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South Africa v. Israel: Balancing Sovereignty and Global Obligations

ABSTRACT

In today's globalised world, the watertight boundaries of a nation's sovereignty are blurring rapidly. The recent South Africa v. Israel genocide debate sparks off the most important question of balancing sovereign power of a nation in the face of invoking international responsibility of states. By delving into the intricacies of the Genocide Convention, this paper aims to provide insights into the challenges and opportunities inherent in balancing the right of sovereignty and global interests of the international community. The paper concludes by outlining potential avenues for a more constructive and mutually beneficial relationship for both nations in the future.

INTRODUCTION

Under International Law, every State has the right to sovereignty, territorial integrity, and political independence."[1] Sovereignty is generally defined as the right of the State to choose and implement its sovereign policy and to decide for itself such matters as its political, economic, social, cultural systems, and its foreign policy.[2] The inviolable right of political integrity means not exercising "methods of coercion in regard to choices, which must remain free ones."[3] Due to the humanisation of international law, the post-World War II era gave rise to obligations of *erga omnes* and *erga omnes partes*, as an exception to the general rule of non-interference and sovereignty. These community interests specifically refer to those

[1] Oppenheim's International Law Vol. I, 9th ed. (Sir Robert Jennings QC & Arthur Watts KCMG QC eds., 1992).
[2] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Rep. 14, para. 73 (1986).
[3] Article 8, Convention on Rights and Duties of States, Montevideo, 165 L.N.T.S. 19 (1933).

obligations which are owed to the world at large and to a specific state or group of nations, respectively.

The recent outbreak of war between Israel and the Palestinian militant group, Hamas began in early October 2023. Almost three months into the resurgence of this centuries' old conflict, a drastic turn of events arose due to the intervention of South Africa. It filed an application instituting proceedings against Israel before the International Court of Justice ["**ICJ**"], on 29th December 2023, concerning alleged violations by Israel of its obligations under the Genocide Convention in relation to Palestinians in the Gaza strip.[1] Genocide, infamously known as "the crime of crimes," refers to any actions committed with the intent to exterminate, "in whole or part, a national, ethnical, racial, or religious group."[2] It has inflicted great loss on humanity, both in times of war and peace equally.

South Africa claims that Israel has breached its obligations under the Genocide Convention by committing genocidal acts with specific intent against Palestinians in Gaza; by failing to prevent genocide against Palestinians in Gaza; and by failing to prosecute public incitement to genocide. As an immediate relief, South Africa has requested the ICJ to indicate certain provisional measures to ensure Israel's compliance with its obligations under the Genocide Convention to not engage in genocide and to prevent and punish genocide. South Africa has also requested that the ICJ direct Israel to preserve relevant evidence so that its claim of

genocide can be adjudicated fairly.

HISTORICAL CONTEXT AND DIVERGENT IDEOLOGIES

The Israel-Palestine conflict has been ongoing since the early 20th century. The conflict originated from the rise of nationalist movements among Jewish and Arab communities both

[1] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).
[2] Article II, The Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ["**Genocide Convention**"]

seeking to create a sovereign state in similar regions of the Middle East. At that time, there were nationalist movements worldwide as people of similar cultures and ethnicities began to identify themselves as nations and strove to become independent. Members of the Jewish

diaspora sought to create their own independent state with borders, rather than being a nation spread around the world. Following the Second World War, this new movement, known as Zionism, became stronger among Jewish people and many Europeans following the Holocaust. To many, the region of Palestine, with strong ties to the historic land of the Jewish people, seemed to be the best option. Following a centuries-long Ottoman rule, the area came under British control during the First World War, as stated in the Sykes-Pikot Agreement between Britain and France in 1916. The British divided the territory into two states - the Arab Transjordan (McMahon-Hussein Correspondence, 1915) and the Jewish Palestinian state (Balfour Declaration, 1917). Following the Second World War, and amid rising tensions, Britain decided to terminate a mandate to draw borders (Faisal-Weizmann Agreement, 1919) in 1947, and referred to the UN for all matters regarding the future of Palestine. In reaction to this, the UN formed the United Nations Special Committee on the Status of Palestine (UNSCOP). This committee proposed the UN Partition Plan, recommending a partition following the termination of the British mandate. This resolution was adopted in November 1947, creating the independence of the two states of Israel and Palestine, and an International Regime for Jerusalem. The Partition Plan provided guidelines for the eventual withdrawal of British armed forces and delineation of boundaries between the two states. The Plan sought to address the conflicting claims of the competing movements: Arab nationalism in Palestine and Jewish nationalism in Israel. The Plan also called for an economic union between the two states, and for protections of religious minorities. The plan was accepted by the Jewish populace, while rejected by Arab leaders in an unwillingness to accept any form of territorial division. Arab leaders stated that it violated the principles of national self-determination in the UN charter which granted people the right to decide their own government.

