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The International Court of Justice: South Africa v Israel

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INTRODUCTION

On the 7th of October 2023, Hamas launched a land, sea, and air assault on Israel from the Gaza Strip, this attack resulted in 1200 deaths, primarily Israeli citizens making it the deadliest day for Israel since its Independence. During the attack, more than 240 people were also held hostage¹. On the 8th Israel declared itself in a state of war and the war began with the Israel Defence Forces conducting air strikes on the Gaza Strip, which was later followed by the incursion of ground troops and armoured vehicles².

29 December 2023, South Africa filed an application instituting proceedings against Israel before the International Court of Justice, concerning alleged violations by Israel of its obligations under the Convention on the Prevention and the Punishment of the Crime of Genocide to Palestinians in the Gaza Strip³. According To the application submitted by South Africa, “acts and omissions of 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” 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 Palestinian in Gaza, is in violation of its obligations under the Genocide Convention”⁴.

Article II of the United Nations Genocide Convention defines genocide as a crime committed with the intent to destroy a national, ethnic, racial, or religious group, in whole or in part⁵. According to South Africa’s application since the 7th of October 2023 Israel couldn’t prevent genocide and engaging in risks that could result in more genocidal acts against the Palestinian people in Gaza⁶.

South Africa seeks to find 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. South Africa also requests for the indication of provisional measures, according to Article 41 of the Statute of the Court and Articles

¹ BBC “What is Hamas and why is fighting with Israel in Gaza?”, 2024
<https://www.bbc.com/news/worldmiddle-east-67039975-#:~:text=On%20the%20morning%20of%207,others%20to%20Gaza%20as%20hostages>. (accessed 06 April 2024)

² *Ibid*

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (Order) [2024] ICJ Rep 192

⁴ *Ibid*

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, Article 2

⁶ *Supra* Note 3

73, 74 and 75 of the Rules of Court, this request is to “protect against further severe and irreparable harm to the rights of the Palestinian people under the Genocide convention” and “to ensure Israel’s compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and punish genocide”.

BACKSTORY

In 1948 the State of Israel was created on land inhabited by both Jews and Arab Palestinians⁷. There were a lot of conflicts between the two communities, and as a result, there was a mass displacement of Palestinians⁸. Most of these Palestinians ended up taking refuge in the Gaza Strip, which was a narrow swath of land roughly 142.71 square miles in size, which was under the control of Egyptian forces⁹. The status of the Palestinians remained unresolved as the protracted Arab-Israeli conflict brought recurrent violence to the region, and the fate of the Gaza Strip fell into the hands of Israel when it occupied the territory in the six day war of 1967¹⁰.



Figure 1 Six-day war Lead-up, battles and legacy

In 1993 the Israeli government and the Palestine Liberation Organisation (PLO) reached an agreement on the creation of a Palestinian state alongside an Israeli state¹¹. However, Hamas, which is a militant Palestinian group opposed the agreement and rejected the plan which included Palestinian recognition of the state of Israel and they carried out a terror campaign in an attempt to disrupt it¹². The plan did end up failing due to the suicide bombings by Hamas and the assassination of

⁷ Center for Preventive Action “Israeli-Palestinian Conflict”, 2024 <https://www.cfr.org/global-conflicttracker/conflict/israeli-palestinian-conflict> (accessed 12 May 2024)

⁸ *Ibid*

⁹ *Supra note 7*

¹⁰ *Ibid*

¹¹ *Supra Note 1*

¹² *Ibid*

the then Prime Minister of Israel Yitzhak Rabin by a Jewish extremist. In 2005, Israel single-handedly withdrew from the settlements it had created in the Gaza Strip after 1967, and in 2007 Hamas emerged as the ruler in the Gaza Strip this was after the conflict within the Palestinian Authority. After the Hamas took over, Israel and Egypt blocked the Gaza Strip which made it difficult for goods and people to enter and leave Gaza, as a result of the blockade there was continued unrest for almost 15 years¹³.

