

The Legal War Against Israel at the International Court of Justice

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Introduction

Enshrined in the UN Charter, the International Court of Justice (ICJ) is the UN's judicial organ.¹ Unfortunately, the Court has emerged during the past two decades as a hotspot in the lawfare campaign against Israel. The ICJ entered the fray in July 2004 by brushing aside objections to its jurisdiction and issuing an advisory opinion declaring portions of the West Bank separation barrier illegal. The Court also ventured beyond the issues raised in the case and declared Israeli settlements illegal.

The ICJ's 2004 advisory opinion set the stage for two recent cases before the Court. The first case involves South Africa's accusations that Israel committed "genocide" in Gaza during its war of self-defense following Hamas's massacres, sexual violence and taking of hostages on October 7, 2023. The second case involves the UN General Assembly's December 2022 request to the ICJ for another advisory opinion, this time addressing the legality of the occupation and the legality of Israel's actions in Jerusalem since 1967.

The South Africa case and the General Assembly case both signal a troubling new phenomenon: Israel's adversaries, wary of a U.S. veto in the Security Council, are using the ICJ instead as their preferred forum for issues of politics, war, and peace that should be the sole province of the Security Council. Rather than dismissing such efforts, the ICJ has embraced the opportunity to play a larger role on the world stage, raising questions about its proper mandate as the "principal judicial organ of the United Nations."

I: The ICJ and Political Disputes

The Palestinian lawfare effort has found sympathy at the ICJ. The Court has waded into the Israeli-Palestinian dispute three times in the last two decades, even though the conflict is fundamentally a political dispute which should be deemed non-justiciable and beyond the ICJ's jurisdictional purview.² However, the Court argues that its occasional practice of accepting cases where "a legal question has political aspects" provides a basis for its jurisdiction over such disputes.³

The ICJ's willingness to intervene in the Israeli-Palestinian conflict stands in stark contrast with the views of two of the Court's most distinguished jurists, Judges Sir Percy Spender and Sir Gerald Fitzmaurice. In their dissenting opinions in the 1962 *Namibia (South West Africa)* cases, Judges Spender and Fitzmaurice cautioned the Court against taking jurisdiction over political cases, no matter how tempting or high-profile the cases might be.⁴

The ICJ's Advisory Jurisdiction and the Israeli-Palestinian Conflict

Article 65(1) of the ICJ Statute lays the foundation for who may request an Advisory Opinion, stating that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." The ICJ has described its advisory jurisdiction as existing to "offer legal advice to the organs and institutions requesting the opinion."⁵ In the *Nuclear*

1. UN Charter, arts. 92-96.
2. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, 1962 I.C.J. 319, 466 (Dec. 21); see also J. Odermatt, "Patterns of Avoidance: Political Questions Before International Courts," 14 INT'L J.L. IN CONTEXT 221-236 (2018).
3. See e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9), ¶ 41 [hereinafter: the "Wall Advisory Opinion"]. The Wall case presented the opposite situation – a purely political case in which the Palestinian side successfully injected enough of a "legal" flavor to give the ICJ a colorable basis for exercising its advisory jurisdiction.
4. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, 1961 I.C.J. 319, 466 (Nov. 9); Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice.
5. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 236 (July 8), ¶ 15.

Weapons Advisory Opinion, the ICJ said it “is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only ‘compelling reasons’ could lead it to such a refusal.”⁶

Once a request is appropriately made, the ICJ engages in a two-step process to determine whether to exercise its advisory jurisdiction. First, the Court determines whether it has jurisdiction. If the Court finds it has jurisdiction, it determines whether it should nevertheless decline to take the case.⁷

The ICJ’s predecessor court, the Permanent Court of International Justice, declined to render an advisory opinion a century ago in the *Eastern Carelia* dispute between Finland and Russia. The Permanent Court of International Justice noted that it lacked sufficient information to resolve factual disputes between the parties, and therefore it would be inappropriate to render an advisory opinion.⁸

II. The Pending ICJ Advisory Opinion Case

On December 30, 2022, the UN General Assembly adopted Resolution 77/247.⁹ The Resolution recites a litany of criticisms of Israel and reads more like an indictment of Israel than a request for legal advice. The Resolution culminates in a request to the ICJ to render an advisory opinion regarding the following two questions:

(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character, and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?

