
South Africa's Genocide Case against Israel before the International Court of Justice

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At the end of 2023, South Africa filed an application before the International Court of Justice (ICJ) alleging that Israel's actions in Gaza since it was attacked by Hamas on 7 October 2023 violate its obligations under the 1948 Genocide Convention. The full application can be found [here](#).

South Africa is calling for “provisional measures”, which would involve the Court stepping in quickly to try to address an unfolding and urgent situation of the gravest harm. The Court is holding public hearings on the core issue on 11 and 12 January 2024 at its seat in The Hague. It will hear oral arguments first from South Africa and then Israel before considering and issuing its initial judgment—on whether or not it will order provisional measures—potentially within a months' time. This Briefing Paper explains the role of the ICJ and its caselaw (earlier judgments) on the issue of genocide and outlines potential outcomes of the case against Israel.

The ICJ in a nutshell

The ICJ was set up in 1945 as the Second World War was coming to an end to serve as the judicial arm of the United Nations. By ratifying the UN Charter, a UN Member State undertakes to comply with the decision of the Court in any case to which it is a party. The Court's primary role is to settle disputes between States on the basis of international law and thereby to prevent recourse to the use of force. These “contentious cases” between States lead to a judgment that is legally binding on the parties to the dispute in question and there is no possibility of appeal. The ICJ also offers “advisory opinions” on important issues of international law, which are not legally binding but nonetheless very influential.

There are ordinarily [fifteen judges](#) for each case, each coming from a different UN Member State (there are currently 193 UN members). Every judge is elected by the UN General Assembly and the UN Security Council to serve on the Court for nine years. In addition, the parties to each dispute are allowed to appoint an “ad hoc” judge to sit in the Court for the deliberations; both Israel and South Africa have chosen to do this. South Africa has appointed Dikgang Moseneke, former deputy chief justice of South Africa, to

be an ad hoc judge for this case. Israel has appointed Aharon Barak, former Supreme Court president, to be an ad hoc judge.

Each conclusion at the end of any judgment in either a contentious case or an advisory opinion is adopted by a simple majority of the total number of sitting judges.

The ICJ and the ICC

The ICJ is often confused with the International Criminal Court (ICC), which also sits in The Hague. The ICJ involves the international legal responsibility of *States* whereas the ICC is a criminal court that puts *individuals* on trial for the perpetration of international crimes (genocide, crimes against humanity, war crimes, and, in particular circumstances, also aggression). The ICC was established in July 2002. South Africa and Palestine, but not Israel, are party to the ICC Statute. The Prosecutor of the ICC, Karim Khan, is in the process of investigating whether he believes international crimes have been committed in the course of the current conflict between Israel and Hamas/Palestine. As the ICC Statute makes plain, a conviction before the International Criminal Court does not preclude action before the ICJ.

What is genocide and how does that apply to Gaza?

The 1948 Genocide Convention is an international treaty that binds the 153 States that are party to it, including Israel, Palestine, and South Africa. The Convention explicitly gives the ICJ jurisdiction over disputes regarding its implementation. The Genocide Convention defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Proving this intent will be the greatest challenge for South Africa if the case progresses. It will potentially be easier to prove the underlying acts, which include killing or seriously harming Palestinians (as a national/racial group) and “deliberately inflicting conditions of life calculated to bring about [their] physical destruction in whole or in part”. Intentional starvation of Gazans would meet this threshold.

The ICJ’s caselaw on genocide

The ICJ has considered genocide in its caselaw on several occasions in the past in both contentious cases and, in one instance, an advisory opinion. It has never yet held a State responsible for the commission of genocide. In 2007, however, the Court concluded that Serbia had failed to *prevent* genocide at Srebrenica in Bosnia and Herzegovina. In 2015, in a case between Croatia and Serbia, the Court did not find a pattern of conduct that demonstrated Serbia’s intent to destroy a substantial part of the group of ethnic Croats. The Court held that the aim of the crimes appeared to have been forced displacement, not their physical or biological destruction. A case brought by Ukraine against Russia in 2022 on the basis of the Genocide Convention is ongoing.

