

South Africa's ICJ Case against Israel: Will the World Wake up to the Ongoing Human Catastrophe in Gaza?

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January 16, 2024

(Views expressed in the brief are those of the author, and do not represent those of ISSI)



On December 29, 2023, South Africa initiated legal proceedings against Israel at the International Court of Justice (ICJ) in The Hague. Hearings concerning South Africa's appeal for provisional measures took place on 11-12 January 2024. The legal action, initiated on December 29, 2023, alleged that Israel has committed "genocidal acts" in its military assaults on Gaza. ICJ, the principal judicial organ of the United Nations, held public hearings on the request for the indication of provisional measures submitted by South Africa in the case South Africa v. Israel. The public hearings took place at the Peace Palace in The Hague, the seat of the Court, under the presidency of Judge Joan E. Donoghue, President of the Court.¹

South Africa in its petition to the ICJ alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") concerning Palestinians in the Gaza Strip.² It argued that Israel had exhibited a consistent "pattern of genocidal conduct" since the commencement of its extensive conflict in Gaza in 1967. The Court was apprised that "this act of killing amounts to nothing less than the intentional

¹ "The International Court of Justice (ICJ) holds public hearings in the case South Africa v. Israel - Oral argument of South Africa," *United Nations*, January 11, 2024, <https://webtv.un.org/en/asset/k11/k11gf661b3>

² The Republic of South Africa institutes proceedings against the State of Israel and requests the Court to indicate provisional measures, *International Court of Justice*, December 29, 2023, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231229-pre-01-00-en.pdf>

destruction of Palestinian lives. It is executed with clear intent, sparing no one, not even newborn infants."³ According to the application, South Africa characterized the "acts and omissions by Israel genocidal in character, with the requisite specific intent to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group" and that "the conduct of Israel — through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence — in relation to Palestinians in Gaza, violates its obligations under the Genocide Convention."⁴

South Africa pressed the ICJ to take urgent provisional measures concerning the Palestinian people. The proposed measures included:⁵

1. The State of Israel must promptly cease its military operations in and against Gaza.
2. Israel is required to ensure that any military or irregular armed units, as well as organizations and individuals under its influence, take no actions furthering the aforementioned military operations.
3. Both the Republic of South Africa and the State of Israel must, in accordance with their obligations under the Genocide Convention, take all reasonable measures within their power to prevent genocide against the Palestinian people.
4. Israel must abstain from committing any acts falling within the scope of Article II of the Genocide Convention concerning the Palestinian people, including killing, causing serious bodily or mental harm, deliberately inflicting conditions of life leading to physical destruction, and imposing measures preventing births within the group.
5. Israel must, in line with the above, desist from and take all necessary measures to prevent the expulsion and forced displacement of Palestinians, deprivation of access to essential resources, and destruction of Palestinian life in Gaza.
6. Israel must ensure that its military and any entities under its influence refrain from engaging in acts described in points 4 and 5 above and cease any incitement to commit genocide,

³ "Gaza: South Africa levels accusations of 'genocidal conduct' against Israel at world court," *United Nations*, January 11, 2023, <https://news.un.org/en/story/2024/01/1145402>

⁴ The Republic of South Africa institutes proceedings against the State of Israel and requests the Court to indicate provisional measures, *International Court of Justice*, December 29, 2023, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231229-pre-01-00-en.pdf>

⁵ "Conclusion of the public hearings held on Thursday 11 and Friday 12 January 2024," *International Court of Justice*, Press Release, January 12, 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-pre-01-00-en.pdf>

conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide. Steps toward the punishment of such acts must be taken.

7. Israel must take effective measures to prevent the destruction and ensure the preservation of evidence related to alleged acts under Article II of the Genocide Convention, allowing fact-finding missions and international bodies access to Gaza for evidence preservation.
8. Israel is obliged to submit a report to the Court on the measures taken to implement these provisional measures within one week of the order, with subsequent reports at regular intervals until a final decision on the case is reached, and such reports must be made public.
9. Israel must refrain from any action that could exacerbate or prolong the dispute before the Court or make its resolution more challenging.

