

The International Court of Justice (ICJ) Order on the IDF Operation in Rafah: Commentary and Implications

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The issuance of additional interim orders in the genocide proceedings underway at the ICJ limits Israel's operational wiggle room in Rafah, but leaves it with some flexibility in the interpretation and implementation of the new orders. To the extent that Israel (1) finds ways to better address the humanitarian needs of civilians in the Gaza Strip, (2) its politicians demonstrate greater responsibility in their public statements, and (3) cooperation between Israel and its allies is strengthened, Israel could advance its operational objectives in the war while reducing the political and legal friction in the international arena.

Background

On May 24, 2024, the International Court of Justice in the Hague (ICJ) issued its [decision](#) following South Africa's request for additional interim orders ("provisional measures") against the State of Israel, as part of the application it had filed alleging that Israel is committing the crime of genocide in the Gaza strip (for background on the South African claim, see [here](#)).

This is South Africa's fourth request for interim orders since the legal proceedings began in late 2023, including an order that would demand an immediate cessation of the war in the Gaza Strip. Although the hearing and ruling into the merits of the case cannot be expected before 2025 (the Court instructed South Africa to submit its written arguments by the end of October 2024 and Israel to file its response by the end of July 2025), South Africa has been exploiting the Court's procedural rules—which authorize the ICJ to issue interim orders necessary to urgently prevent irreparable harm to the rights protected by the Genocide Convention—in order to get it to issue interim orders, including ones that would restrict Israel's operations in the Gaza Strip.

To date, the ICJ has issued a series of interim orders addressing, among other things, Israel's humanitarian obligations concerning the civilian population of the Gaza Strip, as well as Israel's obligation to take all measures within its power to prevent and punish the direct and public incitement to commit genocide. Furthermore, on several occasions, the Court has ordered Israel to submit reports on its implementation of these interim orders.

In catering, to some extent, to South Africa's repeated requests for interim orders, the Court has effectively made itself the overseer of the fighting in the Gaza Strip; to a certain extent, the hostilities are taking place in its shadow. It is significant that, when the ICJ issued additional interim orders on March 28, 2024, Justice Aharon Barak, designated by Israel as its ad-hoc judge for the proceedings, noted in his [minority opinion](#) that the Court had accepted South Africa's invitation to micromanage the war in the Gaza Strip and was utilizing the Genocide Convention as a pretext to rule on the basis of the international humanitarian law (IHL). He added that this is a dangerous course of action, especially when one side of the conflict (Hamas) is not a party to the Genocide Convention. Justice Barak repeated this criticism in his [minority opinion](#) on the most recent decision.

Thus far, however, the Court has not granted South Africa's request to order Israel to halt its military operations in the Gaza Strip. From a legal perspective, it would be difficult to justify such an order, which would effectively deny a country the right to defend its territory and citizens. This difficulty is particularly acute in the present case, as one of the parties to the armed conflict, Hamas, is not a state, not a party to the Genocide Convention or to the legal proceedings, and not subject to the Court's jurisdiction. This most recent decision by the Court is a significant development in this regard.

The following are the main points of the ruling, several insights about it, and a brief analysis of its implications.

Why did the Court decide that it was necessary to issue interim orders in addition to those already issued in the past?

Once the Court has issued interim orders, as the Court has done beginning with its order on January 26, 2024, the issuance of additional orders or amendments to current orders requires the applicant—South Africa—to demonstrate that there has been a change in the situation that prevailed when the original orders were issued. Additionally, as stated, South Africa must prove that there will be irreparable harm to rights protected by the Genocide Convention if new orders are not urgently issued or the current ones are not urgently amended before the Court rules on the merits of the case.

A large majority of the Court (13 justices, with two in the minority) determined that the Israeli operation in Rafah that began on May 7, 2024, and the extensive displacement of Palestinian civilians in its wake do constitute a change in the situation. The Court added that it had not been persuaded that the efforts to evacuate Rafah and additional steps taken by Israel to secure the safety of Palestinian civilians were sufficient to deal appropriately with the great risk they face as a result of the offensive in Rafah. Accordingly, the Court determined that Israel had not provided sufficient information about the safety of civilians during the evacuation of Rafah or the availability of sufficient humanitarian assistance and shelter in the al-Mawasi enclave (declared by Israel as a "humanitarian zone") for the 800,000 civilians displaced thus far. Consequently, the Court concluded that modification of the interim orders it issued in the past was urgently needed to prevent irreparable harm to Palestinian civilians.

What did the Court decide?

In its decision, the ICJ (majority of 13 justices, with two in the minority) reaffirmed all the orders it had issued in the past (on January 26 and March 28, 2024) and issued several additional interim orders:

- **The operation in Rafah:** the Court determines that Israel must “immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.”

