of the Israeli judicial system, he indicated that the court had failed to give a complete account of the situation that has unfolded in Gaza. The Court did not refer to the existential threat posed by Hamas to Israel, and to the *modus operandi* of Hamas that "seeks to immunize its military apparatus by placing it within and below civilian infrastructure, which is itself a war crime, and intentionally places its own population at risk," including by using humanitarian aid for its own purposes and the tunnel network for its fighters rather than to shelter civilians. Judge Barak stressed that this immediate context forms the inescapable backdrop for the legal analysis of Israel's actions and should have played a more central role in the Court's reasoning. He also cautioned that figures of casualties came from the Hamas-controlled Ministry of Health and also did not distinguish between civilians and combatants. Judge Barak stated that genocidal intent could not be inferred from the declarations of Israeli officials, referred to by the Court, since such intent must stem from the organs that are capable of having an effect on the military operations, and these "have repeatedly explained that the purpose of the military operation is to target Hamas, not the Palestinians in Gaza." The steps Israel has taken to relieve the humanitarian situation in Gaza demonstrate the opposite intent. Judge Barak explained that he voted in favor of two of the measures—the one concerning acts of public incitement, with a hope this "will help to decrease tensions and discourage damaging rhetoric"; the second

on alleviating the humanitarian situation in Gaza, to remind Israel of its essential international obligations.

In her dissenting opinion, Judge Sebutinde explained that the conflict between Israel and the Palestinians is a political conflict that must be resolved through political negotiations and not by forcing the case into the context of the Genocide Convention in a desperate bid to foster a judicial settlement. She further stated that South Africa had not succeeded in establishing, even *prima facie*, that Israel's actions were motivated by an intent to commit genocide. Israel was acting in response to an attack initiated by Hamas, and any claim to "genocidal intent" was negated by its restricted and targeted attacks of legitimate military targets, its mitigation of civilian harm by warnings, and its facilitation of humanitarian assistance. She noted that the scale of suffering and death in Gaza is exacerbated by Hamas's tactics of embedding its forces among the civilian population and installations, rendering them vulnerable to legitimate military attack. The statements of Israeli officials do not indicate an intent to commit genocide. The vast majority referred to the destruction of Hamas and not the Palestinian people as such; moreover, the official war policy contains no indicators of a genocidal intent. In her view, issuing provisional measures was unwarranted. Judge Sebutinde ended by suggesting that South Africa should have used its cordial relationship with Hamas to persuade it to immediately and unconditionally release all the hostages, since "such a gesture of good will would go a very long way in defusing the current conflict in Gaza."

The court's decision to issue provisional measures was not surprising in view of past precedents. In effect, in all three cases where the ICJ was asked to grant temporary relief in claims relating to violations of the Genocide Convention, it accepted the requests and issued the orders. This happened in the claim of Bosnia against Serbia, of Ukraine against Russia, and of Gambia against Myanmar, the last two still pending before the court.

An Achievement and a Disappointment

For South Africa, the decision did not bring an immediate end to Israel's counteroffensive in Gaza as it had hoped. Israel's main concern was that the court would accept South Africa's request that Israel stop the military operation, similar to the order that the ICJ issued to Russia in Ukraine's claim against it. Israel's success in blocking such an order is an important achievement; although, unlike the case against Russia, in which Ukraine was a party to the proceedings and was also obliged to stop fighting, in the current case, Hamas is not a party to the proceedings. Therefore, the probability that the court would have unilaterally

ordered Israel to stop the fighting, without the possibility of obliging Hamas to do the same, was slim to begin with.

Despite this success, the court's decision is disappointing due to the complete absence of any reference to the harsh reality of the war and the challenges that Israel faces due to Hamas's unlawful tactic of using civilians and civilian objects to shield its military operations, which is responsible for the huge destruction and loss of lives of civilians in the Strip. This was ignored in spite of the evidence presented to the court by the Israeli representatives. This decision creates a problematic blurring of the lines between the rules of law of armed conflict and the crime of genocide, which is a unique crime of enormous gravity. Adopting this approach will make it hard for Israel, and other countries, to deal with threats from terrorist organizations, who can blatantly violate the law themselves while exploiting the other sides' commitment to abide by the law as a means to deny them the ability to defend themselves. Another concern is the ICJ's uncritical reliance on accounts by UN officials, who are known for their bias against Israel. This is especially true of UNRWA, when new details emerge each day about the extent of its close ties to Hamas.

