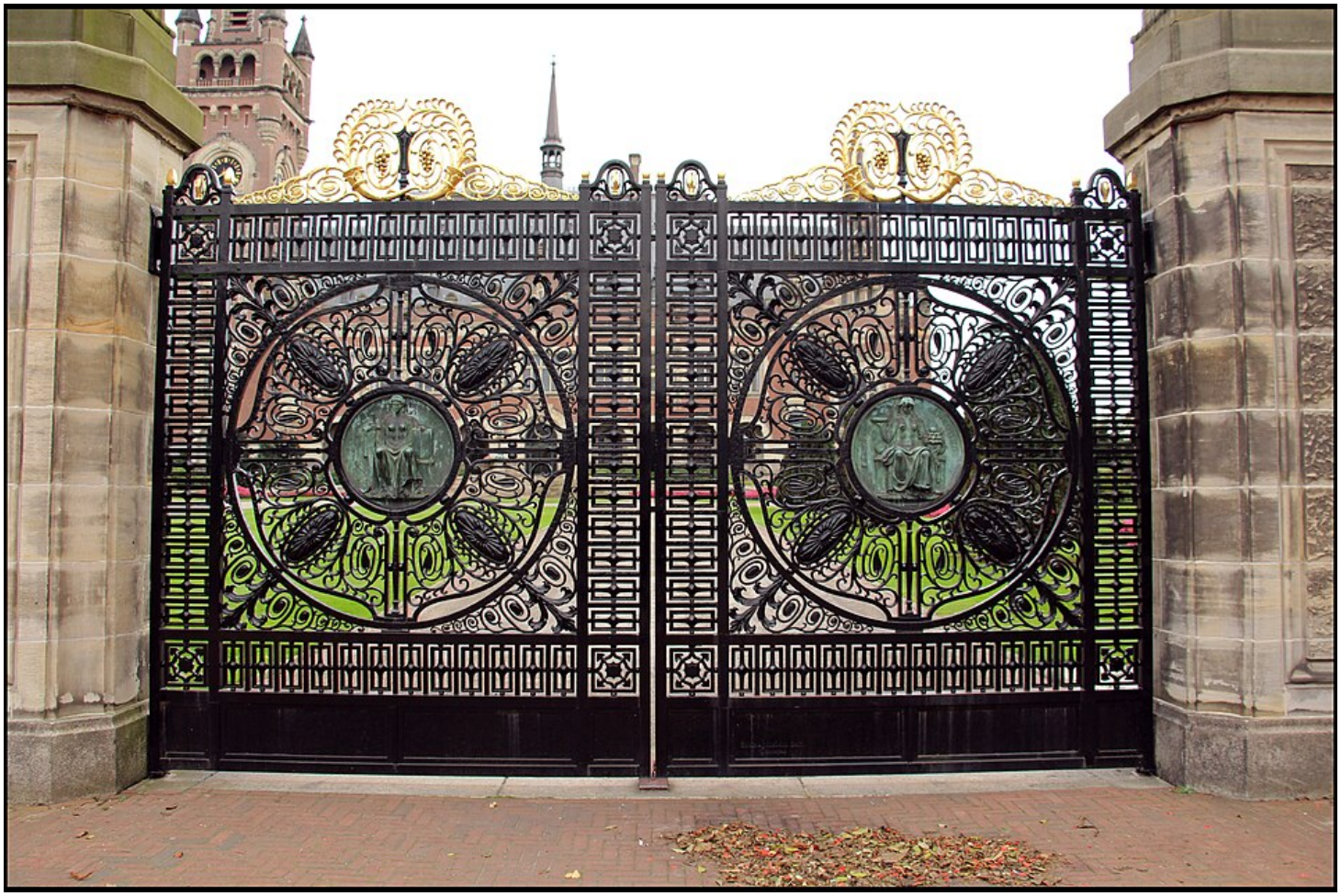


Special Issue: Human Rights and the International Court of Justice — Challenges and Opportunities

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Introduction: Human Rights and the International Court of Justice: Challenges and Opportunities

by Alex Neve and Sharry Aiken

The level of awareness and interest in both the International Court of Justice and the International Criminal Court has grown noticeably in recent years; not simply within legal and international affairs circles, but among the general public. That tracks with a caseload at both courts that reflects a range of countries and pressing issues that are of considerable interest and concern to people across the world, including the climate crisis, and grave human rights violations in Gaza, Myanmar, Afghanistan, the Ukraine and Syria. As such, judicial bodies that have often been overlooked by the public have gained a strong sense of relevance.

That is particularly the case with the International Court of Justice. In late 2024, Alex was invited to give a talk to a roundtable of about thirty business professionals in Ottawa, very few of whom had any particular knowledge of international legal standards or institutions. He had been asked to talk about the potential role of international law in resolving the crisis in Gaza. He began asking the group how many would have raised their hand at a similar session one year earlier, in 2023, if asked if they had ever heard of the International Court of Justice. Only two people raised their hands and both indicated that while they were aware of the court at that time, they had no understanding of its mandate or how

it worked.

Alex then asked the group how many had now heard of the International Court of Justice, and this time all but two of the group raised their hand. When further asked what they knew about the ICJ, most responses described some variation of it being a court where governments were held accountable for violating international law. As the conversation proceeded, it was also clear that many of the roundtable participants were uncertain of the differences between the ICJ and the ICC, and some had confused the former for the latter.

Much of the increased attention on the work of the ICJ does of course arise because of considerable media and social media coverage and discussion of the case that South Africa has brought against Israel under the *Genocide Convention* regarding the situation in Gaza. But as the roundtable discussion continued, there was considerable interest in other cases before the court. One participant eventually asked, is this the world's human rights court?

That is the question we have asked the contributors to this special issue to explore. Is the International Court of Justice becoming, in some fashion, a human rights court? If so, what does that represent? What are the strengths and weaknesses of viewing the ICJ as a human rights court? What are the challenges it faces in playing such a role? Are there opportunities to take that further? What of the relationship between the ICJ and the ICC?

The time for examining these questions is both opportune and pressing. There is much lament and debate about the ways that the international rules-based order is increasingly strained and refuted, including by many of the world's most powerful governments. The disdain demonstrated, for instance, by governments in Washington, Moscow and Beijing for international law and for institutions such as the ICJ is abundantly evident. At a time when international law faces considerable challenge, the fact that there is growing interest in and awareness of the ICJ and its potential to assist in enforcing international human rights standards, is notable and, perhaps, offers some reassurance or at least encouragement.

The contributors to this special issue have considerable expertise and experience following and analyzing key human rights related cases that have come before the ICJ in recent years. Several of the authors have been part of legal teams that have argued or intervened in those cases, and several are also experts in the work of the International Criminal Court.

Professor William Schabas' article, *Towards a Global Human Rights Court*, asserts that "suddenly, and unexpectedly, the International Court of Justice has emerged as a global human rights court." He notes that in many respects this fills a gap left by the unmet ambition, dating from the earliest days of the United Nations, to establish a dedicated international human rights court, a proposal that continues to have currency but appears unlikely to be realized. Schabas surveys a number of ICJ cases touching on human rights and concludes that we should find reassurance, in these troubled times from the fact that the UN's principal judicial organ is "increasingly focused on human rights," and is doing so

with the apparent “confidence of a large number of States from different parts of the world.”

We have included an abridged and edited transcript of an interview with Professor Payam Akhavan. He begins by disagreeing with the proposition that the ICJ operates as a human rights court, particularly because victims of human rights violations themselves have no standing and are unable to initiate proceedings at the court. He notes nonetheless that there has been a marked increase in human rights-related cases at the ICJ in recent years, beginning with the case brought by the Gambia against Myanmar under the *Genocide Convention* in 2019. Like Schabas, Akhavan also posits that this is in part an outcome of the fact that the world lacks a true human rights court. Despite the challenges faced by the ICJ he is optimistic that states will increasingly respect its role, given that the major threats to peace, security and, with the climate crisis, even planetary survival that we face, are all global in their origins and their impact, and thus require global adjudication and enforcement.

Professor Mark Kersten’s contribution, *Courts in Conversation: The International Criminal Court, the International Court of Justice and their Mutual and Respective Roles in Addressing International Crimes*, considers the relationship between the ICJ and the ICC, given that both courts have increasingly found themselves seized of the same situations of mass atrocity crimes, including in Gaza, Myanmar, Ukraine and Afghanistan. He examines their different but also overlapping roles. He considers the work of the two courts by looking at their respective abilities to galvanize state engagement and support, how readily they are able to withstand political interference and pressure, and the extent to which they are able to enforce their decisions. Ultimately, he encourages more attention to the ways in which the two courts might enter into dialogue with each other in ways that “foster greater accountability for international crimes.”

The next two articles consider the role of the ICJ as a human rights court in relation to the global climate crisis, with a consideration of the impact of the Advisory Opinion on climate change that has been sought from the court by the UN General Assembly. At the time this special issue was being finalized the hearings in relation to that Advisory Opinion had been concluded, but the opinion had not yet been rendered.

