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Genocidal Tremors: Taking Israel to the International Court of Justice



Photograph by Nathaniel St. Clair

Litigating against countries is the stuff of esoteric delight for international lawyers. Such matters become yet more complex when it comes to claims of genocide or broader crimes against humanity. Accusations, however motivated, are always easy to make. Proving them in a court of law is quite another proposition. International law remains a terrain of punctures and potholes, rather than smooth lines and fine paving. Working around those punctures is a skill worthy of prize and praise.

The ongoing flattening, mauling and extirpation of the Gaza Strip by Israel's armed forces has drawn interest from jurists and litigants. The potholes and punctures, in that sense, seem to be filling up. It's hard not to see why, when you have such startlingly grotesque admissions as those from Rear Admiral Daniel Hagari, a chief spokesman for the IDF, that "the emphasis is on damage and not on accuracy."

Then come such background briefs as those from retired Colonel Pnina Sharvit Baruch, former director of the wing celebrated for advising IDF commanders about complying with the rules of war. A dive into the short overview from Baruch makes for grim reading. The aim, not method, is what matters, namely, the destruction of Hamas. "Without achieving this goal, Hamas will succeed in de facto denying Israel the exercise of its sovereignty in the areas adjacent to the border with the Gaza Strip. In light of this significant military advantage, even if many civilians in Gaza are harmed during the attacks, this is not necessarily excessive incidental damage and therefore would not be disproportionate attacks that are illegal." Mass murder can thereby be excused.

Leonard Rubenstein, a professor of practice at the Johns Hopkins Bloomberg School of Public Health, was sufficiently troubled by such reasoning to suggest that Israel had "asserted a theory of justifiable conduct in war that, contrary to this body of [humanitarian] law, elevates claims of military necessity in achieving the war's aims over protection of civilians, particularly in a just war."

In the international community, a number of actions are testing the waters of legality regarding Israel's novel view of waging what is increasingly looking like a war of ghoulish extermination. In November, the New York Center for Constitutional Rights (CCR) filed a suit on behalf of Palestinian human rights groups, US citizens with relatives in Gaza and Palestinians in Gaza arguing that the Biden administration had been complicit and failed to prevent "the Israeli government's unfolding genocide". It notes the language of various Israeli government figures that demonstrate "clear genocidal intentions" while deploying "dehumanizing characterizations of Palestinians, including 'human animals'".

That same month, South Africa, Bangladesh, Bolivia, Comoros and Djibouti, according to Karim Khan, the chief prosecutor of the International Criminal Court, expressed the view that an investigation of "the situation in the state of Palestine" should take place. Khan accordingly declared that an investigation into the events in the Gaza Strip and the occupied West Bank from March 2021 was duly expanded to include "the escalation of hostilities and violence since the attacks that took place on October,

2023.” Despite Israel not being a member of the ICC, the prosecutor called “upon all relevant actors to provide full cooperation with my office.”

South Africa has decided to test the validity of Israel’s methods of war in Gaza through the offices of the International Court of Justice, a body of feeble, if acceptable dignity. On December 29, Pretoria filed an application regarding, in the words of the relevant press release, “alleged violations by Israel regarding the Convention on the Prevention and Punishment of the Crime of Genocide [...] in relation to Palestinians in the Gaza Strip.” The application makes the claim that “acts and omissions” by the Israeli government “are genocidal in character, as they are committed with the requisite specific intent ... to destroy the Palestinians in Gaza as part of the broader Palestinian national, racial and ethnical group”.

It further claims that “the conduct of Israel – through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence – in relation to Palestinians in Gaza, is in violation of the obligations under the Genocide Convention.”

The application instituting proceedings gives more detail to the South African case, noting such alleged genocidal acts as “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.”

South Africa requests a number of provisional measures in its ICJ application, namely, that Israel immediately suspend military operations in and against Gaza; ensure all its military or irregular units under the state’s control “take no further steps in furtherance of the military operations” aforementioned; “desist from the commission of any and all actions within the scope of Article II” of the Genocide Convention (killing, causing serious bodily or mental harm to the members of the group); intentional infliction upon the group of conditions “calculated to bring about its physical destruction in whole or in part”; and “imposing measures intended to prevent births within the group”.

The response from Israel was hardly one of chastened reflection. Its government rejected “with contempt the blood libel by South Africa in its application to the International Court of Justice (ICJ).” The Israeli Foreign Ministry scorned the South African claim as lacking any “factual and judicial basis and is a despicable and cheap exploitation of the court.” Pretoria was, in effect, “collaborating with a terror group that calls for the destruction of Israel.”

In some ways, South Africa, with its historically thick layering of scar tissue regarding racial hatred, segregation, policing and administrative detention may be better suited than most in understanding the zealots prosecuting the war in Gaza. Far from proving a blood libel, the case may turn out to be something of a bloody revelation.

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