(b) How do the policies and practices of Israel referred to . . . above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

The ICJ ordered parties to file opening briefs on July 25, 2023, and responsive briefs on October 25, 2023. (The ICJ did not extend the deadline following Hamas’s horrific October 7, 2023 terror attack against Israel.) Although only states are allowed to file briefs, the ICJ permitted the Organization for Islamic Cooperation to

file but refused the same courtesy to the World Jewish Congress. The ICJ scheduled public hearings to commence on February 19, 2024.

Jurisdictional Issues

The first question arising from a request for an advisory ruling is whether the dispute resolution provisions of the Oslo Accords deprive the ICJ of jurisdiction or provide a “compelling” basis for the Court to decline the request. Article 37 of the ICJ statute provides that:

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.¹⁰

The Oslo Accords contain no such provision. Instead, the parties negotiated for and agreed to comply with a binding internal dispute resolution process. This process requires that any type of dispute is to be resolved through negotiations within a Joint Israeli-Palestinian Liaison Committee. If the dispute cannot be resolved by negotiations within the Joint Liaison Committee, then the next step would be to resolve the dispute “by a mechanism of conciliation to be agreed upon by the parties.”¹¹ Should that not produce a resolution, then the final avenue would be for the parties to mutually agree to submit the dispute to an Arbitration Committee to be established by the parties themselves.

Under no circumstances do the Oslo Accords permit

6. *Id.*, at 235, ¶ 14.

7. Malcolm Shaw, *INTERNATIONAL LAW*, 9th ed., 974 (Cambridge: Cambridge Univ. Press, 2021).

8. *Status of Eastern Carelia, Advisory Opinion*, 1923 P.C.I.J. 272, Series B No. 5, 28-29 (July 23) (emphasis added).

9. UN G.A. Res. 77/247, U.N. Doc. A/RES/77/247 (Dec. 30, 2022).

10. Statute of the International Court of Justice, art. 37, available at <https://www.icj-cij.org/statute>

11. *Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords)*, Oct. 11, 1993, art. XV, available at https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_930913_DeclarationPrinciples-interimSelf-Government%28Oslo%20Accords%29.pdf

either party to commence (or to ask others to commence) legal proceedings before an external body, including the International Court of Justice.

In other cases involving dispute resolution clauses, the ICJ asserts jurisdiction only when the parties specifically agree to confer jurisdiction on the Court. For example, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the parties initially agreed on a binding dispute resolution process before the King of Saudi Arabia. Subsequently, however, the parties agreed in an exchange of letters to submit their dispute to the ICJ.¹² In *Cameroon v. Nigeria*, the ICJ noted the practice of states to choose alternative dispute resolution processes and exclude such disputes from the ICJ's jurisdiction.¹³

Here, by contrast, the Israeli and Palestinian sides *never* agreed in the Oslo Accords to submit disputes to the ICJ. Given the scope of the Oslo agreements which covers the entire set of issues dividing the parties, there is no legal basis for the ICJ to accept the General Assembly's request to render an advisory opinion addressing any of those issues. Moreover, the 2004 *Wall* advisory opinion has no precedential impact on jurisdictional objections based on the dispute resolution provisions of the Oslo Accords, as the ICJ's opinion completely ignored those provisions.

If the ICJ decides it has jurisdiction over the issues raised in the General Assembly's December 2022 request for an Advisory Opinion, then it effectively eliminates the authority of a dispute resolution clause in any future treaty. Why would international parties include internal dispute resolution language in their treaties if the Court could intervene at the behest of third parties?

Substantive Issues

The Oslo Accords and UN Security Council Resolution 242¹⁴ already provide the answers to the questions raised in the General Assembly's December 2022 request for an advisory opinion.

Palestinian Self-Determination

Regarding the first issue, the General Assembly resolution asks the ICJ to determine "the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination." The premise of this question is factually and legally incorrect.

