

POLICY BRIEF, JUNE 2024

Enforcing ICJ's Orders in South Africa v. Israel

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Executive Summary

Issue

In the ongoing devastating Gaza Conflict, South Africa took the decisive action of filing a case at the International Court of Justice (“ICJ”) accusing Israel of engaging in “genocidal acts” in Gaza. The ICJ has issued a series of orders, demanding that Israel cease any actions that can potentially be classified as genocidal, facilitate the unhindered delivery of humanitarian aid and permit investigations into alleged war crimes. Despite the binding nature of these rulings, the ICJ enforcement authority remains weak and the court primarily relies on voluntary compliance by member states. Israel's persistent non-compliance highlights its disregard for the Court's authority, complicating international efforts to address the humanitarian crisis in Gaza and undermining the credibility of international judicial institutions.

Recommendations

The following measures can be taken by the international community in case of persistent non-compliance by Israel:

- The issue of Israel's non-compliance should be brought before the United Nations Security Council (“UNSC”), which has the mandate to enforce decisions of the ICJ.
- Under the ambit of universal jurisdiction, national courts can entertain cases against the state of Israel and/or its officials for human rights violations including but not limited to genocide, war crimes and crimes against humanity.
- Complaints can be filed before relevant human rights committees that are treaty-based body tasked with investigating and hearing complaints on specific human rights abuses.
- Engaging in an open dialogue through the Organisation of Islamic Cooperation (“OIC”) could play a constructive role in addressing the ongoing situation. Using diplomatic channels within the OIC, member states could coordinate efforts to exert diplomatic pressure on Israel.
- Pakistan should intervene officially in the case filed by South Africa.

I) Background

On 7 October 2023, Hamas, a Palestinian Sunni Islamist organization, launched a surprise attack on Israel, resulting in approximately 1,200 deaths. Israel retaliated with a declaration of war on the Gaza Strip, conducting extensive airstrikes and a ground invasion that destroyed neighborhoods and displaced over two-thirds of the population. Reports indicate that since the conflict began in October, the offensive has killed at least 37,000 Palestinians, mainly children and women, and wounded over 86,000 others.

During these ongoing atrocities, South Africa, on 30 December 2023, took the decisive action of filing a case at the International Court of Justice (“ICJ”), accusing Israel of violating the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (“Genocide Convention”). The application submitted by South Africa emphasized that the “acts and omissions by Israel” are “genocidal in character” as they aim to destroy a significant part of the Palestinian national, racial and ethnic group. Additionally, South Africa requested the Court to indicate “provisional measures”, pursuant to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court. This request included the cessation of all military activities by Israel in Gaza. Importantly, as per Article 74 of the Rules of Court, “[a] request for the indication of provisional measures shall have priority over all other cases”.

II) Proceedings at the ICJ

Order of 26 January 2024¹

In January 2024, ICJ affirmed its jurisdiction over the case presented by South Africa and issued six emergency directives to Israel:

- Israel must take all necessary measures to prevent acts outlined in Article 2² of the Genocide Convention.

¹ South Africa v. Israel, Order of 26 January 2024 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>

² “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures

- Israel must ensure that its military refrains from executing any such actions.
- Israel must prevent and penalize the “direct and public incitement to commit genocide” against members of the Palestinian population in the Gaza Strip.
- Israel must guarantee the delivery of basic services and essential humanitarian aid to civilians in Gaza.
- Israel must prevent the destruction of evidence of war crimes in Gaza and permit access for fact-finding missions.
- Israel must submit a report within one month detailing all measures taken to comply with the court's orders.

It is pertinent to note that these measures were indicated on the basis of “urgency” because there was “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.”³ This essentially meant that the interim order was put in place to ensure that no irreparable damage was caused to the Palestinian people.

Order of 28 March 2024⁴

As a result of South Africa’s request of 6 March 2024 for the indication of additional provisional measures, the ICJ found that since January 26, 2024, the already “catastrophic living conditions” of Palestinians in the Gaza Strip had further deteriorated, particularly due to the prolonged and widespread deprivation of food and other essential necessities. Hence, the Court ordered that Israel must immediately implement all necessary and effective measures, to ensure the unhindered provision of essential services and humanitarian assistance to Palestinians in Gaza. Furthermore, Israel was directed to ensure that its military does not intervene in the delivery of urgent humanitarian aid.

Order of 24 May 2024⁵

Despite the ICJ’s provisional measures, on 7 May 2024, Israel initiated a military offensive in Rafah. This offensive followed weeks of escalated bombardment,

intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

³ South Africa v. Israel, Order of 26 January 2024, p. 22, para. 74

⁴ South Africa v. Israel, Order of 28 March 2024

⁵ South Africa v. Israel, Request for the Modification of the Order of 28 March 2024 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-sum-01-00-enc.pdf>

compelling thousands of Palestinians to flee from a city that had become a refuge for nearly half of Gaza's 2.3 million inhabitants.

