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WHY SOUTH AFRICA DESERVES APPLAUSE DESPITE POTENTIAL SETBACKS IN THE ICJ

International Law



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Exactly 29 years after gaining independence from the oppressive apartheid regime, South Africa (SA) became the first country to approach the International Court of Justice (ICJ) on an urgent basis to seek a temporary ceasefire of what it has called an Israeli genocide on innocent Palestinians in the Gaza strip. In its application filed on 29 December 2023, SA accuses Israel of committing genocide against Palestinians in retaliation to the surprise attacks that Hamas, launched on Israel in October 2023. Before discussing the potential setbacks that may afflict the application, we must unpack what the ICJ is, its functions, and exactly the case that is before the Court.

Normally dubbed as the World Court, the ICJ is the judicial arm of the United Nations established in terms of the Charter of the United Nations. Its primary purpose is to resolve disputes submitted to it by States under international law.

In the matter that is currently before the Court, South Africa seeks an urgent provisional order for Israel to suspend its military operations in Palestine to pave the way for humanitarian assistance in areas affected by the conflict whilst waiting for the matter to be heard on the merits. Temporary reliefs are often sought on an urgent basis because a full hearing of the actual matter can take years to complete whilst human rights violations continue to occur. In 2019, Gambia filed a suit against Myanmar and the matter has not yet been finalized.

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In its application, SA alleged that there was sufficient evidence to prove an intent to commit genocide against the Palestinians. Although the application recognizes the right of Israel to defend itself, SA alleges that the response has been disproportionate and excessive. At law, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide to mean 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.

In its opposition, Israel has raised several issues in opposing this application. Apart from challenging the jurisdiction of the Court and accusing SA of telling only half the story, Israel's defence is that its military operations are only in self-defense against the attacks by Hamas. Legal practitioners representing Israel also raised issues with the fact that Hamas, the group that it is fighting is not a party to the proceedings. If Israel were to be stopped from its military operations, without requiring the same of Hamas, the State would be left exposed as the militant group would likely recoup and plan another attack, the legal practitioners argued.

Regarding the death toll in Palestine, Israel has blamed Hamas for its military operations that involve embedding itself in civilians in planning attacks on Israel. Further Israel alleged that it is already paving the way for humanitarian assistance into affected areas and therefore what SA is seeking is already being catered for.

Despite this bold move by SA, its application is not without legal challenges and potential setbacks. The first obvious challenge is enforcement of the order assuming that the Court orders Israel to suspend its military operations in Gaza. Although it is the world's highest court, the ICJ has little power to enforce its order. It often has to rely on the Security Council to enforce the order. In the present matter, Israel enjoys the support of 2 key members of the Security Council which are the United Kingdom and the United States. Both have veto powers and will likely veto any resolutions to punish Israel if it does not comply with the order of the Court.

In any event, there are precedents where in the past States have blatantly refused to comply with court orders issued by international courts. One famous case is *Nicaragua v USA*, 1986 where the USA blocked the enforcement of an order which had been handed in favour of Nicaragua by the ICJ.

Another challenge that will potentially cause legal headaches for the judges in this matter is the order itself which is being sought.

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The ongoing conflict is between Hamas and Israel and, indeed, Hamas is not a party to the proceedings.

The ICJ only has jurisdiction over States and since Hamas is not a State, it cannot be brought before the court nor can it approach the Court. An order suspending military operations on Israel only without requiring the same of Hamas can stifle Israel's right to self-defense. Unlike the Ukraine v Russia war where the Court was able to order a ceasefire between these two, in this case, such an order is impossible as Hamas isn't a party to the proceedings. It will be interesting how the Court will balance these competing interests of self-defense and preserving peace pending the hearing of this matter on the merits.

It is therefore clear that the matter is not without challenges. Despite the goodwill of SA, the potential setbacks discussed above may impede the goal of securing temporary peace to pave the way for humanitarian assistance to thousands and millions who have been affected by this conflict. Whatever the result, the bold step by South Africa to demand the suspension of war operations by Israel to pave the way for humanitarian relief and aid to Gaza deserves applause.