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Israel on trial

South Africa is taking Israel to the International Court of Justice. But what are the real chances of a guilty verdict?

On 11 and 12 January, Israel had to defend itself against South Africa's accusation of genocide before the International Court of Justice (ICJ) in The Hague. South Africa has requested the Court to implement provisional measures against Israel, in particular to stop its armed operations in the Gaza Strip, on the grounds that Israel is in breach of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The proceedings have been met with outrage in Israel and beyond, as it was the Holocaust that provided the basis for the Convention, created to forever outlaw such behaviour under international law. So, isn't using the Genocide Convention to sue the very country whose existence is largely due to the Holocaust a case of turning the Convention and thus international law on its head?

The ICJ deals with the responsibility of States, not the criminal responsibility of individuals. That is the purview of the International Criminal Court (ICC), just a few kilometres away, which has long been concerned with Israel's conduct in the occupied territories, i.e. the West Bank and East Jerusalem, as well as the Gaza Strip. So far, the ICC seems to be primarily concerned with possible Israeli war crimes and crimes against humanity, which do not fall within the ICJ's jurisdiction. In turn, this Court's jurisdiction over a possible genocide presupposes a legal 'dispute' between South Africa and Israel over how to interpret the Convention. Although Israel denies this, the fact that it is defending itself before the ICJ suggests that such a dispute does indeed exist.

The main problem in genocide proceedings – whether to establish State responsibility (before the ICJ) or individual criminal responsibility (before the ICC) – is

While the ICC can also hold non-State actors such as Hamas accountable, the ICJ's jurisdiction is limited to States. In the present proceedings, this leads to the astonishing situation that only one party to the conflict (Israel) is on trial, although the genocide accusation could be more persuasively brought against the other (Hamas). The Israeli side has correctly pointed out that asymmetry, which,

proving the intent to destroy.

however, is only a legal consequence of the ICJ's limited jurisdiction. Yet, when ruling on the case, the ICJ will not be able to avoid considering Hamas' involvement in the fighting – as an invisible party to the proceedings, so to speak. Regarding the accusation of genocide, it makes a big difference if a State is using military force to respond to an attack by a non-State party to the conflict or whether its military actions are solely directed against a specific (non-military) group of civilians.

This also distinguishes the present case from The Gambia v. Myanmar proceedings. That ongoing case concerns a possible genocide by Myanmar's military dictatorship against the Rohingya Muslims, being the targeted group protected by the Genocide Convention outside an armed conflict. In this respect, the ICJ granted the measures to prevent genocide requested by The Gambia in January 2020 and recognised its jurisdiction on the merits in July 2022. Germany, together with other States, joined the proceedings in November 2023, supporting The Gambia's application and endorsing a fairly broad interpretation of the crime of genocide. The German Government will now have to stick to that when intervening in support of Israel. It will be interesting to see if Germany manages to square the circle.

Proving intent to destroy

As far as the specific accusation of genocide is concerned, it is clear from the Convention's definition, generally recognised under international law, that the aim is to protect the existence of certain groups, whereby – and this is decisive – the perpetrator must act with the overarching intention of destroying at least part of the group in question ('intent to destroy'). Thus, the genocide crime requires a 'special intent', a kind of ulterior intent ('*überschiessende Innentendenz*'): the perpetrator must wish to accomplish more than he objectively does. For example, killing members of a group – a classic, objective genocidal act – does not suffice to affirm genocide; the specific intention to destroy must go beyond that. The flip side of this is that killing just two members of a protected group *can* constitute genocide if the perpetrator acts with the required specific intent to destroy. At any rate, in the case at hand, this means that genocide cannot be assumed simply because massive military strikes cause substantial damage to people and property.