In their contribution, *The ICJ Advisory Opinion on Climate Change: Potential Implications for the Business and Human Rights Normative Framework*, Professors Sara Seck and Penelope Simons note that the Advisory Opinion could be consequential for the international business and human rights framework. They consider the potential for the court to elaborate the extent to which the obligation of states to protect human rights includes a duty to exercise due diligence with respect to private actors, such as businesses, to ensure that they do not violate the rights of individuals and communities. They will be looking to see what the court has to say regarding the extent to which that duty “includes the obligation to take regulatory, administrative and other action and, where human rights violations occur, to investigate and provide effective remedies.” They note as well that the court’s conclusions as to the normative status of the right to a clean, healthy and sustainable environment will have broad implications for business and human rights.

Professor Christopher Campbell-Duruflé's article, *An Epitome of Modern Environmentalism: Canada's Contribution to the ICJ Advisory Opinion on Climate Change*, critically assesses the written and oral submissions made by the Canadian government as part of the Advisory Opinion proceedings. He summarizes three main themes that emerge from those submissions: that there is not yet a customary international norm related to the obligation to avoid causing climate harm, the specific norms in the United Nations Framework Convention on Climate Change and the Paris Agreement have displaced other more general international norms, and that there are significant limitations in approaching climate change through a human rights framework. Campbell-Duruflé concludes that Canada's position is disappointing, though not surprising. He suggests that this provides "Canadians an occasion to reflect on whether they prefer a rules-based global response to the climate emergency or one that privileges unilateral action."

In her contribution, '*Preventing births' as a gender-neutral harm: Making sense of reproductive violence in South Africa's genocide case against Israel*, Professor Heidi Matthews engages critically with the nature of the arguments advanced by South Africa at the ICJ regarding the extent to which measures taken by Israel, intended to prevent Palestinian births in Gaza, fall within the *Genocide Convention*. She asserts that this provision of the Convention should not be limited, as is customary, to conflict-related sexual and gender-based violence, primarily assessed in relation to the rights of women and girls. She advances an alternative analytical framework which focuses on reproductive violence committed against all genders. Matthews draws upon findings of the UN Human Rights Council's International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, regarding the "potential harm to [Palestinian] men and boys' reproductive capacity and their willingness to procreate in the future" and argues that the ICJ has an important opportunity to recognize that "Palestinians of all genders have been subjected to widespread and systematic biological violence aimed at impairing the capacity of the Palestinian group to regenerate itself as such."

Professor Faisal Bhabha's article, *Anti-discrimination at the ICJ: Ukraine, Palestine and the Freedom to Advocate for Human Rights in Canada*, concentrates on recent ICJ cases with respect to Ukraine and Israel-Palestine, that have been brought under or have significantly drawn on the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). Bhabha highlights several key principles from those two cases, finding a broad conception but narrow application of anti-discrimination law with respect to the Russian occupation of Crimea, and an all-encompassing conclusion that the overall situation in Occupied Palestinian Territory constitutes racial discrimination. He then considers a range of Canadian court cases and government policies dealing with anti-Palestinian racism, antisemitism, and Palestinian solidarity protests. He looks closely at efforts to implement the International Holocaust Remembrance Alliance's controversial definition of antisemitism in Canada. He concludes that the ICJ's reasoning with respect to racial discrimination should provide some legal protection to activists who face penalties for engaging in the Boycott, Divestment and Sanctions movement.

The final two contributions engage directly with the ICJ's recent rulings with respect to Israel and Palestine.

Professor Michael Lynk's article, *Racial Segregation and Apartheid: The International Court of Justice's Advisory Opinion on the Discriminatory Features of Israel's Occupation of Palestine*, considers the approach the ICJ takes to assessing the discriminatory nature of Israel's occupation. He notes that in its Advisory Opinion on Israel's occupation of Palestinian Territory, the Court focuses on three dimensions of the occupation, namely the residence permit policy in occupied East Jerusalem, restrictions on movement that Israel has imposed on Palestinians living in the occupied West Bank, and Israel's practice of demolishing Palestinian homes and properties in the West Bank and East Jerusalem. He stresses that in finding that Israel has violated article 3 of CERD, the ICJ has effectively concluded that Israel is responsible for both racial segregation and apartheid, the first time an international court has reached that conclusion. Lynk highlights that this is a significant addition to the "growing international consensus on the prevalence of apartheid as an integral feature of Israel's occupation of Palestine."

This special issue concludes with Professor Ardi Imseis' powerful article, *Paradigm Shifts and the Palestine Moment: On the International Court of Justice and the Quest to Save International Law*. Imseis underscores that despite 80 years of developing international legal norms and institutions, the current genocide in Gaza has become the "inflection point for world order". He notes that "under the weight of Western hegemonic support of Israel's onslaught against the Palestinian people," middle and smaller powers, mostly but not exclusively from the Global South, are increasingly turning to the ICJ for redress. He provides an overview of the four current ICJ cases dealing directly with the situation in Gaza and also the broader question of Israel's occupation of Palestinian Territory. He emphasizes the particular importance of the ICJ's Advisory Opinion regarding the legal status and implications of Israel's occupation, which he describes as a "paradigm shift" when it comes to the law and politics of the "Palestine question." It has led to a "structural change" which we must now "collectively activate."

These nine thoughtful and, at times, provocative and challenging articles make it clear that the human rights caseload of the International Court of Justice has increased markedly in recent years, across a range of countries and a variety of human rights concerns. That is in part a reflection of legal ingenuity but, more pointedly, it highlights the mounting, widely felt need to shore up the international legal order in the face of contempt and disregard for crucial international norms. While the advent of a true world human rights court is an unlikely prospect in today's global geopolitical context, there is every likelihood of more human rights cases being heard in The Hague. As public awareness of the ICJ's role as a guardian of human rights grows, the challenge ahead lies in working to ensure that governments adhere to its rulings.

Citation: Alex Neve and Sharry Aiken, *Human Rights and the International Court of Justice — Challenges and Opportunities: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 5.

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Towards a Global Human Rights Court

by Bill Schabas

The proposal to establish an international human rights court is credited to the Australian delegation, headed by Herbert Evatt, at the 1946 Paris Peace Conference. At the first session of the United Nations Commission on Human Rights, in February 1947, Australia tabled a formal proposal on the subject. Belgium suggested to the Commission that such an institution might take the form of a special chamber of the International Court of Justice.

From time to time, the idea of a world court of human rights has resurfaced, most recently in a campaign led by Manfred Nowak and Martin Scheinin. The proposal never seems to get much traction. The difficulty in advancing this on the international agenda has always seemed a bit of a paradox given the huge success of regional human rights courts as well as the enthusiastic support for the creation of other specialised global courts like the International Criminal Court.

Rather suddenly, and unexpectedly, the International Court of Justice has emerged as a global human rights court, although perhaps not the one Australia had imagined. No political initiative or legislative change has been involved, nor is any policy decision of the Court itself responsible for this development. Unlike the regional human rights courts, there is no individual petition mechanism although the door has always been open to States challenging the treatment of their own nationals. The International Court of Justice operates within the framework of its Statute, adopted in 1946. Its decisions consist of judgments in inter-State cases and advisory opinions. But then regional human rights courts (and treaty bodies) also tackle inter-State litigation and issue advisory opinions or something analogous.

Commentators have often been rather dismissive of the role of human rights at the International Court of Justice. A book chapter by Carlos Esposito in the Cambridge Companion to the ICJ, published in 2023, speaks of “the restricted and scarce role” and the “disengagement” of the Court in the field of human rights. But I think this publication is already woefully out of date. Esposito explains that the reason for the relative lack of engagement of the Court in the field of human rights is because it is an institution where only States can bring cases. It is true that until recently States have been extremely

reluctant to litigate human rights issues. The inter-State dispute settlement provisions of the main human rights treaties were rarely invoked. For example, article 41 of the International Covenant on Civil and Political Rights, in force for half a century, has never been applied.

This is no longer the case. Indeed, it is States that have chosen to take human rights issues to the International Court of Justice, often acting in the interests of the enforcement of international law rather than because they have some identifiable injury. They are joined, massively in some cases, by other States who intervene pursuant to articles 62 and 63 of the Court's Statute. And it is States that have voted to request advisory opinions from the Court. The issues in both the contentious cases and the advisory opinions are matters that previously were reserved for political bodies like the General Assembly, the Human Rights Council, and the Governing Body of the International Labour Organization.

That human rights law falls within the subject-matter jurisdiction of the Court is not controversial. Sporadically, over the nearly 80 years since it began its activities, the Court has addressed issues that bear on fundamental rights and freedoms. Even its predecessor, the Permanent Court of International Justice, which operated from 1920 to 1945, issued judgments on such issues as education rights of minorities and the principle of legality. The first contentious case before the International Court of Justice addressed "elementary considerations of humanity, even more exacting in peace than in war". A series of advisory opinions, punctuated by an unfortunate contentious case, resulted in firm condemnation of the apartheid regime imposed upon Namibia by South Africa. There were several genocide cases, none of them crowned with great success, and some rulings against the United States concerning the imposition of the death penalty. But human rights was never the bread and butter of the International Court of Justice. That is, until recently.

