

South Africa's ICJ Application for Israel's Genocide in Gaza

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APPLICATION INSTITUTING PROCEEDINGS

To the Registrar of the International Court of Justice, the undersigned, being duly authorised by the Government of the Republic of South Africa, state as follows:

In accordance with Articles 36 (1) and 40 of the Statute of the Court and Article 38 of the Rules of Court, I have the honour to submit this Application instituting proceedings in the name of the Republic of South Africa (“South Africa”) against the State of Israel (“Israel”). Pursuant to Article 41 of the Statute, the Application includes a request that the Court indicate provisional measures to protect the rights invoked herein from imminent and irreparable loss.

I. Introduction

1. This Application concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of the State 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 unequivocally condemns all violations of international law by all parties, including the direct targeting of Israeli civilians and other nationals and hostage-taking by Hamas and other Palestinian armed groups. No armed attack on a State’s territory no matter how serious — even an attack involving atrocity crimes — can, however, provide any possible justification for, or defence to, breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’ or ‘Convention’),¹ whether as a matter of law or morality. The acts and omissions by Israel complained of by South Africa 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 (‘Palestinians in Gaza’). The acts in question include killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. The acts are all attributable to Israel, which has failed to prevent genocide and is committing genocide in manifest violation of the Genocide Convention, and which has also violated and is continuing to violate its other fundamental obligations under the Genocide Convention, including by failing to prevent or punish the direct and public incitement to genocide by senior Israeli officials and others.

2. In preparing this Application, South Africa has paid close attention to the provisions of the Genocide Convention, to its interpretation, and to its application in the years following its entry into force on 12 January 1951, as well as to the jurisprudence of this Court and that of other international courts and tribunals, including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court. South Africa is highly cognisant of the fact that acts of genocide are distinct from other violations of international law sanctioned or perpetrated by the Israeli government and military in Gaza — including intentionally directing attacks against the civilian population, civilian objects and buildings dedicated to religion, education, art, science, historic monuments, hospitals, and places where the sick and wounded are collected; torture; the starvation of civilians as a method of warfare; and other war crimes and crimes against humanity — though there is often a close connection between all such acts. South Africa is also aware that acts of genocide inevitably form part of a continuum — as Raphaël Lemkin who coined the term ‘genocide’ himself recognised.² For this reason it is important to place the acts of genocide in the broader context of Israel’s conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza, including the serious and ongoing violations of international law associated therewith, including grave breaches of the Fourth Geneva Convention,³ and other war crimes and crimes against humanity. However, when referring in this Application to acts and omissions by Israel which are capable of

amounting to other violations of international law, South Africa's case is that those acts and omissions are genocidal in character, as they are committed with the requisite specific intent (*dolus specialis*) to destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group.

3. South Africa is acutely aware of the particular weight of responsibility in initiating proceedings against Israel for violations of the Genocide Convention. However, South Africa is also acutely aware of its own obligation — as a State party to the Genocide Convention — to prevent genocide. Israel's acts and omissions in relation to Palestinians violate the Genocide Convention. That is the shared view of numerous other States parties to the Convention, including the State of Palestine itself, which has called on "world leaders" to "take responsibility... to stop the genocide against our people".⁴ United Nations experts have also repeatedly sounded "the alarm" for over 10 weeks that "[c]onsidering statements made by Israeli political leaders and their allies, accompanied by military action in Gaza and escalation of arrests and killing in the West Bank" there is a "risk of genocide against the Palestinian people".⁵ United Nations experts have also expressed their "profound ... concern" about "the failure of the international system to mobilise to prevent genocide" against Palestinians, and have called on the "international community" to "do everything it can to immediately end the risk of genocide against the Palestinian people".⁶ The Committee on the Elimination of Racial Discrimination ('CERD'), acting under its 'early warning and urgent action procedure', has also called on "all State parties" to the Genocide Convention to "fully respect" their "obligation to prevent... genocide".⁷ This application by South Africa and its request for the indication of provisional measures fall to be considered in that context and in the light of those calls. It is made against the background of South Africa's foreign policy objective for the attainment of a durable peace between Israel and the State of Palestine, with two States existing side by side within internationally recognised borders, based on those existing on 4 June 1967, prior to the outbreak of the 1967 Arab-Israeli war, in line with all relevant United Nations resolutions and international law.