In response to South Africa's request for the modification of the Order of 28 March 2024 and being mindful of the situation in Rafah, the ICJ in its most recent decision modified its previous provisional measures. The court emphasized Israel's obligation to ensure the "unhindered provision at scale" of basic services and humanitarian aid to Gaza, describing the humanitarian situation as "disastrous". Underscoring the necessity of effective measures to guarantee unimpeded access to the Gaza Strip for any commission of inquiry, fact-finding mission, or other investigative body authorized by competent United Nations organs to investigate allegations of genocide, the court has also mandated that Israel submit a report within one month detailing all measures taken to comply with this Order.

III) The Binding Status of ICJ Decisions

Article 94 of the UN Charter states that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party", highlighting the obligatory nature of ICJ decisions for UN member states. However, it is crucial to note that while ICJ decisions are binding, the Court does not possess its own enforcement mechanism. Instead, enforcement relies on the voluntary compliance of states or action by the United Nations Security Council ("UNSC") under Chapter VII of the UN Charter, which can authorize measures to enforce ICJ decisions.

Hence, as a member of the UN, Israel is bound by the court's rulings and cannot appeal a decision. However, the ICJ itself does not have any mechanism to enforce the orders directed at Israel.

IV) Recommendations on Options Available to the International Community

Enforcement through the United Nations Security Council ("UNSC")

Article 94(2) of the United Nations Charter grants the UNSC authority to ensure the enforcement of rulings issued by the ICJ. In instances of non-compliance, the

affected party may refer the matter to the UNSC. Should Israel persist in its refusal to adhere to ICJ measures, South Africa retains the option to elevate the matter to the UNSC.

To do so, South Africa would need to furnish evidence of Israel's non-compliance with ICJ directives and request the Council's intervention to enforce the judgment. Upon assessment of the situation, the UNSC may opt for various measures to exert pressure on Israel for compliance. These measures could entail issuing formal recommendations urging Israel's adherence to ICJ rulings, diplomatic engagement to foster dialogue, or the imposition of economic sanctions targeting Israel's commercial or financial interests.

In severe instances where non-compliance poses a threat to international peace and security, UNSC may authorize coercive actions, such as comprehensive sanctions or other enforcement measures, to compel Israel's compliance with the ICJ's judgment. However, it is crucial to note the limitations of the UNSC's enforcement capabilities. The five permanent members of the UNSC (China, France, Russia, the United Kingdom, and the United States) possess veto power, allowing any single member to block a resolution authorizing enforcement action.

Invoking Universal Jurisdiction

The international community can also invoke universal jurisdiction. Pursuant to this principle every state is obligated to prosecute and punish perpetrators of war crimes, crimes against humanity, genocide and torture irrespective of jurisdiction, territory, and citizenship.⁶ These grave crimes significantly impact the international community, justifying intervention under this principle.

Shifting the focus towards framing the case as crimes against humanity rather than genocide can enhance accountability. Notably, establishing crimes against humanity involves a more comprehensive and systematic approach, as articulated in Article 7(1) of the Rome Statute, which requires demonstrating a physical, contextual and mental element. Consequently, numerous countries could bring cases against Israeli military personnel for committing crimes against humanity. The process would commence with the prosecuting state evaluating whether the alleged crimes fall within

⁶ Article 146 Geneva Convention IV

the scope of its universal jurisdiction laws, followed by an investigation, evidence collection and case preparation. Upon accumulating sufficient evidence, the state may issue arrest warrants and proceed with domestic prosecution. Collaboration with other entities and international bodies may be pursued, and pertinent legal frameworks, including treaties and customary international law, may be invoked to fortify jurisdictional claims.⁷

Open Dialogue through the Organization of Islamic Cooperation (“OIC”)

Engaging in an open dialogue through OIC could play a constructive role in addressing the ongoing situation. The OIC, as a multilateral forum composed of predominantly Muslim-majority countries, provides a platform for member states to collectively address issues affecting the Islamic world⁸, including the Israeli-Palestinian conflict. Through diplomatic channels within the OIC, member states could coordinate efforts to exert diplomatic pressure on Israel to comply with the ICJ's rulings. This could involve issuing joint statements or resolutions condemning Israel's non-compliance and calling for immediate cessation of military operations. Additionally, the OIC could facilitate mediation efforts by appointing a neutral mediator or envoy to engage in dialogue with Israeli authorities.

Accountability Through Human Rights Committees

Human rights committees possess the capability to influence compliance through various avenues. The UN human rights system includes a network of ten treaty bodies that monitor the implementation of specific human rights treaties by member states. These committees are composed of independent human rights experts who serve in their individual capacities, not as representatives of their governments. While treaty bodies lack enforcement powers, their reviews and recommendations carry significant weight. They can influence domestic laws, policies, and practices to improve human rights protection. Moreover, some treaty bodies, such as the Committee on the Elimination of Racial Discrimination (“CERD”) have complaint

⁷ “Universal Jurisdiction” (International Justice Resource Center, February 27, 2021)

<https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>

⁸ Sharqieh, Ibrahim (2012) "Can the Organization of Islamic Cooperation (OIC) Resolve Conflicts?," Peace and Conflict Studies: Vol. 19 : No. 2 , Article 3.

mechanisms before which member states can file complaints for non-compliance against other member states.

