

Analysis | Gaza Genocide Case Against Israel: The Key Legal Questions Facing the International Court of Justice

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South Africa's case against Israel is not the first time the world court is being asked to rule on potential genocide. Previous decisions will give hope to both the Palestinians and Israel, but may ultimately highlight the limitations of international law

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Smoke rises following an Israeli bombardment in the Gaza Strip, as seen from southern Israel, Saturday, Dec. 16, 2023. Credit: Ariel Schalit /AP

Under international law, in order to prove genocide is being committed, it is necessary to show both a physical and a mental element: one or more acts have to be done with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

The acts that can fulfill the physical element include killing members of the group, causing serious bodily harm or mental harm to members of the group, and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

As there is no doubt that Israel has [killed many Palestinians in Gaza](#), and caused bodily harm to many others, the issue on which [South Africa's claims before the International Court of Justice](#) that Israel commits genocide against Palestinians in Gaza will rise or fall is the question of intent.

Israel will argue that it is acting in self-defense and its targets are Hamas members, not Palestinians as such. It is expected to argue that when Palestinian civilians are killed or harmed, that is unfortunate collateral damage, but that it never targets them as such.

So while there is no doubt that Palestinians in Gaza are now subject to horrible conditions of life, South Africa will have to prove these conditions were calculated to bring about the destruction of at least part of the group.

To do so, it will point to statements made by Israeli officials, such as Prime Minister Benjamin Netanyahu's [reference to the Israelites' biblical enemy Amalek](#), or Defense Minister Yoav Gallant's statement on "[fighting human animals](#)" and his declaration that there will be "no electricity, no food, no water, no fuel." It will use these statements - and the big numbers of Palestinian civilian

casualties, including so many children, and the destruction of so many civilian homes - to argue that Israel is targeting Palestinians in Gaza as such.

A child sitting outside, as displaced Palestinians shelter at a tent camp in Rafah, the southern Gaza Strip, on Wednesday. Credit: Ibraheem Abu Mustafa/Reuters

Given the discrepancy between social perception of genocide and its restricted legal meaning, some advocates of the case against Israel may be disappointed.

It will point, as it did in its submission, to videos of Israeli soldiers chanting "[We know our slogan: there are no 'uninvolved civilians'](#)" and "to wipe out the seed of Amalek," to make the claim that these statements have consequences on the ground. It will argue that Israel conflates Hamas and all Palestinians in Gaza, and maybe will point to the fact that even U.S. President Joe Biden talked of "[indiscriminate bombing](#)." But Israel will presumably argue Netanyahu and Gallant's words are meant against Hamas members, not against Palestinians in Gaza as such.

The world court's previous case law in judgments concerning the wars that followed the dissolution of Yugoslavia requires to establish a pattern of conduct from which the only reasonable conclusion to be drawn is an intent to destroy a substantial part of the group. However, it is enough to show an intent to destroy part of the group, even within a geographically limited area.

The legal definition of genocide, while narrow, is not limited to events in the scope of the paradigmatic and incomparable historical case of the Holocaust. In fact, the argument has also been made that the [Hamas attack on Israelis on October 7](#) fulfills the genocide criteria itself - though this issue is at least for now not before the world court in the current proceedings.

Much harder to prove

For the purpose of making the judgment of whether to accept South Africa's narrative about Israel's attacks as having this specific intent, or whether to accept Israel's position, the International Court of Justice will have to look at evidence in a process that may take a number of years. Given the discrepancy between social perception of genocide and its restricted legal meaning, some advocates of the case against Israel may be disappointed.

At the same time, given the statements by Israeli officials and the harsh reality in Gaza, the United Nations' top court may end up accepting South Africa's claim. But it is important to recall that because of the special intent required in genocide, it is much harder to prove it than to prove war crimes - where, for example, it would be enough to show an attack was launched intentionally knowing it will cause incidental loss of life to civilians in a way excessive to the concrete and direct military advantage anticipated from the attack.