4. The facts relied on by South Africa in this application and to be further developed in these proceedings establish that — against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and the ongoing denial of the right of the Palestinian people to self-determination — Israel, since 7 October 2023 in particular, has failed to prevent genocide and has failed to prosecute the direct and public incitement to genocide. More gravely still, Israel has engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza. Those acts include killing them, causing them serious mental and bodily harm and deliberately inflicting on them conditions of life calculated to bring about their physical destruction as a group. Repeated statements by Israeli State representatives, including at the highest levels, by the Israeli President, Prime Minister, and Minister of Defence express genocidal intent. That intent is also properly to be inferred from the nature and conduct of Israel's military operation in Gaza, having regard inter alia to Israel's failure to provide or ensure essential food, water, medicine, fuel, shelter and other humanitarian assistance for the besieged and blockaded Palestinian people, which has pushed them to the brink of famine. It is also clear from the nature, scope and extent of Israel's military attacks on Gaza, which have involved the sustained bombardment over more than 11 weeks of one of the most densely populated places in the world, forcing the evacuation of 1.9 million people or 85% of the population of Gaza from their homes and herding them into ever smaller areas, without adequate shelter, in which they continue to be attacked, killed and harmed. Israel has now killed in excess of 21,110

named Palestinians, including over 7,729 children — with over 7,780 others missing, presumed dead under the rubble — and has injured over 55,243 other Palestinians, causing them severe bodily and mental harm. Israel has also laid waste to vast areas of Gaza, including entire neighbourhoods, and has damaged or destroyed in excess of 355,000 Palestinian homes, alongside extensive tracts of agricultural land, bakeries, schools, universities, businesses, places of worship, cemeteries, cultural and archaeological sites, municipal and court buildings, and critical infrastructure, including water and sanitation facilities and electricity networks, while pursuing a relentless assault on the Palestinian medical and healthcare system. Israel has reduced and is continuing to reduce Gaza to rubble, killing, harming and destroying its people, and creating conditions of life calculated to bring about their physical destruction as a group.

5. South Africa, mindful of the *jus cogens* character of the prohibition of genocide and the *erga omnes* and *erga omnes partes* character of the obligations owed by States under the Genocide Convention, is making the present application to establish Israel's responsibility for violations of the Genocide Convention; to hold it fully accountable under international law for those violations; and — most immediately — to have recourse to this Court to ensure the urgent and fullest possible protection for Palestinians in Gaza who remain at grave and immediate risk of continuing and further acts of genocide.

6. 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.

7. Mindful of the Court's important role and the exercise of its grave responsibility in circumstances in which the genocidal acts of which South Africa complains have occurred very recently and are ongoing — and have not otherwise been subject to judicial determination or detailed fact-finding — South Africa's application and request for provisional measures provide a more detailed factual account than might otherwise be usual. That account draws in significant part on statements and reports by United Nations chiefs and bodies and non-governmental organisations ('NGOs'), as well as eye-witness accounts from Gaza — including from Palestinian journalists on the ground — in circumstances where Israel continues to restrict access to Gaza by international journalists, investigators and fact-finding teams. However, neither the Application nor the request for the indication of provisional measures depends on a determination by the Court of each individual incident or complaint referred to herein. Notably, as the Court's caselaw makes clear, "[w]hat the Court is required to do at the stage of making an order on provisional measures is to establish whether... at least some of the acts alleged... are capable of falling within the provisions of the Convention".⁸ At least some of the acts alleged by South Africa are clearly capable of falling within those provisions.

II. Jurisdiction of the Court

8. South Africa and Israel are both Members of the United Nations and therefore bound by the Statute of the Court, including Article 36 (1), which provides that the Court's jurisdiction "comprises . . . all matters specially provided for . . . in treaties and conventions in force".

9. South Africa and Israel are also parties to the Genocide Convention. Israel signed the Genocide Convention on 17 August 1949 and deposited its instrument of ratification on 9 March 1950, thereby becoming a party when the Genocide Convention entered into force on 12 January 1951. South Africa deposited its instrument of accession on 10 December 1998. It became applicable between the parties on the ninetieth day thereafter, pursuant to Article XIII of the Convention.