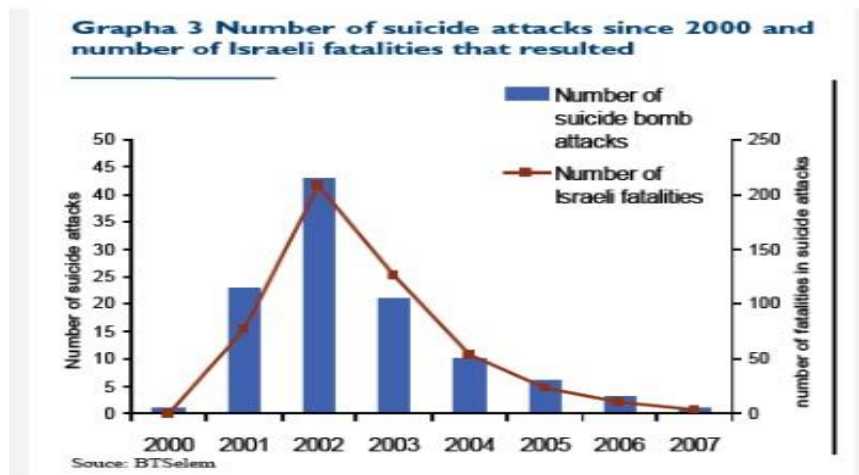


Figure 2 Israeli-Palestinian fatalities since 2000

In 2008 the first huge conflict between Hamas and Israel took place¹⁴. The animosity continued to break out and was noticed mostly in the years 2012, 2014, and 2021¹⁵. Among the factors complicating the hostilities was the high population density of the Gaza Strip and the proliferation of subterranean tunnels there. The tunnels were used by Gazans to avoid the blockade as they were difficult to detect or destroy. The conflicts that took place between Hamas and Israel would last a few weeks and they would result in more Gaza civilian casualties as compared to Israel's casualties, and they would also weaken the Hamas military capacity. After the Hostilities, there would be cease-fire agreements between Hamas and Israel, these agreements included Israel having to ease up on the blockade and facilitating the transfer of foreign aid into the Gaza Strip¹⁶. Due to the years of conflict and Hamas' military capacity getting weaker, Israel's defence assumed that it could manage the occasional hostilities that took place so the military was not that excessive. Israel focused more on the ongoing violence in the West Bank, political turmoil in Israel,

¹³ *Supra* Note 7

¹⁴ Britannica "Israel-Hamas War", 2024 <https://www.britannica.com/event/Israel-Hamas-War> (accessed 06 April 2024)

¹⁵ *Ibid*

¹⁶ *Supra* Note 14

and tensions with Lebanon and because of that the attack from the Gaza Strip on October 7th 2023 was unexpected¹⁷.



West Bank: New Front Challenges Israel, Palestinian Authority

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Figure 3 Westbank

inhabited by Palestinians attacked Israel, to which the Israel Defence Force responded to, with a series of raids in the West Bank which resulted in 2022 being one of the deadliest years for the West Bank. The Israel Defence Force also went after other PIJ militants in the Gaza Strip but left Hamas untouched. In return, the Hamas did not attack Israel and because of this Israeli officials were under the assumption that they could prioritize other threats over Hamas. At the end of 2022, there were unprecedented strikes and protests by many Israelis, in August 2023 senior military officials noticed how the Israel Defence Force's readiness for war was not as strong and they warned lawmakers about this, all this time the risk of a conflict between Hezbollah and Israel was rising¹⁸.

Hamas and Iran shared a close relationship which grew even closer after 2017, and Hamas received a lot of support from Iran to build up its military capacity and capability. On 7 October 2023, it was a Jewish holiday so a lot of Israel Defence Force soldiers were on leave and those that weren't were more focused on the Northern border rather than the Gaza Strip which is in the south, on this day Hamas led a coordinated attack that caught Israel off guard. It all began early in the morning (6:30 am) with over 2000 rockets launched into Israel within 20 minutes, the attack overwhelmed the Iron Dome defence system used in Israel. During the 20 minutes whereby the rockets were being fired at least 1500 militants from Hamas and the PIJ were accessing Israel using explosives at different points to breach the border. They

¹⁷ *Supra Note 14*

¹⁸ *Ibid*

also disabled Israel's communication networks and used that opportunity to attack the installations giving them a chance to enter civilian neighbourhoods undetected¹⁹.

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During this time other militants were breaching the maritime border by motorboats and paragliders.

About 1200 people were killed during the attack, this number includes foreign nationals and families that were attacked in their homes, it was also found that some victims were sexually violated before getting killed, this day was the deadliest day for Jews since the Holocaust. Over 200 others were held captive in the Gaza Strip, including Israelis who have dual citizenship and because of that several countries were putting effort to release their citizens.