That is, rather than fully accepting South Africa's request, the Court did not mandate a total cessation of fighting throughout the Gaza Strip, not even in Rafah. The order addresses military operations in Rafah only, and employs qualified language.

It may be anticipated that the vague wording employed by the Court—evidently chosen to win broad support among the judges—will be the subject of debate regarding its interpretation and practical implications.

This vague wording leaves Israel some room to continue the military operation in Rafah, provided it takes additional steps to adequately address the humanitarian needs and safety of the civilian population, as the Court views the steps taken to date as insufficient. This applies to military operations in Rafah that may have implications for the civilian population elsewhere in the Gaza Strip; to ensuring the safety of civilians who evacuate the Rafah area; and to providing adequate humanitarian conditions in the areas to which they are evacuated. Here, Israel can draw on the opinion of Judge Georg Nolte (Germany), which emphasizes that Israel must limit its military operations in Rafah only to the extent that they may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction, in whole or in part.

- **The Rafah border crossing:** The Court did not sustain South Africa’s request to order Israel to withdraw from the Rafah border crossing. However, it directed Israel to “maintain open the Rafah crossing for the unhindered provision of urgently needed basic services and humanitarian assistance.” The Court ignored the fact that the decision to close the Rafah border crossing was made by Egypt and that Egyptian cooperation is essential for implementing the order. The judges in the minority, ad-hoc Judge Aharon Barak and the Vice President of the Court, Julia Sebutinde (Uganda), addressed this aspect.
- **Allowing United Nations investigators into the Gaza Strip:** The Court instructed Israel “to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission, whatever investigative body mandated by competent organs of the United Nations to investigate allegations of genocide.” Here too the Court accepted only in part the South African request that international organizations and other foreign agencies, as well as journalists, be allowed to enter the Gaza Strip. An interesting question is whether the order allows Israel to limit access by these groups to Gaza only through the Rafah border crossing or if it requires Israel to permit them to enter by traversing its own territory. Another relevant question is whether the existing United Nations agencies—such as the standing Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel established by the UN Human Rights Council—are considered to have a mandate to investigate allegations of genocide, even though this is not stated in their mandate.
- **Submitting a report on implementation of the interim orders:** The Court instructed Israel to submit a report within one month detailing the steps taken to implement the orders. Here too, the Court only partially accepted South Africa’s request that Israel submit a public report within one week.

How did the Court decide given the factual discrepancies between the parties regarding the situation on the ground?

The Court was presented with two wholly different sets of facts, submitted by South Africa and Israel, about the implications of the operation in Rafah for the civilian population of the Gaza Strip, including the humanitarian conditions in the areas to which the population was being evacuated. The majority opinion, in effect, accepted the South African version that the humanitarian situation on the ground has seriously deteriorated as a result of the operation in Rafah and that Israel has not taken the steps necessary to provide a solution.

In doing so, the judges accorded significant weight to the statements and reports by United Nations agencies and officials, who in recent weeks and days have released critical reports about the humanitarian situation in Gaza, which contradict Israel's reports. It is not implausible that these UN statements and reports were made with the intention of influencing the Court's decision. Ad-hoc Judge Barak, in his minority opinion, criticized the Court for relying on these sources (as well as on publications in the media and social media) without verifying them and checking their validity, in contrast to the Court's standard methodology in other cases.

How has the political and public discourse in Israel influenced the Court's decision?

Judge Nolte's opinion highlights the severe implications of statements made by Israeli politicians and attacks on the humanitarian aid trucks carried out by Israeli civilians. It reveals how they have influenced the stance of at least some of the judges who had previously opposed issuing orders that would restrict IDF operations. In an earlier opinion, Judge Nolte had already expressed his concern that the volatile public discourse in Israel might increase the risk of genocide.

In his current opinion, Judge Nolte notes worriedly that this public discourse has continued and includes explicit calls to prevent humanitarian assistance to civilians in the Gaza Strip. He cites statements such as those by Minister of Finance (and Security Cabinet Member) Bezalel Smotrich several weeks ago, from which one may infer that he called for the destruction not only of Hamas but also for harming the civilian population ("There is no halfway job. Rafah, Dir al-Balah, Nuseirat—total annihilation"); and by Minister of National Security Itamar Ben-Gvir (also a Security Cabinet Member), who states his opposition to allowing humanitarian aid trucks to enter the Gaza Strip.