Immediately following the Resolution, a civil war broke out as the partition plan was not implemented. In 1967, the Six-Day War broke out in which Israel seized the West Bank, Gata Sinai, East Jerusalem and the Golan. Regarding these threats and invasions, the Security Council unanimously adopted Resolution 242 sponsored by the United Kingdom. This stressed five different principles: a withdrawal of Israeli forces, peace within secure and recognized

boundaries, freedom of navigation, a just settlement of the refugee problem, and security measures that included a demilitarized zone. The last Security Council action was in 1973 - adopting Resolution 338 - which called for a ceasefire in the Yom Kippur War, which broke out in 1973 and was an attempt by a coalition of Arab states led by Egypt and Syria against Israel from October 6th-25th, 1973. Egypt's goal for the war was the expulsion of Israeli forces occupying Sinai. In 1974, the UN General Assembly Resolution 3236 recognised the right of the Palestinian people to self-determination, national independence, and sovereignty in Palestine. This acknowledged the UN's contact with the Palestinian Liberation Organization (PLO), and made them an official representative to the UN. Even though action by the United States is preventing Palestine from becoming an official member state, they were granted NonMember Observer Status in 2012 by the UN Member States.

Coming to the case at hand, the parallel experiences of apartheid in South Africa and Israel's policies towards Palestinians share legacies of struggle against oppression, yet find themselves on opposing sides on certain international issues. Both nations emerged from tumultuous histories, seeking international recognition and legitimacy. However, ideological differences emerged shortly after, particularly concerning foreign policy. South Africa's post-apartheid government, led by Nelson Mandela, adopted a strong stance against Israeli policies towards Palestinians, drawing on its own experiences with racial segregation and human rights violations. This divergence in views became a central point of tension in the bilateral relationship.

South Africa has historically maintained strong ties with the African Union (AU) and other developing nations, often aligning with their critiques of Israeli policies concerning settlements, occupation, and Palestinian rights. This aligns with domestic public opinion, which widely condones Israeli actions. Balancing these pressures with its alliance with the West, particularly the United States, which remains a significant supporter of Israel, poses a constant challenge for South African foreign policy. Similarly, Israel navigates its own domestic pressures and international alliances. While maintaining strong partnerships with the United States and other Western nations, it faces criticism from many in the global community, particularly on human rights issues.

CRITICAL ANALYSIS OF THE GENOCIDE CONVENTION

The UN recognizes the following acts as genocide:

(a) Killing of 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 part;

(d) imposing measures intended to prevent birth within the group

(e) forcibly transferring children of the group to another group.[3]

This legal criminal definition falls under two universal categories of international law: Obligations *erga omnes* and jus cogens.[4] The former are crimes that supersede any individual state's borders and represent a threat to all humankind. The latter—jus cogens—are crimes that under no circumstances states or their nationals can commit, regardless of exigent circumstances. Crimes such as genocide, slavery, and piracy; constitute actions that threaten the welfare of all states. The international community has deemed these behaviours illegal and immoral in perpetuity under every circumstance.

The legal criminal understanding of genocide has three limitations prima facie. Firstly, the Genocide Convention establishes a dual-mandate of its signatories to prevent and punish individuals who intend to destroy the national, ethnic, racial, or religious groups. Determining intent requires the "establishment beyond a reasonable doubt of the appropriate mode of liability or form of participation by the accused in the relevant crime." In other words, the plain delineation is mandatory to ascertain that beyond an objective threshold, an individual has set out to systematically murder unarmed civilians on a massive scale. The question of intent has become a hotly debated issue in international relations where accused perpetrators deny claims based on this requirement. It has also become a common political and legal defense in recent

[3] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

[4] Jordan J. Paust, M. Cherif Bassiouni, Michael Scharf, et., Human Rights Module: On Crimes Against Humanity, Genocide, Other Crimes Against Human Rights, and War Crimes: Third Edition (Durham, NC: Carolina Academic Press, 2014), 5.