As of 1 January 2025, some 22 cases were pending before the Court and two were under deliberation. About half of them bear on human rights matters. The list includes three requests for advisory opinions, all of them dealing, at least in part, with human rights. Four contentious cases concern application of the *Genocide Convention*, two the International Convention on the Elimination of All Forms of Racial Discrimination, and one the Convention Against Torture. Moreover, there is a very public initiative from some States, including Canada, to bring a case against Afghanistan based on the Convention on the Elimination of Discrimination Against Women.

This is a situation without precedent in the history of the Court. Indeed, the Court went for several years with an extremely sparse case load after it stumbled, in 1966, in a notorious judgment that favoured South Africa. Its image improved somewhat in the mid-1980s when it ruled against the United States for attempting to overthrow the government of Nicaragua. Freedom of movement from the perspective of the International Covenant on Civil and Political Rights was the theme in a diplomatic protection case filed by Guinea against the Democratic Republic of the Congo more than fifteen years ago. Judge Cançado Trindade, a great enthusiast for human rights, described the Court's 2010 judgment in that case as a "turning point".

But the real turning point came much later, in February 2019, with issuance of its advisory opinion on the Chagos Islands. The Court condemned the United Kingdom for snatching the territory from Mauritius at the time of decolonization in order to hand it over to the United States for an important military base. The indigenous population was ethnically cleansed in order to facilitate the repurposing of the archipelago. The General Assembly resolution requesting the advisory opinion was proposed by 54 African States who sought, according to their spokesman, "to complete the decolonization of Africa". London fought bitterly but unsuccessfully in the General Assembly to prevent the request. When the case was heard, it lacked a judge of British nationality on the bench after being beaten in the elections that year by the Indian candidate.

The *Chagos* advisory opinion seemed to send a signal of an increasingly progressive and dynamic court. Late in 2019, Gambia filed an application against Myanmar based upon a provision in the *Genocide Convention*. A unanimous provisional measures order directed against Myanmar followed in January 2020. Gambia is acting *erga omnes* and it is no secret that it is being backed, politically and financially, by the 57-member Organization of the Islamic Conference. In other words, a large number of States are behind the case. Eleven States, most of them European, have formally intervened in the case to support Gambia.

Since then, three more cases based on the *Genocide Convention* have been launched. The *Ukraine v. Russia* case sparked thirty-three interventions. In *South Africa v. Israel* there are now thirteen interventions, and more are to be expected. There are none yet in *Nicaragua v. Germany* but it is still early days. Until these genocide cases were filed, starting with *Gambia v. Myanmar*, in the entire history of the Court there had been only a small handful of interventions in contentious cases, and only one that was successful. They were all by States that were directly concerned in the outcome, and not, as is now the case, States acting in the common interest, *erga omnes or erga omnes partes*. The modern tsunami of interventions, like several of the cases themselves, are all from States that are not 'injured'.

The extraordinary interest in these cases seems to signal a desire that the Court use the *Genocide Convention* in a more effective way than it has done in the past. Although eighteen cases premised on the *Genocide Convention* have been filed in the Court over the past half-century, it has yet to hold a State liable for the commission of genocide. The joint intervention in the *Gambia v. Myanmar* case by Canada and five European States argues for a more liberal interpretation of the *Genocide Convention* than the Court has adopted in its previous judgments. These States stress the importance of factors like internal displacement and the victimisation of children in assessing the presence of genocidal intent. They invoke a dissenting opinion by Judge Cançado Trindade calling for a more flexible approach to proof of genocidal intent. These arguments are most helpful and not only to Gambia. They also bolster South Africa's case against Israel, although this was surely not what Canada and the others intended.

Human rights treaty bodies may be somewhat anxious about the consequences of this new direction for the International Court of Justice. Inevitably, the jurisdictions overlap, raising concerns about

fragmentation. When the Court examined the International Covenant on Civil and Political Rights, in the *Diallo case*, it showed considerable respect for the expertise of the Human Rights Committee. But there was less deference for the treaty body when the Court interpreted provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, in *Qatar v. Emirates*.

By resorting to the International Court of Justice, States demonstrate a confidence and a respect that goes well beyond their approach to human rights treaty bodies. For example, Canada has been somewhat dismissive of the authority of treaty bodies. In its fifth periodic report to the Human Rights Committee, Canada recalled 'the non-binding nature of the Committee's views' and sought to justify its refusal to comply with interim measures ordered by the Committee. It returned to the point in its sixth periodic report, stating that "neither the Committee's interim measures requests nor its Views are legally binding on States parties". But when Canada's legal advisor, Alan Kessel, addressed the International Court of Justice in October 2023 to request a provisional measures order against Syria, he recalled that these "have a binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed". Canada also signed a statement recalling that the Court's provisional measures are "legally binding on the parties to the dispute", and that Russia's failure to comply with the 16 March 2022 Order in *Ukraine v. Russia* was 'a further breach' of international law. Predictably, when the Court granted South Africa's request for an Order against Israel, in January 2024, Canada was more circumspect. It did not remind Israel that this was 'binding' although it politely recognized "the ICJ's critical role in the peaceful settlement of disputes and its work in upholding the international rules-based order".

The phenomenal turn towards the International Court of Justice, manifested in the requests for advisory opinions, the contentious cases filed by States acting *erga omnes*, and the massive number of interventions, points to a penchant for judicial settlement of disputes that concern human rights. Hitherto, such issues were addressed in political bodies like the Human Rights Council, the General Assembly and the Security Council. But these bodies are plagued with double standards. States speak with a forked tongue, denouncing the violations attributable to their enemies while ignoring those of their friends. It is harder to do this in a judicial forum, a lesson some of the intervening States in the *Myanmar* case have now learned.

The Court's great authority has been enhanced by its ability to issue judgments, orders and opinions that are nearly unanimous. The *curricula* of its judges is more than impressive. Members include alumni of human rights treaty bodies, distinguished academics and experts from the International Law Commission. But there is a certain fragility to its current prestige. Great expectations accompany the current enthusiasm for the Court. States expect it to deliver progressive and creative interpretations of legal texts like the *Genocide Convention* that are in line with contemporary values.

The Advisory Opinion on the Occupied Palestinian Territory of 19 July 2024, declaring Israel's occupation to be unlawful, calling for it to come to an end, and demanding that States contribute to this process, stands out as one of the Court's greatest judicial pronouncements. But often overlooked is the order on provisional measures in *Nicaragua v. Germany*, issued a few months earlier, in which the

Court went beyond the instructions to the parties themselves, acting *ultra petita*, in declaring it "particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict" so as to avoid the risk that such arms be used to violate the *Genocide Convention*, the Geneva Conventions and the Hague Conventions.

In its judgment on preliminary objections in *Ukraine v. Russia*, issued in early 2024, the Court recalled "its responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter of the United Nations and the Statute of the Court". That the principal judicial organ of the United Nations is increasingly focused on human rights, including the right to peace, and that it appears to enjoy the confidence of a large number of States from different parts of the world, is reassuring in these troubled times.

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An Interview with Payam Akhavan

by Kathleen Gant

PKI Global Justice Journal Kathleen Gant interviewed Professor Akhavan, the inaugural holder of the Massey Chair in Human Rights at the University of Toronto about his views regarding human rights related cases that have been taken up at the International Court of Justice in recent years. There has

been a growing number of such cases, including under the Genocide Convention, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture. PKI canvassed Professor Akhavan's views on the significance of this growing human rights caseload, and whether we can or even should start to view the ICJ as a human rights court.

The interview took place on February 18, 2025 and is edited slightly for length and flow.

Kathleen Gant (KG): Professor Akhavan, thank you so much for taking the time to share your views with PKI Global Justice Journal. We appreciate your thoughts about the role the International Court of Justice plays in upholding international human rights obligations. We're particularly fortunate to have valuable insights from someone such as yourself, who has direct experience of being before the ICJ in high-profile human rights cases.

So let's begin with a fairly general question. Would you say it is a fair and accurate description of the International Court of Justice to say that it is a human rights court?

Payam Akhavan (PA): It is definitely not accurate. The ICJ is not a human rights court, it is a court that is predominantly mandated to resolve interstate disputes, and individuals have no standing to initiate proceedings before the court. Unlike the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human Rights. So the only possibility of initiating proceedings before the ICJ related to human rights is in the context of interstate proceedings.

And then there is also the advisory opinion function of the court, which is really not a contentious proceeding. It is at the request of the UN General Assembly, or other UN organs and agencies that such a request is made, and while opinions of the courts in advisory proceedings are not binding, they are authoritative statements of law and can have some influence.

But still even advisory proceedings have to be requested in the context of States making a decision within the context of UN organs or specialized agencies. So that's why the ICJ is not a human rights court.