In addition to the treaty bodies, the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories⁹ was established in 1968 by General Assembly resolution 2443 (XXIII). This committee closely monitors Israel's actions, documenting any human rights violations resulting from its non-compliance and reporting them domestically and internationally.

Intervention by Pakistan in South Africa vs. Israel

Pakistan has publically declared its support for South Africa, however, a formal intervention has not been filed by Pakistan supporting South Africa's case. As a party to the Genocide Convention, Article 63(2) of the Statute of the ICJ gives Pakistan the option to enter a formal intervention in the case. Article 63 grants a right to States to intervene in a contentious case when they are party to a multilateral treaty that will be interpreted in the Court's judgment. This right is, however, subject to the Court's power to declare the intervention inadmissible.

The intervention would allow Pakistan to present its own viewpoint on the issue before the Court and the international community and would go a considerable way in cementing Pakistan's solidarity with the Palestinian people.

⁹ M.I., "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories - (A/78/553) - Question of Palestine" (*Question of Palestine*, January 19, 2024) <https://www.un.org/unispal/document/report-of-the-special-committee-to-investigate-israeli-practices-affecting-the-human-rights-of-the-palestinian-people-and-other-arabs-of-the-occupied-territories-a-78-553/>

Action Matrix

Options for the International Community

| Option | Pathways to Solution | Implementation of Solution | Actors Responsible | Implementation Timelines |
|------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Enforcement of ICJ decision through UNSC | The UNSC can enforce the decisions of the ICJ through various means including the imposition of economic sanctions. | South Africa retains the option to take the matter to the UNSC. It must submit evidence to the Council, which may exert diplomatic pressure, impose economic sanctions, or take coercive actions to exert pressure on Israel for compliance. | <ol style="list-style-type: none"> 1. The South African Permanent Mission to the United Nations 2. Department of International Relations and Cooperation (DIRCO), South Africa 3. Department of Justice and Constitutional Development, South Africa | <p>2-4 months to collect the evidence. 1-2 months for submission to the UNSC. 6-12 months for UNSC's deliberations and actions.</p> |
| Invoking Universal Jurisdiction | Universal jurisdiction allows states to prosecute and punish perpetrators of war crimes, crimes against humanity, genocide, and torture irrespective of the jurisdiction, territory, and citizenship. | Numerous countries could prosecute Israeli military personnel for crimes against humanity. The process involves evaluating the alleged crimes, investigating, collecting evidence, and preparing the case. The state may issue arrest warrants and pursue domestic prosecution. | <ol style="list-style-type: none"> 1. Ministries or Departments of Foreign Affairs 2. Ministries or Departments of Law and Justice 3. Judiciary 4. Office of the Attorney General or Chief State Law Advisers | 12-24 months for evaluation, investigation and legal proceedings. |

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|-------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Engaging in Open Dialogue through OIC</p> | <p>The OIC, as a multilateral forum provides a platform for member states to collectively address issues affecting the Islamic world including the Israel-Palestine conflict.</p> | <p>Through diplomatic channels within the OIC, member states could coordinate efforts to exert diplomatic pressure on Israel to comply with the ICJ's rulings. The OIC could also facilitate mediation efforts.</p> | <ol style="list-style-type: none"> 1. Permanent Missions to the OIC 2. Ministries or Departments of Foreign Affairs 3. Special Envoys 4. Human Rights Commissions 5. Ministries or departments of religious affairs | <p>3-6 Months for diplomatic engagements between OIC member States.</p> <p>6-12 Months for discussion of issue at next OIC Meeting.</p> |
| <p>Accountability Through Human Rights Committees</p> | <p>Human rights committees possess the capability to influence compliance through various avenues including hearing complaints and providing recommendation for state behavior.</p> | <p><u>Treaty Based bodies include:</u></p> <ol style="list-style-type: none"> 1. Committee on Elimination of Racial Discrimination 2. Committee on Economic Social and Cultural Rights 3. Human Rights Committee 4. Committee on the Elimination of Racial Discrimination Against Women 5. Committee Against Torture 6. Committee on the Rights of the Child 7. Committee on Migrant Workers 8. Committee on Enforced Disappearances <p><u>Charter Based bodies include the Human Rights Council which includes:</u></p> | <ol style="list-style-type: none"> 1. The Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories 2. National Human Rights Institutions 3. United Nations Human Rights Council | <p>6-12 Months for Investigation and filing of application before relevant committee depending on the human right violation.</p> <p>Each human rights committee has its own rules and procedures.</p> |

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| | | <ol style="list-style-type: none"> 1. Special Procedures and Mandates 2. Universal Periodic Review 3. Independent Investigations, including the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories | | |
| Pakistan should officially intervene in the case filed by South Africa | As a state party to the Genocide Convention, Pakistan can file a declaration of intervention and then plead before the ICJ. | A declaration has to be filed under Article 63(2) of the Statute of the ICJ. | <ol style="list-style-type: none"> 1. Ministry of Foreign Affairs of Pakistan 2. Office of the Attorney General of Pakistan 3. Ministry of Law and Justice of Pakistan | 1 Month for the preparation of the intervention and filing. |