The Palestinians negotiated for and agreed in writing in the Oslo Accords that they would obtain civic autonomy – but not self-determination – in Areas A and B of the

West Bank and in the Gaza Strip during the interim period, prior to the completion of the permanent status negotiations. The Palestinians knowingly, voluntarily, and willingly agreed to *defer* their self-determination claims until the permanent status negotiations. Moreover, the Palestinians signed the Oslo Accords despite the complete absence of any promise or guarantee of future statehood. Few realize that the Oslo Accords did not predetermine an eventual outcome for future negotiations. They operated as a road map to negotiations discussing potential statehood, rather than as a promise of statehood itself. The Palestinians knew exactly what they were bargaining for at Oslo. Nothing was forced upon them against their will. As Mahmoud Abbas later wrote, the Palestinian delegation gave

attention to every word, sentence and expression. It was even necessary to scrutinize every comma and full stop so that we could eliminate the likelihood of fatal pitfalls occurring in the future . . . the DOP documents were reviewed by our legal consultant, Taher Shash, whom we had sent to Oslo for this purpose just before they were initialed on 20 August 1993.¹⁵

The Palestinians nevertheless argue that self-determination is a core international legal norm, so fundamental that it cannot be negotiated away. The Palestinians also rely on *dicta* in the ICJ's 2004 *Wall* advisory opinion, saying the Oslo Accords' recognition of Palestinian "rights" should be interpreted to include the right to self-determination.¹⁶

Thus, the Palestinians would argue their right to self-determination trumps the *deferred possibility* of self-determination which they had agreed to in Oslo. But, as

12. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Judgment, 1994 I.C.J. 112, 121-25 (July 1).

13. *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Judgment, 1998 I.C.J. REPORTS 275, 302-303 ¶ 56 (June 11).

14. UN S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

15. Mahmoud Abbas, *THROUGH SECRET CHANNELS* (Reading, UK: Garnet Pub., 1997), 161-62.

16. *Wall Advisory Opinion*, *supra* note 3, at 182-83 ¶ 118 (citing *East Timor* (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 102, ¶ 29 (June 30)).

Geoffrey Watson noted,

the problem with this argument is that the content of the right of self-determination is indeterminate. In particular, there is little consensus on what, if any, remedy exists for impingement of a people's right of self-determination . . . this variegated practice might lead one to conclude that there is no meaningful right of self-determination at all.¹⁷

Writing more recently, Malcolm Shaw explained that self-determination continues to evolve as a principle of international law. However, the precise nature and scope of the right have yet to be clearly defined. Although the UN has taken a very broad view of self-determination as a "right of all peoples," Shaw criticized the formulation as unworkable.¹⁸

In any event, the most important legal point is that the Palestinians negotiated at Oslo for no more than the possibility of future self-determination. Antonio Cassese admits the Declaration of Principles makes no provision for "external" self-determination:

[T]he determination of the *international status* of the Palestinian territories currently occupied by Israel will be the subject of negotiations between the democratically elected Palestinians and the Israeli authorities . . . Everything is left to the agreement of these two parties. In particular, the declaration does not spell out the possible final options: independent statehood free from any military or territorial servitudes; independent statehood subject to a set of servitudes or disabilities in favour of Israel (e.g., right of passage for Israeli troops or nationals, Israeli jurisdiction over Israeli settlements, the maintenance of Israeli military bases, the obligation for the Palestinians not to militarize certain areas, etc.); free integration into another State; or free association with another State.¹⁹

The Oslo Accords remain in full force and effect. Thus, there are no "legal consequences" arising from the absence of self-determination during the interim period, even though the interim period has lasted longer than originally

contemplated. Moreover, UN Security Council Resolution 242 did not address the issue of Palestine or recognize any Palestinian right of self-determination.

Occupation of the Palestinian Territories

The General Assembly resolution asked the ICJ to determine the legal consequences arising from Israel's "prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967." The Oslo Accords and Resolution 242 once again determine the answers to this question.

The Palestinians knowingly, voluntarily and willingly agreed to *allow* the occupation to continue until such time as a permanent status deal would be reached. The Palestinians further agreed that the settlements could remain in place pending the completion of the permanent status negotiations. Although the time taken to conclude the permanent status negotiations has run longer than originally contemplated, neither party has rescinded or revoked the Accords based on the lapse of time, or indeed on any other basis.

To that end, the concept of "prolonged" occupation is unknown in international law. The Hague Regulations of 1907²⁰ and the Fourth Geneva Convention of 1949²¹ set forth the legal framework for maintaining the status quo ante of occupied territory until such time as a peace agreement or other means of ending the occupation may be reached. However, neither instrument sets forth any time limit for occupation.

