



LPHR legal briefing on the Genocide Convention case brought by South Africa against Israel

04 January 2024

“I have stressed, in face of the persistence of human cruelty, the great need for a people-centred approach, keeping in mind the fundamental right to life, with the *raison d’humanité* prevailing over the *raison d’Etat*.”

Judge Antonio Cançado Trindade in his separate opinion on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, January 2020

On Friday 29 December 2023, the same day that the UK government delivered a grave [speech](#) on Gaza at the UN Security Council entitled, “*Many more will die from attacks, disease and famine if we do not stop the humanitarian catastrophe*”, the International Court of Justice announced that South Africa had brought proceedings against Israel for alleged violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (**Genocide Convention**).

This historic case will be run in distinct phases. The first phase, focusing on whether or not the Court will order provisional measures primarily aimed at protecting Palestinians in Gaza, should be concluded within the next couple of months. Public hearings will be held before the Court on Thursday 11 and Friday 12 January 2024. In contrast, further phases that address jurisdiction and then potentially the merits of the application, will likely take a few years to conclude.

The crime of genocide

The [Convention on Genocide](#) was adopted in 1948 in response to the atrocities committed during World War II. It has been ratified by an overwhelming number of States, including South Africa (1998) and Israel (1950). The jurisprudence of the International Court of Justice considers the prohibition of genocide to be a peremptory norm of international law, and the principles of the Genocide Convention to be binding on all States under general customary international law.

Article 1 of the Genocide Convention establishes that State parties are obliged *to prevent and punish the crime of genocide*. Article 2 then provides:

“...[G]enocide 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.”

A distinguishing feature of the crime of genocide from other serious international crimes is the requirement that a perpetrator must intend, when committing one or more underlying acts of genocide, *to destroy a protected group in whole or in part, as such*. Proving specific intent on the



part of the perpetrators to destroy a protected group is the most difficult legal element to determine. It can be established on the basis of circumstantial evidence, which is important as it is recognised by international courts and tribunals that genocidal intent will rarely be expressly stated.

The UK government, in a joint [written submission](#) to the ICJ in the case of *The Gambia v. Myanmar*, asserts that circumstantial evidence - such as the scope and severity of the atrocities committed - “will typically be highly significant in drawing inferences of specific intent”. The UK approves the Court's “only reasonable inference” test as the appropriate standard to be applied when determining whether the totality of the evidence meets the threshold for inferring genocidal intent.

South Africa's Application under the Genocide Convention

In its [Application](#), South Africa alleges violations of the Genocide Convention through “acts 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.” Specifically, South Africa argues:

“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.”

South Africa's 84-page Application concludes with an urgent request for the Court to exercise its power to indicate provisional measures to protect Palestinians in Gaza. It lists nine specific measures for the Court to consider making, including that Israel “immediately suspend its military operations in and against Gaza”, and that it “desist from, and take all measures... to prevent:

- (a) the expulsion and forced displacement from their [Palestinians] homes;
- (b) the deprivation of:
 - (i) access to adequate food and water;
 - (ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;
 - (iii) medical supplies and assistance; and
- (c) the destruction of Palestinian life in Gaza.”

Determining the request for provisional measures of protection

The Court will only grant provisional measures to preserve certain rights claimed by South Africa for the protection of Palestinians in Gaza if it considers the following conditions to be satisfied:



- i) It appears, prima facie, to have jurisdiction to hear the dispute.
- ii) The rights asserted by the applicant and for which it is seeking protection from the Court are at least plausible.
- iii) There is a link between the rights claimed by the applicant and the measures requested.
- iv) There is an urgent need for the measures in order to prevent irreparable harm.

Judge Antonio Cançado Trindade - in his humanistic [separate opinion](#) in support of the ICJ's [Order of 23 January 2020](#) to indicate provisional measures of protection for the Rohingya in the case of *The Gambia v. Myanmar* - makes the supplementary relevant observation:

“Invocation of extreme human vulnerability is a key element to be taken into account in a decision concerning provisional measures of protection, in a case like the present one, on the *Application of the Convention against Genocide*.” [paragraph 72]

As noted above, the outcome of this initial phase of the case should be expeditiously conducted by the Court, leading to a decision on provisional measures of protection within the next couple of months. A positive decision on provisional measures would be legally binding on Israel with immediate effect; however, there is no accompanying enforcement mechanism.

Potential significance of the case

This case may have very significant ramifications for Palestinians in Gaza. In addition to the possible order of provisional measures of protection, a potential full hearing on the merits of South Africa's application could ultimately lead to a Court order of remedies, including reparations, for victims.

The concurrence of these ICJ proceedings with the separate criminal investigation into the Situation of Palestine at the International Criminal Court may also entail critical consequences, given the tight nexus between State responsibility and individual criminal responsibility for the crime of genocide.

Conclusion

LPHR will closely monitor this Genocide Convention case before the International Court of Justice. In respect of its initial phase, we strongly encourage the Court to be guided by the spirit of the late Judge Cançado Trindade's approach of placing primacy on protecting the extremely vulnerable.

Whilst this significant legal case takes its course, we also strongly emphasise that it remains deeply imperative that all diplomatic measures be urgently exercised to deliver an immediate ceasefire. Even should the ICJ impose provisional measures of protection in the next few weeks, it will not, on its own, end the extreme human suffering being cruelly inflicted on the civilian population of Gaza.