

SOUTH AFRICA'S APPLICATION AGAINST ISRAEL

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ABSTRACT

This paper attempts to throw light on the Application made by South Africa against Israel before the ICJ (ICJ) and the Judgement passed by the ICJ. It further, attempts to explain, how the ICJ has the jurisdiction to decide the Application filed by South Africa and also the interim reliefs granted by the ICJ on 26th January, 2024.

The ongoing conflict between Israel and Palestine, compounded by the attack on Israel by Hamas on October 7, 2023, and subsequent reprisals, has garnered significant international attention. On December 29, 2023, South Africa filed an application before the International Court of Justice (ICJ), alleging that Israel's actions in Gaza constitute genocide. Citing Article 92 of the United Nations Charter, which designates the ICJ as the principal judicial organ of the UN, the ICJ issued an order on January 26, 2024, in response to South Africa's application directing Israel to prevent genocidal acts in Gaza, pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide.

Keywords: ICJ, UN, genocide, military.

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INTRODUCTION

The conflict between Israel and Palestine and the attack on Israel by Hamas on 7th October, 2023 and the reprisal by Israel are the most talked about international current affairs. On 29th December, 2023, an Application was filed by South Africa before the ICJ, claiming that the activities of Israel on Gaza amounted to Genocide and further, requesting the ICJ for grant of interim reliefs, stopping Israel from continuing with its military actions in and against Gaza, till the pendency of the proceedings.

According to Article 92 of the Charter of the United Nations¹ (UN), the ICJ is the ‘principal judicial organ’ of the UN. The ICJ has by virtue of its order dated 26th January, 2024, in the matter of the application on the Convention on the Prevention and Punishment of the Crime of Genocide² in the Gaza Strip, filed by South Africa against the military operations in and against Gaza, has ordered Israel to prevent genocidal acts in and against Gaza.

South Africa invoked the jurisdiction of the ICJ under Article 36, Paragraph 1³ of the Statute of the ICJ and Article IX of the Genocide Convention.

JURISDICTION OF THE ICJ

The ICJ exercises two kinds of jurisdictions:

1. Contentious Jurisdiction

Where the ICJ decides legal disputes, according to the international law, which are brought before the ICJ by the States.

2. Advisory Jurisdiction

In Advisory Jurisdiction, advisory opinions can be sought by the organs of the United Nations, specialized agencies or one related organization authorized to make such a request, from the ICJ, on legal questions.

It is the fundamental principle of International Law that ‘no State can, without its consent be compelled to submit its dispute with other States either to mediation or to arbitration, or to any

¹ Article 92 of the United Nations Charter, <https://www.un.org/en/about-us/un-charter/chapter-14>

² Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

³ Article 36, Statute of the ICJ, <https://www.icj-cij.org/statute>

kind of pacific settlement'. The Contentious jurisdiction⁴ of the ICJ can be invoked only by States in the following manner:

1. By consenting to the jurisdiction of the ICJ in treaties or conventions;
2. By executing a Special Agreement, consenting to the invocation of the jurisdiction of the ICJ;
3. By declarations of the States, where they choose the Compulsory jurisdiction of the ICJ in case of International Disputes.

THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 defines Genocide under Article II⁵ as follows:

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 or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

Further, Article IX⁶ of the Convention gives the jurisdiction to the ICJ for matters relating to the interpretation of the application and the State responsibility to prevent acts amounting to Genocide as defined in the Convention. According to the said Article the matter can be referred by the State parties to the Genocide Convention to the ICJ.

⁴ Article 36, Statute of the ICJ, <https://www.icj-cij.org/statute>

⁵ Article II, Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

⁶ Article IX, Convention on Prevention and Punishment of the Crime of Genocide, 1948, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

APPLICATION BY SOUTH AFRICA

South Africa instituted a proceeding against Israel by filing an Application before the Registry of the ICJ. According to the Application, South Africa invoked the jurisdiction of the ICJ under Article 36, Para 1 of the Statute of the ICJ. Article 36 Para 1 states the voluntary jurisdiction of the States where the States have accepted the jurisdiction of the ICJ in the treaties or convention.

South Africa articulated in its Application; “concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023. South Africa contends that the acts and omissions by Israel of which it complains are genocidal in character because “they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip”. South Africa asserts that the relevant acts are attributable to Israel, which has failed to prevent genocide and is committing genocide, and which has also violated and continues to violate other fundamental obligations under the Genocide Convention.”⁷

Further, South Africa in its Application also stated that it had applied the ICJ for the grant of interim relief. South Africa further submits, “In light of the extraordinary urgency of the situation, South Africa seeks an expedited hearing for its request for the indication of provisional measures. In addition, pursuant to Article 74(4) of the Rules of Court, South Africa requests the President of the Court to protect the Palestinian people in Gaza by calling upon Israel immediately to halt all military attacks that constitute or give rise to violations of the Genocide Convention pending the holding of such hearing, so as to enable any order the Court may make on the request for the indication of provisional measures to have its appropriate effects. To that end, the Court should order Israel to cease killing and causing serious mental and bodily harm to Palestinian people in Gaza, to cease the deliberate infliction of conditions of life calculated to bring about their physical destruction as a group, to prevent and punish direct and public incitement to genocide, and to rescind related policies and practices, including regarding the restriction on aid and the issuing of evacuation directives.”⁸

⁷ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>

⁸ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>

DEFENCE BY ISRAEL

Israel has contented in the said proceedings that according to Article 41 of the ICJ Statute, for the grant of interim reliefs, the party requesting interim reliefs shall prove prima-facie case. Israel further, contented that the acts of Israel cannot fall within the purview of the Genocide Convention as the necessary specific intent required, to destroy, in whole or in part, the Palestinian people of Israel has not been proved by South Africa, even on the prima-facie basis.

Further, Israel also contented that South Africa had conveniently ignored the attack by Hamas on Israel on 7th October, 2023. It was also contented that the attack on Israel by Hamas from Gaza and the open pledge of Hamas to repeat the attacks had given Israel the inherent right to take all lawful actions to defend its citizens and to secure the release of the Hostages, who are still in captivity.

ORDER PASSED BY THE COURT

The Court passed an order on 26th January, 2024 on the application for provisional measures made by South Africa.

The Court did not decide on whether the acts committed by Israel, amounted to Genocide. The Court also did not order a cease-fire as per South Africa's primary request. However, the Court did state in its order that Israel has the obligation not to commit acts amounting to Genocide.

“The Court considers that, with regard to the situation described above, 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, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.”⁹

⁹ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>

Further, the Court also mentioned the hostages abducted during the 7th October attack by Hamas, even though the ICJ exercise jurisdiction only over States and not over Militant Groups like Hamas and stated, “The Court deems it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law. It is gravely concerned about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release.”¹⁰

ANALYSIS OF THE JUDGEMENT

It can be observed from the order of the Court that no cease – fire was ordered as was requested by South Africa. However, the Court did order Israel to not commit acts which amounted to Genocide.

The Court encouraged the efforts taken by South Africa and further also made references to humanitarian situation in Gaza and ordered that Israel must take “immediate and effective measures” to ensure humanitarian assistance is provided to the people in Gaza.

CONCLUSION

As is evident from the order passed by the ICJ to the Application made by South Africa, it has positives for both South Africa and Israel. The Court has identified the Palestinian people as a distinct group and has ordered Israel to stop all actions amounting to Genocide as per the Genocide Convention. Further, no cease-fire was ordered by the Court, which in a way allows Israel to continue its Military operations in Gaza.

¹⁰ <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>