Israel vows 'mighty vengeance' after deadliest day in 50 years following surprise Hamas attack

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Figure 4 Israel after Hamas attack

THE WAR

08:23 AM on 7 October 2023, the Israel Defence Force announced a state of alert war and began utilising its army reserves, after a couple of hours jets began conducting air strikes in the Gaza Strip¹⁹. The next day Israel declared itself in a state of war, on the 9th of October it ordered that water, electricity, food, and fuel should be cut off from entering the Gaza Strip territory, during the air strikes international efforts were being made to release the hostages safely. Qatar was the main mediator between the Gaza Strip and other countries on the release of the civilians held captive and in the first few weeks since the war began, only four hostages were released by the Hamas. Because of Gaza's subterranean tunnels, it was difficult to locate the hostages as well as target the militants and their weapons

¹⁹ *Ibid*

caches. 3 weeks after Hamas's attack more than 1.4 million Palestinians were internally displaced, and thousands of Palestinians were killed whilst climbing, this war became the deadliest conflict for Palestinians since the Arab-Israeli war in 1948.

By the end of October, Israeli ground forces had entered the Gaza Strip, and communications in the territory were cut this limited the ability of paramedics and humanitarian organizations to attend to emergencies²⁰. This conflict was different from previous conflicts in the sense that the ground invasion was slow, and the number of armoured vehicles and personnel was increased. On the 1st of November, the Rafah border crossing between the Gaza Strip and Egypt was opened to allow a limited number of foreign nationals in Gaza for the first time since 7 October to evacuate the territory as per the agreement between Egypt, Israel and Hamas. On November 22, there was a temporary pause in fighting, during the pause the Israel security cabinet and Hamas had agreed to a prisoner exchange and the interaction was mediated by Egypt and Qatar. 110 Hamas hostages were released for 240 Palestinian prisoners, after 7 days the war resumed, Israeli forces moved into the largest urban centre in the South of the Gaza Strip which was also a refuge to senior Hamas leaders. Within weeks more than half of the Gaza Strip population was overcrowded in the city along Egypt's border. By the end of the year, there was a lot of international pressure on Israel this was after a high number of civilian casualties in the Gaza Strip, and in the early days of January 2024 almost 23 000 Palestinians were reported dead, most of the deaths were of civilians so Israel announced that it will use a more targeted approach. By the end of January, there was an average of one-third of deaths as it was in October daily, also a framework came about through the mediation of Qatar, Egypt and the USA for a potential pause in the war and during the pause negotiations to cease fire would take place and there would be a hostage exchange between Israel forces and Hamas, but this framework was unsuccessful as Hamas would only agree if the hostage exchange resulted in a permanent ceasefire²².



Figure 5 Gaza after Israeli Attack

²⁰ *Supra note 14*

Ibid

Supra Note

In February Israel announced its intention to continue the war in the city along the Egypt border (Rafah) as it believed this would root out the “last bastion” of Hamas battalions but there were international concerns about this operation as it did not guarantee the safety of the civilians²³. Somewhere in the middle of March, the Israel Defence Force said that it would move some of the civilians out of Rafah and to the “humanitarian islands” it set up in the centre of the Gaza Strip, on 25 March the

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United Nations Security Council called for an immediate cease-fire and for the first time since the outbreak of the war the United States did not disagree with the United Nations. The war was centred around the Gaza Strip but was not limited to it, the Israel Defence Force also intensified its raids in the West Bank with strikes by warplanes, the attacks by Israeli settlers towards the Palestinians increased and the unpremeditated fighting at the Lebanese border was threatening to be another major conflict.

FACTS OF THE CASE

29 December 2023, South Africa filed an application instituting proceedings against Israel before the International Court of Justice, concerning alleged violations by Israel of its obligations under the Convention on the Prevention and the Punishment of the Crime of Genocide to Palestinians in the Gaza Strip²¹.

South Africa seeks to find 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. South Africa also requests for the indication of provisional measures, under Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court, this request is to "protect against further severe and irreparable harm to the rights of the Palestinian people under the Genocide convention" and "to ensure Israel's compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and punish genocide"²⁵.

