

Why the ICJ Cannot Order Israel to Stop the War in Gaza as a Provisional Measure

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By Jesse Lempel

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Will the International Court of Justice (ICJ) order Israel to cease or curtail its military operations in Gaza as a provisional measure, as South Africa requested in its proceedings against Israel under the Genocide Convention? That is the “big question,” as Professor Mike Becker put it. And Israeli officials are reportedly concerned about the “real danger that the court will issue an injunction calling on Israel to halt its fire.”



This post argues that the ICJ’s authority to indicate provisional measures is constrained by the right of self-defense recognized in Article 51 of the UN Charter. Therefore, on the (plausible) assumption that Israel’s war against Hamas is an act of self-defense with the meaning of Article 51, the ICJ cannot order provisional measures that would impair the lawful exercise of that right.

South Africa v. Israel

At the end of December last year, South Africa instituted proceedings in the ICJ against Israel, accusing it of violating the Genocide Convention. Israel has announced that it will defend itself in the proceedings.

Importantly, South Africa also asked the ICJ to order a slew of “provisional measures” before the case is adjudicated, including ordering Israel to “immediately suspend its military operations in and against Gaza.” That is a bold request, but there is a recent precedent: In *Ukraine v. Russia (2022)*, also under the Genocide Convention, the ICJ indicated provisional measures that ordered Russia to “immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine.”

So South Africa’s request is not off the wall, as far as ICJ precedent goes.

This post does *not* address whether South Africa’s claims of genocide have any merit, or even whether the applicable test for provisional measures would be met in this case.

Instead, the post highlights an important and overlooked constraint on the ICJ’s authority to indicate provisional measures: the right to self-defense recognized in Article 51 of the UN Charter. The ICJ does not have the power to indicate provisional measures that deny Israel the ability to lawfully defend itself against an armed attack.

The ICJ Cannot Order Provisional Measures that Impair a State's Right to Self-Defense

The ICJ's authority to impose provisional measures derives from Article 41 of the ICJ Statute: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." This language, as Professor J.G. Merrills observed, leaves "unanswered questions concerning both the basis of interim measures and the scope and exercise of the power."

What is clear, though, is that the ICJ Statute is part of the UN Charter. Article 92 of the Charter provides (emphasis added): "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which ... *forms an integral part of the present Charter.*" The ICJ relied on this integration in the LaGrand Case (2001).

In turn, Article 51 of the Charter provides (emphasis added): "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.*"

Putting these provisions together, it follows that the ICJ's authority to indicate provisional measures cannot impair the right of self-defense recognized in Article 51. The critical point is that the Court's authority to indicate provisional measures does not arise from the Genocide Convention, even though that would be the jurisdictional basis for this case. Indeed, the Court will usually indicate provisional measures without definitively establishing jurisdiction—it need only appear *prima facie* that "jurisdiction could be founded." (Gambia v. Myanmar (2020).) And this determination, grounded in Article 41 of the ICJ Statute, "in no way prejudices the question of jurisdiction"—which is "entirely different from the special provisions of Article 41." (Anglo-Iranian Oil Company Case (1952).) Article 41 allows the Court to indicate provisional measures even if it will ultimately conclude that it lacks jurisdiction, as in fact happened in Anglo-Iranian Oil Co.

Accordingly, the ICJ's power to indicate provisional measures is a creature of the ICJ Statute, "an integral part" of the UN Charter. The Charter's carve-out for self-defense actions thus constrains the provisional measures available to the Court. To borrow the language of Judge Tomka's separate opinion in Congo v. Uganda (2005), "a lawful exercise of the right to self-defence cannot constitute a breach of any relevant article of the United Nations Charter." That principle applies to the provisional measures authorized by Article 41 of the ICJ Statute.