As for Israel, under Article 60, paragraph 2, of the Rules of Court, for reasons articulated during the hearing on January 12, 2024, and any additional reasons deemed appropriate by the Court, Israel formally requested the Court to:⁶

1. Reject South Africa's request for the indication of provisional measures.
2. Remove the case from the General List.

Reactions to the Hearing:

Palestine: The State of Palestine welcomed the compelling legal presentation made by South Africa at the International Court of Justice on Israel's egregious and massive violations of the Genocide Convention. The Palestinian Ministry of Foreign Affairs called it "a critical moment for Palestine, a pivotal moment for the international system, and a moment of history."⁷

Israel: the Israeli Foreign Ministry in its statement called the proceedings in the ICJ one of the greatest shows of hypocrisy in history and a series of baseless and false claims. South Africa is

⁶ "Conclusion of the public hearings held on Thursday 11 and Friday 12 January 2024," *International Court of Justice*, Press Release, January 12, 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-pre-01-00-en.pdf>

⁷ "Press Statement For Immediate Release 12 January 2024 State of Palestine Welcomes South Africa's Legal Presentation at the International Court of Justice," *Ministry of Foreign Affairs and Expatriates Palestine*, January 12, 2024, <http://www.mofa.pna.ps/en-us/mediaoffice/press-statement-for-immediate-release-12-january-2024-state-of-palestine-welcomes-south-africas-legal-presentation-at-the-international-court-of-justice>

ignoring the fact that Hamas terrorists infiltrated Israel, murdered, executed, massacred, raped and kidnapped Israeli citizens, just because they were Israelis, in an attempt to carry out genocide.⁸

Pakistan: Pakistan deemed the legal initiative timely and a crucial stride toward holding Israel accountable for documented atrocities committed against the Palestinian people since October 7, 2023, and shared the apprehensions outlined in South Africa's application, contending that Israel's ongoing military aggression and actions towards the Palestinian people amount to war crimes, crimes against humanity, and genocidal acts. In a statement issued by its Foreign Ministry, Pakistan reiterated its plea for an immediate and unconditional ceasefire, urging an end to Israel's relentless assault on the Palestinian population, the lifting of the inhumane siege, and the swift provision of humanitarian aid to the Palestinian people.⁹

Separately, the Acting Permanent Representative of Pakistan to the UN in New York, Ambassador Usman Jadoon, told the 193-member UN General Assembly that “the root cause of this crisis lies in Israel's prolonged occupation and denial of Palestinians' inalienable right to self-determination. Israel's brutal campaign against the occupied people of Palestine struggling for their freedom cannot be justified under the guise of self-defence.”¹⁰ Without naming the U.S., Ambassador Jadoon further stated that “the Council has been paralysed due to the resistance and negative vote of a permanent member and heavy responsibility rests on those who have enabled the prolongation of this war and the continuing slaughter of innocent civilians in Gaza.”¹¹

United States: U.S. Secretary of State Antony Blinken called the claims deposited against Israel “meritless” and denounced Israel being referred to the International Court of Justice (ICJ) for alleged genocide during its war in Gaza. He added that the submission against Israel “distracts the world” from efforts such as securing the remaining hostages taken by Hamas during its Oct. 7 attack on Israel, addressing the humanitarian crisis in the Gaza Strip, and preventing the conflict from

⁸ “Reaction to South Africa's UN court case against Israel's war in Gaza,” *Reuters*, January 11, 2024, <https://www.reuters.com/world/reaction-south-africas-un-court-case-against-israels-war-gaza-2024-01-11/>

⁹ “Pakistan's support for the application by South Africa at ICJ concerning Israel's violations of the Genocide Convention,” *Ministry of Foreign Affairs Pakistan*, January 11, 2024, <https://mofa.gov.pk/press-releases/pakistans-support-for-the-application-by-south-africa-at-icj-against-israel-concerning-the-genocide-convention>

¹⁰ “Pakistan backs ICJ probe into ‘genocide’ in Gaza,” *Tribune*, January 11, 2024, <https://tribune.com.pk/story/2452885/pakistan-backs-icj-probe-into-genocide-in-gaza>

¹¹ “Pakistan backs ICJ probe into ‘genocide’ in Gaza,” *Tribune*, January 11, 2024, <https://tribune.com.pk/story/2452885/pakistan-backs-icj-probe-into-genocide-in-gaza>

spreading.¹² Taking a hard line against the claims made by South Africa, the White House called the allegations “counterproductive” and “completely without any basis.”¹³

European Union: The EU has remained silent on the genocide proceedings against Israel in the ICJ. European Commission reiterated its support for the ICJ but did not endorse the genocide case against Israel. Peter Stano, the spokesperson for foreign affairs, emphasized that while countries have the right to submit cases, the EU is not part of this particular lawsuit, and it is not within their purview to comment on it.¹⁴ While recent signs suggest that some EU countries are leaning toward stronger calls for Israeli restraint, the EU has primarily remained cautious with a neutral stance on the conflict, acknowledging Israel's right to self-defence while urging the protection of civilian life in Gaza and the unimpeded delivery of humanitarian aid.

