

The International Court of Justice is the right place for a ceasefire decision

- By Michael Byers

“We’re on a break from the Security Council and I need to know, is ethnic cleansing genocide?”

It was the summer of 1992, and I was on the phone with Canada’s ambassador to the United Nations.

Moments earlier, an administrator in Canada’s foreign ministry had pulled me aside in the departmental headquarters in Ottawa and with urgency said: “You have to take this call. I can’t find anyone else.”

I might not have been the only lawyer in the building, but I was certainly the most junior, having graduated from law school just months earlier.

I grabbed a book of human rights treaties, found the 1948 Genocide Convention, and read the definition to the ambassador:

“Genocide 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; ...”

“Got it,” the ambassador cut me off – and hung up.

The Security Council was debating the situation in Bosnia.

Three decades later, South Africa has asked the International Court of Justice to make a similar assessment, initiating a case against [Israel](#) based on the Genocide Convention.

The ICJ can only rule on disputes between countries, and only those that consent to its jurisdiction. South Africa and Israel did this when they ratified the Genocide Convention.

South Africa has filed an [84-page document](#), most of which seeks to demonstrate that Israel has been deliberately harming Palestinians as Palestinians, and not just those Palestinians who are members of Hamas. It is a sobering read, even for someone who studies armed conflict.

The most difficult part of any genocide case is establishing “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” The South African document quotes numerous statements by Israeli officials that were, at the very least, hateful.

It is not for me to decide the merits of the case. The 15 judges of the ICJ – elected by the UN General Assembly based on expertise and geographic representation – will do that, after extensive written and oral submissions. It will take years before a judgment is handed down.

Meanwhile, South Africa has asked the ICJ for “provisional measures” – an order, binding on Israel under the UN Charter, to “immediately suspend its military operations in and against Gaza.”

Hearings on that request will occur next week, with an order as soon as late January.

The burden of proof for provisional measures is lower than for a judgment. In the case of an alleged genocide, the ICJ only has “to establish whether ... at least some of the acts alleged ... are capable of falling within the provisions of the Convention.”

Much like the Canadian ambassador with whom I spoke in 1992, the judges can compare the alleged actions of Israeli forces and statements of Israeli officials to the definition of genocide and conclude, fairly quickly, whether the threshold for issuing an order has been met.

An order from the ICJ might not have an immediate effect on Israel, but it could affect the United States. President Joe Biden has been resisting calls for a ceasefire – and paying a political price, especially among young voters.

His administration has also expressed support for the ICJ, intervening in a case taken by Ukraine against Russia. I doubt the Biden administration will involve itself in the case between South Africa and Israel, but an ICJ order could give the President a convenient reason for changing his position on a ceasefire.

As for Canada, last month, it voted for a UN General Assembly resolution that called for a ceasefire. It is also one of the strongest supporters of the ICJ.

If the ICJ orders a ceasefire in Gaza, it will face heavy criticism, but not from those who understand its role in international affairs.

The ICJ is a legitimate body, supported by the United States, Canada and many other countries.

It did not initiate this case, but has to hear it.

And like other courts, it must follow the law and the evidence – wherever they might lead.

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This commentary first appeared in the Globe and Mail on 2 Jan 2024 and is reprinted here with the kind permission of the author.