8 April 2024

The ICJ's Second Order on Provisional Measures in the *South Africa v. Israel* Case

On 28 March 2024, following a request by South Africa, the International Court of Justice (ICJ) issued a second order on provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.[1] On 26 January 2024, the Court had already rendered an order indicating a range of provisional measures relating to the case.[2] On 12 February 2024, South Africa called upon the Court to exercise its power to indicate new provisional measures,[3] but the Court found that the situation at the time did not warrant the indication of additional provisional measures.[4]

The following is a brief overview of the Court's order of 28 March 2024, together with the declarations and the separate opinions of the individual judges.

A note examining possible avenues for securing the enforcement of provisional measures orders, as well as the legal consequences for third States that follow from the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the prohibition of genocide in customary international law, is available here.[5] A detailed Q&A on the *South Africa v. Israel* case is available here.[6] All publications and updates on legal proceedings relating to Israel and the occupied Palestinian territory (oPt) can

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Order) General List No. 192 [2024] ICJ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf> 28 March 2024 accessed 2 April 2024; 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)' (ICJ) <https://www.icj-cij.org/case/192> accessed 8 April 2024.

[2] 'South Africa v. Israel - Order on Provisional Measures (26 January 2024)' (*Diakonia IHL Centre*, 26 January 2024) <https://www.diakonia.se/ihl/news/icj-order-provisional-measures-south-africa-v-israel/> accessed 8 April 2024.

[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 of Court of the International Court of Justice) General List No. 192 [2024] ICJ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240212-wri-01-00-en.pdf> accessed 8 April 2024.

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Decision of the Court on South Africa's Request for Additional Provisional Measures: Press Release) General List No. 192 [2024] ICJ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf> accessed 8 April 2024.

[5] 'ICJ Order on Provisional Measures in South Africa v. Israel: Legal Consequences for Third States' (*Diakonia IHL Centre*, 2 February 2024) <https://www.diakonia.se/ihl/news/icj-order-provisional-measures-consequences-for-third-states/> accessed 8 April 2024.

[6] 'ICJ Contentious Case South Africa v. Israel' (*Diakonia IHL Centre*, 23 February 2024) <https://www.diakonia.se/ihl/news/icj-questions-answers-contentious-proceedings-southafrica-israel-genocide-convention/> accessed 8 April 2024.

be found here,[7] and all materials relevant to the 2023-2024 hostilities in Israel and Gaza can be found on this page.[8]

Introduction

On 6 March 2024, South Africa submitted an 'urgent request for the indication of additional provisional measures and the modification of the Court's prior provisional order and decision' pursuant to Article 41 of the Statute of the ICJ and Articles 75(1-3) and 76(1) of the Rules of the Court. Article 41 of the Statute establishes the Court's power to indicate provisional measures, while Articles 75(1-3) and 76(1) of the Rules of the Court further detail its power to indicate (new) provisional measures or to revoke or modify them, respectively.[9]

In its application, South Africa requested 'the indication, clarification, and/or modification' of five provisional measures which, unlike in its first application, did not only address Israel but more broadly included measures directed at the parties to the conflict and the parties to the Genocide Convention.

First, South Africa requested a measure to halt all hostilities, and to release all hostages and detainees, addressing 'all participants in the conflict'. Second, it requested measures addressing the parties to the Genocide Convention, including that they 'refrain from any action, and in particular any armed action or support thereof, that might prejudice the right of the Palestinians in Gaza to be protected from acts of genocide'. Third, it requested a measure specifying how Israel should deal with the conditions of life in Gaza, including by means of, once again, 'suspending its military operations in Gaza' and demanding that Israel ensure the provision of basic supplies and services. Lastly, South Africa requested that Israel submit an open report on all measures taken.

