

# Your Man in the Hague (in a Good Way). 211

*January 11, 2024 in [Uncategorized](#) by [craig](#)*

I attended the hearing on Thursday of South Africa's case against Israel for genocide at the International Court of Justice. I was able to sit in the public gallery and watch all the proceedings. I was, however, handicapped in reporting by the fact that we were not allowed pens or pencils (though we were allowed paper). I asked the Head of Security at the ICJ why pens were not allowed in the public gallery. He told me, with a perfectly straight face, that they could be used as a weapon. So bereft of my deadly ballpoint, this account is less detailed and more impressionistic than I would wish to give you.

I had arrived at the Hague early Wednesday morning on 10 January, having flown in from Indonesia. This had involved four flights, to Singapore, Milan, Copenhagen and finally Schiphol. Wednesday was spent in a frantic search of the charity shops of the Hague for warm clothing, as I had only beach clothes with me apart from a friends' old ski jacket. I called first at the ICJ to get information on how to attend Thursday morning's session.

A young lady informed me that I had to queue outside the small arched gate in the wall. It would open at 6am and the first 15 members of the public would be admitted to the gallery. I asked where I should queue exactly. She said she doubted it was necessary, it should be fine to arrive at 6am on Thursday.

I am staying in a hotel just five minutes' walk away, so at 10pm on Wednesday evening, with the temperature already at -4°C, I went to check if a queue had formed. Nobody was there. I returned to the hotel, but every hour went to check for a queue I should join. Nobody was there at midnight or 1am, but at 2am there were already 8 people, sat around in three very cold little groups. Everybody looked extremely cold, but everybody was friendly and talkative.

The first group, right next to the gate, consisted of three young Dutch women, who sat on a blanket and were well provided with flasks of hot coffee and boxes of baklava. The second group were three young students of international law, all of them Arabs, who had attended other cases and knew the ropes here. The third group were two young women, one Dutch and one Arab, sitting on a bench, looking cold and miserable.

We were soon all talking together and it was plain that every one of us was motivated by support for the Palestinians in their struggle against the relentless occupation. Shortly afterwards, another Arab gentleman arrived, older and authoritative, who rather incongruously had been schooled in Scotland at Gordonstoun. A tall Tunisian man kept walking back and forth making phone calls; he appeared pre-occupied and rather shy.

We had all been given similar information about the number of people who would be admitted, though some had been told 15, some 14 and some 13. Our numbers were stable at 12 for several hours. Then about 4.30am a car drew up and out jumped Varsha Gandikota-Nellutla of Progressive International. She had come as a place-keeper for Jeremy Corbyn and Jean-Luc Mélenchon. Others of her organisation arrived bit by bit. Then as 6am approached, there started a small flood of people arriving, many with Palestinian flags and wearing keffiyehs.

It really was seriously cold. After four hours my toes had gone from very painful to having no feeling, and my fingers were becoming unresponsive. As so often, from 5am the cold grew more and more invasive. Mélenchon and Corbyn had arrived at 5.30am to take their places in the queue, Mélenchon as voluble as ever, wide awake, delighted to meet everybody, and lecturing on economics and the organisation of society

to anybody who would listen. As my brain had by now frozen, that did not really include me. Jeremy was equally typically Jeremy, concerned that he did not want to take anybody's position in the queue.

Then as preparations to open the gate began on the other side, things took an unpleasant turn. Those of us who had been there all night knew our order of arrival, but we began to be swamped by latecomers pushing past and around us to get to the gate. I had to be assertive and try to marshal the queue. Activists in the crowd challenged this, suggesting that the criterion for entry should not be time of arrival, but that Palestinians should be given the places.

It all became distressing. One Palestinian lady from Sweden who was just behind 14th in the queue became deeply distressed at the idea of not being admitted, and a couple of Palestinian gentlemen who had arrived after 6am started to determinedly push past the queue. I made a little counter speech explaining that we were all here to help the Palestinians, but none of us knew each other's stories, and the question of what use someone's attendance would be to the Palestinian cause was as important as gratifying individual feelings of the terribly aggrieved.