decades.[5] The difficulty in proving intent, in real-time, has created a daunting task for the international community; therefore, this mandate limits the effectiveness of prevention strategies to retroactivity and not concurrent with exigent circumstances. This *de facto*,

retroactive process of prevention does little to thwart genocides from emerging, as does the politics of genocide acknowledgment.[6]

Secondly, the Genocide Convention limits the application of genocide to four protected groups, that is, national, ethnic, racial, and religious groups. The restrictive application of the convention was accomplished through considerable negotiations and debate among permanent United Nations Security Council members and other drafters of the Convention's text, eventually agreeing upon these four specified groups as earning the status of protection under international law.[7] The UN's minimalist definition excludes groups that form because of political affiliation, gender, sexual orientation, or others categories and prohibit these groups from claiming protective rights under the Genocide Convention. The narrow legal definition of genocide, led to a lacuna between legal scholars' understanding of genocide and the academy's conceptualization. This divergence between the legal crime and social processes established by academics has held back our collective understanding of what can constitute genocide for decades.

Thirdly, the phrase "mental harm" creates challenges of application under Article II of the Convention.[11] The category of mental harm is vast, establishing causality from behaviours associated with points a through e under Article II is difficult, particularly in measuring

[5] Individuals can be charged with the crime of genocide irrespective of their affiliation with a government or if albeit they are a private citizen. See Morten Bergsmo, "Intent," in The Genocide Studies Reader, eds. Samuel Totten and Paul R. Bartrop (New York: Routledge, 2009), 22.

[6] Vahakn N. Dadrian and Taner Akçam's Judgment at Istanbul: The Armenian Genocide Trials (New York: Berghahn Books, 2011), 4-5; Judgment at Istanbul explains the difficulty and research bias of some academic publications in Turkey that "almost completely ignore the rich source-material available outside Turkey… [and rely on] dogmatic state officials, entrenched bureaucrats who, relying on a method of extreme selectively in the use of domestic sources, are trying to validate this state-authorized viewpoint."; Leo Kuper, Genocide: Its Political Use in the Twentieth Century (New Haven, CT: Yale University Press, 1981), 33

[7] David Shea Bettwy, "The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?" Notre Dame Journal of International & Comparative Law 2, no. 1 (2011), 167, available at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1009 &context=ndjicl. [11] Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955" American Political Science Review 97, no. 1 (2003), 58, available at: http://dx.doi.org/10.1017/S0003055403000522.

perpetrator effects on survivors' mental state. Point b requires "serious bodily or mental harm to members of the group" be carried out; no threshold is set for establishing mental harm (or other indicators). This disjuncture between individual harm and group harm is problematic and creates grey areas under international law, and limits the ability of courts to punish such unseen effects from said crimes. The shortcomings of the legal criminal definition of genocide have led scholars to redefine the operationalized definition in the decades since 1948.

THE QUESTION OF INTERNATIONAL OBLIGATIONS AND SOVEREIGNTY

If any State party has standing to take legal action in ICJ for the protection of the common interest of the States parties in compliance with the obligations *erga omnes*, the Court's decision has no binding force on all other States parties as well. This is because Articles 59 and 60 of the ICJ Statute provide that the decision of the Court has no binding force except between the parties, thus importing the effect of *res judicata* of the judgment.[8] It follows that those States parties will not be prevented from exercising their right to institute separate proceedings for the same cause against Israel before the Court. This may challenge the principle of finality in the adjudication of the dispute.

Despite the shared interest of the States parties in upholding the Convention, a State's involvement in the Convention does not automatically grant it the authority to initiate legal proceedings in the Court.[9] In the *Gambia v. Myanmar,* the matter concerning the genocide of Rohingya Muslims in 2019, asked whether the Court has jurisdiction to entertain the case instituted by a non-injured State, relating to whether the states have agreed to grant a general standing to all the parties under the Genocide Convention for the invocation of responsibility of any other State party solely on the basis of their common interest.[10] The Genocide Convention does not explicitly mention in any of its provisions the general standing to all the State parties for the invocation of responsibility of any other State party solely on the basis of their common interest in compliance with the obligations under the Convention. The terms of

[8] Statute of the International Court of Justice, arts. 59-60 (June 26, 1945).
[9] Treaties and Other International Agreements: The Role of the United States Senate," A Study Prepared for the Committee on Foreign Relations, United States Senate, by the Congressional Research Service, Library of Congress, January 2001, 106th Congress, 2d Session.
[10] *Gambia v. Myanmar*, International Court of Justice, ICJ Reports 2020, p. 113 (2020).

the Convention must be interpreted in accordance with the applicable rules on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[11]

