



Police officers disperse demonstrators who have gathered outside the International Court of Justice during a hearing on a genocide complaint by South Africa against Israel in The Hague, Netherlands, on January 11, 2024.

AFP

South Africa's aim at ICJ is lawfare



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PERSPECTIVE

The South African government is proud of its activist foreign policy in speaking out on the big international issues of the day. Its case before the International Court of Justice (ICJ) in The Hague last week was applauded domestically and abroad as a sign that South Africa really cares about the Palestinians and human rights.

The case may also be an attempt at domestic nation-building. Such spectacles as Team SA in The Hague take minds off power cuts, the state of the economy, and unemployment, and are useful for mobilisation just months before an election. And just like the Springboks, many felt the need to support Team South Africa at The Hague.

But the case is not a sports game, it is really lawfare — using the courts to damage and delegitimise an opponent. Lawfare is part of many wars and campaigns, and it can do great damage.

Israeli cause

Even if the ICJ rejects South Africa's case, the Israeli cause will have been damaged as they have been seen to have been placed in a dock. Popular opinion does not look at the intricacies of a case. It is the visuals of Israel defending itself against having conducted genocide as well as the pictures of bombed buildings and children being rushed to hospital that count in people's minds.

It is almost as though winning the case is all incidental to South Africa. It is the show of a large legal team in The Hague that really counts. The Court, on its own, cannot enforce these provisional measures. It will require a United Nations (UN) Security Council vote, as well as the possible deployment of UN peacekeeping troops. Due to the sheer danger and political risks, no country probably wants to send troops to Gaza.

There is no chance this case will speed up a political settlement of the conflict. Lawfare is about propaganda and raising pressure on an opponent. It is not fundamentally about truth and justice.

And the case is not about bringing about a peaceful settlement between Israel and Hamas. There is an open question as to why no Arab countries have joined South Africa in taking this case to the ICJ. Surely, a show of wider support at the Court would have shown that South Africa has allies. That would have added to the lawfare value of the case.

A number of Arab countries expressed their support for the case, but that was all. It is the US, the Egyptians, the Saudis, and the Qataris who are actually seeking a solution to the war and the freeing of the Israeli hostages held by

Hamas. The case before the ICJ is irrelevant to the worthy work of trying to reach a settlement of the Gaza war.

Encouraged

Although no Arab countries joined South Africa at The Hague, it is possible that Pretoria might have been encouraged to petition the ICJ. Alec Hogg, who runs BizNews.com, has said it is hard to miss the coincidence between the ANC's dramatic financial turnaround from last October and the government's interest in Gaza.

The court might come up with provisional measures in a matter of days, but deciding whether or not genocide has been committed could take years. The South African legal team in The Hague last week asserted, but did not really prove, that genocide had taken place. They said there was a pattern in the Israelis inflicting massive numbers of civilian deaths, and used quotes from Israelis, including extremists, to back their case. What they did not prove was the official intention to conduct genocide. At the start, South Africa's legal team must have known they could only win at a stretch.

Mia Swart, a South African legal academic, who praises South Africa's case as "bold", wrote in The Sunday Times earlier this month that it is a very difficult case to win but, "the application forms part of a multipronged approach to assert the rights of Palestinians." So, then it is really about lawfare. Given South Africa's failure to prove genocide, what is the court likely to decide?

No jurisdiction

The court could say it does not have jurisdiction over this matter, as there

was no prior dispute between South Africa and Israel. Petitions cannot be decided upon by the ICJ without the existence of a dispute in which both parties have directly exchanged their views. Israel argued that the ICJ should turn down South Africa's petition on these grounds.

South Africa sent a "note verbale", a diplomatic message, to Israel raising concerns about genocide in Gaza on December 21 last year. On December 26, the Director General of the Israeli Department of Foreign Affairs replied, proposing a meeting with his South African counterpart at his earliest convenience to discuss the issues raised. However, Israel's attempt to deliver the message was refused due to the holiday, and the South African Department of Foreign Affairs and Co-operation advised the Israelis to hand-deliver the note on January 2, 2024. But in the meantime, on December 29, 2023, South Africa instituted action against Israel in the ICJ.

The Israelis argued that South Africa rushed to court without taking up their offer to hold talks to engage in the dispute. On January 10, the South Africans eventually replied to the Israelis, saying that there was no point in holding talks.

The South African Department of Foreign Affairs might have neglected to fulfill a basic requirement to bring a petition to the ICJ.

But South Africa's petition to the ICJ was about waging endless lawfare on the issue. A win would have been good, but it has still been able to make its point.

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A special intent crime has to happen with the exclusive intent for causing a specific consequence. No other inference may be drawn.



destroying Hamas, even though he is effectively eradicating Palestinians from Gaza. How do we claim that? Easy. We — and the South African legal team at ICJ — tackle both actus reus and mens rea of Israel's genocidal acts in Gaza — and it would still not be enough for the UN court to deem it genocidal — absurdly. The actual act of the Israeli genocide is laid out for all to see. Civilian casualties in Gaza are maximized as the Israeli army continues to drop dumb bombs on civilian-dense areas it finds using an artificial intelligence system called "Habsora," ("The Gospel"), as revealed by an investigation by +972 Magazine and Local Call. Whoever is not killed by bombardments on hospitals, refugee camps, and residential buildings is still living in "the world's largest open-air prison," where water, food, and power are intentionally scarce.

The intent would have not been too hard to prove, either, if demonstrating general intent or any other reasonable standard was required. In arguing the case for Israeli genocide in Gaza at ICJ, the South African legal team was able to draw on a comprehensive database, compiled by Law for Palestine, which meticulously documents and collates 500 statements that embody Tel Aviv's intention to commit genocide and incitement to genocide since October 7, 2023. The statements by Israelis with command authority — leaders, war cabinet ministers, and senior army officers — and by other politicians, army officers, journalists, and public figures reveal the widespread commitment in Israel to the genocidal destruction of Gaza. The Israeli cabinet and military officials have verbalized their genocidal intent towards the Palestinian people, according to Al Jazeera. On October 9, 2023, when announcing the full blockade, Israeli Minister of Defense Yoav Gallant described the 2.3 million people in Gaza as "human animals". On October 29, Netanyahu

used Judaic scripture to justify the killing of Palestinians. "You must remember what Amalek did to you, says our Holy Bible," he said, quoting a verse that goes on to say: "Now go and smite Amalek ... kill both man and woman, infant." On November 5, Heritage Minister Amihai Eliyahu said one of Israel's options in Gaza is to drop a nuclear bomb. He also explained that no humanitarian aid should be provided to Palestinian civilians as "there is no such thing as uninvolved civilians in Gaza". There has been a litany of other official statements employing dehumanizing language towards Palestinians, along with incitement by common Israelis for the "annihilation of Gaza". These reveal the intent to commit war crimes, crimes against humanity, and, indeed, genocide. In the case of Kayishema and Ruzindana, who were accused of committing genocide against the Tutsis in Rwanda, the Trial Chamber decreed that the evidence of genocidal intent can be inferred from "the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing". It added, "The number of victims from the group is also important."

Nevertheless, by including the requirement of proving a special intent for committing genocide in its definition of genocide, the United Nations has dropped the ball in a spectacular fashion. Israeli Prime Minister Benjamin Netanyahu will most likely avoid liability for killing over 24,000 people in Gaza just because of this legal minutia. So, we will continue to see the same pattern happen again and again until the UN wakes up to the fact that its narrow, easily circumventable definition has let many war criminals go unpunished and amplified many genocides.