

# The International Court of Justice on Trial

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## COMMENTARY

Yesterday, less than two weeks after the conclusion of its public hearings concerning the charges of genocide South Africa brought against Israel, the International Court of Justice in The Hague announced that it will issue an interim decision tomorrow. The ICJ will rule on whether to grant emergency measures to restrain Israel's military operations in Gaza. A final decision concerning the entirety of South Africa's complaint could take months or even years.

Nevertheless, with its impending judgment, the ICJ is on trial. If it fails to reject South Africa's scurrilous accusation, the ICJ should lose what legitimacy it possesses, at least among men and women around the world who respect facts, the rights of nation-states to defend themselves against barbaric aggression, and the rule of law.

In late December, South Africa submitted an application to initiate proceedings against the Jewish state. South Africa demanded that Israel suspend military operations against Hamas on the grounds that the Jewish state was violating multiple provisions of the 1948 Genocide Convention.

South Africa filed its formal accusation of genocide less than three months after thousands of Hamas jihadists, under the cover of thousands of rockets fired at civilian areas, rampaged for hours through Israel's Gaza border communities killing, raping, maiming, mutilating, and kidnapping as many civilians as they could find. South Africa's filing also came three-quarters of a century after Nazi Germany killed 6 million Jews in a systematic and unprecedented campaign of extermination that gave the crime of genocide its name.

International law knows of no graver crime than genocide. The 1948 convention, which Israel was among the first nations to join, defines genocide as the perpetration of any of several heinous crimes – killing members of a group, physically or mentally harming them, deliberately exposing them to fatal dangers, preventing their births, or forcibly transferring their children to another group – “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

Hamas' stated aim is genocide. The jihadists do not hide that they seek to destroy not only Israel, but global Jewry. Four years ago, for example, Hamas leader Fathi Hamad called on Palestinians around the world to eradicate the Jewish people: “Seven million Palestinians outside, enough warming up, you have Jews with you in every place. You should attack every Jew possible in all the world and kill them.”

At a Jan. 3 press briefing, Biden administration National Security Council spokesman John Kirby asserted that South Africa's genocide charges against Israel are “meritless, counterproductive, and completely without any basis in fact whatsoever.”

Three initial considerations bolster the Biden administration's unequivocal assessment.

First, South Africa has long sympathized with Hamas, despite the jihadists' founding, and oft reaffirmed, commitment to extirpating Israel. On Oct. 7, the very day Hamas launched its massacre, the South African Ministry of International Relations and Cooperation issued a statement that sought to block Israel's exercise of its right of self-defense and blamed the Jewish state for Hamas' slaughter of Jews: “South Africa calls for the immediate cessation of violence, restraint, and peace between Israel and Palestine. South Africa expresses its grave concern over the recent devastating escalation in the Israeli-Palestinian conflict. The new conflagration has arisen from the continued illegal occupation of Palestine land, continued settlement expansion, desecration of the Al Aqsa Mosque and Christian holy sites, and ongoing oppression of the Palestinian people.”

Second, the ICJ's composition weakens its capacity for impartial adjudication of Israel's defense against Hamas' ambitions to wipe it out. The court's bylaws call for its 15 judges to “be elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.” But the

qualifications for appointment to their highest judicial offices differ from country to country. In particular, the qualifications in free and democratic nation-states differ from those in authoritarian regimes as do the qualifications in nation-states that protect religious liberty differ from those in countries that don't.

Currently, the court includes judges from the world's two most powerful authoritarian regimes, Russia and China. Vladimir Putin's Russia and Xi Jinping's China oblige judges to put the regime's interest in the nation's supremacy ahead of human rights and international law.

Another factor determining a country's judicial qualifications is the relation between religion and the state. Three of the ICJ judges are citizens of Muslim-majority countries that recognize Islam as an official state religion: Lebanon, Somalia, and Morocco. Leading interpretations of Islam place Sharia law above human rights and international law.

Third, the neglect by the ICJ and member nations of war crimes and genocide elsewhere in the world erodes the court's claim to administer impartial justice. Last November, the ICJ issued its first ruling against Syria, requiring it to prevent torture. Why, for example, has it taken the court and member nations 12 years after the commencement of the Syrian War – which has killed hundreds of thousands, displaced 12 million people (more than half of the country's population), and produced 5 million refugees abroad – to address war crimes in Syria?