Significance

First and foremost, as the court stressed in its decision, the fact that the court issued the preliminary measures should not be construed as evidence of the court's position that Israel is indeed committing genocide, but only that the circumstances demand the protection of the rights defined in the Convention. Issuing the interim order does not guarantee that the court will ultimately rule in favor of South Africa's claim. For example, in the case of Bosnia's claim against Serbia, although the ICJ issued an interim order against Serbia, in the final judgment it determined that Serbia had not committed genocide. Proving intent to commit genocide is complicated, and the merits of the case have not yet been examined. In addition, other countries may submit their own positions later in the proceedings. For example, Germany has already announced that it will join the proceedings on behalf of Israel, while some countries have announced they will join with South Africa.

On a practical level, the interim order will not influence Israel's conduct, as Israel is not committing genocide and is already permitting humanitarian aid into Gaza, although its conduct will be examined under a magnifying glass, starting with the report it was ordered to provide within a month from the decision on the measures taken to implement the Court's order.

Nevertheless, the decision has negative consequences for Israel that should not be dismissed. The ICJ is a highly respected and impactful body. Its decision to issue the interim order and to continue the legal proceedings against Israel casts Israel in a negative light and causes significant harm to its image in the international arena.

In addition, the ICJ decision may be used to exert additional pressure on the prosecutor of the International Criminal Court (ICC) to accelerate the investigation of allegations of crimes by Israeli soldiers and officials during the war, including the crime of genocide, which is included in the Rome Statute, the constitution of the ICC. The ICJ decision may also encourage the initiation of proceedings against Israelis in various countries, on the basis of universal jurisdiction, whereby countries are able to instigate proceedings for serious crimes such as genocide, even in the absence of any direct link to the case. Several such initiatives had already begun before the ICJ decision. The current decision could also influence the ongoing parallel proceedings on the request of the UN General Assembly from December 2022 that the ICJ issue an advisory opinion on the legality of the Israeli occupation of Palestinian territories. The hearing in these proceedings is set for February 19.

Moreover, the very existence of proceedings that accuse Israel of genocide has a severe detrimental impact on its international standing. There is no doubt that the decision will be used to exert pressure on countries and bodies that cooperate with Israel to reduce their support for it, particularly in areas related to the war, such as arms transfers. If Israel can be presented as failing to observe the court's interim order, for example by not doing enough to relieve the humanitarian crisis in Gaza, such pressure can be expected to increase. A final decision stating that Israel is committing genocide would be a calamity for the country, with far-reaching consequences. Thus, it is essential for Israel to prevent such an outcome.

Apart from the direct consequences for Israel's military campaign, the presentation of Israel as a genocidal country will cause intense pressure on countries and other international entities, such as large corporations, to impose bans, boycotts, and sanctions on Israel. These could be expressed in practical ways, such as by withdrawal of investments, restrictions on trade, and the termination of diplomatic, academic, and commercial relations. In the long run, countries could even bar the entry of Israelis or prevent their participation in international events, such as tournaments and competitions. Ultimately, Israel could become an isolated pariah state. International isolation would have destructive consequences for the country's economy and security. Furthermore, isolation would have serious implications for the basic character of the state, by

strengthening extremists in Israeli society and leading to the collapse of Israel's democratic essence.

It is important to recognize that the court proceedings are part of an overall campaign against Israel in the international arena, which is conducted in parallel to the military campaign on the battlefield. Both have the same goal of bringing about the destruction of the State of Israel: physically, through military action and politically, by denying its right to exist. The main course of action in this campaign is to delegitimize Israel by presenting it as a country that violates the most basic principles of the international system and thus pressure Israel's allies to terminate their support to Israel, either political or military. Defeat in the courtroom could result in defeat on the battlefield by limiting Israel's fighting capabilities and its freedom of action. South Africa, acting on behalf of extreme Palestinian elements, has already led the campaign to portray Israel as an apartheid country, and it has now added the accusation of committing genocide to its arsenal.

