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# UNPACKING SOUTH AFRICA VS ISRAEL AT THE ICJ

## Background

Established by the United Nations Charter in June 1945, **the International Court of Justice (ICJ) is the principle judicial organ of the United Nations.** Located at the Peace Palace in the Hague, the Netherlands, the Court is composed of 15 judges elected for a nine-year term by the UN General Assembly and Security Council.

The Court has two roles: **to settle legal disputes submitted to it by states; and to provide advisory opinions on legal questions referred to it** by duly authorised United Nations organs and agencies of the system. The court's president is American Judge Joan Donoghue. Other judges come from Russia, China, France, Germany, Australia, India, Slovakia, Jamaica, Japan, Brazil, Morocco, Somalia, Lebanon and Uganda.

In contrast to the International Criminal Court (ICC), which deals with criminal prosecution against individuals for war crimes or crimes against humanity, **cases dealt with by the ICJ involve states.** The ICJ can hear cases brought by any UN member state against any other member state, whether or not they are directly in conflict, when the common interest of the international community is at stake. The ICJ possesses jurisdiction based on the consent of states involved, which in the present instance of South Africa's case against Israel exists because both states are members of the Convention on the Prevention and Punishment of the Crime of Genocide.

## The Case of Genocide

**In late December, South Africa appealed to the ICJ alleging that Israel was committing genocide in the Gaza Strip** under 1948's Convention on the Prevention and Punishment of the Crime of Genocide and demanded interim measures to stop the fighting immediately.

The Convention establishes two elements for genocide:

- **Intent to destroy**, in whole or in part, a national, ethnical, racial or religious group; and
- **Acts committed to achieve this goal (actus reus).** These include: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

Achievement of these exterminationist goals is not a prerequisite to be charged under the Convention. Acts of "direct and public incitement to commit genocide;" "attempt[s] to commit genocide;" and "complicity in genocide" are also punishable.

## South Africa's Position

**South Africa is one of few countries to maintain diplomatic relations with Hamas,** despite the group being generally proscribed as a terrorist organisation. In the immediate aftermath of October 7 (before Israel's ground offensive), the ANC government – soon to face elections against the backdrop of waning popularity and deep economic challenges – held a call with Hamas chief Ismail Haniyeh. Hamas later claimed that Foreign Minister Pandor expressed solidarity with the organisation (a claim she denied). In December, the ANC hosted a Hamas delegation led by senior official Bassem Naim.

**In its application to the ICJ, South Africa makes claims regarding both intent and acts committed.** The application states that the "conduct of Israel... in relation to Palestinians in Gaza, is in violation of its obligations

under the Genocide Convention,” and its actions “are genocidal in character, as they are committed with the requisite specific intent... to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group.”

**The statements of intent referenced by South Africa are those from a host of Israeli politicians.** These include Prime Minister Netanyahu, who compared Israel’s fight against Hamas to the one waged against the Biblical Amalek, as well as statements from President Isaac Herzog, Defence Minister Gallant, National Security Minister Ben Gvir, Foreign Minister Katz, and Likud MK Bismuth, regarding the targeting of civilian populations in Gaza.

South Africa also claims that the number of civilians killed in Gaza as well as the humanitarian crisis and extensive damage to infrastructure fall under the definition of *actus reus*.

## Israel’s Response

**In its legal response, Israel argued that South Africa’s presentation erased both Jewish history and any Palestinian agency or responsibility, weaponised the term ‘genocide’ against Israel, and ignored the events of October 7 that caused Israel’s war on Hamas.** “It is impossible to understand the armed conflict in Gaza, without appreciating the nature of the threat Israel is facing, and the brutality and lawlessness of the armed force confronting it,” Tal Becker, legal counsel at the Foreign Ministry said.

