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South Africa's Case against Israel for Genocide in Gaza at the ICJ: Challenges and Prospects

Unit for Political Studies

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Unit for Political Studies

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Nearly three months into Israeli's relentless war on Gaza, which had, at that time, resulted in about 100,000 Palestinians martyred, wounded, or missing, on 29 December 2023, the government of South Africa filed a lawsuit with the International Court of Justice (ICJ) against Israel. South Africa has accused Israel of violating its obligations under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) on the basis of Articles 36 / 1 and 41 of the Statute of the ICJ, which was established in 1945.¹ South Africa's legal application also included a request for provisional measures (as an urgent subsidiary procedure), pursuant to the provisions of Article 41 of the Statute.² Accordingly, on 3 January 2024, the court announced that it would hold two sessions to hear the prosecution and defence arguments on 11 - 12 January 2024.³ On 12 January 2024, the court announced the conclusion of the hearings and indicated that its decision would be released at a later date.⁴

South Africa's ICJ Case

The lawsuit filed by South Africa relied on 84-pages documenting evidence collected from international reports, including those of special rapporteurs to the United Nations or the Office of the High Commissioner for Human Rights. In addition, the team collected evidence documented by the press and media professionals on the ground in Gaza and a multitude of other credible sources.

The most prominent arguments made by the claimants indicated the physical acts that constitute the crime of genocide in accordance with Article II of the Genocide Convention,⁵ which referenced evidence from multiple sources.⁶ Under Article II, the act of genocide is directed against a group, whether national, ethnic, or religious, and this applies to the Palestinians in the Gaza Strip, as they

¹ Article 36 / 1

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Article 41

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.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

² "South Africa v. Israel: Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip," International Court of Justice, 29/12/2023, accessed on 18/1/2024, at: <https://bit.ly/424ZNOX>

³ "Proceedings Instituted by South Africa against Israel on 29 December 2023, Request for the Indication of Provisional Measures: Public Hearings to be Held on Thursday 11 and Friday 12 January 2024," International Court of Justice, 3/1/2024, accessed on 18/1/2024, at: <https://bit.ly/3tX9pQZ>

⁴ "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Indication of Provisional Measures: Conclusion of the Public Hearings Held on Thursday 11 and Friday 12 January 2024," International Court of Justice, 12/1/2024, accessed on 18/1/2024, at: <https://bit.ly/48XfrQj>

⁵ **Article II:** In the present Convention, 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 intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

United Nations, General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide, Approved and Proposed for Signature and Ratification or Accession by General Assembly Resolution 260 A (III) of 9 December 1948, Entry into Force: 12 January 1951, in Accordance with Article XIII* (New York: 9/12/1948), accessed on 18/1/2024, at: <https://bit.ly/48COG42>

⁶ The crimes that South Africa accuses Israel of committing on the basis of Article II of the Convention are: (1) Killing of Palestinians in Gaza (2) Causing serious bodily and mental harm (3) Mass expulsion from homes and displacement (4) Denial of access to sufficient food and water; (5) Denial of adequate medical assistance (6) Denial of access to adequate shelter, clothing, hygiene and sanitation (7) Destruction of the lives of Palestinians in Gaza; and (8) Imposition of measures aimed at preventing Palestinian births. See: "South Africa v. Israel"



are a group against which crimes were committed with the intention of destroying them in the Gaza Strip. The South African case demonstrated that Israel had committed the first four types of crimes in Article II of the Convention against civilians in Gaza over the course of its onslaught against Gaza.⁷

The legal document submitted by the South African team went on to detail “Expressions of Genocidal Intent against the Palestinian People by Israeli State Officials and Others”.⁸ It also leaned on evidence of genocidal intent by listing reports and statements from a number of UN and international bodies warning of Israeli intent to commit genocide against the Palestinians.⁹

Human rights organizations have launched a database that is constantly being updated to record statements inciting genocide against the Palestinian people. It contains more than 500 statements by Israeli decision-makers, army personnel and officers, legislators, journalists, influencers, and former government officials.¹⁰ These statements help prove criminal intent – which is usually the most difficult element to establish in supporting a genocide case.

