

Will South Africa's case against Israel help end the war?

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On December 29, 2023, South Africa filed in the International Court of Justice (ICJ), The Hague, an application instituting proceedings against Israel. The petition alleged that Israel has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”) in relation to Palestinians in the Gaza Strip.

According to the application, “acts and omissions by Israel . . . 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”. South Africa sought the Court’s jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention, to which both South Africa and Israel are parties.

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South Africa has informed the ICJ that since October 7, 2023, “Israel has engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza”. It has sought provisional measures to “protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention”.

The ICJ stipulates that any request for the indication of provisional measures must have priority over all other cases. The ICJ promptly titled the case “Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)” and scheduled public hearings on the matter on January 11-12. South Africa and Israel both presented their arguments before the Court, which has now adjourned for deliberations. It is expected that a date will soon be announced for its decision on provisional measures.

The 15-judge ICJ, which represents all major regions and legal jurisdictions of the world, has been a strong supporter of victims of human rights violations, especially at the stage of provisional measures. Its orders in the case filed in 2019 by Gambia on behalf of the Organisation of Islamic Cooperation (OIC) against Myanmar over the Rohingya issue and the Jhadav case filed by India in 2017 against Pakistan are examples.

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It is reasonable to expect that the Court will issue orders calling upon Israel to halt the war and impose a ceasefire immediately. But, will those orders bring an end to the war? Sadly, that seems unlikely. The UN General Assembly resolutions passed with an overwhelming majority have been ignored by Israel. The fate of provisional measures ordered by the ICJ

might suffer the same fate. Moreover, the Court normally takes two to three years to issue final orders. A decision on Gambia's case against Myanmar is still awaited. The people of Gaza cannot afford to wait that long.

The provisional measures sought by South Africa ask the ICJ to call upon Israel to immediately suspend its military operations in and against Gaza, desist from all acts that lead to the killings as well as bodily and mental harm to Palestinians and rescind all orders that have resulted in expulsion and forced displacement, deprivation of access to food, water, humanitarian assistance and medical supplies, and the destruction of Palestinian life in Gaza. Israel has denied these accusations and claimed that its actions fall within its legitimate right to self-defence against Hamas rocket attacks and threats to civilian security. It has argued that South Africa's case misconstrues complex security realities and ignores Hamas's role in inciting violence. It has claimed that South Africa misinterprets the Genocide Convention. Tel Aviv has asserted its actions do not target Palestinians as a national group – it is aimed solely at Hamas, a terrorist organisation. Israel has questioned the ICJ's jurisdiction in the case. It has also asserted that it does not accept the Court's compulsory jurisdiction on matters relating to armed conflict.

Proving intent for genocide is difficult in international law. The ongoing daily human cost and civilian casualties alone are insufficient to establish that a genocide has occurred. South Africa needs to convince the Court that the current situation is tantamount to genocide as specifically defined in the Convention. The definition contained in Article II of the Convention describes genocide as a crime committed with the intent to destroy a national, ethnic, racial or religious group, in whole or in part.

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The ICJ's provisional orders in the case may not end the war but it could increase international scrutiny and condemnation of Israel's actions. It will place on public record the views of the World Court on the situation in Gaza as well as acts by nations tantamount to genocide, creating precedents for the future. A provisional measure against Israel will increase pressure on it as well as on its principal backer, the US, to engage diplomatically and search for political solutions.

The need of the hour is an immediate end to the massive, merciless and disproportionate assault on Gaza. This can happen only if Israel introspects and changes its policy, and realises the current strategy is not going to bring it the results it seeks. Instead, it will lead to continued conflict, regional instability and increased terrorism.

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The only country that can influence Israel's policies in this regard is the US, its best friend and strong backer. The Security Council has remained deadlocked due to the veto of the US and the UN has been incapable of bringing an end to the war. All we can therefore hope is

that an ICJ's verdict against Israel will strengthen moral pressure on Tel Aviv and influence Israeli domestic opinion — as well as in the US — to bring to an end the conflict and move towards a political resolution of the Palestinian issue.

This also requires sustained diplomatic and political efforts by all important members of the international community, including India. South Africa deserves praise for having taken the initiative to approach the ICJ. Rather than stay on the sidelines, India should correct the perception that its tilted towards Israel. It should place its views on the situation in Gaza and the allegations of genocide against Israel before the ICJ. It should also lead international diplomatic efforts for an end to the conflict and a permanent political resolution of the Palestinian issue.

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