

BEST OF BOTH SIDES: ISRAEL IS ONLY DEFENDING ITSELF

Relevant for: International Relations | Topic: International Treaties & Agreements, and other important organizations

Starting Thursday, January 11, the International Court of Justice (ICJ) will hold a two-day hearing to decide whether it will order “provisional measures” (the equivalent of seeking urgent interim relief in pending cases in Indian courts) in a case South Africa has filed against Israel for violating its obligations under the Genocide Convention in relation to Palestinians in Gaza. The ICJ is the principal judicial organ of the United Nations that settles legal disputes between states. It is not a criminal court and it does not try individuals. That is the role of the International Criminal Court (ICC). Both courts are in The Hague.

The ICJ cannot automatically decide all cases involving breaches of international law. It can only decide cases that are brought before it by states that consent to its jurisdiction. This consent can be expressed in different ways. In this case, the consent stems from an article in the Genocide Convention that states that disputes between parties relating to the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a state for genocide, shall be submitted to the ICJ at the request of any of the parties to the dispute. Both South Africa and Israel are parties to the Convention.

The Genocide Convention defines genocide as the following five acts: killing members of a group; causing serious bodily or mental harm; deliberately inflicting on the group conditions of life calculated to bring about their physical destruction; imposing measures intended to prevent births within a group and forcibly transferring children to another group “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” In other words, it contains two separate elements: The physical acts and the specific intent “to destroy, in whole or in part” a specific group. The need to demonstrate this specific intent to destroy is what distinguishes genocide from war crimes, ethnic cleansing and crimes against humanity. The commission of the acts is not enough. Also, the commission of war crimes, ethnic cleansing and crimes against humanity do not provide an avenue for states to approach the ICJ because it does not have automatic jurisdiction over those crimes.

South Africa alleges that Israel has committed several of these acts and that the evidence of Israeli state officials’ specific intent (*dolus specialis*) to commit and persist in committing genocidal acts or to fail to prevent them has been significant and overt since October 2023. This, when combined with the level of killing, maiming, displacement and destruction on the ground, together with the siege — “evidence an unfolding and continuing genocide.” South Africa has set out nine pages of statements by senior Israeli officials, including its president, prime minister and ministers, to show the existence of specific intent. Additionally, and importantly, South Africa states that Israel has failed to prevent genocide and to prosecute the direct and public incitement to genocide and that it “has engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza”.

South Africa argues that urgent relief is necessary to protect against further, severe and irreparable harm to the rights of the Palestinian people which continue to be violated, and to prevent any aggravation or extension of the dispute. Accordingly, it has asked the Court to order Israel to immediately suspend all military operations in Gaza; abide by its obligations under the Convention to prevent genocide; prevent expulsion and forced displacement; the deprivation of access to adequate food and water; access to humanitarian assistance; medical supplies and

assistance; and the destruction of Palestinian life in Gaza. It also asks that Israel be directed to prevent the destruction of evidence, including by not denying access to fact-finding missions; to submit reports on measures taken to implement the Court's order and finally, refrain from acts which might aggravate the dispute.

South Africa's case appears to meet the threshold for the Court to make a provisional measures order. (The Court must be satisfied it has prima facie jurisdiction; there is a "plausible" link between the rights asserted by South Africa and the measures it requests; a risk of irreparable harm and urgency). That order will come within weeks and will have legal significance for all states that are parties to the Genocide Convention because it will create legally binding obligations.

This is not the first case the Court will hear under the Genocide Convention. In 2022, [Ukraine](#) filed a case against Russia, and in 2019, the Gambia filed a case against Myanmar with respect to the Rohingya people. That was the first time a state invoked the Court's jurisdiction to seek redress for genocidal acts committed against the citizens of another state. The Court agreed that the Gambia had standing to bring the case. Like the Gambia, South Africa basis its jurisdiction under obligations erga omnes partes, namely that as a party to the Convention, it can bring this case because of its community interest in preventing genocide.

The writer is an international lawyer who represented Croatia in a case against Serbia, under the Genocide Convention, before the ICJ

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