

A symbolic exercise

South African NGOs hope to invoke ICC law to prosecute individuals with links to alleged war crimes in Gaza

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An attempt to have the South African state investigate and prosecute 70 individuals with links to alleged Israeli war crimes in Gaza is of symbolic importance but has little chance of succeeding, says Gerhard Kemp, a professor of public law at Stellenbosch University.

The accused individuals include David Benjamin, a legal adviser to the Israeli defence force on "Operation Cast Lead", the Israeli offensive in Gaza in December and January in which more than 1000 people died.

Benjamin has been in South Africa on a speaking engagement for the past fortnight.

Two South African NGOs, the Palestinian Solidarity Association and the Media Review Network, invoked the Rome Statute of the International Criminal Court (ICC) in their request for investigation to the national director of public prosecutions (NDPP) and the head of the directorate for priority crime investigation.

Along with their request, sent to the NDPP this week, the NGOs submitted a 3500-page body of evidence, calling it the "Gaza Docket".

As the Rome Statute was incorporated into South African law through the International Criminal Court Act in 2002, the country can exercise universal jurisdiction over those who have committed war crimes – even though they may have no links with the country.

Last week Ayanda Ntsaluba, the foreign ministry director general, remarked that South Africa had an international obligation to arrest Sudanese president Omar al-Bashir should he set foot in the country.

But previous attempts to invoke universal jurisdiction over individuals – most notably by Belgium and Spain – have failed. Kemp pointed out that these cases were abandoned not because of their legal merits but because of diplomatic pressure.

"I'd be very careful to say that we are going to see any success in this regard," said Kemp.

He said that, in principle, the case brought by the NGOs falls within South African jurisdiction as there is prima facie evidence that war crimes were committed by Israel in Gaza. "But to say the state of Israel is guilty of war crimes is one thing; to carry that over to individuals is another."

According to Kemp, the 3500 pages of contextual material provided by the NGOs is irrelevant

because, although the individuals concerned may be associated with certain actions by Israel, it would be difficult to tie the evidence to them.

"The national prosecuting authority would have to go to Israel to conduct investigations. It's highly unlikely that Israel would cooperate," he said.

But he said: "I think it's an important exercise to see how the Act is available as a legal tool in the quest for international criminal justice."

Virginia Tilley, chief research specialist in the democracy and governance unit of the Human Sciences Research Council, which recently completed an indepen-

dent study that found Israel guilty of apartheid, said bringing such a case to the ICC was "historic".

"There is a new movement around the world to bring universal jurisdiction to cases, to questions of war crimes, particularly to Israeli practices in Gaza, and this is a step forward in the international application of human

rights law," she said.

But it seems the government is sceptical about engaging on the issue. Yousha Tayob, an attorney acting for the NGOs, said the group was "expecting a whole lot more from government", but that the issue had been referred to the national commissioner of police for a response.