10. Article IX of the Genocide Convention provides:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

11. Neither South Africa nor Israel has entered any reservation to Article IX.

12. South Africa has repeatedly and urgently expressed its concerns and condemnation in respect of Israel's acts and omissions which form the basis of this Application. South Africa and other States Parties to the Genocide Convention have, in particular, made clear that Israel's actions in Gaza constitute genocide against the Palestinian people. By way of example, the Presidents of Algeria,⁹ Bolivia,¹⁰ Brazil,¹¹ Colombia,¹² Cuba,¹³ Iran,¹⁴ Türkiye,¹⁵ and Venezuela¹⁶ have all described Israel's actions as a genocide, as has the Palestinian President.¹⁷ State officials and representatives from Bangladesh,¹⁸ Egypt,¹⁹ Honduras,²⁰ Iraq,²¹ Jordan,²² Libya,²³ Malaysia,²⁴ Namibia,²⁵ Pakistan,²⁶ Syria,²⁷ and Tunisia,²⁸ have also referred to genocide or the risk thereof in Gaza; as have heads of State and State officials from non-State parties to the Genocide Convention, including Qatar²⁹ and Mauritania.³⁰ Speaking on behalf of the 'Arab Group' at the 9498th meeting of the United Nations Security Council on 8 December 2023, ahead of the United Nations Security Council vote on a ceasefire, Egypt's representative stated that the "[c]ivilian fatalities [in Gaza] lay bare the lie that the war is against an armed group. Rather, it is a collective punishment and genocide against the Palestinian people [...] Citing "the extensive destruction of civilian infrastructure and the targeting of United Nations staff members", he stated that "the forcible displacement of 85 per cent of Gaza's people, living in dire circumstances, represents . . . an effort to eliminate the Palestinian people."³¹

13. Having regard to the fact that the prohibition of genocide has the character of a peremptory norm and that the obligations under the Convention are owed erga omnes and erga omnes partes,³² Israel has been made fully aware of the grave concerns expressed by the international community, by States Parties to the Genocide Convention, and by South Africa in particular, as to Israel's failure to cease, prevent and punish the commission of genocide. South Africa's concern has been expressed, inter alia, as follows:

— On 30 October 2023, the South African Department of International Relations and

Cooperation issued a statement calling on the international community to hold Israel accountable for breaches of international law. Warning that “the crime of genocide, sadly looms large” in Gaza, the statement recalled that “President Lula da Silva of Brazil has called the attacks on Gaza a genocide” and that the South African Minister of International Relations and Cooperation, Naledi Pandor, addressing the United Nations Security Council on 24 October 2023, had also “reminded the international community not to stand idle while another genocide is unfolding”.³³

— On 7 November, addressing the South African National Assembly, South Africa’s International Relations Minister warned that “[t]he crime of genocide sadly looms large in the current situation in Gaza”, recalling that “in 1994, a genocide occurred on the African continent with much of the whole world watching as innocent people were massacred”, and underscoring that South Africa could not stand by and allow that to happen again.³⁴

— On 10 November 2023, the Director-General of South Africa’s Department of International Relations and Cooperation (“DIRCO”), conducted a formal diplomatic démarche of the Ambassador of the State of Israel to South Africa, advising him that while South Africa “condemned the attacks on civilians by Hamas” which “should be investigated for war crimes”, “the response by Israel was unlawful”, and that South Africa “wants the ICC to investigate the leadership of Israel” for crimes including genocide.³⁵

— On 13 November 2023, at a meeting at the Presidential residence with the leadership of the South African Jewish Board of Deputies, at which they called inter alia for the re-opening of the South African Embassy in Israel, the President of South Africa, Mr Cyril Ramaphosa “condemn[ed] the genocide that is being inflicted against the people of Palestine, including women and children, through collective punishment and ongoing bombardment of Gaza”.³⁶

— On 17 November 2023, during the course of a State visit to Qatar, the President of South Africa, announced that South Africa was referring the Situation in the State of Palestine to the International Criminal Court, expressing his abhorrence for “what is happening right now in Gaza, which has now turned into a concentration camp where genocide is taking place.”

— Later on 17 November 2023, the Embassy of South Africa in The Hague, acting on behalf of South Africa, jointly with three other States parties to the Genocide Convention — namely Bangladesh, Bolivia, and Comoros — and Djibouti, referred the Situation in the State of Palestine to the Office of the Prosecutor of the International Criminal Court, requesting that the Prosecutor vigorously investigate crimes within the jurisdictional scope of the Court, including the crime of genocide, as provided for in Article 6 (a), (b) and (c) of the Rome Statute of the International Criminal Court (‘Rome Statute’).³⁸

— On 21 November 2023, addressing the Extraordinary Joint Meeting of BRICS (Brazil, Russia, India, China, and South Africa) Leaders and Leaders of invited BRICS members on the situation in the Middle East called to address “in the Middle East, the President of South Africa asserted that “[t]he deliberate denial of medicine, fuel, food and water to the residents of Gaza is tantamount to genocide.”³⁹

— On 12 December 2023, speaking at the 10th Emergency Special Session of the United Nations General Assembly — at which Israel was represented — the South African Ambassador to the United Nations stated that “[t]he events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide

Convention". She underscored that, "[a]s a UN Member State and owing to South Africa's painful past experience of a system of apartheid, this impresses on us, as Member States to take action in accordance with international law."⁴⁰

— On 21 December 2023, South Africa sent a Note Verbale to the Embassy of Israel in South Africa, in which South Africa raised its concerns about "credible reports that acts meeting the threshold of genocide or related crimes as defined in the 1948 Convention on the Prevention and Punishment of Genocide, have been and may still be committed in the context of the conflict" in Gaza. The Note Verbale recalled that "[a]s a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide, South Africa is under a treaty obligation to prevent genocide from occurring, and therefore calls upon Israel which is also a State Party to the Convention to immediately cease hostilities in Gaza and to refrain from conduct constituting or failing to prevent violations of its obligations under the Convention". South Africa, "[a]larmed by rhetoric from Israeli officials and others", also called on Israel "to prevent and punish direct and public incitement to genocide". This served to communicate directly to Israel South Africa's claims regarding the fulfilment of its own obligations under the Genocide Convention and breaches by Israel of its obligations under the Genocide Convention and the detail thereof.⁴¹

14. Israel has not responded directly to South Africa's Note Verbale sent on 21 December 2023. However, Israel has publicly rejected any suggestion that it has violated international law in its military campaign in Gaza. Notably, Israel has dismissed as "outrageous and false" the assertion that Israel's military attacks on Gaza meet "the legal definition of genocide" and are aimed at "not just simply the killing of innocent people and the destruction of their livelihoods but a systematic effort to empty Gaza of its people."⁴² Israel denies that its conduct in Gaza violates its obligations under the Genocide Convention, asserting that "[t]he accusation of genocide against Israel is not only wholly unfounded as a matter of fact and law, it is morally repugnant" and "antisemitic".⁴³ Moreover, Israel has engaged and continues to engage in acts and omissions against the Palestinian people in Gaza as have been asserted to be genocidal and, by its attitude and conduct, has refuted any suggestion that its actions in Gaza are constrained by its obligations under the Genocide Convention. Indeed, the Israeli Prime Minister asserted on 26 December 2023: "We are not stopping. We are continuing to fight, and we are deepening the fighting in the coming days, and this will be a long battle and it is not close to being over."⁴⁴ Israel's own conduct therefore serves to underline the parties' disagreement. South Africa has not resiled from its own position that it is responsible as a State party to the Genocide Convention to act to prevent genocide or a risk thereof in Gaza.

15. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests" between parties.⁴⁵ Such a disagreement or "positive opposition of the claim by one party by the other need not necessarily be stated *expressis verbis*... the position or the attitude of a party can be established by inference, whatever the professed view of that party".⁴⁶

16. There is plainly a dispute between Israel and South Africa relating to the interpretation and application of the Genocide Convention, going both to South Africa's compliance with its own obligation to prevent genocide, and to Israel's compliance with its obligations not to commit genocide and to prevent and punish genocide — including the direct and public

incitement to genocide — and to make reparations to its victims and offer assurances and guarantees of non-repetition. Given that South Africa’s claim concerns its own obligations as a State party to the Genocide Convention to act to prevent genocide — to which Israel’s acts and omissions give rise — South Africa plainly has standing in relation thereto. Moreover, given that “any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, and to bring that failure to an end”, South Africa also “has prima facie standing” to submit to the Court its dispute with Israel “on the basis of alleged violations of obligations under the Genocide Convention”.⁴⁷

17. Therefore, pursuant to Article 36 (1) of the Court’s Statute and Article IX of the Genocide Convention, the Court has jurisdiction to hear the claims submitted in the present Application by South Africa against Israel.

III. The Facts



Map of the Gaza Strip

A. Introduction

18. Since 7 October 2023, Israel has engaged in a large-scale military assault by land, air

and sea, on the Gaza Strip ('Gaza'), a narrow strip of land approximately of 365 square kilometres - one of the most densely populated places in the world.⁴⁸ Gaza — home to approximately 2.3 million people, almost half of them children — has been subjected by Israel to what has been described as one of the “heaviest conventional bombing campaigns” in the history of modern warfare.⁴⁹ By 29 October 2023 alone, it was estimated that 6,000 bombs per week had been dropped on the tiny enclave.⁵⁰ In just over two months, Israel’s military attacks had “wreaked more destruction than the razing of Syria’s Aleppo between 2012 and 2016, Ukraine’s Mariupol, or proportionally, the Allied bombing of Germany in World War II.”⁵¹ The destruction wrought by Israel is so extreme that “Gaza is now a different colour from space. It’s a different texture”.⁵² As stated by the United Nations Secretary-General, in a letter dated 6 December 2023 to the President of the United Nations Security Council,⁵³ of which the United Nations General Assembly took express “note” in Resolution ES/IO/22 of 12 December 2023 on the Protection of civilians and upholding legal and humanitarian obligations:⁵⁴