Moreover, Security Council Resolution 242, which called for Israel to withdraw from territories "occupied in the recent conflict," placed no time frame or deadline by *when* the withdrawal should occur. Indeed, the conditions specified in Resolution 242 for Israel's withdrawal have not yet occurred, as Lebanon, Syria,

17. Geoffrey Watson, *THE OSLO ACCORDS* (Oxford; New York: Oxford University Press, 2000), 270-71.

18. Shaw, *supra* note 7, at 233.

19. Antonio Cassese, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (Cambridge; New York: Cambridge Univ. Press, 1995), 239.

20. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Second International Peace Conference, The Hague (Oct. 18, 1907).

21. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 153-221 (Aug. 12, 1949).

Iraq, and Saudi Arabia have yet to recognize Israel's right to live peacefully within secure borders.

Nevertheless, in recent years Palestinian advocates have argued without citing any legal authority that any occupation exceeding ten years should be regarded as presumptively unlawful.²² Their position ignores Turkey's 50-year occupation of Northern Cyprus, which Turkey invaded without provocation on July 20, 1974. The Security Council requested Turkey's withdrawal from Cyprus in Resolution 360, but since then neither the Security Council nor the General Assembly have demanded Turkey's withdrawal or otherwise condemned the occupation or described it as "prolonged."²³

Similarly, the UN has never condemned Morocco's nearly 50-year occupation of most of the Western Sahara as "prolonged," and the Arab League recognizes Moroccan sovereignty over the occupied territory. Although the General Assembly condemned the Moroccan occupation in Resolution 35/19,²⁴ neither it nor the Security Council has condemned the occupation since then.

Annexation

The General Assembly's December 2022 reference to "annexation of occupied Palestinian territory" is unclear. The language cannot, in fact, mean the entire West Bank, because the West Bank has not been formally annexed by Israel. The only territories Israel has ever formally annexed were East Jerusalem and the Old City in 1980, and the Golan Heights in 1981. Therefore, the reading of the General Assembly's request must be limited to these areas.

It is important to emphasize that the Israelis, Palestinians, Jordanians, and the United Nations, have repeatedly failed to articulate any meaningful legal Palestinian claim over East Jerusalem or the Old City. This failure occurred within the 1947 UN Partition Plan, in the wake of the Six-Day War in 1967, and during multiple peace negotiations.

First, the UN's November 1947 partition plan called for the internationalization of Jerusalem, and no part of the city was allocated to the proposed Palestinian state.

Second, Resolution 242, which was adopted in the wake of the 1967 war, demanded that Israel withdraw only "from territories occupied in the recent conflict." The Council's focus on the "recent conflict" creates an implicit recognition of Israel's claim over West Jerusalem, which Israel had incorporated into its sovereign territory nearly two decades earlier. Moreover, the "withdrawal" requirement is predicated on the Arab states recognizing Israel's "right to live in peace within secure and

recognized boundaries free from threats or acts of force." However, several neighbors of Israel refuse to recognize its borders, the right to live peacefully within them, or the right to maintain the security of the borders.

In any event, if Israel were to withdraw from any portion of East Jerusalem or the Old City, Resolution 242 would require Israel to hand those areas back to Jordan, not to the Palestinians. The Security Council in 1967 understood that during the Jordanian occupation between 1948-1967, the Palestinians never laid claim to any portion of Jerusalem, and therefore the Security Council made no mention of any Palestinian "rights" to East Jerusalem.

Third, the Israel-Jordan Peace Treaty of 1994 acknowledged Jordanian, but not Palestinian, rights at the Muslim Holy sites in Jerusalem.²⁵ The Treaty takes note of "the present special role of the Hashemite Kingdom of Jordan in Muslim Holy shrines in Jerusalem." The Jordanian role was reaffirmed in a March 2023 Joint Communique issued by Israel, Jordan, Egypt, the United States and even the Palestinian Authority, reiterating "the importance of the Hashemite Custodianship/special role of the Hashemite Kingdom of Jordan."²⁶

22. Comm. on the Exercise of the Inalienable Rights of the Palestinian People, Study on the Legality of the Israeli occupation of the Occupied Palestinian Territory, including East Jerusalem, 8, 22 (Aug. 30, 2023), available at <https://www.un.org/unispal/document/ceirpp-legal-study2023/>