The South African case argued that the Israeli occupation authorities have failed in their obligations under Articles (I, III, IV, V, VI) of the Genocide Convention,¹¹ which stipulate in their entirety the obligation to prevent conspiracy, incitement, collusion, or to punish acts of genocide in accordance with Article II.¹² South Africa seeks to obtain a judicial ruling to convict Israel of violating its obligations under the agreement.¹³ In addition, it includes a Request for the Indication of Provisional Measures “in relation to the Palestinian people as a group protected by the Genocide Convention” that includes Israel suspending its ongoing military operations in Gaza.¹⁴ The case emphasized the “grave threat” to the existence of Palestinians in Gaza, who are in “severe need of the Court’s protection”, and

7 Ibid.

8 Ibid, P.59.

9 Ibid., P. 67.

10 Law For Palestine, “Law for Palestine Releases Database with 500+ Instances of Israeli Incitement to Genocide – Continuously Updated”, 4 January 2024, accessed on 18/1/2024 at: <https://cutt.ly/owLah4Uh>

11 Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article III

The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

12 “South Africa v. Israel,” pp. 70, 71.

13 Ibid., p. 82. Some of the requests of the State of South Africa:

(a) killing members of the group; (b) causing serious bodily or mental harm to the 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; and (d) imposing measures intended to prevent births within the group.

14 Ibid, Para. 144.

affirmed that with “each passing day [...] Israel’s military attacks continue, further significant loss of life and property is being caused, and grave human rights violations are being committed. There can be no doubt that the requirements for the indication of provisional measures are satisfied here.”¹⁵

Accordingly, South Africa’s application seeks two outcomes. The first is a judicial ruling that Israel has violated the obligations imposed on it under the Genocide Convention, which would take years to decide, as happened with the case of Bosnia, which began in 1993 and ended with a judicial conviction in 2007.¹⁶ The second is an urgent ruling in favour of provisional measures to stop the military aggression and acts of genocide in Gaza, which will shape the court’s perspective and determine its course of action concerning the first charge, i.e. committing the act of genocide against the Palestinian people later.

The Israeli Defence at the ICJ

The Israeli defence team began its rebuttal by recalling the Holocaust and the genocide of Jews in Europe during World War II and under Nazi rule.¹⁷ It claimed that its war in Gaza was one of self-defence against the attacks launched by Hamas, arguing that its military actions have been conducted within the framework of international humanitarian law and justifying the large number of civilian casualties by claiming that Hamas “embedded its military operations, militants and assets throughout Gaza within and beneath densely populated civilian areas”.¹⁸

The Israeli team also argued that the court does not have jurisdiction to consider this case on the basis of Article IX of the Convention, which stipulates that, “disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”¹⁹ Israel argued that a legal case only exists between two parties to a conflict before the court, one of whom is harmed by the other party’s practice against it, seeking compensation for this harm. In addition, the discourse cited by South Africa is not directed against it.

Malcolm Shaw, a member of the Israeli team, sought to deny that Israel is an occupying authority by pointing out that Israel has the right to Palestine, going back to the Balfour Declaration of 1917, and historical contentions about the entry of the tribes of the Children of Israel into the land of Palestine

¹⁵ Ibid, P. 82.

¹⁶ “Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),” International Court of Justice, 26/2/2007, accessed on 18/1/2024, at: <https://bit.ly/3SxjSMF>

¹⁷ “Public Sitting Held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, President Donoghue Presiding: In the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),” International Court of Justice, 12/1/2024, accessed on 18/1/2024, at: <https://bit.ly/3O6kZjD>

¹⁸ Ibid. P. 18.

¹⁹ “Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),” p. 129, para. 209.



about 3,500 years ago. The Israeli defence team indicated that the evidence provided is not sufficient to obtain a decision on provisional measures as they are a “complex instrument in that the Court has to decide upon the basis of certain assumptions which may or may not be disproved at a later stage of the proceedings.”²⁰ It cited the Bosnia and Herzegovina ICJ case against Serbia and Montenegro, which concluded that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.²¹

Court Response

Given the period that the court usually takes to decide on provisional measures, two challenges emerge. The first is the urgency of the request submitted by South Africa. The second relates to the judicial composition of the court, as the urgency of the request prompts the court to expedite its decision according to the information provided and the danger to civilians in the event of genocide, in addition to the desire to preserve evidence of genocide, and to contribute to its prevention. In this type of request related to the Genocide Convention, the Court has dealt with two cases in recent years. The first was Gambia’s case against Myanmar regarding genocide crimes against the Rohingya,²² and the second was the Ukraine’s case against Russia.²³ The court took 72 days in the first case to make its urgent decision,²⁴ and 19 in the second case.²⁵

In light of the volume of documented evidence of genocide presented by South Africa in its lawsuit against Israel, it is not expected that the court will take a long time to decide on provisional measures, but this matter collides with the restructuring of the court as a result of the expiration of the term of five of its members. The new judges will be appointed on 6 February and subsequently join the team presiding over the case.²⁶

Some believe that an urgent ruling on provisional measures will be issued by the Court at the end of February 2024 or later. That is, after the new judiciary of the court has been formed and its body stabilized and has taken the time to read the submitted legal applications and meet to deliberate and draft the decision, in addition to the previously scheduled tasks of the court. This assumption

²⁰ Ibid, P. 29.