In addition, in 2019, The Gambia called upon the Court to impose provisional measures on Myanmar with respect to compliance with the Genocide Convention. In 2021, the Court did so, requiring Myanmar to prevent genocide against the Rohingya, to direct its forces not to commit genocide, and to preserve all relevant evidence, and in 2022, the Court formally decided the case could proceed. There is, however, no evidence that Myanmar changed its policies or practices towards the Rohingya, but the Court ruling has increased the country's international isolation.

What is at stake in South Africa's ICJ Genocide case?

The case brought by South Africa is only in regard to the Genocide Convention. The Court will not rule on whether war crimes or other violations of international humanitarian law have taken place as it does not have jurisdiction over such cases. But as noted above, the ICC has an ongoing investigation of war crimes and violations of International humanitarian law in Gaza.

It is possible—and perhaps likely—that the ICJ will not, in the end, even make a substantive ruling on whether Israel is responsible for the commission of genocide. However, it is not necessary for the Court to rule whether Israel's conduct in Gaza amounts to genocide or not, it could already determine that there is a serious risk of it occurring and therefore decide that Israel has to take provisional measures to prevent genocide.

In a decision on provisional measures, the Court will first determine whether it has the legal authority to reach a judgment in this case. It will then determine whether there is a sufficient link between the measures requested by South Africa and the rights whose protection is sought. It will also consider whether there is a risk of irreparable harm and a situation of urgency.

South Africa therefore has to overcome a number of obstacles before its application can be successful. The first is persuading the Court that it has jurisdiction in this case. Here the precedent of the *Myanmar* genocide application for provisional measures is likely to be influential. In that case in 2021, the Court held that the peremptory (overriding) nature of the prohibition of genocide meant that every single State had an interest in preventing the commission of genocide. The Court therefore accepted that The Gambia could bring a case against Myanmar to the Court about genocide against Rohingya's. The second challenge for South Africa is to convince the Court that the damage inflicted by Israel's military campaign against Gaza since October 7 constitute enough evidence of the risk of genocide that provisional measures are needed.

So, if the Court does make such an order this is not confirmation that genocide has actually been committed, but it is at least indicating that the Court accepts that there is a serious risk of it occurring.

What are the likely outcomes and implications?

Establishing genocidal intent is very challenging, as it requires proof of specific intent to destroy a group in whole or in part. It is far from certain that genocide has already been committed on the facts as they stand; killings in the course of an armed conflict do not ordinarily meet the threshold of such intent unless they are perpetrated in cold blood. But the denial of food and medicines to Gaza by Israel and the consequent risk of starvation and disease among the Palestinians are stronger arguments.

A finding that Israel has to take provisional measures to prevent genocide would lead to Israel coming under huge pressure both to comply with the ICJ's order and presumably also to cease large-scale military operations and allow for full-scale humanitarian aid into Gaza, at least for a while. Ignoring the order would increase Israel's international isolation. The United States, which has strongly supported Israel (while cautioning about its indiscriminate use of force in Gaza), could also be held legally responsible for failing to prevent genocide based on its vetoing action in the Security Council calling for a ceasefire and full-scale humanitarian aid. But in practice the chance is remote.

What happens if a country does not comply with an ICJ ruling?

If Israel were to ignore an order on provisional measures, the case could go to a judgment on the merits, i.e. a judgement on whether Israel's acts amount to genocide. Such a judgment will likely take years.

A final ruling that Israel had actually committed genocide against the Palestinians in Gaza—the first ever in the ICJ's history—would be a devastating political blow to Israel and its standing in the world. It would increase the pressure on the ICC to issue arrest warrants for those deemed responsible, and impact on cooperation and relationships between Israel and a wide range of States that have domestic laws making genocide, as well as incitement to genocide, a criminal offence.

The UN Security Council has the possibility to enforce ICJ judgments (including economic sanctions and use of force), but with any of five permanent members, China, France, Russia, the United Kingdom, and the United States being able to veto such decision, it has never taken such a decision on enforcing an ICJ judgment before. However, defending a State that has been found by the UN's judicial arm to have committed genocide is not something many states would want to do.