

# Possible Outcomes in South Africa's Genocide Case against Israel before the International Court of Justice

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### Introduction

In December 2023, South Africa filed an application before the International Court of Justice alleging that Israel's actions in Gaza since it was attacked by Hamas on 7 October 2023 violate its obligations under the 1948 Genocide Convention. South Africa called upon the Court to order nine "provisional measures" to address what it considers to be an unfolding genocide. It prosecuted its case before the Court in The Hague in oral, public hearings on 11 January 2024. The following day, Israel defended its actions and rebutted the claim of genocide.

This case has brought unprecedented attention to the International Court of Justice. But it has also led to a significant amount of speculation, misunderstanding and misinformation circulating on social media.

This briefing therefore aims to factually outline the possible outcomes of the case, as well as summarises the role of the judges, other states, and the measures being sought by South Africa.

### The Three Possible Outcomes

There are effectively three possible outcomes of the case: (1) a full order is made as South Africa is seeking (on the basis that genocide is occurring or is at risk of occurring); (2) the Court refuses to issue any order (on the basis that no genocide is occurring or is at risk of occurring); (3) or a partial order of some of the measures called for (on the basis that some risk of genocide could be occurring). These are considered in turn.

#### ***Scenario 1: The court orders all the provisional measures requested by South Africa***

In the—unlikely—event the Court were to order all nine provisional measures (listed below), this would imply that either genocide is already unfolding in Gaza or that the Court believes there is a serious risk of it occurring. This would be a momentous decision in legal and political terms. Israel has declared that it will ignore the ruling, especially an order to cease military operations. Israel would almost certainly not be sanctioned by the United Nations (UN) Security Council due to the United States' expected veto of any enforcement resolution. However, this does not mean the ruling would have no consequences. It would be hugely politically embarrassing not only to Israel but also to its strongest supporters – the United States and Germany. They would both be prevented by international law from transferring weapons to Israel that might be used in the Gaza operations. Germany would be precluded from doing so by virtue of being a party to the UN Arms Trade Treaty as well as under the European Union Code of Conduct on Arms Transfers. The United States (and indeed all other States) could not lawfully do so under the rules of customary international law that govern State responsibility. Such a ruling would only further Israel's isolation on the global stage.

### ***Scenario 2: The court rejects South Africa's request for an order of provisional measures***

This is what Israel has called for on the basis that it is not committing genocide and has no intention to do so. The Court could decide in particular that Israel did not have genocidal intent. This would not mean, however, that the Court believes Israel's conduct of the war in Gaza is lawful. Its jurisdiction (legal mandate) to hear the case depends on the 1948 Genocide Convention and it does not have jurisdiction to consider whether other international crimes, particularly war crimes and crimes against humanity, have been or are likely to be committed. These are already being investigated, with respect to both Hamas and Israel, by the International Criminal Court, which covers individual criminal responsibility but not the responsibility of a State. In addition, Palestine and a number of other States are preparing to call for a special conference on the Geneva Conventions to prevent violations of international humanitarian law in the war. The United States is keen to block such a conference from occurring, arguing that it would politicise the law.

### ***Scenario 3: The court orders some of the provisional measures requested by South Africa***

The third of the options—to order only some of the provisional measures being sought— seems the most likely. This would mean that the Court believes there is some risk of genocide occurring. An order to Israel to stop all fighting would be almost unprecedented, and would not bind Hamas. Given the catastrophic humanitarian situation in Gaza, the most likely measure to be ordered would be to allow in and possibly even facilitate the delivery of all necessary humanitarian aid to prevent mass starvation. This could conceivably involve another “humanitarian pause”. The Court could make these orders on the basis that genocide was at risk of being perpetrated given Israel's wilful impeding of humanitarian access. The Court could also be expected to specify the measures that Israel should take to prevent genocide. This would include clear instructions to the Israel Defence Forces (IDF) not to commit genocide and to its political leaders not to engage in unlawful acts such as incitement to genocide. The Court could also order the government to preserve all relevant evidence. This is what it did last year in relation to the situation in Myanmar with respect to the Rohingya.

In such a scenario, the case would be expected to proceed to a consideration on its merits; that is to say, to assess whether genocide had either been committed or had been incited by Israel through its government. Public and direct incitement to genocide is also prohibited under the 1948 Genocide Convention. Such a case would take many years to be decided.

## **Role of the judges and other states**

A total of seventeen judges heard the case – the fifteen ordinary judges of the Court and two “*ad hoc*” judges. The fifteen judges are independent of their States but are usually nominated on the basis that they share their respective governments' approach on core international legal issues. The parties are each allowed to appoint one *ad hoc* judge to represent their interests. While they swear to act impartially, typically the *ad hoc* judges will vigorously defend their own State's actions. The Court is now deliberating its decision, which is expected in the coming week or two. States that express support for either side—as many have done—are not realistically expecting this to influence the judges' decisions, but tend to act in this way in order to appease a domestic and/or international audience.

Each conclusion at the end of the Court's judgement will be adopted by a simple majority of the number of sitting judges. So in this case, the support of at least nine judges is needed for each specific finding. The judges who are in the minority on any decision are free to append a dissenting opinion to the judgement on any of these findings but are not obligated to do so.

## The Provisional Measures South Africa is Seeking

South Africa has asked the Court to formally order nine separate actions. Eight of these concern conduct by Israel alone while the ninth concerns both South Africa and Israel:

1. Israel must immediately suspend its military operations in and against Gaza.
2. Israel must ensure any armed units under its control do nothing to further such military operations.
3. South Africa and Israel must both take “all reasonable measures” to prevent genocide against the Palestinian people in accordance with their obligations under the Genocide Convention.
4. Israel must desist from any genocidal acts against the Palestinian people.
5. Israel must cease and take all measures to prevent the expulsion and forced displacement of Palestinians from their homes; deprivation of access to adequate food and water and humanitarian assistance, including fuel, shelter, clothes, sanitation, and medical supplies and assistance. It must also prevent the destruction of Palestinian life in Gaza more generally.
6. Israel must ensure its military and any other forces under its control do not commit any of the acts described in points (4) and (5) and must not engage in incitement, conspiracy, or attempt to commit genocide. If they do, Israel must ensure they are prosecuted.
7. Israel must take effective measures to ensure the preservation of evidence related to alleged genocide and must not restrict access by fact-finding missions to Gaza that assist in doing so.
8. Israel must report to the Court on its compliance with the Order within one week of its issuance, and thereafter at regular intervals, until a final decision on the case is rendered.
9. Israel must refrain from any action that might aggravate the dispute before the Court or make it more difficult to resolve.

## Conclusion

Whatever the Court decides legally will provoke a political firestorm internationally. Fail to intervene at all and the Court risks being seen by many as standing by while genocide is being perpetrated. Issue any sort of Order and Israel will unleash fury at the Court (and the United Nations more broadly). The stakes are extraordinarily high.

## About Lex International

Lex International is a philanthropic fund hosted by the Swiss Philanthropy Foundation, with the purpose to support and strengthen international law. Lex International provides regular briefings and updates on key international issues such as treaties, international legal processes and multilateral negotiations.

Lex International is based in Geneva, Switzerland and led by Beatrice Fihn, an international jurist who accepted the Nobel Peace Prize in 2017 for the International Campaign to Abolish Nuclear Weapons.

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