Becker, together with UK barrister Malcolm Shaw, argued that:

- **Quotes from politicians and cabinet members do not reflect official Israeli policy** and only policy decisions made by the war cabinet and broader security cabinet are relevant in determining policy in the war: “It is the collective decisions of those bodies which have binding provisions,” Shaw saw. “In order to determine the policy and intentions of the government of Israel it is necessary to examine the decisions of the security cabinet and the war cabinet... to produce random quotes which are not in conformity with government policy is misleading at best,” he added.
- A few days after the initial hearing, Netanyahu explained that the claim that his reference to Amalek reflected intention to commit genocide was a “false and preposterous charge” which “reflects a deep historical ignorance,” adding that he used the biblical quotation to reference the savage Hamas massacre, rather than as a call for genocide. He also pointed out that the same phrase appears in a permanent exhibit at the Yad Vashem Holocaust museum, as well at a memorial in The Hague for Dutch Jews murdered in the Holocaust. “Obviously neither reference is an incitement to genocide of the German people” he concluded.
- The quote from Herzog used by South Africa – that “it is an entire nation that is responsible... They [the Gazan people] could have risen up... fought against that evil regime which took over Gaza in a coup d’etat” – was parsed from a press briefing a few days after October 7. Herzog was speaking as the IDF dropped leaflets calling on a million people in northern Gaza to leave their homes before the ground invasion. “We are working, operating militarily according to the rules of international law, period, unequivocally,” Herzog emphasised, before referring to responsibility held by the people of Gaza. When asked by a reporter to clarify whether his comments meant Gazans were legitimate targets, he responded “no, I didn’t say that.” He later said, “of course there are many, many innocent Palestinians who don’t agree to this — but unfortunately in their homes, there are missiles shooting at us, at my children.”
- South Africa ignored the situation in Gaza. “The Applicant [South Africa] purports to describe the reality in Gaza,” said Becker. “But it is as if Hamas and its 30,000 fighters, and its total contempt for civilian life, just do not exist as a direct cause of that reality... There are no explosives in mosques and schools and children’s

- bedrooms, no ambulances used to transport fighters, no tunnels and terrorist hubs under sensitive sites, no fighters dressed as civilians, no commandeering of aid trucks, no firing from civilian homes, UN facilities and even safe zones. There is only Israel acting in Gaza.”
- **Hamas is a genocidal organisation and Israel has a right to self-defence:** “if there have been acts that may be characterised as genocidal” claimed Becker, “then they have been perpetrated against Israel.” He added that it is “in response to the slaughter of October 7 – which Hamas openly vows to repeat – and to the ongoing attacks against it from Gaza, that Israel has the inherent right to take all legitimate measures to defend its citizens and secure the release of the hostages.” As Becker emphasised, “what Israel seeks by operating in Gaza is not to destroy a people, but to protect a people, its people, who are under attack on multiple fronts, and to do so in accordance with the law, even as it faces a heartless enemy determined to use that very commitment against it.”
- **There is deep suffering on both sides, but one needs to understand the reality of Hamas control in Gaza.** Becker pointed out that while “the hostilities between Israel and Hamas have exacted a terrible toll on both Israelis and Palestinians, any genuine effort to understand the cause of this toll must take account of the horrendous reality created by Hamas within the Gaza Strip.” South Africa described “unparalleled and unprecedented” suffering, Becker noted, “as if they are unaware of the utter devastation wrought in wars that have raged just in recent years around the world. Sadly, the civilian suffering in warfare is not unique to Gaza. What is actually ‘unparalleled and unprecedented’ is the degree to which Hamas has entrenched itself within the civilian population, and made Palestinian civilian suffering an integral part of its strategy.” While the Court was also told of the dire humanitarian situation in Gaza, “it is not told of Hamas’s practice of stealing and hoarding aid, it is not told of the extensive Israeli efforts to mitigate civilian harm, of the humanitarian initiatives being undertaken to enable the flow of supplies and provide medical attention to the wounded... it is almost as if there is no intensive armed conflict taking place between two parties at all, no grave threat to Israel and its citizens, only an Israeli assault against Gaza.”

## The International Diplomatic Arena

**British Prime Minister Sunak said he believed South Africa's case was "completely unjustified and wrong"** and Foreign Secretary Cameron said he disagreed with the decision to take Israel to the ICJ and says Israel has no case to answer. “I take the view that Israel is acting in self-defence after the appalling attack on 7 October,” Cameron said, “but even if you take a different view...to look at Israel a democracy with the rule of law a country with armed forces that are committed to obeying the rule of law to say that country, that leadership, that armed forces that they have the intent to commit genocide, I think that is nonsense.”