KG: Following that question, there appears to be a growing number of cases brought by states at the ICJ under a number of key UN human rights treaties, including the *Genocide Convention*, the Convention against Torture, the Convention on the Elimination of All Forms of Racial Discrimination, and likely in the near future, the Convention on the Elimination of All Forms of Discrimination Against Women. What do you think accounts for all that?

PA: It is quite a remarkable and unprecedented period of human rights-related litigation before the Court. In the 1960s, Ethiopia and Liberia brought a historic case against South Africa in relation to South West Africa, today known as Namibia. South Africa, contrary to the mandate system of the League of Nations, by which it inherited South West Africa as a trust territory until such time as it could achieve independence, decided instead to annex that territory. That case was remarkable in the sense that it was based on what we call *actio popularis* litigation, where the applicant States were

themselves not directly injured, but they invoked international human rights law in a wider sense, as obligations *erga omnes*, or owed to the international community as a whole.

[The Court found that Ethiopia and Liberia lacked a sufficient legal interest to bring the claims because they were not directly affected. The case was seen as a setback for the enforcement of international human rights.] The [South West Africa cases] were for some time the end of *actio popularis* litigation; until more recently, which I will come to in a moment.

Now, throughout the history of the court there have been instances of human rights litigation where a state had a direct interest, even during the time of the League of Nations. When the ICJ was known as the PCIJ, the Permanent Court of International justice, there were several notable cases dealing with the rights of national minorities, pursuant to a series of treaties concluded under the League of Nations' auspices to protect national minorities who are, in a sense, living in a state other than the state of their ethnicity or nationality or language.

And then, in the 1980s, there were a series of notable cases, beginning with Bosnia Herzegovina initiating proceedings against Serbia under the *Genocide Convention*. There was a case subsequently in 2008, whereby Georgia brought proceedings against Russia in respect of alleged ethnic cleansing in the enclave of South Ossetia. So there were periodic cases where States that were directly injured were using the legitimacy, authority, and visibility of the court as a platform, for what some would call 'lawfare' (using international law as the continuation of politics by other means), trying to isolate and pressure states who are responsible for human rights violations.

But in recent times, there has been a return to the *actio popularis* litigation, which really was, for some time, limited to the South West Africa case that I mentioned from the 1960s. One notable case was the proceedings by Belgium against Senegal, under the Convention against Torture, invoking the extradite or prosecute provisions of the convention in respect of Hissène Habré, the former dictator of Chad, who was residing in Senegal, and although that was *actio popularis* litigation, the Belgian judiciary had initiated proceedings against this individual. So there was some sort of connection with Belgium.

But the turning point, perhaps, was the *Gambia vs. Myanma*r in 2019, when the small West African nation of Gambia brought a case really on behalf of the members of the Islamic Organization for Cooperation, who were concerned by the persecution and ethnic cleansing against the Rohingya Muslim minority in Myanmar. That was really the first genuinely *actio popularis* proceeding since Southwest Africa, and it was met with success, at least at the provisional measure stage, with a 17 to 0 order issued by the court against Myanmar. Following the successful example of the Gambia versus Myanmar case, Canada and the Netherlands initiated proceedings against the Syrian Arab Republic under the Convention against Torture and subsequent to the Israel-Hamas conflict, South Africa initiated what is perhaps to date the most controversial case before the court, initiating proceedings against Israel under the *Genocide Convention*. That was followed by Nicaragua, initiating proceedings against Germany, also under the *Genocide Convention*, in respect of Germany's support for Israel.

And, as you put it, now a coalition of 4 countries, led by Germany, together with Canada, Australia, and the Netherlands, has signaled that it may initiate proceedings against the unrecognized Taliban leadership in Afghanistan under the Convention on the Elimination of Discrimination Against Women.

So there is now really a steady stream approximating a flood of cases before the court in which you have what one could call altruistic litigation in the sense that the states are not directly injured. But it's never truly altruistic, because there is always a political interest which explains the motivations of states in invoking the moral authority of the ICJ as an extension really of their foreign policy, and therein lies both the distinction between a human rights court, where individuals can initiate proceedings, if they are directly the victim, as opposed to interstate proceedings, where States will invariably be selective and have their own interest.

So this proliferation of so-called public interest litigation, on the one hand, is welcome because it has made the ICJ and international law more relevant than ever, not just in our elite academic and practitioner circles, but even in the eyes of the public. Many people who would never have heard of the ICJ are now aware of its existence at least. But the problem is that reducing human rights litigation to interstate proceedings, which is invariably selective and politicized, also risks entangling the court in highly controversial disputes, in a manner which may not necessarily increase its legitimacy in the eyes of the world.

So I would say that this historical juncture, where there is unprecedented recourse to the court, is also an opportunity for us to pause and consider why so many years after the adoption of the Universal Declaration of Human Rights, do we still not have a UN human rights court?

And is it time to rethink the very weak and fractured mechanisms that currently exist at the UN Level for the enforcement of human rights to have a more robust, consolidated jurisdiction that could disentangle itself from this sort of politicization.

KG: What about the relationship between the ICJ and the International Criminal Court? Do you see ways that they are complementary or ways that they overlap, and may be confusing or problematic?

PA: Well, the main distinction is that the jurisdiction of the International Criminal Court is focused on the attribution of individual criminal liability, whereas the ICJ jurisdiction extends to disputes between states. That is the main distinction. But of course, there will be overlap where, for example, the ICC and ICJ will be considering the same matter.

This occurred in a different context when Bosnia brought the *Genocide Convention* proceedings against Serbia, and then subsequently Croatia brought proceedings against Serbia, also under the *Genocide Convention*. And in parallel to the ICJ proceedings, there was the International Criminal Tribunal for the former Yugoslavia, the ICTY, which was an *ad hoc* jurisdiction, established in 1993, 5 years prior to the establishment of the ICC. The ICJ gave great weight and relied very heavily on the findings of fact and law made by the ICTY, and one could say the same thing in respect of the ICC. That the ICJ, if it addresses, let's say, a certain conflict in which there are allegations of genocide, for

example, under the *Genocide Convention*, the ICJ may look to the jurisprudence or findings of the ICC. In that regard, in particular, the evidentiary threshold for ICC proceedings is much higher than that before the ICJ. Because they involve finding guilt beyond a reasonable doubt, as opposed to state responsibility, which generally would have a balance of probabilities approach, even if it is heightened in the context of serious allegations, such as the crime of genocide.

So, for the most part, this raises the issue of the unification and harmonization of international law between different jurisdictions, which are not in a hierarchical relationship. This is not a case where a judgment of the Ontario Court of Appeals, for example, is brought before the Supreme Court of Canada, which can, in effect, overrule the lower courts. You have the ICJ, you have the ICC, and you have a number of other jurisdictions, none of which are in a hierarchical relationship with each other. So it falls on these jurisdictions to do their utmost, where possible, to avoid what's called the fragmentation of international law, where different jurisdictions come to opposing conclusions on the same set of facts applying the same laws. And that is why I think that it is always in the back of the mind of judges to try, where possible, to adopt consistent findings, whether of fact or law.

KG: You have been centrally involved in the case that Gambia has brought against Myanmar under the *Genocide Convention*, alleging that the Myanmar government is responsible for genocide against the Rohingya. To readers, it may not be necessarily obvious as to why a small West African country was the one to initiate that case. Could you give us an overview of how that case came to be?

PA: It's a good question. And as I mentioned, the issue of the Rohingya, the ethnic cleansing by the Myanmar military forces against the Rohingya Muslim minority, was an important matter for the Organization of Islamic Cooperation, which has 57 members extending from Africa and the Middle East to Southeast Asia. And, the question of why the Gambia, specifically, it's in part because Gambia had at that time a newly elected democratic government, after many years of a notorious dictatorship, and the Minister of Justice of that government, Abubacarr Tambadou, was previously a prosecutor at the International Criminal Tribunal for Rwanda, and perhaps had a certain understanding of the importance of international courts and tribunals in addressing such issues. In a visit to the Rohingya refugee camps in Bangladesh, on the border of Myanmar, he was especially affected by the stories of the survivors. So that was at least part of the story, that there was an individual with influence in a government who believed that it was important to speak truth to power, and not to be indifferent to such a grave injustice.

But at the same time, one could also say that the Gambia had very little to lose. It didn't really have extensive diplomatic or economic, or other relations with Myanmar, and therefore, it had very little to lose. As distinct, for example, from Bangladesh, which is neighbouring Myanmar, which is hosting some one million Rohingya refugees, and which has to negotiate regularly with its neighbour, and to try and maintain good, at least peaceful relations. So, sometimes the state that has the least to lose is the ideal applicant in bringing such proceedings.

KG: What do you think we can expect of an eventual ICJ ruling in that case?

PA: Well, I'm not going to speculate on what the court will eventually decide. There is a significant volume of evidence before the court, and it will be up to the 17 judges of the court to assess the evidence in light of the applicable law and come to their own conclusions.