In a sense, the argument made here resembles the question (discussed by Professor Christine Gray, at 132) whether the Security Council's powers are "limited by the requirement that such measures do not undermine the right of self-defence under Article 51." But there is also an important difference. By qualifying the right as existing "until the Security Council has taken measures necessary to maintain international peace and security," Article 51

contemplates that the right of self-defense is temporary and subordinate to the Security Council's actions. The Court, acting under the ICJ Statute's authority to indicate provisional measures, does not enjoy the same prerogative to quash a State's right to lawful self-defense against an armed attack.

The ICJ Should Assume that Article 51 Applies Without Definitively Resolving the Question

The ICJ's power to indicate provisional measures implies the power to determine whether a particular requested measure is authorized by the ICJ Statute. Given the breadth of South Africa's requested provisional measures (immediately suspending military operations in Gaza), the ICJ could not grant that request without considering whether such measures are consistent with Article 51 of the Charter. Therefore, if the Court would otherwise be inclined to grant South Africa's request, it must determine whether Article 51 applies and take account of any limitations that follow from that determination.

That being said, the ICJ Statute compels the Court to determine whether the "circumstances so require" before indicating provisional measures. In considering the totality of the circumstances, the Court should factor in whether it is prudent to pass upon a fraught and very important legal question in a rushed manner at this preliminary stage of the proceedings. As discussed below, there are many doctrinal puzzles and unresolved factual questions that bear upon whether Israel's war against Hamas in Gaza is properly characterized as invoking the right of self-defense under Article 51. It would be injudicious to veer into that thicket now, especially in a case where those issues will not even be presented at the merits.

The better course, I suggest, would be to assume—without definitively resolving—for purposes of this preliminary stage that Article 51 applies, and to fashion any provisional measures accordingly. Even the substantial possibility that Article 51 applies is among the "circumstances" that counsel against a sweeping provisional measure like the one indicated in *Ukraine v. Russia*.

In fact, if Israel chooses to advance an argument along the lines of the one in this post, it is unlikely to ask the Court to actually adjudicate whether Article 51 applies. Israel will probably not want to risk a negative answer or inviting the Court to analyze whether its operations are a lawful exercise of that right. And, in any event, that issue is unrelated to the merits of the case. But Israel may well frame the Article 51 question as a serious complication to be considered among all the relevant "circumstances" in determining whether and which provisional measures are "require[d]." In my view, the Court should be very wary of brushing Article 51 aside.

Does the War Against Hamas in Gaza Implicate Israel's Right of Self-Defense?

The assumption that Israel's war against Hamas in Gaza is governed by Article 51 is debatable—and vigorously debated. (For recent illuminating discussions surrounding this question, see the contributions by Professors [Schmitt](#), [Milanovic](#), [Tsagourias](#), [Buchan](#), and [Gill](#).) The one criterion actually mentioned in the text of Article 51—"an armed attack"—is surely met. Indeed, South Africa's application to the ICJ says as much, acknowledging that Israel's current military campaign was "launched in response to an attack in Israel on 7 October 2023 ... by two Palestinian armed groups." And numerous States have explicitly recognized Israel's right of self-defense in response to the October 7, 2023 attacks (see sources collected [here](#)).

But other States and scholars do not believe that Israel's war against Hamas in Gaza falls within the Article 51 framework. Some do not accept that Article 51 applies to non-state actors like Hamas (see, e.g., the discussion [here](#)) or that an occupier can invoke Article 51 in the occupied territory (and they consider Gaza to have been occupied by Israel on October 7). In a 2004 advisory opinion, [the ICJ itself](#) denied that Article 51 was relevant to Israel's construction of a wall in the West Bank meant to stop terror attacks. The Court reasoned that "Israel does not claim that the attacks against it are imputable to a foreign State"; that "Israel exercises control in the Occupied Palestinian Territory"; and that "the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."