23. The Security Council in Resolution 541 (18 Nov. 1983) rejected Turkey's effort to declare the independence of Northern Cyprus but did not explicitly call for Turkey's withdrawal from the Island. No states currently recognize Northern Cyprus as a separate state, but several states maintain informal relations with the entity, and the Organization for Islamic Cooperation has granted it observer status. UN S.C. Res 360, U.N. Doc. S/RES/360 (Aug. 16, 1974), available at <https://digitallibrary.un.org/record/93476?ln=en>

24. UN G.A. Res 35/19, U.N. Doc. A/RES/35/19 (Nov. 11, 1980), available at <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F35%2F19&Language=E&DeviceType=Desktop&LangRequested=False>

25. Israel-Jordan Peace Treaty, art. 9(2), Oct. 26, 1994, 2042 U.N.T.S. 35325.

26. "Joint Communique from the March 19 meeting in Sharm El Sheikh," U.S. DEPARTMENT OF STATE, Office of the Spokesperson, Mar. 19, 2023, available at <https://www.state.gov/joint-communique-from-the-march-19-meeting-in-sharm-el-sheikh/>

Finally, even the Oslo Accords fail to grant the PLO any interim rights over East Jerusalem. The PLO agreed to defer any discussion of Jerusalem to the permanent status negotiations.

Therefore, it is fair to ask exactly how and when did East Jerusalem and the Old City morph into “Palestinian” territory. Interestingly, in 1979 the UN Security Council in Resolution 446 (March 22, 1979) referred solely to “*the Arab territories* occupied since 1967, including Jerusalem.”²⁷ The following year, in Resolution 478, the Security Council added the word “Palestinian,” modifying the formulation to read, “*the Palestinian and other Arab territories* occupied since June 1967, including Jerusalem.”²⁸ By December 2016, the Security Council in Resolution 2334 had dropped the word “Arab” and modified the formulation yet again to refer to “*the Palestinian territory* occupied since 1967, including East Jerusalem.”²⁹ But the mere change in formulation conferred no legal rights on the Palestinians regarding East Jerusalem.

Determining Legal Consequences

The General Assembly resolution asked the ICJ to determine the legal consequences arising from “measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures.” The sweeping language of the General Assembly’s request regarding Jerusalem is highly troubling.

The reference to the “Holy City of Jerusalem” appears to encompass the entirety of the city, including West Jerusalem, which contradicts the Security Council’s implicit recognition of Israeli sovereignty over West Jerusalem in Resolution 242. Furthermore, what exactly is meant by the phrase “measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures”? The Resolution does not provide any specificity regarding any such measures or legislation.

The Palestinians agreed in Oslo that the status of Jerusalem would be reserved for future negotiations as part of the permanent status talks. Jerusalem will be the most sensitive issue for those negotiations. Jerusalem holds intense religious and emotional attachment for Muslims, Christians and Jews. The Temple Mount has been a flashpoint for decades. If there were ever a “compelling” reason for the ICJ to exercise its discretion and decline to issue an advisory opinion, surely it would

be to defer to the Security Council and avoid interfering in the incendiary politics of Jerusalem.

III: The South Africa Genocide Case

In late December 2023, the Republic of South Africa initiated proceedings at the ICJ and requested that the Court “indicate provisional measures” against Israel for alleged violations of the Genocide Convention during the course of its defensive war in Gaza following the October 7, 2023, Hamas massacre in southern Israel.³⁰ The Court immediately accepted jurisdiction and fast-tracked the case, hearing oral arguments from South Africa on January 11, 2024, and from Israel the following day.

South Africa’s petition recited a laundry list of unproven allegations against Israel and demanded that the Court indicate provisional measures, including a ceasefire, in a blatant attempt to bypass the UN Security Council where the U.S. had vetoed a ceasefire resolution on December 8, 2023.

On January 26, 2024, the Court issued its ruling. The Court found “the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible.”³¹ The Court indicated various provisional measures but did not include a ceasefire among them.³² The Court issued a supplemental order on March 28, 2024 requiring Israel to ensure the flow of humanitarian aid to Gaza.³³ Following this, the case was

27. UN S.C. Res. 446, U.N. SCOR 34th Year, U.N. Doc. S/RES/446 (Mar. 22, 1979).

28. UN S.C. Res. 478, para. 2, U.N. SCOR 35th Year, U.N. Doc. S/RES/478, at 14 (Aug. 20, 1980), available at <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20SRES%20478.pdf>

29. UN S.C. Res. 2334, U.N. SCOR 72nd Year, U.N. Doc. S/RES/2334 (Dec. 23, 2016), available at <https://www.un.org/webcast/pdfs/SRES2334-2016.pdf>

30. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), I.C.J. Verbatim Record CR 2024/2 (Dec. 28, 2023).

31. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order, I.C.J. Verbatim Record CR 2024/2, ¶ 54 (Jan. 26, 2024).

32. *Id.*, ¶ 86.

33. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Order (March 28, 2024).

set to move forward to the merits stage.

The South African application represents a classic and particularly insidious example of lawfare where the post-World War II Genocide Convention is weaponized against the Jewish state.

Article II of the 1948 Convention on the Prevention and Punishment of Genocide defines the crime of genocide as follows:

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.³⁴

It is important to note that this language was adopted by Article 6 of the Rome Statute, which established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.³⁵ The crucial component of the definition for genocide is the intent requirement.

To that end, if the definition of genocide applies to any actions in the region, it is to the repeated calls by Hamas and Iran for the destruction of Israel and their expressed intention to continue harming Israelis and Jews around the world. The deaths of Gazan civilians since October 7, 2023, are a tragedy, yet most of the deaths are due to Hamas's use of those civilians as human shields. By contrast, Israel's conduct in its war of self-defense does not come remotely close to an intent to destroy the Palestinian people of Gaza. If anyone is guilty of genocide and other crimes, it is Hamas.

No aspect of the above definition applies to Israel's actions within its own borders, the West Bank, or the Gaza Strip, and demographic data contradict the very idea of a claim of "genocide." Logic requires that if a group is intent on committing genocide, then they will try to reduce the number of people in the targeted group. However, the Arab population inside Israel's borders rose from 167,000 in 1950 to 2.1 million in 2023.³⁶ Similarly, when Israel took control of the West Bank and Gaza in June 1967, the West Bank's Palestinian population stood

at 598,637, and Gaza's population was 356,261.³⁷ By 2023, according to the Palestinian Central Bureau of Statistics, the population of the West Bank had increased to 3,256,906, while the population of the Gaza Strip had grown to 2,226,544.³⁸ The dramatic population growth in the West Bank and the Gaza Strip belies any claim of an alleged Israeli "intent to destroy" the Palestinian people.

Moreover, the above figures negate the related Palestinian claim that Israel has engaged in "ethnic cleansing" of the Palestinian population. The only population group in the Middle East that experienced ethnic cleansing during the past century were the more than one million Jewish inhabitants of Arab countries, nearly 850,000 of whom were expelled between 1948-1950 following Israel's declaration of independence.³⁹

The "genocide" accusation is especially offensive and insidious given the Nazi genocide of the Jewish people during World War II. However, Palestinian advocates have repeatedly characterized Israelis as "Nazis" in a cynical and deplorable attempt to equate Jews as morally equivalent with the regime that perpetrated the Holocaust against them. The modern-day Palestinian "genocide" claim has its origins in the January 1937 testimony of one of its most famous lawyers, Auni Bey Abdul Hadi, before the Palestine Royal Commission. Auni Bey claimed the "plight" of the Palestinian Arabs as of early 1937 was "worse" than the plight of German Jews on the eve of the Holocaust.

34. UN G.A. Res. 260 (III), at 277, U.N. Doc. A/RES/3/260 (Dec. 9, 1948).

35. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90, available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

36. <https://www.jewishvirtuallibrary.org/latest-population-statistics-for-israel>

37. West Bank of the Jordan, Gaza Strip and Northern Sinai, Golan Heights, Data from Full Enumeration, State of Israel, Central Bureau of Statistics (Jerusalem 1967), available at https://www.levyinstitute.org/pubs/1967_census/vol_1_intro.pdf

38. 2023 Mid-Year Population Report, Palestine Central Bureau of Statistics, available at https://www.pcbs.gov.ps/statisticsIndicatorsTables.aspx?lang=en&table_id=676

39. Carole Basri, "The Jewish Refugees from Arab Countries: An Examination of Legal Rights – A Case Study of the Human Rights Violations of Iraqi Jews," 26 *FORDHAM INT'L L.J.* 655, 666-67 (2002).