²¹ Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 129, para. 209.

²² “Application Instituting Proceedings and Request for Provisional Measures Filed in the Registry of the Court on 11 November 2019: Application of the Convention on the Prevention and Punishment of the Crime of genocide (The Gambia v. Myanmar),” International Court of Justice, 11/11/2019, accessed on 18/1/2024, at: <https://bit.ly/356xJrK>

²³ “The Ukraine v. Russian Federation: Request for the Indication of Provisional Measures Submitted by Ukraine,” International Court of Justice, 25/2/2022, accessed on 18/1/2024, at: <https://bit.ly/48BHJQx>

²⁴ “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures: Order of 23 January 2020,” International Court of Justice, 23/1/2020, para. 86, accessed on 18/1/2024, at: <https://bit.ly/3O8AW8K>

²⁵ “Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order of 16 March 2022,” International Court of Justice, 16/3/2022, para. 86, accessed on 18/1/2024, at: <https://bit.ly/35nORwO>

²⁶ “Security Council Elects Five Judges to International Court of Justice after Five Rounds of Voting”, 9/11/2023, accessed on 18/1/2023 at: <https://press.un.org/en/2023/sc15485.doc.htm>

is supported by the fact that the court set the date of the hearings in the Palestinian claim on “the legal consequences arising from Israel’s policies and practices in the occupied Palestinian territories, including East Jerusalem” as 19 February 2024, that is, after the date on which the new judges joined the court.²⁷ In addition, not enough countries were supporting South Africa’s ICJ case. Although some still hope that the urgent ruling on provisional measures will be issued before 6 February 2024, the two previous decisions in which urgent ruling on provisional measures were taken in Bosnia and Ukraine for crimes of genocide did not occur during the transitional period in which new judges were inaugurated.²⁸ The decision on provisional measures holds significant weight as it will determine the course of the trial for the entire lawsuit.

It is unlikely that the court will deviate from the provisional measures it implemented in the genocide cases in Myanmar and Ukraine, when deciding the South Africa case. By including the request for provisional measures, and not just adjudicating the commission of the crime of genocide, the South African legal team demonstrated their experience and prudence as the trial does not need to prove conclusively that the Palestinians are at risk of genocide, nor that they are being subjected to acts of genocide, or that Israel is violating its obligations under the Genocide Convention. Rather, it is sufficient for the State of South Africa to fulfil its obligations in committing to prevent genocide, or exercise its right to request that a member state (Israel) comply with its own obligations under the Genocide Convention, and to prevent and punish genocide and related prohibited acts under said Convention.²⁹

Therefore, South Africa’s application was drafted to focus on proving the plausibility that Israeli actions *could* fall within the provisions of the Convention; instead of seeking to unequivocally argue the case that genocide is being committed, it would suffice for South Africa to prove that the current situation has the potential to escalate into genocide, ultimately easing the burden of proof.³⁰ If the request were based solely on adjudicating the commission of the crime of genocide, without linking it to an urgent request for temporary measures, this would require years of investigation and data collection, giving Israel plenty of time to continue its crimes against Palestinian civilians in its war on Gaza.

Israel’s legal team presented a weak legal case, with many gaps, including its argument that it does not occupy Palestine, including the Gaza Strip, its reliance on the Balfour Declaration of 1917, and its claims of the Jews’ “historic right” to Palestine. In this context, the International Court of Justice had previously issued an advisory opinion in 2004 on the issue of the separation wall, in which it affirmed that Israel is a military occupying authority in the Gaza Strip and the West Bank, including East Jerusalem.³¹ Israel’s claim that its military operations adhere to international humanitarian law is clearly contradicted by the fact that the Israeli leadership follows a distorted perspective of

²⁷ “Calendar of Hearings and Events,” International Court of Justice, accessed on 18/1/2024, at: <https://bit.ly/425pQay>

²⁸ See the dates of the decisions (South Africa v. Israel) and (Bosnia and Herzegovina v. Serbia and Montenegro). See the ICJ judicial appointment history: “All Members of the Court Past and Present,” International Court of Justice, accessed on 18/1/2024, at: <https://bit.ly/48T1liW>

²⁹ “South Africa v. Israel,” Para. 134.