However, while alleged war crimes committed by both Hamas and Israel are now under investigation in the other international court located in the Hague - the [International Criminal Court](#) - the International Court of Justice would not have jurisdiction regarding claims on “merely” war crimes.

This is because the world court - unlike the International Criminal Court, which deals with criminal prosecution against individuals - deals only with claims against states, only has jurisdiction based on the consent of states. In this case, such consent exists because both South Africa and Israel are members of the Convention on the Prevention and Punishment of the Crime of Genocide, which determines that disputes relating to the convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

South Africa - and in fact any state that joined the Genocide Convention - can bring a claim against Israel given that its obligations are of the sort called in international law obligations “*erga omnes*,” i.e., obligations owed toward all, reflecting the idea that all state parties have a common interest to ensure the prevention, suppression and punishment of genocide.

A Rohingya woman reacting as she is relocated from her temporary shelter in Indonesia following a protest calling for the deportation of the refugees last month. Credit: Riska Munawarah/Reuters

This was affirmed by the world court in 2022 [in the case of the Gambia v. Myanmar](#), in which the former initiated proceedings concerning allegations of genocide of the Rohingya group in Myanmar.

This clause in the Genocide Convention opens the door for International Court of Justice jurisdiction. So, while proving a situation amounted to genocide is much harder than proving war crimes or even crimes against humanity, the jurisdiction clause in the convention makes claims based on this convention possible in a way that may channel arguments in this direction.

Ukraine v. Russia

A prime example of how the existence of jurisdiction for genocide shapes the legal framing of disputes is the most recent genocide-related case before the world court: that of [Ukraine v. Russia](#). Ukraine sued Russia not because it argued that Russia commits genocide, but rather because Russia has made the allegation that Ukraine itself committed genocide in the disputed regions of Luhansk and Donetsk. Ukraine argued that Russia made a false claim of genocide as a basis for its military actions against it.

A Ukrainian police officer taking cover in front of a burning building hit in a Russian airstrike in Avdiivka, Ukraine, last March. A year earlier, the world court issued interim measures ordering Russia to immediately suspend its military operations in Ukraine. Credit: Evgeniy Maloletka/AP

Based on this, Ukraine managed to convince the UN’s top court that there is a dispute about genocide in a way that led to the preliminary conclusion that the world court probably has jurisdiction over the case. This led the International Court of Justice to issue interim measures in 2022 ordering Russia to immediately suspend its military operations in the territory of Ukraine.

Indeed, it is interim measures that this week’s hearings will focus on, with a decision expected within a few weeks. South Africa asked the world court to order provisional measures, including the demand that Israel suspend its military operations in and against Gaza; that it will take measures to

prevent genocide; that it will desist from the commission of acts such as the killing of Palestinians in Gaza, causing bodily or mental harm, and inflicting conditions of life which it is argued are deliberately inflicted on the group in a way calculated to bring about its physical destruction in whole or in part.

The UN's top court is also asked to order Israel to take measures to prevent expulsion and forced displacement of Palestinians from their home, deprivation of access to food and water, and access to humanitarian assistance.

Additionally, the world court is asked to order that Israel will ensure that no one in its control, direction or influence will engage in incitement to commit genocide and that Israel will not act to deny or restrict access to fact-finding missions and other bodies to Gaza for the purpose of retention of evidence.

In deciding on the request for provisional measures, the International Court of Justice will not in this early stage make a decision on whether South Africa's claims re genocide are correct or not. All it will examine is whether the claims are plausible.

If it finds this is the case, it will issue provisional measures if it finds that irreparable prejudice or consequences could be caused to rights that are the subject of the proceedings, and if there is an urgency - i.e., a real and imminent risk that irreparable prejudice will be caused before the world court gives its final decision.