The diffident Tunisian was replaced in the queue by the former Tunisian President whose place he had been keeping – a really pleasant and diffident man, but the timing did not help the situation. In the end we were admitted in groups of five and processed. One of the Dutch ladies who had been the very first to arrive gave up her place to a Palestinian. I left clutching my pass, number 9, and returned to the hotel and straight into a hot bath. The pain from my toes and fingers as they thawed was really unpleasant.

Then it was quickly back for 9am and a lot of excessive security hassle and removal of deadly wallets and pens. Then we were escorted into the public gallery.



The Palace of Peace was built by Andrew Carnegie, the extraordinarily morally complex Fifer, a vicious and incredibly successful capitalist monopolist who also wished to end all war and to improve the lives of the poor everywhere. Its fairytale appearance, with its folly of a tower perched on a tower, belies its steel frame and concrete construction, and inside it could be any grand City Chambers in Scotland, with majolica



tiling and solid Armitage Shanks in the toilets. Extraordinarily, the building is still owned and managed by the Carnegie Foundation.

For a building that was built as a world court, strangely it does not appear to contain a court room. The Grand Chamber is just a large empty hall, taking up one side-wing of the building. A comparatively modern, simple and gently curved dais has been inserted across the length of the hall and held a long table and seventeen chairs for the judges, but this structure looked temporary, as if it gets taken away and the building used for weddings. The parties to the case were seated on simple stacking chairs arranged in the body of the hall beneath the dais, again looking more like a wedding than a court. Above the judges spread a mighty stained-glass window, of garish colours and rather dubious quality.

I have written of my faith in the International Court of Justice, in its history of impartial judgment and in its system of election by the UN General Assembly. The ICJ has rather unfairly been tarnished by the reputation of its much younger sister the International Criminal Court. The ICC is rightly derided as a Western tool, but that really is not true of the ICJ. On Palestine alone, it has ruled that the Israeli “wall” in the West Bank is illegal and that Israel has no right of self-defence in the territory of which it is the occupying power. It ruled that the UK must decolonise the Chagos Islands, a cause close to my own heart.

There was every reason for those of us opposing the genocide to have travelled hopefully to the Hague.

In addition to the normal fifteen judges of the court, each of the parties to the dispute – South Africa and Israel – had exercised their right to nominate an additional judge. After the judges filed in to the court, proceedings started with these two judges taking an oath of impartiality, which gave us the first Israeli lie of the case before it had even started.

The nomination of Aharon Barak as the Israeli judge on the International Court of Justice is extraordinary, given that as President of Israel’s Supreme Court he [refused to implement](#) the ICJ judgment on the illegality of the wall, stating that he knew the facts of the matter better than the ICJ.

Barak has an extremely long history of accepting all forms of repression of Palestinians by the Israeli Defence Force as legal for “national security”, and in particular has repeatedly refused to rule against the longstanding Israeli programme of demolitions of Palestinian homes as collective punishment. That reads across directly to the destruction of civilian infrastructure in Gaza now.

Barak is viewed as a “liberal” in Israel in the constitutional struggle between the judiciary and executive. But that is about the ability of Netanyahu’s corruption to go unchallenged, not about Palestinian rights. By appointing his apparent opponent Barak to the ICJ, Netanyahu has exhibited typical cunning. If Barak rules against Israel, Netanyahu can claim his domestic opponents are traitors to national security. If Barak rules in favour of Israel, Netanyahu can claim Israeli liberals support the destruction of Gaza.

I expect it is the latter claim we shall be seeing.

I was seated in the public gallery, and watching the seventeen judges occupied much of my time throughout the hearing. Acres have been written about which way who will jump. There is a too-easy assumption they will be swayed by their domestic governments. That varies from judge to judge.

The President of the court, Joan Donoghue, is a US State Department, Clinton hack who has never formed an original idea in her life, and I should be astonished if she starts now. I half-expected her strings to actually be visible, emerging from holes in the hall’s magnificent deep relief-panelled wooden ceiling. But others are more puzzling.