³⁰ Leela Jadhav et al., “The Gaza Genocide Case: A Comprehensive Overview of South Africa’s Legal Battle with Israel at the International Court of Justice || Highlights and FAQs,” Law for Palestine, 10/1/2024, accessed on 18/1/2024, at: <https://cutt.ly/twLaszWY>

³¹ “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004,” International Court of Justice, 9/7/2004, accessed on 18/1/2024, at: <https://bit.ly/48F7bom>



international humanitarian law through which they attempt to justify their criminal behaviour, which cannot be understood outside the framework of their colonial policies.³²

Furthermore, the argument regarding South Africa's need to be positively opposed in order to fulfil the requirements of *prima facie* jurisdiction is unreasonable. South Africa's case is not based on two conflicting parties but on its own obligations as a signatory of the Genocide Convention and the court has previously exercised its jurisdiction on this basis in a precedent. Gambia's case against Myanmar regarding the genocide against the Rohingya was heard despite no direct conflict between Gambia and Myanmar that could have been considered positive opposition.

Moreover, contrary to Israeli allegations, the evidence presented before the court is compelling enough for its body to issue a decision. The Israeli team cited the court's response to the lack of conclusive evidence in the Bosnia and Herzegovina case dating back to 1992, where the documentation did not fulfil the threshold of proof to push the court to issue a judicial ruling of genocide. But the various UN institutions and local and international civil society organization reports regarding the war on Gaza are credible and rely on detailed documentation of current events. The work of the International Criminal Court and its inclusion of these sources in its reports attests to their credibility. In addition, the visual documentation that was broadcast live by the press and self-incriminating footage published by those threatening or inciting acts of genocide, or depicting the execution of genocidal acts, reflects the reality of Israeli behaviour while committing, or intending to commit, genocide. Specifically, the case fulfils the burden of proof needed to receive a positive judgement on the request to suspend the military operation in order to ensure the preservation of evidence and provide food and medicine to civilians, because a mistake on this decision will have consequences that cannot be repaired or compensated for retroactively.

Likelihood of Israel's Adherence to the Provisional Measures

The ICJ decision is binding on both parties to the case (South Africa as claimant, and Israel as defendant) in accordance with the provisions of Article 94 of the Charter of the United Nations³³ and Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁴ However, Israel, which is in the habit of ignoring international law, may not abide by the ICJ decision; Prime Minister Benjamin Netanyahu has already insisted that "Nobody will stop us — not The Hague, not the [Iranian-led] axis of evil and not anybody else", vowing to continue "until total victory".³⁵ It is thus

³² Maryam Jamshidi, "How Israel Weaponizes International Law", *Boston Review*, 16/2/2022, accessed on 18/1/2024, at: <https://cutt.ly/fwLas9rr>

³³ Article 94

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. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. United Nations, *United Nations Charter*, (San Francisco: 26/6/1945) accessed on 18/1/2024 at: <https://www.un.org/en/about-us/un-charter/full-text>

³⁴ Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. See: United Nations, General Assembly.

³⁵ Neri Zilber, "Netanyahu says 'nobody' will stop Israel including Hague court", *Financial Times*, 14/1/2024, accessed on 18/1/2024 at: <https://cutt.ly/BwLahEUP>

clear that the Israeli occupation authorities are preparing themselves not to abide by the ICJ decision regarding urgent temporary measures, but rather will find US support in condemning the decision, as they did when the International Criminal Court affirmed its jurisdiction to look into possible war crimes in the Occupied Palestinian territories.³⁶

However, Israel and its supporters will not be able to completely disregard any decision made or act like it does not exist without consequences, as an official ruling by the highest global judicial body, in particular if the court indicates the provisional measures to suspend the military operation. To ignore such a decision would be considered a continuation of committing acts Genocide, embarrassing Israel's Western supporters on a global stage and setting a precedent that justifies Russia's dismissal of the ICJ ruling of March 2022 to suspend its ongoing invasion of Ukraine, in response to Ukraine's request to take provisional measures in its case under the Genocide Convention, which prompted many countries to impose sanctions on Russia.³⁷

Conclusion

In light of the content of South Africa's ICJ application and the two judicial precedents (*Gambia v. Myanmar*, and *Ukraine v. Russia*), the Court is likely to lean in favour of the urgent requests for provisional measures against Israel, at least partially. The most important part of these requests, which include stopping the Israeli military campaign in Gaza and protecting the lives of civilians and any evidence of genocide, establishes a solid basis for the court in its future consideration of the lawsuit regarding Israel's violation of its obligations under the Genocide Convention.

Finally, the case was formulated to remove any room for manoeuvre through postponement and procrastination from the ICJ. A wide range of evidence has been presented that Israel has committed genocide. South Africa's request from the court to rule on provisional measures (as an urgent measure) includes, as a first step, working to stop the Israeli military aggression on the Gaza Strip.

³⁶ "Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation" US Department of State, 5/1/2021, accessed on 18/1/2024 at: <https://cutt.ly/QwLahDpa>

³⁷ Leela Jadhav et al.,