Even so, the ICJ could take a different approach in this situation, as Professor Terry Gill [suggests](#). Much has changed since 2004, including Israel's withdrawal from Gaza in 2005 and years of Hamas strengthening its governance and military capabilities in the territory. Those intervening events [cast doubt](#) on the proposition that Israel was legally occupying Gaza on October 7 (or afterward), as Professor Michael Meier [recently discussed](#).

And the ICJ may well conclude that Article 51 can be invoked against a non-state actor like Hamas—as argued in the separate opinions of Judges [Kooijmans](#) and [Simma](#) in *Congo v. Uganda* (2005), where [the Court itself](#) left the question open. Alternatively, the ICJ could conclude that the October 7 attacks are attributable to a State—either [the State of Palestine](#), which is recognized by South Africa and many other countries (though not by Israel), or perhaps Iran, should the evidence establish Iran's substantial involvement in the attacks (a question [analyzed](#) by Professor Jenny Maddocks).

It is plausible that, one way or another, the ICJ will conclude that Israel's self-defense is implicated—or, as discussed above, that the Court will assume that conclusion at this preliminary stage without definitively resolving it. On that assumption, my contention is that Article 51 prevents the Court from indicating any provisional measures under the ICJ Statute that would impair Israel's right to lawfully wage a defensive war.

What Provisional Measures Could the ICJ Order?

If the analysis above is correct, the ICJ would likely not have the power to order Israel to cease or substantially curtail its military operations in Gaza as a provisional measure, to the extent that such an order would impair Israel's Article 51 right to lawfully defend itself.

But Article 51 only goes so far. There are limits to self-defense, including the prohibition of genocide and the strictures of international humanitarian law (IHL). Thus, it would not offend Article 51 for the Court to accept South Africa's request to indicate provisional measures requiring Israel to comply with its obligations under the Genocide Convention, which Israel is already bound to do and is unlikely to argue otherwise. (Although the issue is beyond the scope of this post, I presume that a State's obligations under the Genocide Convention either do not conflict with its right to self-defense or, in the rare event of a true conflict, the Genocide Convention would control.)

Similarly, the Court could generally order Israel to ensure that its self-defense actions comply with its obligations under IHL and other applicable legal rules.

But, if the ICJ is not content with ordering Israel generally to comply with its legal obligations, and is instead inclined to issue a specific order to halt or limit its military operations in Gaza (à la *Ukraine v. Russia*), it must add an appropriate caveat: "except as necessary to lawfully exercise the right of self-defence recognized in Article 51 of the Charter."

The Court could also grant South Africa's request to order Israel not to take any action that "might aggravate or extend the dispute before the Court or make it more difficult to resolve." Likewise, the Court could presumably order Israel generally to "take effective measures to prevent the destruction and ensure the preservation of evidence," as South Africa requests. Those requests track the measures indicated by the ICJ in *The Gambia v. Myanmar (2020)*.

Reaching further, however, South Africa also asks the ICJ to order Israel not to "deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence." Israel will surely object to this request for various reasons.

From the self-defense angle, Israel may plausibly argue that allowing unrestricted access of "fact-finding missions" and unnamed international "bodies" into Gaza would interfere with its legitimate military objectives (e.g., attacking Hamas combatants and rescuing hostages) and thus impermissibly frustrate its right to self-defense—especially when some of those entities could be used by Hamas to undermine Israel's war aims. But, if it makes that claim, Israel may need to put forward some evidence to substantiate that concern.

Conclusion

If the ICJ determines that provisional measures are appropriate in this case, it should carefully consider how to narrowly tailor those measures so that they are consistent with Israel's inherent right to self-defense. Because of the self-defense context here, a far-

reaching and unqualified order to halt or scale back combat operations in the style of *Ukraine v. Russia* would overstep the bounds set by the UN Charter and ICJ Statute.

If the Court is inclined to go beyond general provisional measures requiring Israel to comply with its legal obligations, and instead order Israel to refrain from specific combat activities, it should add the caveat: “except as necessary to lawfully exercise the right of self-defence recognized in Article 51 of the Charter.”