There has been no more rabidly anti-Palestinian national elite than that of Germany. Rather than channel feelings of inherited guilt into opposition to genocide in general, they seem to have concluded that they need to promote alternative genocides to make amends. Added to which, the German judge on the ICJ, Nolte, does not come preceded by a liberal reputation. But friends in Munich tell me that Nolte has a particular interest in the law of armed conflict, and is a stickler for intellectual rigour. Their view is that his professional self-esteem will be the key factor, and that only points one way with regard to what the Israeli Defence Force has done so blatantly to the civilian population in Gaza.

On the other hand, there is a Ugandan judge on the ICJ who you might assume would align with South Africa. But Uganda, for reasons which frankly I do not fathom, joined the United States and Israel in opposing Palestine's membership of the International Criminal Court, on the grounds Palestine is not a real state. Similarly India you might expect to support South Africa as a key member of BRICS. But India also has a Hindu Nationalist government prone to hideous Islamophobia. I haven't found any evidence of Judge Bhandari's domestic record on inter-communal issues.

But it has been suggested to me that in this case before the World Court now, the UN General Assembly may have shot itself in the foot in replacing a particular British judge with the Indian, an election viewed at the time as a triumph in the UN for the developing world. My point is this: that these questions are very complicated, and much of the analysis I have seen, including from some dear colleagues, has been simplistic mince.







Not only is the Great Hall of Justice not fitted out as a courtroom, for a World Court the public gallery is minuscule. Running along one side of the hall, high enough to kill you if you fell over the balcony edge, it is just two seats deep. Furthermore the fitted theatre-style seats are a hundred years old and in a state of near collapse. Your arse is eight inches off the ground and the seats now tilt so your thighs are four inches off the ground and the whole contraption is throwing you forward and over the edge. Rather than fix the seats, the Carnegie Foundation have fixed a strong cable from wall to wall above the balcony rail, acting in effect as a second rail giving six inches more protection.

With one third of the public gallery screened off to house the audio-visual projection and webcasting facility, there were just 24 available seats in the public gallery. There were us 14 from the queue and the rest were for representatives of key NGOs and UN organisations, such as Human Rights Watch and the World Health Organisation. They were allowed pens, obviously being judged respectable enough not to kill anybody with them. I may in fact have acquired a pen from one of them at some stage, purely of course to assist them. Or I may not – it is very difficult to know what counts as terrorism these days.

South Africa opened with statements from their Ambassador and their Minister of Justice Ronald Lamola, and they opened with a bang. I rather expected South Africa to start with some soft soap about how much they had condemned Hamas and sympathised with Israel over 7 October, but no. Within the first thirty seconds South Africa had launched both the word “Nakba” and the phrase “apartheid state” at Israel. We had to hang on to our collapsing seats. This was going to be something.

Minister of Justice Lamola came out with the first memorable phrase of the case. Palestinians had suffered “75 years of apartheid, 56 years of occupation, 13 years of blockade”. It was very well done. Before

handing over to the legal team, the “agents” of the South African state, in terms of the Court’s statute, were framing the argument. This injustice, and history itself, did not start on October 7.

There was a second important point of framing. South Africa stressed that in order for the request for “provisional measures” to be granted, it did not need at this stage to be proven that Israel was committing genocide. It only had to be shown that actions of Israel were prima facie capable of falling as genocide within the terms of the Genocide Convention.

The legal team then led off with Dr. Adila Hassim. She outlined that Israel was in breach of the Genocide Convention Article II a), b), c) and d).

## **Article II**

**In the present Convention, 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;**
- (d) Imposing measures intended to prevent births within the group;**
- (e) Forcibly transferring children of the group to another group.**

On a), killing of Palestinians, she outlined the simple facts without embellishment. 23,200 Palestinians were killed, 70% of them women and children. Over 7,000 were missing presumed dead under the rubble. Over 200 times, Israel had dropped 2,000lb bombs into the very residential areas in southern Gaza into which Palestinians had been ordered to evacuate.

60,000 people were seriously wounded. 355,000 homes had been damaged or destroyed. What could be observed was a substantial pattern of conduct indicating a genocidal intent.

Dr Hassim was notably calm and measured in her words and delivery. But on occasion when detailing atrocities, particularly against children, her voice trembled a little with emotion. The judges, who were generally fidgety (on which much more to follow), looked up and paid closer attention at that.