The main problem in genocide proceedings – whether to establish State responsibility (before the ICJ) or individual criminal responsibility

(before the ICC) – is proving this intent to destroy. In this respect, State statements with clear genocidal intent are key. A classic example of this is the 'Final Solution of the Jewish Question' outlined in the Protocol of the 1942 Berlin Wannsee Conference. South Africa has now presented a number of statements by Israeli politicians and military officials that suggest a genocidal intent with regard to the Palestinian civilians in Gaza. But there are two main objections to its argument.

On one hand, some of the statements are decontextualised and incomplete. For example, contrary to South Africa's account, in his statement of 28 October 2023, Israeli Prime Minister Benjamin Netanyahu not only referred to the biblical story of the Israelites fighting their hereditary archenemy, the Amalekites, but also said that the aim was to destroy Hamas and free the hostages and that non-combatants should not be harmed. On the other hand, only statements made by members of the so-called Security Cabinet and/or the (smaller) War Cabinet can be attributed to the State of Israel — as a subject of international law before the ICJ. This is because these two bodies are (collectively) responsible for the conduct of the war.

Which acts constitute State acts?

A further question is whether genocidal statements by individual members of these bodies – such as the far-right politicians Itamar-Ben-Gvir and Bezalel Smotrich, both members of the Security Cabinet – can be attributed to the State of Israel, even if such statements were contradicted by the prime minister or were not included in collective decisions of those bodies. In any case, those politicians should have been fired long ago. Otherwise, Israel opens itself to the – in this respect justified – accusation of failing to act decisively against statements inciting genocide, which are also punishable under Israeli law (as also Israeli voices point out).

An intent to destroy can also be inferred from a certain pattern of conduct — through circumstantial evidence. The compatibility of Israel's conduct of hostilities with the rules of international humanitarian law can certainly be questioned, but this does little or nothing to prove genocidal intent to destroy. The international case law requires the specific intent to appear to be the 'only reasonable inference' of the objectively committed acts (see fundamentally the IJC decision in Croatia v. Serbia of 2015). It is however disputed, whether this strict standard also applies in preliminary proceedings dealing with provisional measures.

At the same time, South Africa should also be obliged to work towards ensuring that Hamas and other jihadist groups also stick to such a ceasefire and renounce their genocidal plans for annihilation.

Insofar, it is generally assumed that the applicant only has to plausibly demonstrate that certain violations of the Genocide Convention have occurred or are occurring. The standard of plausibility could be lowered even further if there is particular urgency and a risk of 'irreparable harm'. However, opinions on this differ. Be that as it may, some of the measures that Israel has taken to comply with international humanitarian law (e.g. warning and evacuating civilians) and allowing in humanitarian aid tend to speak against genocidal intent.

When South Africa describes Israel's evacuation orders themselves as 'genocidal' – reproaching Israel for complying with its responsibilities under international humanitarian law to evacuate civilians from a combat zone – it turns that law on its head. Even if you consider that Israel's evacuation orders were deficient, for example because there are no safe spaces in the Gaza Strip, they can't possibly entail the inference of genocidal intent.

Finally, in terms of South Africa's (nine!) requested provisional measures, some go beyond previous jurisprudence while others go too far because their adoption would unduly restrict Israel's right to defend itself against Hamas' armed attack. Of course, Israel must comply with international (humanitarian) law (and in particular must not commit genocide) while defending itself. But a State that has been attacked cannot be forced to end combat operations – thus abandoning its self- defence – especially if such an order would only affect one conflict party (Israel), while the other (Hamas) could continue to operate freely and escalate militarily. Thus, if the ICJ really orders provisional measures – and there are some indications that it will – it will have to find a compromise formulation that minimises the risk of genocide (a humanitarian ceasefire) on the one hand and that does not unduly restrict Israel's right to self-defence on the other.

At the same time, however, South Africa should also be obliged – in line with its own obligations as acknowledged (p. 82, measure 3) – to work towards ensuring that Hamas and other jihadist groups also stick to such a ceasefire and renounce their genocidal plans for annihilation. Finally, in line with its sixth requested measure, Israel should also be called upon to more consistently repress incitements to genocide.



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