And of course, one of the problems is that the ICJ, unlike a national court, does not have general jurisdiction; one cannot presume jurisdiction, because the foundation for international law, whether in respect of which norms are binding or which courts have jurisdiction, the foundation is state consent. States must consent to be brought before a particular jurisdiction, not in this specific instance, but they must have signed a treaty or made a declaration which recognizes the jurisdiction of the court. Now, under Article 36, paragraph 2 of the ICJ Statute, there is what is called the optional clause declaration, where a state can declare that it recognizes the jurisdiction of the court in general. And that's ideal for a state that has made a reciprocal declaration because it allows for proceedings in respect of all matters of international law. But when a state such as Myanmar has not made such a declaration, then one must search for another basis for jurisdiction. And that basis for jurisdiction was Article IX of the 1948 *Genocide Convention*, which allows States to bring disputes regarding the *Genocide Convention* before the court.

So the court's jurisdiction in this instance is limited to allegations of genocide. Allegations of war crimes or crimes against humanity cannot be brought before the court because the court has no jurisdiction. So it creates an artificial situation where the applicant state has to shoehorn its claim into the crime of genocide, because it's genocide, or it's nothing. You cannot say that “Well, there are also war crimes and crimes against humanity.” The court will simply say, we have no jurisdiction.

So this creates, you know, a distortion in the way in which human rights issues are brought before the court. And that's yet another reason why we need a proper human rights court rather than one which has this fragmented and piecemeal basis for jurisdiction.

KG: Moving on, you have also closely followed the case at the ICJ, which the Netherlands and Canada have brought against Syria under the Convention against Torture. How significant is this case? And do the clearly very significant political changes in Syria impact those proceedings?

PA: I, together with my distinguished colleague Alex Neve, had proposed such a case, and lobbied for it as early as 2016, but unfortunately there was no willingness at that point to initiate such a case. And the reason why the idea of going to the ICJ was important is that the ICC had no jurisdiction in respect of Syria. These horrific crimes are being committed in the context of a civil war which had erupted in 2011. I think it was France that, on two occasions, submitted a resolution whereby the UN Security Council to refer Syria to the ICC. And this is the only way in which the ICC can exercise jurisdiction against a non-state party. This basis for jurisdiction was invoked for the first time in 2005 against Sudan, for the atrocities being committed in the Darfur region, and in 2011 against Libya, when the Gaddafi regime was brutally suppressing the revolutionary uprising.

So in 2014, with the Russian Federation and China vetoing the referral of Syria to the ICC, it became very clear that the only other jurisdiction that one could invoke was the ICJ, even if it was not addressing individual criminal responsibility.

So it took quite a few years, I believe, until 2020, before the Netherlands, perhaps inspired by the example of the extraordinary visibility of the Gambia versus Myanmar case – which was helped by the presence in court of Aung San Suu Kyi, the Nobel Prize Laureate and human rights champion who disappointingly had decided to become the agent and an apologist, in effect, for the atrocities being committed against the Rohingya – which created massive interest in the global media.

So perhaps inspired by that example, the Netherlands, which was subsequently joined by Canada, decided to reawaken this earlier proposal to bring proceedings against Syria, except that, as important as it was, it was quite a few years after the worst atrocities had already been committed, and it was difficult, perhaps, to persuade the court that there was an element of urgency, because in bringing provisional measures—which is the way you get before the court quickly, rather than having to wait several years until a final hearing of the merits—it's necessary to establish urgency in the threat of irreparable harm.

Now, what's interesting is that Syria, of course, did not show up, unlike Myanmar, and that always diminishes the impact of the case. But it is still possible to continue the proceedings without the specific consent of a respondent, so long as there's a basis for jurisdiction which there was here in the compromissory clause of the Convention against Torture. And what is remarkable is that just as Canada and the Netherlands were busy preparing the memorial for this case, the main written pleading where they set up their case, the Assad regime was overthrown. And now there is an entirely new leadership. So that will have a significant impact on the case. The new leadership obviously does not wish to shield those in the Assad regime who are responsible for torture and other international crimes. Assad himself has fled now to Moscow, so he would have to be extradited in order to be brought to justice.

There are other Assad officials, some of whom have fled, others of whom may be in hiding, others of whom were, for the most part, executed by angry mobs. So the question now is, how to leverage the ICJ proceedings, perhaps to persuade the new leadership to put in place some sort of transitional justice policy, and mechanism, and it remains to be seen whether that will be feasible or not.

KG: Onto the final question: Do you see possibilities to deepen and expand the types of human rights cases being brought before the ICJ?

PA: Well, it's always possible for there to be more proceedings, *actio popularis*, and other proceedings. There is no shortage, tragically, of situations in the world that call for this sort of intervention.

I think that there is now a momentary setback for the international legal order in particular, with the commencement of the second Trump Administration. There is a clear signal that the rule-oriented

international order will be subordinated to power politics for the most part, and a disregard, if not dismantling, of multilateralism in general, including a diminishing of the power of international organizations, such as the United Nations.

So in this climate, and against that backdrop now already of an unprecedented volume of cases having been brought before the court, it remains to be seen whether there will be an expansion and deepening, or whether there will be a lull, if you like, for some time, where states busy themselves with more immediate concerns. And I say this because, as we know, there is really no direct means of enforcement in respect of ICJ, or, for that matter, ICC decisions. Their power is derived largely from the power of legitimacy, or what Professor Tom Frank famously called the “compliance pull of international law.”

At the end of the day the reason why we have something called international law is because, to quote famous words of Professor Oscar Schachter, “most nations obey most laws most of the time.”

So there is a process of socialization, if you like, and internalization of international norms. And in the context of global interdependence, where military might and economic power have to be mediated through legitimacy, through persuasion, international law plays a very important role. So ultimately because we don't have formal enforcement mechanisms, much of the power and relevance of international law is a culture which is receptive to the idea that in a diverse world, with differing civilizations and cultures and political systems and competing national interests, there must be a transcendent universal set of norms, through which nations are able to converse with each other, to deal with each other, other than through bullying and intimidation, and the idea of “might makes right.”

And of course this isn't just a naive ideal. It is born of centuries of war and bloodshed that the international community finally came to the conclusion that it must establish the United Nations. It must adopt the UN Charter, it must prohibit recourse to wars of aggression. It must respect human rights.

So I think that for now we have a detour, perhaps, towards an earlier period of anarchy, “might makes right,” this whole idea of “America First,” the Russian aggression against Ukraine, the whole host of other centrifugal forces which, frankly speaking, are on the wrong side of history.

And it's important to say this, this is not just a question of morality, but it's also a question of what the course of history is. The course of history has been irresistibly pushing us towards ever greater and inextricable interdependence. And when you have a highly interdependent system, it also becomes very vulnerable and in need of cooperation, in need of norms that allow this system to function. So in that sense, I would also say that—and returning back to the theme of litigation before the courts—one of the most notable recent developments has been the climate change advisory proceedings before ITLOS, the International Tribunal for the Law of the Sea and the International Court of Justice.

And I had the privilege of representing the Commission of Small Island States on Climate Change and International Law, so-called COSIS, and it is remarkable that the smallest of nations on

earth—including one of my clients, Tuvalu, population 11,000 Indigenous Pacific islanders—have initiated these proceedings. Because ultimately, one can say that climate change is perhaps the biggest human rights issue of our time. In the sense that we can decide to ignore a genocide in this or that corner of the world because it doesn't affect us, but we cannot choose to remain indifferent to climate change because it is truly inescapable. It is going to affect all of us.

So, a group of small island states initiated unprecedented proceedings before ITLOS and the ICJ in the context of advisory proceedings. So there is not a specific respondent state, but it is asking the question as to whether international law has anything to say about catastrophic climate change. And in that context we begin to see that there is a scientific truth that we are confronted with when we are dealing with climate change and the Paris Agreement of 2015, based on the uncontested scientific evidence detailed in reports of the Intergovernmental Panel on Climate Change, which acknowledges that to avert the worst catastrophic harms from climate change, we must keep temperature rises within 1.5°C above pre-industrial temperatures by the year 2100.

That threshold, unfortunately, was breached last year in 2024. And perhaps the horrific fires in Southern California, were the opening chapter of the post-1.5°C world. And the science tells us that with every incremental rise in temperature after 1.5°C, there is an exponential increase in catastrophic harm.

Now I speak about scientific truth in the sense that scientists are not ideologues. They're not on the political left or political right. They just make measurements, and they tell us what's going to happen if we don't reduce greenhouse gas emissions.

But at the same time one sees among the Indigenous Pacific Islanders that I've dealt with, that ancient wisdom also is as compelling as modern science, and as the Attorney General of one of the small Pacific Island States, Vanuatu, who said before the court, “If you respect nature, nature will respect you.”

So, why do I say this? Here we have a remarkable cluster of human rights issues. We have the rights of Indigenous Peoples to self-determination, which, in the case of the small Pacific islands is being threatened in an existential sense, because rising sea levels will swallow these islands, and they will be under the sea within a generation. And at the same time, one sees that what is happening to the Pacific Islanders today in terms of the right to life, the right to security, will also affect the rest of us tomorrow, and these small islands are like the canary in the coal mine of a climate disaster.