**US Secretary of State Antony Blinken said that the charges were “meritless,”** and called it “particularly galling” because “Hamas, Hezbollah, the Houthis and their supporter Iran continue to openly call for the annihilation of Israel and the mass murder of Jews.” US State Department spokesman Matt Miller noted that the US is “not seeing any acts that constitute genocide” by Israel in its war against Hamas. “Genocide is one of the most heinous atrocities that any individual can commit. Those are allegations that should not be made lightly,” Miller added.

Within the EU, Germany and France have been supportive of Israel. Steffen Hebestreit, the spokesman for Germany's government, announced it

would intervene on Israel's behalf as a third party in the case. "The federal government firmly rejects the accusation of genocide made against Israel. It has no basis whatsoever. We will therefore speak as a third party in the main hearing before the International Court of Justice." French Foreign Minister Sejourne said that "accusing the Jewish state of genocide crossed a moral threshold." Canada has also expressed its support for the Jewish state.

**Another group within the EU, which includes Slovenia, Ireland, Belgium, Luxembourg, and Malta, has been vocally critical of Israel over Gaza, and Slovenian Foreign Minister Fajon announced her country intended to join ICJ proceedings against Israel. Irish PM Varadkar meanwhile said the case against Israel wasn't clear cut. "I think this is actually quite a complex case and there are some people making it out to be much more simple than it actually is," he said. "I do genuinely think we need to be careful about the use of the term genocide and accusations of genocide," he said. "We should not forget that there are two or more parties in this conflict and I think sometimes people have a tendency to forget that."**

**Arab and Islamic countries – as well as others in the 'global south' – have been outspoken in their support for South Africa.** The Organisation of Islamic Cooperation (OIC) wrote that it appreciated the case filed by South Africa to the ICJ and "expressed its hope that the ICJ would take the necessary urgent measures to put an end to the crime of genocide committed by the Israeli occupation forces in the occupied Palestinian territory." The Arab League Secretary-General Ahmed Aboul-Gheit said he hoped for "a fair and brave judicial ruling to halt this aggressive war and put an end to the Palestinian bloodshed" and hailed South Africa "for filing the lawsuit that prioritizes human values above all considerations." Brazil, Bolivia, Colombia and Venezuela have also expressed support for South Africa. Turkey is actively providing documents for the South African case against Israel.

## What Could Happen?

**With the court's discussions currently at the provisional measures stage, the court will not yet decide on the accuracy of the genocide accusations, but rather examine whether these accusations are *plausible*, and determine whether to rule on provisional measures. Decisions are made by a simple majority of the presiding judges. Israel has argued that the case should be rejected in its entirety.**

Alternatively, in a situation in which the ICJ does decide to consider the accusations, Israel argues that the court should not grant any specific provisions against IDF operations in Gaza.

The biggest challenge facing Israel is that **the evidentiary standard for plausibility is considered to be very low.**

**If the judges find South African accusations to be plausible, the court can issue provisional measures** which might include immediate and urgent orders to prevent the situation deteriorating. The court can also issue an injunction obliging Israel to allow additional humanitarian aid into Gaza and grant international investigators access to look into allegations and demand it abide by the Genocide Convention. The most significant of South Africa's demands is for the IDF to desist from its activities in Gaza for fear of possibility genocide.

**Israel would almost certainly reject any court demand to stop its military operation against Hamas.**

**There are no direct enforcement provisions for ICJ decisions, although lack of compliance could lead the parties to turn to the UN Security Council. In this specific case, however, the US would almost certainly veto any resolution against Israel.**

Even without Security Council censure, **an ICJ ruling of plausibility to accusations against Israel of genocide could lead to severe diplomatic repercussions**, such as possible sanctions and other measures in the UN or international bodies. It could open up entire realms of legal and political activity, including local initiatives to use universal jurisdiction legislation against Israeli leaders and officials visiting countries abroad; and complicate IDF procurement of military parts from Western allies.

**After the judges decide on the question of interim injunctions**, the main proceedings will begin. A final ruling is expected to take years.



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