Israel's [Foreign Ministry](#) characterized South Africa's charges as "baseless", describing the country as "functioning as the legal arm" of Hamas and requested that the case be removed from the General List. Israel claimed that it was conducting a war of self-defence in accordance with international law following the [Hamas-led attack](#) on its territory on 7 October 2023, which resulted in 1200 casualties, the ongoing firing of missiles at civilian population centres and also the holding captive of Israeli members. Israel also mentioned that it does take measures to minimise harm to civilians and allows humanitarian aid in the territory, it also accused South Africa of working with a terrorist organisation that aims to destruct the State of Israel²⁶.

²¹ *Supra Note 3*

Ibid

Supra Note

Israel also stated that its goal is to eliminate Hamas and not Palestinians, taking actions such as warning civilians in targeted areas and not striking in areas with civilians is proof of that. Israel representatives also argued that the atrocities that

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Hamas committed on the 7th of October are acts that should be characterised as genocidal acts and they were against Israel²⁷. Israel emphasized complying with international law despite Hamas using civilians as human shields, having military bases in civilian infrastructure, firing rockets at Israeli civilian targets and capturing and holding civilians hostage. The Israeli team also claimed that the court has no jurisdiction over this case, as no disputes exist between their country and South Africa. Israel further argued that South Africa had failed to show intent, which is a fundamental element of genocide, about the acts which are the subject of the complaint, for it to fall within the provisions of the Genocide Convention and therefore asserted that the International Court of Justice lacked jurisdiction over the Gaza war. The team also contended that the South African case provided only a partial narrative and urged the court to consider the decisions of the Israeli cabinet. The Israeli team asserted that the requested provisional measures would deprive Israel of its obligation under international law to provide a defence to its citizens, the hostages, and the internally displaced Israelis; it would also encourage further attacks²⁸.

ISSUES OF THE CASE

- Is Israel violating its obligations under the Convention on the Prevention and the Punishment of the Crime of Genocide (CPPCG)?
- Did Israel commit genocide as defined in the United Nations Genocide Convention?
- Should the International Court of Justice have Jurisdiction over this case?
- Is it in accordance with International law for South Africa to request the indication of provisional measures?

RULE OF LAW

- Article I of the CPPCG states that “the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish”
- Article II of the CPPCG states that, “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily harm or mental harm of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction as whole or in part;”
- Article II of the United Nations Genocide Convention defines genocide as a crime committed with the intent to destroy a national, ethnic, racial, or religious group, in whole or in part.
- Article 36, paragraph 1, of the Statute of the Court, provides that, “the jurisdiction of the Court comprises all cases to which the parties refer to it”.
- Article IX states that, “For the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case.”
- Article 41. 1. of the Statute of the Court provides that, “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”

□ *Article 73 of the Rules of the Court*

1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.

Ibid

Supra Note

2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.

□ *Article 74 of the Rules of the Court*

1. A request for the indication of provisional measures shall have priority over all other cases.
2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.
3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings.
4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects.

□ *Article 75 of the Rules of the Court*

The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.

When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

CONCLUSION

The court recalls the immediate context in which the present case came before it. On 7 October 2023, Hamas and others carried out an attack on Israel that resulted in 1200 deaths, thousands injured and about 240 held captive many of which are still held captive. As retaliation, Israel launched a large-scale military operation in Gaza which caused a large number of civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population of Gaza. The ongoing conflict in Gaza has been addressed in the framework of several organs and specialised agencies of the United Nations. Resolutions have been adopted by the General Assembly of the United Nations and the Security Council, referring to many aspects of the conflict. The scope of the present case submitted to the court, however, is limited, as South Africa has instituted these proceedings under the Genocide Convention.

The following are the conclusions of the court:

- In light of the foregoing the court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case and that, consequently it cannot adhere to Israel's request for the case to be removed on the General List.
- The Court concludes, prima facie, that South Africa has standing to submit to it the dispute with Israel concerning alleged violations under the Genocide Convention.
- Some of the rights claimed by South Africa and for it is seeking protection for are plausible, this is the case concerning the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.
- Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention. Israel must also ensure with immediate effect that the military forces do not commit any of the acts under Article II.
- Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian Group in the Gaza Strip.
- Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.

- Israel must submit a report to the court on all measures taken to give effect to this order within one month, from the date of this order. The report shall then be communicated to South Africa, which shall thereon be given the opportunity to submit its comments to the Court.
- The court called for the immediate and unconditional release of hostages who were abducted during the attack on Israel on 7 October 2023 and held since then hostage by Hamas and other armed groups.



Figure

6 International Court of Justice