So this brings me back to the future of international human rights law before international courts and tribunals. International courts and tribunals don't exist in a vacuum, they reflect a certain historical, cultural, and civilizational reality born of painful experience. It was the Holocaust and total war that in 1945 resulted in or gave birth to the Charter of the United Nations. And today, I would say that climate change is arguably the biggest threat to our collective survival as humankind inhabiting a common planet. And to the extent that world leaders are calling this a hoax, or are otherwise diminishing its

importance to serve the interests of the fossil fuel industry, or what have you, then we are going to pay a catastrophic price. Because nature has its own laws, and the Earth will go on with or without us.

And in that sense I'm optimistic that even if today's powerful states, the major polluters, are ignoring international law, are ignoring the jurisprudence of courts in respect of the harm, the principle of transboundary harm—which basically states that a state cannot conduct activities on its territory that causes significant harm to other states–which has obvious application in the context of climate change. Sooner or later we will be left with no choice but to return with a vengeance to an even stronger rule-oriented international order. Because in effect, climate change, migration, trade, human rights, one could go on and on: virtually every significant human activity today has a global dimension. And if we do not accept that reality and create global institutions that are necessary for solving those problems, then we will pay the price and, in that sense, I think we should not despair too much about this momentary retreat in international law. We should move forward with even greater faith and determination to create global justice, to create a world based on law rather than naked power. And we should have confidence that history is on the side of those who have that vision for our future.

KG: Thank you so much for your time and for sharing these thoughtful and timely insights, Professor Akhavan.

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A judge's gavel and world globe on a table
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Courts in Conversation: The International Criminal Court, the International Court of Justice and their mutual and respective roles in Addressing International Crimes

by Mark Kersten

Courts in Conversation: The International Criminal Court, the International Court of Justice and their mutual and respective roles in Addressing International Crimes

Introduction

In recent years, several wars and mass atrocity events have come under the scrutiny of not just one international court, but two. Situations like Russia's war in Ukraine, Israel's ongoing war in Gaza and occupation of Palestinian territories, atrocities against the Rohingya people of Myanmar, as well as the Taliban's persecution of women and girls, have fallen under the purview of both the International Criminal Court (ICC) and International Court of Justice (ICJ). Observers of international law are accustomed to these Hague-based institutions being confused for each other in media portrayals. This confusion is unlikely to abate given the increasing overlaps between the atrocity events that have come under each court's jurisdiction.

Few have attempted to articulate the consequences of this new dynamic or the relative strengths and weaknesses of each institution as venues to address the perpetration of international crimes, let alone their potential to work constructively and together to deliver a proverbial one-two punch of accountability for mass atrocities. With both institutions coming under increasing strain and with each susceptible to wider attacks on whatever remains of a rules-based order, such an assessment seems timely and is therefore the focus of this essay.

Before proceeding, it is important to briefly lay out the similarities and differences between the ICC and ICJ. Both are international courts based in The Hague, The Netherlands. However, the ICJ is an organ of the United Nations and deals exclusively with disputes between states. Created in 1945, the

ICJ's ambit is wide—much wider than international crimes. It covers, *inter alia*, territorial and boundary disputes between states, the lawfulness of certain kinds of nuclear weapons tests, reparations owed between states over breaches of international laws and, most recently, the obligations of states to address climate change. The ICJ can be asked to issue both advisory opinions, which carry legal authority but are not binding on states or, in so-called contentious cases, it can issue binding opinions in disputes where states accept to be bound to its rulings. Sometimes referred to as the "World Court," the ICJ deals with state responsibilities and therefore instructs state, rather than individual, behaviour.

While the ICC has a relationship with the United Nations and may, in some cases, be asked to investigate situations of mass atrocities by the UN Security Council, it is an independent body and institution established by its member-states. It is created by the acceptance of states of its founding treaty, the 1998 *Rome Statute of the International Criminal Court*. Established in 2002, the ICC is mandated to investigate and prosecute core international crimes—war crimes, crimes against humanity, genocide, and the crime of aggression—in the territories of states that have acceded to the *Rome Statute* and by citizens of its member-states. It can also investigate in situations referred to it by the Security Council and in states that have voluntarily accepted the jurisdiction over the Court. The ICC has 125 member-states and has numerous ongoing investigations occurring in situations such as Ukraine, Palestine, Georgia, Libya, Darfur, the Philippines, the Democratic Republic of Congo, the Central African Republic, and Afghanistan. It has prosecuted numerous individuals, including both state- and non-state actors. The ICC can only investigate and prosecute individuals and is therefore exclusively focused on individual criminal responsibility for the core international crimes under its jurisdiction.

While the key difference between the ICC and ICJ is their respective emphasis on individual versus state responsibility, one can nevertheless appreciate that such legal differences are not always apparent to certain constituencies. While the *legal* distinction between state and individual responsibility is clear, some will inevitably view the pursuit of individual responsibility for international crimes against government and state leaders as implicating the state itself, and judgements against certain states for violations of international law as implicating individual state leaders. For this reason, and even more so because both the ICC and ICJ are engaged in determining unlawful conduct in relation to the same situations of mass atrocities, a richer understanding of the relative strengths and weaknesses of these institutions' engagement in this area is of use to scholars, advocates, diplomats, and policymakers.

Overlapping courts

As noted above, the overlaps between the ICC and ICJ include contexts where international crimes and serious breaches of international law have been committed: Ukraine, Palestine, Myanmar, and Afghanistan. Additional overlaps may be forthcoming in contexts like Azerbaijan's expulsion of the Armenian population of the Nagorno-Karabakh enclave. Put simply, there are and will continue to be situations where both courts exercise their jurisdiction at the same time. The overlap between courts

examining both state and individual responsibility is not entirely new, with atrocities committed in the Balkans during the 1990s also triggering cases under international criminal law, at the International Criminal Tribunal for the former Yugoslavia (ICTY), as well as the ICJ. However, measured by the number of situations under consideration by the ICC and ICJ, the intensity of these overlaps has grown in recent years. This suggests that advocates of international law, many of whom work on both public international law before the ICJ and international criminal law matters before the ICC, may not see an unenterable firewall between what the ICJ does and what the ICC does. Indeed, why not double down and seek to address *both* state and individual responsibility for international crimes like genocide (as in the cases of Ukraine, Palestine and Myanmar) and such severe forms of discrimination against women and girls that it may amount to gender persecution (as with the Afghan cases)? After all, the perpetration of these kinds of atrocities requires both individual perpetrators as well as that of the state.

Amidst expanding overlaps, certain trends stick out. One is that allegations of genocidal violence have been far more common in ICJ cases than at the ICC. Indeed, in none of the above situations—Ukraine, Myanmar, or Palestine—has the ICC pursued charges of genocide against individual perpetrators, although investigations into each context are ongoing and we cannot prejudge their outcomes. In general, the ICC has been reluctant to prosecute genocide, issuing only one arrest warrant in relation to the crime, for former Sudanese President Omar al-Bashir who was likewise charged by the Court with war crimes and crimes against humanity.

What remains to be seen is whether the ICC and ICJ enter into any form of constructive dialogue in relation to overlapping subject matter. If, for example, the ICJ eventually comes to a determination that Israel or Russia have committed genocide in Gaza, Myanmar, or Ukraine, will that compel the ICC into issuing warrants for the likes of Israeli Prime Minister Benjamin Netanyahu, Russian President Vladimir Putin, or Burmese Acting President Min Aung Hlaing on allegations of genocidal conduct? If so, would the ICC rely on findings of the ICJ in doing so?

It seems probable that affirmative findings by the ICJ would place significant pressure on the ICC. Indeed, it would be odd if the ICJ determined that a state bore responsibility for violations of the 1948 *Genocide Convention* yet the ICC declined to act against individuals responsible for planning and perpetrating genocide. A more likely situation would be what transpired over genocidal violence committed by the Serbian army in Srebrenica in 1995; *both* the ICJ and the ICTY addressed the genocide, the former finding the Serbian state responsible for failing to prevent genocide and the latter in relation to the individual responsibility of perpetrators over genocide, including senior Serbian officials Radko Mladic and Radovan Karadži?. A notable determination of the ICJ's case was also that it found Serbia had wrongfully failed to cooperate with the ICTY in punishing the individuals who committed the genocide. Similar findings seem likely in future cases relating to breaches of the *Genocide Convention* where the ICC has concurrent jurisdiction.

The growing coincidence of the ICC and ICJ over the same conduct underlying mass atrocities raises

questions about the very relationship between state responsibility and individual responsibility. As suggested, if a state is found to be liable for genocide, it should follow that individuals are liable too. After all, and to paraphrase the famous judgement of the 1946 Nuremberg Tribunal, it is *men* and not the abstract entity of states that commit crimes against international law.

The costs and benefits of ICC and ICJ addressing international crimes

Insofar as cases at the ICJ and investigations conducted by the ICC coincide, it is helpful to assess their relative strengths and weaknesses. In what follows, I do so in relation to three parameters: (i) their ability to galvanize state support and engagement; (ii) their ability to withstand political interference; and (iii) the enforcement of their decisions. The analysis is far from exhaustive and does not touch on some key issues (such as the selectivity in cases before each institution). However, I hope it can represent an overture for a more sustained dialogue about the role of these courts against the backdrop of unrelenting attacks on the international rule of law.