Commissioner Horace Rumbold seemed taken aback by Auni Bey's testimony:

Q: Are you taking a leaf out of Germany's book?

A: It is different here. The case here is the contrary. Here we are in the same position as the Jews in Germany.

Q: How do you make that out?

A: The Jews are being driven out of the land upon which they lived for centuries and they are losing their existence, but the policy which is being adopted here will culminate in destroying our national existence here.

Q: You compare yourselves, in fact, to the Jews in Germany?

A: We are in an even worse position. There their personal rights are affected, but here the national rights of a people are affected.⁴⁰

However, the Nazis slaughtered *more than one-third of the entire worldwide Jewish population* during the Holocaust. Most were transported hundreds of miles to death camps designed and constructed for one purpose: to murder thousands of Jews every day, and to do so on an industrial scale while subjecting them to conditions and situations that reshaped the fields of international humanitarian law and international human rights law. Nothing even remotely as horrific has ever befallen any other group of people in human history.

Hamas Showed Intent to Commit Genocide as Defined by International Criminal Law

Following the language of Article II of the Convention on the Prevention and Punishment of Genocide and Article 6 of the Rome Statute, Hamas carried out the October 7, 2023 attack with the intent to destroy all Jews living in the State of Israel. To that end, the original Hamas Covenant (1988) proclaims very clearly the organization's goal of destroying Israel and committing genocide against the Jewish people. The Preamble to the Hamas Covenant declares:

Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it . . . Our struggle against the Jews is very great and very serious. It needs all sincere efforts. It is a step that inevitably should be followed by other steps. The Movement is but one squadron that should be supported by more and more squadrons from this vast Arab and Islamic world, until the enemy

is vanquished and Allah's victory is realised.⁴¹

Article 7 of the Hamas Covenant states:

[T]he Islamic Resistance Movement aspires to the realisation of Allah's promise, no matter how long that should take . . . The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.⁴²

While the revised version of the Hamas Charter has removed such expressed calls for the destruction of Jews, it still frames any use of violence as "a legitimate right guaranteed by divine laws and by international norms and laws."⁴³ Hamas spokesperson Ghazi Hamed confirmed the organization's genocidal intent in an interview with the LBC television network in Beirut on October 24, 2023.⁴⁴ Hamed warned that the October 7 attack was only the beginning, and that Hamas would continue to strike Israel until it killed every Jew and destroyed the country.

Hamas Committed War Crimes and Crimes Against Humanity

The Hamas attack included shocking crimes against humanity, in violation of Article 7 of the Rome Statute, especially rape, sexual violence and the taking of hostages.

40. Auni Bey Abdul Hadi Testimony, Minutes of Evidence Heard at Public Sessions, Palestine Royal Commission, Colonial Paper 134, 312-13 ¶ 4906-08 (Jan. 13, 1937).

41. The Covenant of the Islamic Resistance Movement, Aug. 18, 1988, available at https://avalon.law.yale.edu/20th_century/hamas.asp

42. *Id.*

43. A Document of General Principles & Policies, art. 25 (May 2017), available at https://irp.fas.org/world/para_docs/hamas-2017.pdf

44. Gianluca Pacchiani, "Hamas official says group will repeat Oct. 7 attack 'twice and three times' to destroy Israel," *TIMES OF ISRAEL*, Nov. 1, 2023, available at https://www.timesofisrael.com/liveblog_entry/hamas-official-says-group-will-repeat-oct-7-attack-twice-and-three-times-to-destroy-israel/

The ICJ largely ignored these atrocities in its January 26, 2024 order.

For decades, Hamas has committed war crimes by using the civilian population in Gaza and civilian facilities including schools, hospitals, and ambulances as human shields.⁴⁵ They have continued this behavior over the course of the war as well. Yet Article 8(2)(b)(xxiii) of the Rome Statute strictly prohibits “[u]tilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.”