Based on the criteria of irreparable harm and urgency, as applied in previous cases such as the Gambia v. Myanmar and Ukraine v. Russia, it is expected that the world court will issue interim measures.

U.S. Secretary of State Antony Blinken touring the "Burma's Path To Genocide" exhibit at the United States Holocaust Memorial Museum last March. Credit: Kevin Lamarque /AP

The claim made by South Africa is against Israel's alleged commission of genocide - not against its military actions per se. Accordingly, the world court may stop short of ordering Israel to suspend military operations, and only order measures to prevent acts that fall under the Genocide Convention

In the Ukraine v. Russia case, the world court pointed in its interim measures decision to the fact that Russian military operations resulted in numerous civilian deaths and injuries, significant material damage, including the destruction of buildings and infrastructure, and the creation of difficult living conditions for the civilian population, with many people not having access to the most basic foodstuffs, potable water, electricity and essential medicines. The paragraph where the world court pointed to these facts can in fact be copied verbatim to a decision it may make in the Gaza case.

However, it is not clear that it will order measures as extensive as it did in the Ukraine case. In that instance, the central issue which was the basis of jurisdiction was Ukraine's argument that Russia's invasion was based on the false premise of genocide, and hence it made sense for the world court to demand suspension of Russia's military operations in Ukraine.

The right route?

In the Gaza case, the claim made by South Africa is against Israel's alleged commission of genocide - not against its military actions per se. Accordingly, while South Africa asked that Israel suspend its military operations, the world court may decide to stop short of that and only order measures to prevent acts that specifically fall under the Genocide Convention, as it did in the Myanmar case - including ordering to prevent and punish incitement to genocide.

Of course, even if it stops short of ordering Israel to suspend its military operations, it will be significant if the world court will order it to take measures to stop killing Palestinians in Gaza, not to cause serious bodily or mental harm, to allow humanitarian access and not to deliberately inflict conditions of life calculated to bring about their physical destruction.

Such an order could leave a margin of interpretation regarding which military actions will be considered violations, however, whereas no such margin will exist if it will give a broader order as it did in the Ukraine case.

In any event, we should also recall that Russia did not obey the world court's order and, given its veto power at the [UN Security Council](#), no enforcement steps can be taken against it in the Council, which is the body parties can turn to if there is no compliance with International Court of Justice decisions.

In Myanmar's case, the world court ordered it to issue reports on the measures it is taking to comply by the order. The reports have not been made public, but human rights groups claim that Myanmar does not fulfill its obligations under the order.

Dutch police standing in front of the Peace Palace in the Hague in 2004, when the world court was asked to determine the legality of Israel's West Bank separation barrier. Credit: Peter Dejong/AP

While a U.S. veto may protect Israel from enforcement decisions in the UN Security Council, an order by the world court may lead to different forms of international pressure.

The two cases may be illustrative of the fact that while the world court is today dealing with ongoing conflicts more than it did in the past - with the Genocide Convention the basis for jurisdiction in some of these cases - we may possibly also see less compliance with its decisions than in the past.

States may defy its decisions more when it comes to what they perceive as national security issues.

However, direct compliance is not the whole story. While a U.S. veto may protect Israel from enforcement decisions in the Security Council, an order by the world court may lead to different forms of international pressure upon Israel: diplomatic and political, economic and legal.

Whether the court proceedings will help alleviate the huge suffering caused to civilians during this war remains to be seen. Ending the horror afflicting so many, both Israelis and Palestinians, is a noble goal. The question of whether international law, with all its limitations – be it ones of jurisdiction, merit or compliance – can assist in reaching this goal is one we will be attuned to in the next few months.

Aeyal Gross

P.S.

• Haaretz. Jan 10, 2024 7:06 pm IST:
<https://www.haaretz.com/israel-news/2024-01-10/ty-article/.premium/gaza-genocide-case-against-israel-the-questions-the-international-court-of-justice-faces/0000018c-f3b7-d6ce-abcc-fbbfe7680000>