(i) Galvanizing state engagement and support

Both the ICJ and ICC appear to have galvanized collective engagement and support (as well as their share of opposition) for their work in responding to atrocity crimes. This is evidenced by the coalitions that have either instigated or offered compelling support for specific cases. Such engagement and support have had significant symbolic and legal impacts, as evidenced by the following examples.

Prior to the 24 February 2022 invasion of Ukraine by Russia, the ICC had jurisdiction in Ukraine despite it not being a member-state of the Court, because of Kyiv's decision to voluntarily submit itself to the jurisdiction over the ICC under Article 12(3) of the *Rome Statute*. A limiting factor in the scope of the ICC's jurisdiction, however, was that the Prosecutor would require the approval of judges of the Pre-Trial Chamber to open an official investigation into the situation in Ukraine, a potentially cumbersome process. That changed on 2 March 2022, when thirty-nine states jointly referred Ukraine to the ICC. An official investigation into international crimes committed in Ukraine was commenced that very day. Since then, multiple arrest warrants have been issued for Russian authorities, most notably against President Vladimir Putin on charges of the war crime of forcibly transferring children from Ukraine into Russia and Russian-held territory.

The ICC's work on the situation in Palestine also enjoyed multilateral state support when, on 17 November 2023, Bangladesh, Bolivia, Venezuela, Comoros and Djibouti jointly referred the situation in Palestine to the Court. Unlike in Ukraine, this joint referral was a largely symbolic demonstration of support for the ICC; the Prosecutor had already opened an investigation in 2021, prior to the atrocities committed on 7 October 2023 and in its wake.

In the context of the ICJ, states have also come together in support of its cases. The case at the ICJ

over the alleged commission genocide against the Rohingya people by Myanmar was brought by The Gambia. However, it is important to note that Banjul brought the case with the full backing of the fifty-seven member-Organization of Islamic States. In addition, seven states - Maldives, Canada, Denmark, France, Germany, the Netherlands, and the UK – have joined the case against Myanmar as intervenors.

The ICJ's case over the legal consequences of Israel's illegal occupation of Palestinian territories likewise received the support of many states. Indeed, the case was brought to the ICJ as a result of 98 United Nations member-states requesting the Court's opinion on the occupation via a UN General Assembly resolution. In the proceedings against Russia over its alleged breaches of the *Genocide Convention* in Ukraine, some two-dozen states have filed to intervene alongside Ukraine.

Of course, the express support of states for certain cases before the ICJ and investigations by the ICC does not invariably translate into support for specific outcomes. Moreover, some cases, particularly those relating to atrocities committed in Palestine, continue to generate opposition from certain quarters, most loudly from the United States. There are thus varying levels of support and engagement across certain cases and contexts, illustrative of geopolitical differences, tensions, and divergent commitments to the international rule of law. This is certain to continue, and it remains an open question as to whether differences in opinions among states will promote or fracture commitments to the courts' work and whether they will remediate or exacerbate double standards in the application of international law.

(ii) Withstanding political interference and pressure

An important attribute of international courts is their capacity for resilience and therefore their ability to weather political storms instigated by state responses to their jurisdiction over politically sensitive subjects, such as genocide and war crimes allegations. On this count, both courts thus far appear robust, albeit with one facing far graver threats than the other. The ICC has had to prove its ability to resist concerted attempts to undermine it by states, and faces an unprecedented, even existential, campaign of political coercion from the United States, one that the Court's President has said may "jeopardise its very existence."

As its workload touches on the geopolitical interests of powerful states, particularly the United States, Israel, and Russia, the ICC has faced repeated attempts to interfere with its work. In 2023, it faced a serious cyberattack (almost certainly the doing of Moscow), one that has cost it millions of dollars to address. In 2024, repeated and long-standing attempts by the Israeli intelligence service Mossad to threaten and coerce ICC staff were revealed by journalists. And in 2025, the Trump administration took aim at the Court, passing legislation that would permit it to sanction not only ICC staff, but the institution itself.

To date, the Court has survived these attempts to interfere with its operations and mandate. It has continued its work undeterred, and even secured the arrest of former President of the Philippines Rodrigo Duterte over charges of crimes against humanity, a remarkable achievement for an embattled institution. Nevertheless, whether the ICC can withstand ongoing pressures and attacks on its operations and survive in its current configuration remains an open question, especially as conducting its work undeterred by external threats may lock the institution into a cycle of escalation with the United States.

Despite operating in the same theatres, including in Ukraine and Palestine, the ICJ appears to have been largely impervious to similar attempts to interrupt and interfere with its work. This may be in part because the vast majority of states accept its jurisdiction and typically choose to engage directly with the Court, even when facing serious charges relating to genocide and other international crimes. Of note here, both Myanmar and Israel participated in proceedings at the ICJ in relation to violations of the *Genocide Convention* (although Israel did not participate in proceedings related to the legal consequences arising from its unlawful occupation of Palestinian territories).

However, as the ICJ engages more regularly in questions of genocide, implicating and frustrating the perceived interests of major powers like the United States (via its ally in Israel) and Russia, it may very well come under increased scrutiny and even attack. Recent years and even more recent developments have taught advocates of international law that it is foolhardy to take hard-fought gains reflected in the post-WWII and post-Cold War rules-based order for granted.

(iii) Enforcement of decisions

Are ICJ or ICC decisions more likely to be enforced? The answer to this question is unclear, as both have struggled to have judgements in relation to the situations canvassed in this essay enforced. This fact should galvanize consideration as to how these courts may relate.

The ICC has no police force and therefore is incapable of enforcing the warrants it issues itself. Indeed, a truism demonstrated repeatedly over the history of the institution's life is that it is domestic political machinations and shifting dynamics that lead to the Court's arrest warrants being enforced. In the Duterte example, his arrest by police in Manila and surrender to The Hague pursuant to the ICC's warrant for him was only possible because of the collapse of the political alliance between Filipino President Bongbong Marcos and Duterte's daughter, Vice President Sara Duterte. In another example, that of Ivory Coast, former President Laurent Gbagbo was only surrendered to the ICC after he lost power to Alassane Ouattara, and the new government felt it advantageous for Gbagbo to be transferred abroad (he was later acquitted and returned to the Ivory Coast).

None of these kinds of shifts have transpired in the situations where the ICC is seeking to prosecute crimes concurrently with ICJ proceedings: Ukraine/Russia, Israel/Palestine, Afghanistan, or Myanmar.

No person targeted with an arrest warrant in any of these contexts has been detained, let alone transferred to the ICC. On the contrary, and as noted above, the lack of enforcement is not to say that the ICC's work struggles for relevancy; there is indeed justice in the pursuit of justice itself. But the enforcement record of ICC decisions in these contexts remains dismal.

The ICJ has had only nominally more success. It is important to note here that none of the cases regarding alleged breaches of the *Genocide Convention* by Israel in Gaza, Russia in Ukraine, or Myanmar in relation to the Rohingya people have been concluded. However, the Court's record in having its preliminary orders enforced is weak. Violence by all parties facing charges of genocide continues. In the context of the alleged genocide in Gaza, Israel has only clearly complied with a single order issued by the ICJ: to report to the Court on its conduct in relation to the ICJ's orders. Some of the ICJ's orders, particularly in relation to ensuring that adequate aid gets to a starving and suffering population, have been openly and repeatedly violated, with the denial of food, medicine, and energy supplies being used by Israeli authorities as a weapon of war and leverage in peace negotiations.

The decisions of both the ICC and ICJ are, of course, not only aimed at the particular state authorities under scrutiny but also the wider international community. In this respect, enforcement of decisions also remains paltry. All member-states of the ICC are under obligations to enforce the Court's arrest warrants, but some have refused to do so, including Mongolia, which hosted Vladimir Putin in September 2024. Others, like South Africa, have declined to allow Putin to visit. In relation to the warrant for Israeli Prime Minister Netanyahu, numerous ICC member-states—including France, Germany, and Poland—have claimed they would not enforce it and surrender Netanyahu to The Hague.

Some of the ICJ's decisions are also intended to be enforced by third parties. The Court's Advisory Opinion on the legal consequences of Israel's illegal occupation of Palestinian territories, for example, told all states (as well as financial institutions and banks) to end any activities or relations with Israel that would further the continued occupation of Palestine and not to recognize the situation of Israel's unlawful occupation of Palestinian territories as legal. It does not appear that states have changed their behaviour significantly since the release of the Court's Opinion.

In short, then, both the ICC and ICJ continue to face obstacles in having their orders and arrest warrants enforced. This fact should embolden further conversations on how the two might operate, if not in cahoots, than in a more constructive and coherent manner when addressing the same situations of mass atrocities.