The next lawyer, Tembeka Ngcukaitobi (only South Africa spoke today) addressed the question of genocidal intent. He had perhaps the easiest task, because he could relate numerous instances of senior Israeli ministers, senior officials and military officers referring to Palestinians as “animals” and calling for their complete destruction and that of Gaza itself, emphasising that there are no innocent Palestinian civilians.

What Ngcukaitobi did particularly well was emphasise the effective transmission of these genocidal ideas from senior government to the troops on the ground, who quoted the same phrases and genocidal ideas in filming themselves committing and justifying atrocities. He emphasises that the Israeli government had ignored its obligation to prevent and act against incitement to genocide in both official and popular culture.

He concentrated particularly on Netanyahu’s invocation of the fate of Amalek and the demonstrable effect of that move on the opinions and actions of Israeli soldiers. Israeli ministers, he said, could not now deny the genocidal intent of their plain words. If they did not mean it, they should not have said it.

The venerable and eminent Professor John Dugard, a striking figure in his bright scarlet gown, then addressed questions of jurisdiction of the court and of the status of South Africa to bring the case – it is likely that Israel will rely heavily on technical argument to try to give the judges an escape route. Dugard pointed out the obligations of all state parties under the Genocide Convention to act to prevent Genocide, and the judgment of the court.

Dugard quoted Article VIII of the Genocide Convention and read out in full Paragraph 431 of the court's judgment in Bosnia vs Serbia,

*This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences ; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit.*

I must confess I was very gratified. Dugard's argument was precisely the same, and quoted the exact same passages and paragraphs, as [my article](#) of 7 December explaining why the Genocide Convention should be invoked.

The judges particularly enjoyed Dugard's points, enthusiastically rustling through documents and underlining things. Dealing with thousands of dead children was a bit difficult for them, but give them a nice jurisdictional point and they were in their element.

Next was Professor Max du Plessis, whose particularly straightforward manner and plainness of speech brought a new energy to proceedings. He said that Palestinians were asking the court to protect the most basic of their rights – they had the right to exist.

Palestinians had suffered 50 years of oppression, and Israel had for decades considered itself above and beyond the reach of the law, ignoring both ICJ judgments and security council resolutions. That context is important. Palestinian individuals have rights to exist protected as members of a group in terms of the Genocide Convention.

South Africa's case was founded on respect for international law and was based on law and on fact. They had taken the decision not to show the court atrocity videos and photos, of which there were many thousands. Their case was of law and fact, they did not need to introduce shock and emotion and turn the court into a theatre.

This was a shrewd blow by Du Plessis. The hearings were originally scheduled for two hours each side. The South Africans had been told, very late, that was increased to three because the Israelis insist on showing their hour long October 7 atrocity video. But in fact the court's guidelines reflect a longstanding resistance to this sort of material which must be used "sparsely". If 23,000 people are dead it does not add intellectual force to show the bodies, and the same is true of the 1,000 dead from 7 October.

Du Plessis concluded that the destruction of Palestine's infrastructure that supports human life, the displacement of 85% of residents into ever smaller areas where they were still bombed – all were plain examples of genocidal intent.

But undoubtedly the highlight of the entire morning was the astonishing presentation by Irish KC Blinne Ni Ghrálaigh. Her job was to demonstrate that if the Court did not order "provisional measures", then irreparable damage would be done.

There are times when a writer must admit defeat. I cannot adequately convey to you the impression she made in that courtroom. Like the rest of the team she eschewed atrocity porn and set out the simple facts plainly but elegantly. She adopted the ploy used by all the South African team, of not using emotional



language herself but quoting at length deeply emotional language from senior UN officials. Her outline of daily deaths by type was devastating.

I simply urge you to listen to her. “Each day over ten Palestinians will have one or more limbs amputated, many without anaesthetic ...”

I should write more now about the court. The South African delegation sat beside their lawyers on the right of the court, the Israeli delegation on their left, each of about 40 people. The South Africans were colourful with South African flag scarves and keffiyehs draped over shoulders. There was a mixture of South Africans and Palestinians, with Deputy Foreign Minister of the Palestinian Authority Amaal Hijazi prominent, which I was glad to see.

