

## **Analysis of the ICJ Order on Provisional Measures in Comparison to South Africa's Request & Recommendations to the Canadian Government**

### **I. Introduction**

In its [decision](#) on January 26, 2024, the International Court of Justice ("ICJ") considered only South Africa's request for provisional measures - urgent measures that they requested to take into effect immediately - and not the merits of their case against Israel for genocide. That decision will be made at a later stage in the legal proceedings. The ICJ was tasked with deciding whether Israel's acts appear capable of falling within the provisions of the Genocide Convention ("Convention").

The ICJ ruled in favor of South Africa, that there is a plausible case that Israel is committing genocide against a protected group and that provisional measures are therefore warranted. The ICJ rejected Israel's arguments to dismiss the case, affirming that the ICJ has jurisdiction and that South Africa has standing to seek Israel's compliance with its obligations under the Convention.

The ICJ made note of UN sources on the number of Palestinians killed, injured, and displaced, as well as destruction of essential infrastructure. It also recognized UN representatives' statements regarding the uninhabitability of Gaza and the trauma of Palestinian children. Additionally, the Court referred to statements made by senior Israeli officials, which South Africa had presented as proof of genocidal intent. Dismissing Israel's assertions of adequate civilian protection measures, the ICJ deemed provisional measures imperative due to the potential for irreversible harm to Palestinians' fundamental rights.

To summarize the order of the ICJ on South Africa's request for provisional measures, Israel is ordered to:

1. Take all measures within its power to immediately stop killing, causing serious bodily and mental harm, inflicting on Palestinians in Gaza conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the protected group;
2. Ensure its military does not commit any of the above mentioned acts;
3. Prevent and punish the direct and public incitement to commit genocide;
4. Allow humanitarian aid into Gaza;
5. Preserve evidence; and
6. Report back to the ICJ within a month on the measures it has taken.

## **II. Comparison of the ICJ order with South Africa's Request**

This analysis compares the provisional measures requested by South Africa with those ordered by the ICJ. Overall, the decision was a historic victory for Palestinians. The ICJ, with near unanimity, found that South Africa presented a plausible case that Israel is committing a genocide against a protected group under the Convention, and granted most of the provisional measures requested.

The order fell short in one notable way. South Africa requested that the ICJ order Israel to “immediately suspend its military operations” and the ICJ did not specifically grant this in its order. By contrast, when Ukraine sought similar provisional measures in an alleged case of genocide, the ICJ ordered that “The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine.”

South Africa's request for provisional measures also included language for Israel to not only “prevent,” but also “desist” from acts falling within the scope of the Convention. This was likely done intentionally to avoid suggesting that Israel is already committing a genocide, as that determination is to be made at a later stage in the proceedings.

Though not calling for an immediate suspension of military operations, the ICJ did grant the request of South Africa to order the State of Israel and the Israeli military to prevent the commission of any acts falling within the scope of Article II of the Genocide Convention, which includes killing and injuring Palestinians in Gaza.

In addition to the State of Israel and its military, South Africa had requested the prevention of any “irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, from committing any acts described above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.” This request was not included in the Court's order.

South Africa had specifically requested that Israel rescind orders related to expulsion and forced displacement, and prevent the deprivation of access to adequate food, water, medicine, and humanitarian assistance. The ICJ ordered Israel to enable the provision of urgent humanitarian assistance. The order did not, however, specifically address the rescinding of Israeli orders related to the expulsion and forced displacement of Palestinians from their homes, which had also been requested by South Africa.

The ICJ did order, as requested by South Africa, that the State of Israel take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts falling within the scope of the Convention. In furtherance of this objective, South Africa requested that the ICJ order Israel to grant access to fact-finding missions, international

mandates, and other bodies. While the general request to prevent the destruction of evidence was granted, the order did not specifically grant fact-finding missions, international mandates, and other bodies access to Gaza to assist with this process.

Finally, the ICJ ordered the State of Israel to submit a report to the ICJ on all measures taken as requested by South Africa. The order differed from South Africa's request in that it ordered the report in one month rather than one week.

### **III. Did the ICJ Order a Ceasefire?**

South Africa did not use the word "ceasefire" in its request for provisional measures, but it did ask the ICJ to order Israel to "immediately suspend its military operations." The ICJ did not specifically grant this request, though it ordered Israel to take all measures to prevent the killing and injuring of Palestinians in Gaza and to provide a report of the measures taken in one month. This raises the concern that Israel will continue to conduct its military operations during the next month.