Indeed, Hamas has publicly declared for years that sacrificing innocent Palestinian civilians is a key element of its strategic doctrine. In a speech delivered on February 29, 2008, Hamas official Fathi Hammad said:

for the Palestinian people, death has become an industry, at which women excel, and so do all the people living on this land. The elderly excel at this, and so do the mujahideen and the children. This is why they have formed human shields of the women, the children, the elderly, and the mujahideen in order to challenge the Zionist bombing machine.⁴⁶

Senior Hamas official Khaled Mashal repeated the claim in a televised interview on *Al Arabiya* television on October 20, 2023, in which he bragged about sacrificing Gazan civilians.⁴⁷

Israel’s Lawful Right to Self-Defense

The October 2023 Hamas attacks triggered Israel’s lawful right to defend itself pursuant to the United Nations Charter. Specifically, Article 51 provides that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”

In *Nicaragua v. United States*, the ICJ made clear that terrorist strikes, such as the Hamas attacks, constitute an “armed attack” that triggers Article 51’s right to self-defense.⁴⁸

Conclusion

In the wake of October 7, 2023, Israel experienced a brief period of sympathy from the international community. However, it was not long before the international community quickly (and predictably) turned against the Jewish state as the death toll in Gaza mounted amidst Israel’s military response against Hamas. Calls

for a ceasefire replaced expressions of sorrow for Israel’s horrific losses. The media and many others accused Israel of engaging in a “disproportionate” response to the losses it suffered on October 7, so much so that Israel was accused of committing “genocide” in the Gaza Strip.

As discussed, the factual inaccuracy of these claims is stunning. The Israeli military is not perfect, but it takes far more steps to avoid civilian casualties than any other army in the world. As early as October 13, Israel asked Gazans to leave the northern half of the tiny territory and move a few kilometers south for their own safety. The Israeli military was, in effect, notifying civilians in advance of upcoming military operations, saying it did not want to hurt them.

Moreover, Israel worked with Egypt and the United States to allow trucks carrying humanitarian relief supplies to enter Gaza as early as October 23, 2023. Since then, hundreds of truckloads of aid have been delivered through the Rafah border crossing, according to Palestinian Red Crescent officials.⁴⁹ Further, Israel announced on November 9, 2023, that it would begin to observe four-

45. “Hybrid Threats: Hamas’ Use of Human Shields in Gaza,” NATO STRATEGIC COMMUNICATIONS CENTRE OF EXCELLENCE, June 6, 2019, available at https://stratcomcoe.org/pdfjs/?file=/publications/download/hamas_human_shields.pdf?zoom=page-fit

46. Howard Adelman, “Research on the Ethics of War in the Context of Violence in Gaza,” 7 J. ACADEMIC ETHICS 93, 110 (2009).

47. “Hamas official says group ‘well aware’ of consequences of attack on Israel, Palestinian liberation comes with ‘sacrifices,’” ARAB NEWS, Oct. 20, 2023, available at <https://www.arabnews.com/node/2394966/middle-east>

48. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 103-04 ¶ 195 (June 27).

49. Jacob Magid, “Over 100 aid trucks enter Gaza in a day for 1st time since start of Israel-Hamas war,” TIMES OF ISRAEL, Nov. 3, 2023, available at <https://www.timesofisrael.com/over-100-aid-trucks-enter-gaza-strip-for-first-time-since-start-of-israel-hamas-war/>; The news item stated that the “Palestinian Red Crescent says 374 trucks of food, water and medicine or medical supplies have entered via Rafah since October 21.”

hour humanitarian pauses *every day*, to facilitate the passage to safety for Gazan civilians.⁵⁰

Given Hamas's candid admissions that it deliberately sacrifices Palestinian civilians, the evidence shows Israel cares far more about protecting those civilians than Hamas. Israel's commitment to avoiding civilian casualties, which is unique among the nations of the world, undermines any claim that Israel was acting with the requisite intent required to demonstrate a violation of the doctrine of proportionality and international humanitarian law, much less a violation of the Genocide Convention.

Unfortunately, the most likely legal outcome of South Africa's genocide case and the General Assembly December 2022 request for an advisory opinion will be further ICJ rulings against Israel. The Court will have become the willing enabler and ultimate weapon in the anti-Israel lawfare campaign, bypassing the Security Council as the preeminent international voice in the conflict.

But at what cost to the Court's legitimacy, and to its legal and moral authority? ■

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50. Aamer Madhani, Zeke Miller, and Ellen Knickmeyer, "Israel agrees to 4-hour daily pauses in Gaza fighting to allow civilians to flee, White House says," ASSOCIATED PRESS, Nov. 9, 2023, available at <https://apnews.com/article/israel-gaza-humanitarian-pauses-b8f-c613ffd8b9351c0dc37b90b6e10dd>