That being said, it is also important to recognize that the reality in Gaza is indeed extremely dire. The exact number of civilian casualties may not be clear, but there is no doubt that there are many, including children and women. The scope of the destruction is extensive and over one and a half million Palestinians have been uprooted from their homes in the areas of fighting. The humanitarian situation is severe, and there are widespread shortages of food, water, fuel, and medical supplies. While it is true that these are the direct consequences of Hamas's use of civilians as human shields, the ongoing suffering of the civilian population, as documented and broadcast all over the world, naturally arouses sympathy for the Palestinians, accompanied by an outcry—even hostility—toward Israel, which is perceived as directly causing this suffering and as having the power to put an end to it. Anti-Israeli elements know how to exploit such sentiments to garner support from who are not necessarily prejudiced against Israel. The harsh reality in Gaza makes it difficult for Israel's supporters in the liberal camp to maintain their support. It also creates strong public pressure on the authorities in Arab countries to condemn Israel.

Recommendations

Given this analysis, Israel must act responsibly and wisely in response to the legal campaign being waged against it and to the ICJ proceedings.

- The legal arena must not be neglected. Although Israel encounters powerful forces, it should not be assumed that the legal battle is lost. Israel should take proactive steps to minimize negative impact, such as by appearing before the ICJ to present its arguments. It is important for Israel

to continue taking the ICJ proceedings seriously—to submit detailed arguments, enlist as many countries and leading experts as possible to support its position, and strive for a final decision that will absolve Israel from the accusation of genocide. The law is with Israel in this case, and it should be made difficult for the judges to rule otherwise.

- Israel should fully adhere to the ICJ's interim order. First, Israel must take strong criminal and disciplinary action against Israeli leaders, soldiers, and civilians who incite genocide. Second, Israeli leaders should restate the need to limit the harm to Gazan civilians and to facilitate the entry of humanitarian aid for civilians, while continuing to demand supervision in order to prevent aid from reaching Hamas. Israel should also begin preparing detailed reports on these matters, as a counterweight to the biased reports of UN officials.
- Israel must continually reiterate the complexity of the war in Gaza. Israel's continued focus on the horrific deeds of Hamas on October 7 creates the impression that Israel is on a mission of vengeance; due to the large number of casualties and the extent of the destruction in Gaza, Israel is perceived by the international community as seeking to kill as many Palestinians as possible without justification. The tangible threats and challenges that Israel faces in its war against Hamas are not appreciated. Therefore, Israeli spokespeople must stress that Israel is fighting a war against a strong enemy that has utilized the years of control over the Gaza Strip to totally embed itself within, and under, the civilian infrastructure of the Strip, developing a warren of underground tunnels, several hundred kilometers in length, throughout the Strip. Hamas fights against Israel with every possible means, including the use of civilians as human shields, in a clear violation of international humanitarian law. The complexity of the war can be underscored by the large number of casualties among the Israel Defense Forces (IDF) and from the fact that, even after four months, Hamas is still actively fighting. In other words, this is not a one-sided operation conducted by a strong military against a weak group of resistance fighters. This is a full-scale war against an enemy, deeply entrenched in the combat area which is placed within the civilian infrastructure that is under its control. This reality is not clear to Israel's critics, including the ICJ judges.
- Israeli public figures must be responsible when making statements, especially those involved in the operational decision-making such as the defense minister. In addition, anyone who incites genocide or calls publicly for acts of violence must be investigated, and if appropriate, punished.
- Israel must play an active positive role in the international arena. Israel is considered by many as the one preventing a peaceful resolution of the

Israeli-Palestinian conflict, despite the fact that much of the responsibility lies on the Palestinian side, as the broad support among the Palestinian people for Hamas and armed resistance makes clear. Israel must offer a political horizon to the Palestinian that relates to Palestinian demands. Such a position would make it clear that the genocide accusations against Israel are totally baseless. Promoting extreme ideas of transferring the Palestinian population from Gaza and adopting policies that undermine Palestinian rights play into the hands of those conducting the campaign against Israel in the international arena and could even lead to an unfavorably decision in the Hague.

- Israel should consider “going on the offense,” for example by initiating proceedings in the court against countries that have assisted Hamas in its acts of genocide or that incite the genocide of Israelis or Jews. While Israel does not welcome international legal proceedings concerning its affairs, once such proceedings already exist, Israel should leverage the legal opportunity to go after those seeking its destruction.