Since 2015, moreover, the Yemeni people have faced a massive humanitarian crisis. Why has the ICJ not heard complaints about violations of the laws of war and human rights in that longstanding conflict? And in January 2021, then-Secretary of State Mike Pompeo formally determined – and his successor, Secretary of State Antony Blinken, subsequently reaffirmed – that the Chinese Communist Party's internment of some 1 million Muslim Uyghurs living in China's Xinjiang province and other forms of oppression against them rose to the level of crimes against humanity and genocide. You would not know of the CCP's inhumanity from the ICJ's docket, however, which has certainly not received a complaint against China brought by South Africa or, for that matter, any other member country.

In his somber Jan. 12 opening argument, Israeli Ministry of Foreign Affairs Legal Adviser Tal Becker made a compelling *prima facie* case that South Africa's allegations were meritless. "The Applicant has regrettably put before the Court a profoundly distorted factual and legal picture," Becker stated. "The entirety of its case hinges on a deliberately curated, decontextualized, and manipulative description of the reality of current hostilities."

South Africa's warping of facts and law, according to Becker, comprised several elements. South Africa delegitimized Israel as the nation-state of the Jewish people, assigned virtually all blame for the Israeli-Palestinian conflict to Israel, suppressed Hamas' responsibility for Gaza poverty, and obscured the Israeli victims' humanity.

Becker acknowledged the tragedy of Palestinian civilians' suffering "in a war" that Israel "did not start and did not want" and "in which Israel is defending itself against Hamas, Palestinian Islamic Jihad, and other terrorist organizations whose brutality knows no bounds."

Nevertheless, he argued, “as this Court has already made clear, the Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population, even when the use of force raises ‘very serious issues of international law’ and involves ‘enormous suffering’ and ‘continuing loss of life.’” Whereas the Genocide Convention criminalizes acts aimed at destroying a people, Israel’s military campaign, as government officials have made clear, intends to destroy Hamas, a military force that seeks Israel’s destruction.

Hamas’ flagrant violations of the laws of war do not absolve Israel of the obligation to adhere to the laws of war, but Hamas’ war crimes do affect the application of Israel’s obligations to the Gaza fighting. Hamas’ war aim, which is the annihilation of Israel, is unlawful. Hamas unlawfully targets, terrorizes, and kills Israeli citizens. Hamas unlawfully kidnaps Israeli civilians and unlawfully uses them and Palestinian noncombatants as human shields. And Hamas unlawfully employs civilian infrastructure to wage war and unlawfully constructs tunnels for military use under civilian areas. One aim of Hamas’ unlawful acts is to force Israel – even as the Jewish state seeks, consistent with the laws of war, to minimize civilian casualties and damage to civilian infrastructure – to cause terrifying levels of death and destruction in Gaza.

It cannot be said enough but it is hardly said at all: Hamas is morally and legally responsible for the Gaza carnage because of its fiendish strategic decision, as part of its decades-long campaign to eliminate Israel, to transform Gaza’s urban areas into battlefields.

Becker asked the ICJ to keep in mind three crucial points obscured by South Africa’s accusations.

First, it is particularly ugly and perverse to bring false charges of genocide against Israel given Hamas’ “proudly declared agenda of annihilation, which is not a secret, and is not in doubt.”

Second, under the international laws of war, “Israel has the inherent right to take all legitimate measures to defend its citizens and secure the release of the hostages.”

Third, it is the complainant South Africa that should be directed by the ICJ to take remedial action, because of its close relations over many years with an organization whose very reason for existence is, in defiance of the Genocide Convention, to destroy Israel. “It seems fitting, then,” asserted Becker, “that [South Africa] be instructed to comply with those obligations itself; to end its own language of de-legitimization of Israel’s existence; end its support for Hamas; and to use its influence with this organization so that Hamas permanently ends its campaign of genocidal terror and releases the hostages.”

If, on Friday, the ICJ rejects South Africa’s vile accusation, justice will have been served. If the ICJ sides with South Africa and finds, contrary to the facts and the law, that Israel must pare back its military operations out of a concern that it is engaging in genocide, then the ICJ will have usefully exposed itself as an international court of injustice.

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