

# Analysis | Humanitarian Catastrophe in Gaza Is at Heart of ICJ's Genocide Ruling on Israel

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**The International Court of Justice's provisional ruling focuses on what it sees as the most urgent matter in Gaza: the catastrophic conditions for Palestinians, but also the need to release the Israeli**

*Palestinian children and women waiting to collect food at a donation point in a refugee camp in Rafah last month. Credit: Saher Alghorra/Middle East Images via AFP*

The humanitarian catastrophe in Gaza is at the heart of the International Court of Justice order regarding provisional measures in the case brought by South Africa against Israel.

Based on reports from UN bodies and related agencies such as the World Health Organization, the world court [describes the disastrous situation in Gaza](#). It details that 25,700 Palestinians in Gaza have been killed, over 360,000 housing units destroyed or partially damaged, and some 1.7 million people displaced. It cites statements on an unfolding public health disaster and the collapse of the health-care system in Gaza, of imminent famine and Gaza becoming uninhabitable.

"In these circumstances," the United Nations' top court wrote, "the catastrophic situation in the [Gaza Strip](#) is at serious risk of deteriorating further before the court renders its final judgment." The court points to an "urgency" – a real and imminent risk to further damage to Palestinians in Gaza. Its orders that Israel will take a few measures, including all measures to prevent the killing of Palestinians in Gaza, to prevent the deliberate inflicting of conditions of life calculated to bring about physical destruction, and to take immediate and effective measures to enable the provision of urgently needed humanitarian assistance and basic services – all are given in light of this sense of urgency.

Under international law, there is always a duty during war to prevent the killing of civilians and to allow for the provision of humanitarian assistance. One does not need to turn to the [Genocide Convention](#) for this: these are duties enshrined in [International Humanitarian Law](#), which governs the use of force during armed conflicts.

*Protesters holding a Palestinian flag as they gather outside the International Court of Justice in The Hague on Friday. Credit: Piroshka van de Wouw/Reuters*

But in this specific case, for having the jurisdiction allowing it to give an order, the UN court had to determine that at least some of the rights claimed by South Africa are "plausible" – including the right of the Palestinians in Gaza to be protected from acts of genocide and related acts prohibited in the Genocide Convention, and the right of South Africa to see Israel's compliance with Israel's obligations under the convention.

This determination opened the door to the world court's jurisdiction, given that by ratifying the Genocide Convention, Israel agreed to the court's jurisdiction over disputes relating to the convention. There is no similar jurisdiction regarding violations of International Humanitarian Law, so the court does not have jurisdiction over it unless both sides to a dispute would consent to jurisdiction.

The debate over the relevance of the Genocide Convention [has been discussed at length in recent weeks](#). Based on statements by various Israeli politicians, some of which the court cited, South Africa argued that Israel's killing of civilians in Gaza is done with the intent to destroy the Palestinian population in Gaza at least partly. Israel argued that it is only targeting Hamas and any damage to civilians is collateral in nature. The court did not decide on that dispute at this stage.

The door of plausibility allowed it to make an urgent call, asking for the catastrophe to stop. It did not adhere to South Africa's request to order Israel to stop its military actions in Gaza. It did not explicitly discuss the matter of self-defense - neither accepting nor rejecting the parties' arguments on the matter directly. All it did was order Israel not to take measures prohibited under the Genocide Convention. Under the convention, these measures can become genocide if a link exists between them and the special intent.

From this perspective, it is interesting to consider the view of dissenting Judge Julia Sebutinde. She opined that lacking, in her view, indicators of a genocidal intent on the part of Israel, the measures requested by South Africa amount to a requirement by Israel to abide by International Humanitarian Law. Even if some of the acts may amount to grave violations of International Humanitarian Law, the Genocide Convention is not in her view the right framing and no provisional measure should be issued.

In his partial dissent, Israeli Ad Hoc Judge Aharon Barak also opined that, absent genocidal intent and thus lacking "plausibility," the appropriate legal framework is one of International Humanitarian Law. However, unlike Sebutinde, Barak voted with the majority on two of the provisional measures: the provision of humanitarian assistance and basic services; and the order to prevent and punish incitement to commit genocide. Barak explained that his vote regarding humanitarian assistance came from his deep humanitarian convictions, and in ensuring that Israel will comply - or in his view continue to comply - with International Humanitarian Law.

Barak, then, shares a sense of urgency about the humanitarian catastrophe with the majority judges. Unlike them, he refuses to attribute genocidal intent to Israel even at the "plausibility" level, but he is willing to make the "leap" and join them in some of the measures. The gap between these positions is bridged by Judge Georg Nolte in his separate opinion, where he holds that South Africa did not fulfill the "plausibility" requirement that Israel's military operation is being conducted with genocidal intent, but that it is enough to find that certain statements by Israeli officials give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention.

Thus, both the majority judges and Barak see the humanitarian catastrophe as being at the heart of the matter. But Barak, refusing to see the genocide claim as "plausible," stops short of joining the order regarding the prevention of the killing of civilians - even if that could also be framed as an existing International Humanitarian Law obligation. This was how Barak framed the part of the order that he did join. In fact, the order may point to a continuity between the Genocide Convention and International Humanitarian Law's duties not to target civilians.

*Israeli Ad Hoc Judge Aharon Barak, center right, at the opening of the genocide hearing at the International Court of Justice in The Hague earlier this month. Credit: Patrick Post/AP*

One can be critical of many aspects of the International Court of Justice order. However, it does notably start with describing, albeit briefly, the Hamas attacks on Israel on [October 7](#), and ends with expressing grave concern about the fate of [the Israeli hostages](#) and calling for their “immediate and unconditional release.” It does not engage with the actions of Hamas after October 7, though.

But we can read the judgment as neglecting any discussion on the ongoing war in an attempt to address the catastrophe of those at greatest risk at this moment: the residents of Gaza, as well as the hostages. Regarding the latter, the world court does not have jurisdiction to order their freedom, with Hamas not a side to the proceedings, but it chooses to end the order with addressing the need for their release.

The order given by the court may be one that Israel will say it already fulfills: it will argue that it does not target civilians, and that it allows for humanitarian assistance. However, the reality on the ground, the bombings [even U.S. President Joe Biden called “indiscriminate,”](#) the huge civilian death toll and the data regarding the health and food situation, may point to the fact that Israel honors these duties in the breach (i.e., it violated them).

Whether the International Court of Justice’s attempts to alleviate the humanitarian catastrophe in Gaza will bring about change on the ground remains to be seen. For now, whatever good or bad things we may say about the legal reasoning of the court, it is the humanitarian catastrophe and the need to end it - including the situation of the Israeli hostages - that resonates from both the majority opinion and that of Barak.

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**P.S.**

• Haaretz. Jan 26, 2024 11:52 pm IST:  
<https://www.haaretz.com/israel-news/2024-01-26/ty-article/.premium/gazan-humanitarian-crisis-over-shadows-everything-else-in-icjs-preliminary-genocide-ruling/0000018d-4739-d02c-a79f-47bb34a90000>