For Nolte, even statements by Israelis who are not part of the official decision-making hierarchy also constitute grave indications of the volatile political context, which casts a shadow of doubt as to whether Israel can meet the obligations it has accepted - to provide appropriate humanitarian aid to civilians evacuating from Rafah. As an example of this, he cited Shimon Boker, the deputy chair of World Likud, who told a television interviewer that the IDF should already have entered Rafah. "There are no uninvolved persons there and they should kill and kill and kill." According to Judge Nolte, these fears are corroborated by the calls by senior officials, such as the Minister of National Security, not to provide humanitarian assistance to the Gaza Strip and their support for Israeli civilians' attacks on the aid convoys. The judge noted that the Israel Police and IDF had not prevented the attacks on the aid convoys.

Did the Court refer to the Israeli hostages held by Hamas?

As in its previous decisions, the ICJ again expressed its concern for the fate of the Israeli hostages held in the Gaza Strip and called for their immediate and unconditional release. Because Hamas is not a state and not a party to the proceedings before the court, this statement has symbolic value only and highlights the extremely problematic nature of the proceedings before the Court in which only one side to the armed conflict in Gaza is taking part.

Can Israel continue its military operation in Rafah?

The Court's decision appears to limit Israel's operational wiggle room in Rafah, suggesting that it views Israel's actions thus far (particularly regarding the evacuation of the civilians and the humanitarian assistance available to them) as insufficient. However, the vague wording of the order concerning the fighting in Rafah and the fact that the legal framework within which it was issued is the Genocide Convention, which is the exclusive source of the Court's jurisdiction, leave Israel with a certain amount of flexibility in interpreting and implementing the order, especially if it can demonstrate an improvement in the scale of the humanitarian assistance entering the Gaza Strip.

As a signatory of the Genocide Convention, Israel is obligated by international law to respect the Court's decisions. The ICJ has no power to enforce its decisions; only the United Nations Security Council can do so.

The State of Israel responded to the May 24, 2024 decision by the Court in a joint statement by the Head of the National Security Council and the Foreign Ministry Spokesperson: "Israel has not and will not conduct military actions in the Rafah area which may inflict on the Palestinian civilian population in Gaza conditions of life that could bring about its physical destruction in whole or in part." This seems to be a declaration that Israel will comply with the order issued about the fighting in Rafah. So too with the order about the Rafah border crossing: "Israel will continue to enable the Rafah crossing to remain open for the entry of humanitarian assistance from the Egyptian side of the border, and will prevent terror groups from controlling the passage." This response reduces the potential for diplomatic and legal friction in the international arena. Note, however, that the Israeli response does not refer to the other parts of the Court's decision, in particular the obligation to allow international investigators into the Gaza Strip.

Finally, after the ICJ issued its decision, it was reported that the United States and Egypt had agreed on a plan to resume the delivery of humanitarian aid trucks and fuel from Egypt to UN personnel in the Gaza Strip via the Kerem Shalom crossing (there is still no agreement about Egypt reopening the Rafah border crossing). This development could help Israel demonstrate that steps have been taken to improve the situation on the ground as compared to the situation that prevailed when the Court issued its decision.

What else can Israel do in view of the Court's decision?

In view of the order about continuation of the military operation in Rafah and the likelihood that its interpretation and implication will be controversial, it is important that Israel coordinate its continued military action in Rafah with its allies, especially the United States, with the goal of providing legitimacy to the assertion that Israel is not violating the Court's order.

Such coordination is crucial not only to prevent Israel from being accused of violating its international legal obligations but also considering the serious implications that allegations of violating the Court order could have. These include: implications on Israel's diplomatic relations with its allies and its ability to enjoy their diplomatic support; implications on its ability to continue to procure arms abroad, which is already under heavy pressure; implications on criminal complaints and proceedings that are being constantly initiated against senior political officials, IDF commanders and IDF soldiers in an increasing number of countries around the world; and implications on the criminal investigation conducted by the International Criminal Court (the ICC) and its impending decision on the Prosecutor's request to issue arrest warrants for the Israeli Prime Minister and Defense Minister on

charges of employing starvation of the civilian population in the Gaza Strip as a method of warfare.

In light of the damage to Israel as a result of the inappropriate statements made by public officials, as the decision again highlights, it is important that they avoid statements that might imply an intention to violate the law. When such statements are made, however, they need to be addressed by the relevant Israeli law enforcement authorities. Similarly, it is necessary to continue to fight against the phenomenon of IDF personnel who express themselves inappropriately and to take steps to prevent the publication of such statements on the social networks.

Finally, Israel must show uncompromising resolve in addressing the humanitarian needs of civilians in the Gaza Strip; this includes thwarting the attempts by Israeli civilians to frustrate the passage of humanitarian assistance, as stated.