[Palestinians](#) and others across the international community have expressed their disappointment that the ICJ did not order an immediate ceasefire, fearing that if Israel has a full month to submit a report, they will be "exterminated" during this time. [Lubna Farhat](#), member of Ramallah city council, expressed concern that settlers may increase their attacks in the West Bank with an increased sense of impunity. [Marwan Bishara](#), Al Jazeera's Senior Policy Analyst, expressed: "I am saddened by the fact that there is no ceasefire, but I am not as saddened because I know that Israel is not going to carry out the ceasefire. We knew from the past two weeks that Israel was not going to abide by any ceasefire ruling."

Though not granting South Africa's request for Israel to suspend its military operations, the ICJ acknowledged that Israel's ongoing military operation is the cause of devastating death, destruction, displacement, and deprivation of basic necessities for a protected group under the Convention, and that this necessitates provisional measures: "the military operation conducted by Israel after 7 October 2023 has resulted, inter alia, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale." The ICJ further noted, "At present, many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating." As a result of this observation, the Court concluded that "there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, before it gives its final decision."

This acknowledgement supports the view that Israel must effectively cease its current military operations in order to comply with the order for provisional measures under the Convention.

Practically, the provision of humanitarian aid can only occur once the Israeli bombardment has ceased. [Naledi Pandor](#), South Africa's Minister of International Relations, stated: "If you read the order, by implication a ceasefire must happen." She asked, "How do you provide aid and water

without a ceasefire?” She acknowledged, however, that she would have wanted the word “cessation” included.

The question is, if Israel continues its military operations, will it be considered to have violated the ICJ’s order?

According to [Craig Mokhiber](#), former director of the New York office of the UN High Commissioner for Human Rights and specialist in international human rights law: “Ceasefire language or not, if Israel continues killing and harming civilians, destruction of civilian infrastructure, blockade, denial of humanitarian aid, or dehumanization and incitement to genocide, destroys evidence or fails to report, it will be in breach of the ICJ order.”

[Professor William Lawrence](#) of American University, who holds a PhD in international law, opined on why the Court did not go so far as to order a “ceasefire,” stating that the Court might have taken a narrower definition of the Genocide Convention, as courts often do, to achieve a stronger decision, in this case a near unanimous decision in favor of South Africa.

Highlighting the importance of international pressure alongside the ICJ ruling, [Agnès Callamard](#), Secretary General of Amnesty International, stated, “An immediate ceasefire by all parties remains essential and – although not ordered by the Court – is the most effective condition to implement the provisional measures and end unprecedented civilian suffering.”

#### **IV. Recommendations to the Canadian Government:**

1. **Support the Implementation of the ICJ Order** - As a purported champion of international human rights, the Canadian government must actively support and encourage the implementation of the measures granted by the ICJ as an urgent protective measure and a first remedial step towards reconciliation on behalf of the Palestinian people.
2. **Prevent Further Violations of the Genocide Convention, Which are Now Plausible** - the Canadian government should take all available measures to secure an immediate, durable, and permanent ceasefire in order to prevent further loss of life and suffering. Concrete measures must be taken to protect Palestinian civilians, humanitarian personnel, persons hors de combat, civilian objects, and humanitarian facilities from attacks. Mere expressions of concern or general calls for increased humanitarian aid are insufficient in light of the dire circumstances.
3. **Humanitarian Aid** - Palestinians are in urgent need of immediate, continuous, and unhindered humanitarian aid. The Canadian government should mobilize the international community to bring immediate relief to victims of this growing humanitarian crisis, including clean water, food, medical supplies, emergency housing, and other life-saving and gender-responsive essentials. Due to the significant trauma experienced

by Palestinian civilians, reparation, restitution, and reconstruction must be provided for victims and their families on an urgent basis.

4. **Restore Funding for UNWRA** - The United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNWRA) provides critical life-saving support for Palestinians. In light of the above, we call upon the Canadian government to restore and continue its funding to UNRWA.
  
5. **Cease Military, Economic, and Diplomatic Support** - The Canadian government must cease arms transfers, military funding, and diplomatic support for Israel's genocidal aggression. The international Arms Trade Treaty promotes responsibility, transparency and accountability in the transfers of conventional arms and has been ratified by Canada. Moreover, pursuant to the Export and Import Permits Act, the Canadian Minister of Foreign Affairs must deny exports and brokering permit applications for military goods and technology if there is a substantial risk that such items would undermine peace and security, or could be used to commit or facilitate serious violations of international humanitarian and human rights law. Israel's human rights violations are more than sufficient to impose an arms embargo, including with respect to arms, military equipment, technologies, and technical assistance. Moreover, the international community should be mobilized to increase diplomatic pressure on Israel to implement the ICJ order.

*Sabrina Mirza is a lawyer serving as the Director of Legal Affairs for Justice for All.*

*Aiden Alexio is a lawyer serving as a Human Rights Policy Analyst for Justice for All Canada.*