Further, the principle of *erga omnes partes* was developed after the Genocide Convention was adopted. According to the ratio decidendi in *Gambia v. Myanmar*, the Convention was drafted at a time when the notions of obligations *erga omnes partes* were not established in general international law.[12] As the Court stated in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, regard should be given to "the origins and character of the Convention, the objects pursued by the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects."[13]

Sovereignty as a concept fulfils the criteria necessary for the identification of a peremptory norm of general international law (*jus cogens*), namely,

(a) it is a norm of general international law; and

(b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[18]

The principle of sovereignty is considered to be non-derogatory, meaning that states cannot, through their actions or declarations, effectively nullify or undermine it. While there may be instances where states agree to limit their sovereign powers in specific contexts, such as by submitting to the jurisdiction of international courts, these actions do not negate the fundamental principle of sovereignty itself. It is important to note that the precedence of State's sovereignty over international obligations was discussed in the *Certain Expenses of the United Nations* case.[19] Hence, any violation of a nation's sovereignty in the name of exercising international obligation is a violation of the *jus cogens* norm.

[11] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, arts. 3132.
[12] *Supra* note 14.
[13] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.
[18] ILC, Report of the International Law Commission, 71st Session (29 April - 7 June and 8 July - 9 August 2019), Chapter V: Protection of the Environment in Relation to Armed Conflicts, U.N. Doc. A/74/10 (2019). [19] Certain Expenses of the United Nations (Art. 17, para. 2 of the Charter), Advisory Opinion, [1962] I.C.J. Rep. 151, I.C.G.J. 221 (1962).

STANCE OF ICJ

Over the years, the ICJ has played a crucial role in the development of application of the Genocide Convention. The ongoing South Africa v. Israel case has reignited discussions about the Convention's application in contemporary contexts. In the present dispute, the ICJ heard the application for provisional measures and raised certain fundamental questions on the determination and attribution of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” (pursuant to Article II of the Genocide Convention).

The ICJ recognized the complementary nature of the Genocide Convention with other human rights treaties, thereby expanding its reach effectively.[14] Initially, the Convention protected only the national, ethnical, racial, or religious groups. The ICJ in the Croatia v. Serbia case (1998) opened the doors for the protection of "political group" under certain circumstances. However, the potential inclusion of "gender group" as a protected category under the Convention remains a debated topic till date.[15] Further, the ICJ, in Bosnia v. Serbia (1993), established the need for specific intent to destroy a protected group in whole or in part to prove genocide.[16] The Bosnia v. Serbia case identified five stages of genocide, aiding in identifying and preventing the crime at early stages. This was further refined in subsequent cases as the Court recognized the use of both direct violence and indirect methods like imposing living conditions meant to destroy a group.

The ICJ extended its jurisdiction to interpret the Convention in various scenarios, including disputes between States not party to the case and established its power to order provisional measures to prevent ongoing genocide. Overall, the ICJ has broadened the understanding of the acts constituting genocide, strengthened the international community's ability to identify and address genocide, and emphasized the importance of prevention and accountability.

CONCLUSION

To conclude, it is imperative to strike the right balance between invoking international obligations and the respect towards nation’s sovereignty. This can also be done upon

[14] Ahmad Abou Gheit v. Libya, 2001.

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits (Judgment of 3 February 2015).

[16] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) ([1993] I.C.J. 324).

interpreting the relevant convention applicable in each case and recognising its *travaux preparatoires*. Particularly, the key challenge in the South Africa-Israel relationship lies in reconciling the divergent perspectives and pressures. To move forward, several approaches could be explored such as conducting regular high-level diplomatic engagements and open communication to foster mutual understanding and address the areas of disagreement constructively. Further, increasing the collaboration in areas of mutual benefit, such as technology, innovation, and water management, could create stronger bonds and foster trust. With this aim in mind, the regional or international actors could help facilitate dialogue and mediate potential conflicts, offering neutral ground for constructive engagement. Lastly,

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people-to-people exchanges and collaborative projects between academics, artists, and civil society organizations could build bridges and create positive interactions.

Thus, the relationship between South Africa and Israel reflects the broader challenges of balancing national interests with global norms and pressures. Both nations navigate complex international relationships and domestic constituencies. While historical and ideological differences create tensions, shared economic interests and a common commitment to democratic values remain potential bridges. Fostering dialogue, highlighting shared interests, and engaging in collaborative projects offer promising avenues for building a more constructive and mutually beneficial relationship in the future.