Since its last order, the composition of the Court has changed; four out of sixteen permanent judges have been replaced.[10] One of the newly appointed judges is Judge Tladi of South Africa,

[7] 'Legal Proceedings Relating to Israel and the oPt' (*Diakonia IHL Centre*) <https://www.diakonia.se/ihl/jerusalem/proceedings-before-international-courts-relating-to-israel-and-the-opt/> accessed 8 April 2024.

[8] '2023-2024 Hostilities and Escalating Violence in the oPt' (*Diakonia IHL Centre*) <https://www.diakonia.se/ihl/jerusalem/2023-2024-hostilities-escalating-violence-opt/> accessed 8 April 2024.

[9] *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 the Indication of Additional Provisional Measures and the Modification of the Court's Prior Provisional Measures Order and Decision: Press Release) General List No. 192 [2024] ICJ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240306-pre-01-00-en.pdf> accessed 8 April 2024; Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) XV UNCIO 355 (Statute of the ICJ) art 41; Rules of Court (adopted 14 April 1978, entered into force 1 July 1978) arts 75 (1-3) and 76 (1).

[10] Alonso Gurmendi, 'Comparing the ICJ's Provisional Measures Orders in South Africa v. Israel' (*Opinio Juris*, 29 March 2024) <https://opiniojuris.org/2024/03/29/comparing-the-icjs-provisional-measures-orders-in-south-africa-v-israel/> accessed 8 April 2024.

and so Judge ad hoc Moseneke, appointed by South Africa, is no longer sitting on the bench. Judge ad hoc Barak, appointed by Israel, on the other hand, is still on the case.[11]

The provisional measures order issued by the Court is binding upon the parties to the proceedings. Israel has an international legal obligation to comply with both orders of 26 January and 28 March, implementing all provisional measures indicated therein.[12]

Conditions for the modification of provisional measures

Considering the request as one of modification of provisional measures indicated, the Court had to establish that a) there was a change in the situation justifying the requested modifications as per Article 76 of the Rules of the Court and b) the general conditions for the indication of provisional measures as per Article 41 of the Statute of the Court were met.

In assessing whether there was a change in the situation justifying modifications to the provisional measures indicated, the Court recalled its previous observations on the gravity of the humanitarian situation in Gaza and noted that the then already catastrophic conditions in Gaza have deteriorated further 'in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip have been subjected'.[13] It then concluded that the 'exceptionally grave' developments – including, notably, that famine is no longer only a risk but a reality – constitute a change in the situation and that the provisional measures indicated earlier fail to address the consequences arising therefrom, justifying their modification.[14] Judge Nolte, writing separately, further elaborated on the application of this criterion and concluded that while the Court had already considered the risk that the situation could further deteriorate on 26 January 2024, the current circumstances go beyond what was then expected to potentially materialise and, as such, 'constitute a qualitative change of the situation which is exceptional'.[15]

The Court further affirmed that the general conditions for the indication of provisional measures had been met. In support of this conclusion, the Court referenced its findings in the order of 26 January 2024 as well as subsequently published reports by United Nations (UN) agencies that establish a risk of irreparable prejudice and urgency.[16]

---

[11] Chimène Keitner, 'The ICJ's Modified Provisional Measures Order in South Africa v. Israel' (*Lawfare*, 2 April 2024) <https://www.lawfaremedia.org/article/the-icj-s-modified-provisional-measures-order-in-south-africa-v.-israel> accessed 8 April 2024.

[12] *LaGrand (Germany v. United States of America)* (Judgement) [2001] ICJ Rep 466 [102].

[13] South Africa v. Israel (Order) 28 March 2024 (n 1) [18].

[14] ibid [21]-[23].

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Separate Opinion of Judge Nolte) General List No. 192 [2024] ICJ 1 [6]; Jill Goldenziel, 'Why the International Court of Justice Gave Israel a New Order' *Forbes* (New Jersey, 1 April 2024) <https://www.forbes.com/sites/jillgoldenziel/2024/04/01/why-the-international-court-of-justice-gave-israel-a-new-order/?sh=83c1e955080e> accessed 8 April 2024.

