

# Foreign Country Actions to Place the Israel-Hamas Conflict Before International Courts

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The escalation since October 7, 2023, in the Israel-Hamas conflict has reportedly resulted in significant [civilian casualties](#); destruction of civilian residential areas and infrastructure, including [hospitals and schools](#); and the [displacement](#) of approximately 85% of Gaza’s population. Increased civilian deaths have also been [reported](#) in the West Bank.

Several countries have requested international courts to consider whether conflict parties have committed violations of international humanitarian law. In November 2023, Bangladesh, Bolivia, Comoros, Djibouti, and South Africa, as parties to the [Rome Statute of the International Criminal Court \(ICC\)](#), [referred](#) the situation in the “State of Palestine” to the ICC Prosecutor. In December 2023, South Africa brought a [case](#) in the International Court of Justice (ICJ) alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) concerning “Palestinians in the Gaza Strip.”

As it did with judicial efforts related to Russia’s alleged crimes in Ukraine, Congress might address judicial actions related to the current Israel-Hamas conflict through oversight and legislation.

## ICC Investigation in the “State of Palestine”

The ICC investigates and prosecutes [war crimes, crimes against humanity, genocide, and aggression](#). The “State of Palestine” became party to the Rome Statute in 2015 after the General Assembly [accorded](#) “Palestine non-member observer State status in the United Nations” in 2012. Israel is not a party to the ICC.

An ICC investigation of possible crimes in Palestine predates the current conflict. In 2015, the ICC Office of the Prosecutor (OTP) opened a preliminary examination, and in 2019 determined that an investigation was proper. In February 2021, the ICC Pre-Trial Chamber (PTC) determined that the ICC’s jurisdiction extended to the territories that were occupied by Israel in 1967, comprising the Gaza Strip and West Bank, including East Jerusalem. The ICC Prosecutor opened the formal [investigation](#) on March 3, 2021.

Given the preexisting investigation, the decision of five states to formally [refer](#) the situation in Palestine to the ICC Prosecutor in November 2023 does not alter the authorities and responsibilities of the Prosecutor or the ICC. A referral from a state party allows the Prosecutor to initiate an investigation

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without seeking PTC approval; for instance, the Prosecutor proceeded from a preliminary examination to a formal investigation into the situation in Ukraine after over 40 states parties referred the situation after Russia's 2022 invasion.

Regarding Palestine, the investigation opened in 2021, and the Prosecutor [explained](#), “extends to the escalation of hostilities and violence since the attacks that took place on 7 October 2023.” The referral may signal growing international support for the Prosecutor's investigation of possible war crimes, crimes against humanity, and genocide in Gaza. The referral might also signal the referring countries' intentions to provide information and other assistance to the ICC regarding this situation.

The United States has [opposed](#) the ICC's investigation, arguing the court lacks jurisdiction because “Israel is not a party to the ICC and has not consented to the Court's jurisdiction,” and that “the Palestinians do not qualify as a sovereign state” capable of delegating jurisdiction to the ICC.

## ICJ Genocide Convention Case

The ICJ, the “principal judicial organ of the United Nations,” often exercises jurisdiction over disputes between states through treaty provisions permitting states parties to submit disputes over interpretation or application of the treaty to the ICJ. Article IX of the [Genocide Convention](#) provides such jurisdiction, stating that disputes concerning the Genocide Convention between states parties “shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.” In contrast to the ICC, the ICJ does not hear criminal cases, and South Africa's case under the Genocide Convention does not involve the individual liability or criminal prosecution of any Israeli officials or citizens.

Both South Africa and Israel are parties to the Genocide Convention. Invoking Article IX, South Africa has asserted that Israel has violated its obligations under the Genocide Convention. In its [application](#), South Africa alleged that Israel had

- taken actions intended to “destroy Palestinians in Gaza as a part of the broader Palestinian national, racial and ethnical group” and therefore genocidal in nature;
- failed to prevent genocide against Palestinians in Gaza, in violation of its Genocide Convention obligations; and
- engaged and continued to engage in genocidal acts against Palestinians in Gaza.

South Africa's filing also asked the ICJ to grant “provisional measures,” a preliminary ruling from the court that could require Israel to cease actions that might constitute further Genocide Convention violations. The court has ordered provisional measures, including orders to cease related military and other coercive actions, in two preceding Genocide Convention cases: [The Gambia's 2019 case](#) against Myanmar, and [Ukraine's 2022 case](#) against Russia. The next [hearings](#) in South Africa's case are scheduled for January 11-12, 2024. Israel has [indicated](#) that [it will participate fully](#) in the court's proceedings in the case.

The [United States](#) has [asserted](#) that South Africa's ICJ case is “meritless,” [stating](#) that the United States is “not seeing any acts that constitute genocide.”

## U.S. Policy and Related Legislation

If Congress takes action related to atrocities accountability in the Israel-Hamas conflict, it might consider the role of international courts in advancing U.S. policy priorities. Congress has recently, for instance, [expanded U.S. domestic criminal jurisdiction](#) to cover individuals who commit war crimes to include cases in which neither the perpetrator nor the victims are U.S. persons. This expanded U.S. acceptance of “universal jurisdiction,” the concept that any competent national judicial system can prosecute humankind's atrocities, creates an alternative to international tribunals. U.S. opposition to the ICJ case

might prompt the United States to “intervene” as a Genocide Convention state party, allowing it to make its own arguments to the court. As the case progresses, certain outcomes [might affect international perceptions of U.S.](#) responsibilities to prevent, punish, and deny support of those who commit genocide and other human rights violations, under international obligations such as the Genocide Convention, domestic criminal legislation such as the [genocide statute](#), and the [Leahy Law](#), which prohibits assistance to military units that commit human rights violations.

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