The South African delegation was buoyant and mutually supporting, with a lot of inclusive body language and comparative animation. The Israeli delegation was the opposite of animated. It appeared severe and disdainful – it was as though the members were all under instruction to get on with some work and not particularly notice the proceedings were happening at all. They were generally youthful, and I think cocksure would be a fair description. When Blinne was speaking they seemed particularly keen to ensure everyone could see they were not listening.

You would not think from the body language it was Israel that stands accused. In fact the only people in the court whose demeanour was particularly dodgy and guilty were the judges. They absolutely looked like they really did not want to be there. They seemed deeply uncomfortable, fidgeted and fumbled papers a lot, and seldom looked directly at the lawyers speaking.

It occurred to me that the people who really did not want to be in the Court at all were the judges, because it is in fact the judges and the Court itself on trial. The fact of genocide is incontrovertible and had been plainly set out. But several of the judges are desperate to find a way to please the USA and Israel and avoid countering the current Zionist narrative, the adoption of which is necessary to keep your feet comfortably under the table of the elite.

What counts more for them, personal comfort, the urgings of NATO, future wealthy sinecures? Are they prepared to ditch any real notion of international law for those things?

That is the real question before the court. The International Court of Justice is on trial.

During Blinne’s talk, the President of the court suddenly took an intense interest in her startling red iPad, the colour of a particularly bright nail varnish. This came out several times during the hearing, and I could never put these iPad appearances together with what had just been discussed – it was not that cases or documents had just been cited to look up, for example.

The final speaker for the South African legal team was Vaughn Lowe, and he had the delicate task of countering Israel’s defence, which they have kept secret from the court until it is made. Countering arguments you have not seen yet is a tricky proposition, and for me this was the legal tour de force of the entire morning. Vaughn Lowe’s performance was outstanding.

He started by asserting that South Africa did have standing to bring the case, repeating Durand’s points about the duty of states to act to prevent genocide under the Genocide Convention. He said there was a dispute in the terms of the Convention, over whether or not genocide had occurred. South Africa had framed this dispute in a series of Diplomatic Notes Verbales sent to the Israeli government and not satisfactorily replied to.

Lowe said it was acknowledged that a series of individual incidents were being investigated by the International Criminal Court as war crimes, but the existence of other crimes did not preclude their being part of a wider genocide. Genocide was a crime which by its nature tends to come along with other war crimes committed in furtherance of the Genocide.

Finally Lowe said that genocide is never justified. It is absolute, a crime in itself. No matter how appalling the atrocities committed by Hamas against Israel or Israeli citizens, a genocidal response was not appropriate and never could be.

Vaughn Lowe stated that South Africa asked for action against Israel and not against Hamas, simply because Hamas was not a state and thus not subject to the jurisdiction of the court. But the fact that the court could not act against Hamas must not prevent it from acting against Israel to prevent the current urgent danger of genocide. Nor must the court be swayed by Israeli offers of voluntary restraint. Israel's failure to acknowledge any wrongdoing whatsoever in its actions in "grinding Gaza into the dust" showed Israel could not be trusted in any assurances to adjust behaviour, as it believed it had done no wrong.

The session ended with the South African Ambassador reiterating the provisional measures South Africa now wished the court to impose. These are:

- (1) The State of Israel shall immediately suspend its military operations in and against Gaza.
- (2) The State of Israel shall ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to point (1) above.
- (3) The Republic of South Africa and the State of Israel shall each, in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people, take all reasonable measures within their power to prevent genocide.
- (4) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people as group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention, in particular:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to the 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; and
  - (d) imposing measures intended to prevent births within the group.
- (5) The State of Israel shall, pursuant to point (4)(c) above, in relation to Palestinians, desist from, and take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent:
  - (a) the expulsion and forced displacement from their homes;
  - (b) the deprivation of:
    - (i) access to adequate food and water;
    - (ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;
    - (iii) medical supplies and assistance; and
  - (c) the destruction of Palestinian life in Gaza.
- (6) The State of Israel shall, in relation to Palestinians, ensure that its military, as well as any irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in (4) and (5) above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.
- (7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence.
- (8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court.

(9) The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve it.

With that, we closed the argument. Next, Israel responds.

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