[16] South Africa v. Israel (Order) 28 March 2024 (n 1) [24]-[40].

Measures indicated

In light of the above, the Court concluded that 'the circumstances of the case require it to modify its decision concerning provisional measures indicated in the Order of 26 January 2024'.[17] However, as it did in its order of 26 January 2024, the Court indicated measures that differed from those requested by South Africa, based on its power under Article 75(2) of the Rules of Court.[18]

After reaffirming the provisional measures indicated in its order of 26 January 2024 (vote of fourteen in favour, two against), the Court added the following thereto:

> *The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:*
>
> *(a) Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary (unanimous vote);*
>
> *(b) Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance (vote of fifteen in favour, one against);*
>
> *[T]he 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 (vote of fifteen in favour, one against).*

Notably, Judge Sebutinde, who had voted against all provisional measures indicated on 26 January 2024, voted in favour of the new provisional measures. Judge ad hoc Barak voted against two of the three new provisional measures.

Differences between the measures requested and measures indicated

First, the Court did not indicate measures addressing parties other than those to the ongoing proceedings, explaining that the decisions of the Court are binding only between the latter.[19] The first three measures requested – concerning parties to the conflict and parties to the

[17] ibid [41].

[18] ibid [42]-[43].

[19] ibid [44].

Genocide Convention – were thus rejected. The Court nevertheless repeated its call for the 'immediate and unconditional release' of the hostages taken by Hamas and other armed groups.[20]

Second, the Court indicated a measure relating to the provision of basic services and humanitarian assistance, but did not specifically order that Israel immediately suspend its military operations in Gaza, lift its blockade, or in general that it rescind all measures and practices that obstruct access to humanitarian relief and basic services, as was requested by South Africa. However, the Court did specifically order that Israel must '[increase] the capacity and number of land crossing points and [maintain] them open for as long as necessary' to *ensure* 'the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance'. In its previous order, the Court had merely demanded that Israel take 'immediate and effective measures to *enable* the provision of urgently needed basic services and humanitarian assistance' (emphasis added) without further specifying what types of measures ought to be taken. Also, more generally, *ensuring* implies a wider range of obligations than only *enabling*, and, as such, reflects better Israel's positive obligations as an occupying power, which bears the primary responsibility to ensure access to humanitarian relief.[21]

The Court further stressed, on its own initiative, that these measures should be taken immediately and 'in full co-operation with the United Nations'. This addition by the Court is crucial since UNRWA is a UN agency, whose operations continue to be obstructed by the Israeli authorities.[22]

Third, the Court ordered, on its own initiative, that Israel ensure 'that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the [Genocide Convention]'. This is comparable to the second provisional measure indicated in the order of 26 January 2024; however, this time, the Court further elaborated that such unlawful acts include 'preventing, through any action, the delivery of urgently needed humanitarian assistance', possibly implying that the Israeli military currently engages in such unlawful conduct.

Fourth, the Court ordered that Israel submit a report on the measures taken to give effect to the order, but not an 'open' report as was requested by South Africa. It is at the discretion of the Court to make public such reports submitted by parties, which it has not done to date.

---

[20] ibid [50].

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi) General List No. 192 [2024] ICJ 1 [2], [7].

[22] Gurmendi (n 10); 'UNRWA Situation Report #99 the Situation in the Gaza Strip and the West Bank, Including East Jerusalem' (*UNRWA*, 4 April 2024) <https://www.unrwa.org/resources/reports/unrwa-situation-report-99-situation-gaza-strip-and-west-bank-including-east-Jerusalem> accessed 8 April 2024.