A majority of EU members supported a UN General Assembly resolution in December, calling for a cessation of hostilities. However, Germany, Austria, and the Czech Republic, known as allies of Israel, expressed scepticism about the case in the ICJ. Germany's Vice Chancellor, Robert Habeck, showed support for Israel while criticizing the ICJ for its perceived bias against Israel, rejected the characterization of it as ‘genocide’ and defended Israel’s right to self-defence.¹⁵

On the other hand, EU member states that have endorsed South Africa's lawsuit against Israel and are not on the same page as Israel remain limited. Belgium's Deputy Prime Minister, Petra De Sutter, supportive of Palestinians, expressed her intention to urge Belgium's backing, but the government has not formally endorsed it yet. Ireland, known for supporting Palestinian statehood, has ruled out joining the case. Spain, critical of Israel's actions, has refrained from commenting. Human Rights Watch has urged the EU to support the ICJ case, emphasizing the opportunity to reaffirm commitment to justice and accountability in the Gaza conflict.

Conclusion:

There are no quick fixes to court rulings and judgments in the ICJ. The case presented by South Africa against Israel is anticipated to extend over several years before a final decision is rendered. At present, the court is primarily focused on addressing South Africa's petition for provisional

¹² Ellen Mitchell, “Blinken calls genocide case against Israel ‘meritless’,” *Hill*, January 9, 2024, <https://thehill.com/policy/international/4398781-israel-gaza-blinken-genocide-case-meritless/>

¹³ “U.S. slams ‘meritless’ Israel genocide suit, reigniting tensions with South Africa,” *CNBC*, January 9, 2024, <https://www.cnbc.com/2024/01/09/us-slams-south-africas-meritless-israel-genocide-suit.html>

¹⁴ Mared Gwyn Jones “Why is the EU mostly silent on South Africa's genocide case against Israel?,” *Euro News*, January 12, 2024, <https://www.euronews.com/my-europe/2024/01/12/where-do-eu-countries-stand-on-south-africas-genocide-case-against-israel>

¹⁵ “Israel has every right to defend itself against Hamas,” affirms German Vice Chancellor Habeck,” *Jerusalem Post*, January 11, 2023, <https://www.jpost.com/israel-hamas-war/article-781736>

measures, marking the subject of the hearings. Provisional measures, in this context, refer to emergency measures that the Court can instruct the parties to undertake to prevent irreparable harm to a right directly tied to the ongoing case.

It is important to note that the Court will not pass judgment on whether Israel has committed genocide during this phase as its ruling will be restricted to provisional measures. As noted, South Africa, in its request, has urged the court to mandate Israel to suspend military operations, implement all necessary measures to avert genocide, and abstain from actions such as killing, injuring, or engaging in acts indicative of genocide against Palestinians. While Court orders, including those on provisional measures, are binding on the involved parties, it is essential to acknowledge that the ICJ lacks an independent enforcement mechanism.

Although the decisions made by the ICJ may not exert direct influence on the ongoing war, a ruling in favour of South Africa and the Palestinians could potentially amplify the pressure on Israel and its primary supporter the U.S. placing substantial international, diplomatic and political pressure. Moreover, the ICJ's decision could catalyze reevaluating international relationships and alliances, prompting countries like the U.S. to reconsider their positions during the war at the diplomatic level as well as in the UN. Moreover, the global community's perception of the conflict could transform, with the ICJ ruling serving as a focal point for heightened scrutiny and critique. This increased international attention could contribute to the isolation of Israel diplomatically and intensify calls for resolutions that address the root causes of the conflict.

In essence, while the ICJ's rulings may not directly impact the dynamics of the ongoing war, a judgment favouring South Africa and the Palestinians holds the potential to exert substantial indirect pressure on Israel. This could trigger a ripple effect, reshaping diplomatic ties, altering international perceptions, and ultimately influencing the broader geopolitical landscape surrounding the conflict.