“Civilians throughout Gaza face grave danger. Since the start of Israel’s military operation, more than 15,000 people have reportedly been killed, over 40 per cent of whom were children. Thousands of others have been injured. More than half of all homes have been destroyed. Some 80 per cent of the population of 2.2 million has been forcibly displaced, into increasingly smaller areas. More than 1.1 million people have sought refuge in UNRWA facilities across Gaza, creating overcrowded, undignified, and unhygienic conditions. Others have nowhere to shelter and find themselves on the street. Explosive remnants of war are rendering areas uninhabitable. There is no effective protection of civilians.

The health care system in Gaza is collapsing. Hospitals have turned into battlegrounds. Only 14 hospitals out of 36 facilities are even partially functional. The two major hospitals in south Gaza are operating at three times their bed capacity and are running out of basic supplies and fuel. They are also sheltering thousands of displaced persons. Under these circumstances, more people will die untreated in the coming days and weeks.

Nowhere is safe in Gaza.

Amid constant bombardment by the Israel Defense Forces, and without shelter or the essentials to survive, I expect public order to completely break down soon due to the desperate conditions, rendering even limited humanitarian assistance impossible. An even worse situation could unfold, including epidemic diseases and increased pressure for mass displacement into neighbouring countries.

While delivery of supplies through Rafah continues, quantities are insufficient and have dropped since the pause came to an end. We are simply unable to reach those in need inside Gaza . . . We are facing a severe risk of collapse of the humanitarian system. The situation is fast deteriorating into a catastrophe with potentially irreversible implications for Palestinians as a whole and for peace and security in the region. Such an outcome must be avoided at all cost.”⁵⁵

19. Since that letter was written, the numbers have risen even more starkly: at least 21,110 Palestinians in Gaza have been killed and over 55,243 other Palestinians have been wounded, many severely. ⁵⁶ The death toll includes over 7,729 children,⁵⁷ not including the

4,700 women and children still missing, and presumed dead under the rubble.⁵⁸ Entire multi-generational families have been wiped out completely. Over 355,000 homes equivalent to more than 60 per cent of Gaza's housing stock in Gaza has been damaged or destroyed.⁵⁹ 1.9 million Palestinians — 85 per cent of the total population — have been internally displaced.⁶⁰ Many fled the north of the territory to the south, having been ordered to do so by Israel, only to be bombed again in the south, and told to flee once again further south or the south west, where they are reduced to living in makeshift tents in camps with no water, sanitation or other facilities.⁶¹ Israel has bombed, shelled and besieged Gaza's hospitals, with only 13 out of 36 hospitals partially functional, and no fully functioning hospital left in North Gaza.⁶² Gaza's healthcare system has all but collapsed, with reports of operations, including amputations and caesarean sections, taking place without anaesthetic.⁶³ A significant proportion of the wounded and sick are unable to access any or adequate care.⁶⁴ Contagious and epidemic diseases are rife amongst the displaced Palestinian population, with experts warning of the risk of meningitis, cholera and other outbreaks.⁶⁵ The entire population in Gaza is at imminent risk of famine, whereas the proportion of households affected by acute food insecurity is the largest ever recorded according to the Integrated Food Security Phase Classification ('IPC').⁶⁶ Experts warn that silent, slow deaths caused by hunger and thirst risk surpassing those violent deaths already caused by Israeli bombs and missiles.⁶⁷

20. The United Nations General Assembly has expressed “grave concern over the catastrophic humanitarian situation in the Gaza Strip and the suffering of the Palestinian civilian population”,⁶⁸ with the United Nations Security Council noting in particular “the disproportionate effect on children”.⁶⁹ In its Resolution ES10/22 of 12 December 2023, the United Nations General Assembly also took express “note” of a letter dated 7 December 2023 from the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East ('UNRWA'), addressed to the President of the General Assembly. In the unprecedented letter, the Commissioner-General “predict[s] collapse of the mandate [he] is expected to fulfil” and calls for of its people”.⁷⁰

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Featured image: At least 90 Palestinians were killed in Sunday's attack on the Maghazi refugee camp [Abdelhakim Abu Riash/Al Jazeera]

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