The question of suspension of military operations by Israel

The question of a legally mandated suspension of operations by Israel warrants further attention. While the Court once again refrained from indicating a measure to this effect as per South Africa's request, this time it did take note of the calls for a ceasefire or a suspension of military operations as a prerequisite for addressing the catastrophic humanitarian situation in Gaza and of UN Security Council resolution 2728 demanding an immediate ceasefire.[23] It had already been suggested that 'a lull in hostilities between the parties may in fact be practically required to even comply with the measures ordered' on 26 January 2024.[24] Now, declarations by seven judges demonstrate that a significant proportion of the bench in fact considers that a halt of the operations is imperative for Israel's compliance with its international obligations, including those stemming from the order.

Indeed, in his declaration, President Salam explained that the new measures 'can only take full effect' if the ceasefire demanded by the Security Council is respected by all parties.[25] Judge Yusuf clarified that 'the only effective way in which Israel can meet its obligations under the Convention is to suspend its military operations to allow for the delivery of aid and to bring to an end the relentless destruction and death caused by it at the expense of the right of existence of the Palestinian population'.[26] In their joint declaration, Judges Xue, Brant, Gómez Robledo, and Tladi were more straightforward and stated that they 'deeply regret that this measure does not directly and explicitly order Israel to suspend its military operations for the purpose of addressing the current catastrophic humanitarian situation in Gaza' as 'suspension of military operations, including [the] planned military operation in Rafah, under the circumstances, appears indispensable for any meaningful implementation of the provisional measures indicated'.[27] Lastly, Judge Charlesworth stated that 'the Court should have made it explicit that Israel is required to suspend its military operations in the Gaza Strip, precisely because this is the only way to ensure that basic services and humanitarian assistance reach the Palestinian population'.[28]

---

[23] United Nations Security Council (UNSC) Resolution 2728 (25 March 2024) UN Doc S/RES/2728.

[24] 'Top Expert's Views of Int'l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case)' (*Just Security*, 26 January 2024) <https://www.justsecurity.org/91457/top-experts-views-of-intl-court-of-justice-ruling-on-israel-gaza-operations-south-africa-v-israel-genocide-convention-case/> accessed 8 April 2024.

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Declaration of President Salam) General List No. 192 [2024] ICJ 1 [11].

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Declaration of Judge Yusuf) General List No. 192 [2024] ICJ 1 [10].

[27] Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (n 21) para 1, 7.

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Declaration of Judge Charlesworth) General List No. 192 [2024] ICJ 1 [7].

The separate opinion of Judge ad hoc Barak

Significantly, Judge ad hoc Barak voted against the reaffirmation of the provisional measures indicated on 26 January 2024 as he considered them to be 'unwarranted'.[29] He only voted in favour of one of the new provisional measures, that Israel take measures to ensure the provision of basic services and humanitarian assistance, which he clarified was for 'moral reasons'.[30] His explanation, which references solely Article 23 of the Fourth Geneva Convention, implies that he does not consider Israel to be bound by the law of occupation in Gaza, contrary to the view of at least four other judges (Xue, Brant, Gómez Robledo, and Tladi).[31]

In his separate opinion, Judge ad hoc Barak criticised the Court for going beyond its jurisdiction by 'regulating the conduct of hostilities' and claimed that its 'reasoning … is far removed from the Genocide Convention and based primarily on humanitarian considerations'.[32] He continued to state that 'the Court is intervening in an armed conflict between Hamas and Israel, but only Israel is bound by its decisions', which creates a 'structural imbalance', and went as far as to say that 'part of [the] Order shields Hamas while imposing interim obligations on Israel'.[33] He enumerated the absence of a change in the situation justifying modification of previous provisional measures; absence of the required conditions for the indication of provisional measures in general; and inadequate and problematic treatment of evidence by the Court as the 'three fatal flaws in the Order'.[34]

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Modification of the Order of 26 January 2024: Order) (Separate Opinion of Judge ad hoc Barak) General List No. 192 [2024] ICJ 1 [4].

[30] ibid [30].

[31] ibid

[32] ibid [6].

[33] ibid [7].

[34] ibid [11].