Courts in conversation: 'All hands on deck'

A common refrain among international lawyers when the ICJ and ICC come up is to bemoan that they

are insufficiently distinguished and differentiated; if I had a dollar for every time I heard a law professor or professional bemoan a mistaken new story by saying “that’s the ICC, not the ICJ!”, I’d be a much wealthier man.

But the apparent firewalls in our treatment of and thinking about these courts and their roles in addressing situations of mass atrocity crimes may no longer be so sustainable. They are different courts; but there are open questions as to how they can simultaneously contribute to addressing the perpetration of international crimes. The overlaps in subject matter between the ICJ and ICC are growing, and there is no reason to believe the trend will be reversed. Scholars, advocates, and policymakers should think through what this means and how the two courts might speak to each other in ways that foster greater accountability for international crimes.

Speaking to the fact that the ICJ and ICC are examining the conduct of the Taliban towards women and girls, Alex Neve recently stated that having both courts in play is “consequential, it’s historic, and it’s groundbreaking.” What likewise would be remarkable is if, by way of conversation, cooperation, and mutual respect, the work of each court strengthened the work of the other. With the perversion of the rules-based order and the seemingly relentless commission of mass atrocities, this moment calls for all hands—and therefore both courts—on deck.

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Photo: Mark Kersten

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Legal hammer placed on the desk
dee karen | shutterstock.com

The ICJ Advisory Opinion on Climate Change: Potential Implications for the Business and Human Rights Normative Framework

by Sara Seck & Penelope Simons

Introduction

The Advisory Opinion (AO) proceedings on climate change currently before the International Court of Justice are momentous for a number of reasons. Other international tribunals, including the European Court of Human Rights, the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR) have considered or are considering state obligations in relation to protecting against anthropogenic greenhouse gas (GHG) emissions. However, this is the first time that an international tribunal will consider the universal legal obligations of states with respect to protecting against climate change and the legal consequences that would flow from breaches of those obligations with respect to their impacts on particular states and present and future generations. In addition to clarifying the obligations of states with respect to preventing GHG emissions, this AO could be consequential for the business and human rights (BHR) normative framework on a number of fronts, and we address two key implications here. First, it is likely to clarify the applicable international law with respect to states obligations to regulate the GHG emissions produced by fossil fuel companies within their jurisdiction, which it may determine includes international human rights law (IHRL). Second, assuming that IHRL is found to be part of the applicable law, the ICJ could also weigh in on the scope of the state obligation to protect human rights, from both a geographic and normative perspective. Under international human rights law states have an obligation to respect, protect and fulfil human rights. The obligation to protect refers to the duty to exercise due diligence with respect to private actors to ensure that they do not violate the rights of individuals and communities. This includes the obligation to take regulatory, administrative and other action and, where human rights violations occur, to investigate and provide effective remedies.

Over 90 states participated in the ICJ proceedings, submitting written statements, written replies and making oral presentations on their views on a variety of issues in the hearings held in December 2024. In section 1, we describe the proceedings and their genesis. In section 2, we discuss states' divergent views on the applicable law, and in section 3, we consider the differing positions of states on the question of geographical scope of states' IHRL obligations and on the legal status of the right to a clean, healthy and sustainable environment. We conclude with some thoughts on the implications of the various positions of states on these issues for BHR.

1. The Advisory Opinion Proceedings at the ICJ

The request for an AO on the climate change obligations of states was put before the ICJ following the adoption of resolution 77/276 by the United Nations General Assembly (UNGA) on March 29, 2023. The quest for this UNGA resolution began in 2019 with eight law students in Vanuatu who were looking for legal avenues to address climate change, eventually forming the Pacific Island Students Fighting Climate Change. Having secured the support and leadership of the Vanuatu Government, the 2023 UNGA resolution was then developed by a core cross-regional group of eighteen states including Antigua and Barbuda, Bangladesh, Germany, Mozambique, New Zealand, Sierra Leone, Singapore and Vietnam, among others. During the same period, the Commission of Small Island States on Climate Change and International Law (COSIS) was created, open to members of the Alliance of Small Island States, and on December 12, 2022 a request was submitted to the ITLOS seeking an AO on the obligations of states in relation to climate change under the law of the sea. While these are different initiatives, it is anticipated that the findings of the ITLOS AO, released on 21 May 2024, will be relevant to the deliberations of the ICJ. Notably, while IHRL was not raised explicitly in the questions before ITLOS, the Tribunal nevertheless observed "that climate change represents an existential threat and raises human rights concerns" and some ITLOS judges issued separate Declarations suggesting that the Tribunal's Opinion "could have been more comprehensive and up to date" had it reflected on recent human rights developments (e.g. Judge Pawlak). Perhaps most relevant to the ICJ is the ITLOS' conclusion that, despite submissions to the contrary, state obligations under UNCLOS to protect and preserve the marine environment are separate from those under the climate regime including the Paris Agreement, and so failure to comply with obligations under UNCLOS to "take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions" would engage international responsibility for that State.

The specific questions put before the ICJ go beyond those in front of ITLOS, explicitly referencing sources of IHRL and seeking clarity on legal consequences:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

In the following sections, we will consider the views of select home states of carbon majors and other fossil fuel producing states on the one hand and select climate vulnerable states, on the other. Specifically, we consider arguments over the applicable law for determining state obligations to prevent GHG emissions and whether it includes IHRL and, to the extent that IHRL is considered part of the applicable law, the geographic and normative scope of states' obligations to protect human rights.

2. The Applicable International Law and the Obligations of Fossil Fuel Producing States

Thomas Burri, who has compiled and coded all of the written and oral statements of states made up until the end of the oral proceedings in December 2024, found that 15% of states argued that the relevant law was confined to the UNFCCC, the Kyoto Protocol and the Paris Agreement, and 18% did not address, or provide a clear answer on, this issue. On the other hand, 67% of states argued that the applicable international law was much broader than the climate regime treaties and included IHRL and the rules of customary international law (CIL) requiring states to exercise due diligence to ensure that their territory is not used in ways that cause harm to other states and prohibiting transboundary harm. These two positions are generally, but not exclusively split down fossil fuel producing states/climate vulnerable states lines. Unsurprisingly, home states of carbon majors argued for a narrow interpretation of the law applicable to determining states' obligations to prevent GHG emissions. For example the Peoples Republic of China (PRC), Saudi Arabia, the Russian Federation (Russia), the United Kingdom (UK), and the United States (US) all pointed to the climate regime as the primary source of state obligations, Russia also argued that the CIL obligation to prevent transboundary harm is relevant but subsidiary to the climate regime. Saudi Arabia, the US and Russia underlined the irrelevance of IHRL to determining states' climate obligations, while the PRC contended that IHRL obligations are subsidiary to the climate regime and have limitations in terms of determining state obligations. Canada noted the primacy of the UNCCC and the Paris Agreement, while noting that the impacts of climate change on human rights does not "broaden the scope" of states' IHRL obligations.

On the other hand, many climate vulnerable states, citing the principle of systemic integration, maintained that the law applicable to state obligations was much broader and that states have CIL obligations that predate and go beyond the climate treaty regime. The Republic of Vanuatu (Vanuatu), for example, argued that, in addition to the climate treaties, CIL applies, including specifically the obligation of due diligence, the obligation to prevent significant harm to the environment. Furthermore, the obligations imposed by the rights set out in the UDHR, the obligations imposed by the right to self-determination, the duty to protect and preserve the marine environment, the right to a clean and healthy environment, "the duty to co-operate and the obligations arising from the principle of good faith", the ICCPR, the ICESCR and UNCLOS form part of the applicable law. The Melanesian Spearhead Group (MSG), comprised of Vanuatu, Fiji, Papua New Guinea, Solomon Islands and the Kanak socialist National Liberation Front, argued that the ICJ should consider the "entire corpus of international law". The Organisation of African, Caribbean and Pacific States (OACPS) pointed to their state members as "sacrifice zones", and took a similar view on the applicable law, adding the obligations of states arising from the prohibitions against genocide and racial and gender discrimination. A key contention among these states and organizations was that the CIL obligations of due diligence and the prevention of transboundary harm date back to the 19th and mid-20th century respectively (e.g. Vanuatu; MSG) and fossil fuel producing states had "actionable knowledge" of the impacts of fossil fuel extraction on the climate from at least the 1960s (OACPS; see also Vanuatu.) The EU, while pointing to the primacy of the Paris agreement, also argued that pursuant to the principle of systemic integration, the applicable law includes the climate treaties, CIL and IHRL. It contended that under IHRL, states have duties to prevent human rights violations and to exercise due diligence with respect to private actors, and that IHRL imposes obligations on states "to take mitigation and adaptation measures" to address climate change.

At the conclusion of the oral proceedings in December 2025, four Judges posed questions. Of these, two are of particular relevance to BHR and especially the obligations of states in relation to carbon majors. First, Judge Cleveland sought to clarify what, if any, are the "specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system" from GHG emissions, including with respect to subsidies. Several states, including Saudi Arabia and Russia, took the position that it was beyond the ICJ's jurisdiction to ask this question, as neither of the questions asked of the ICJ nor the climate treaty refer to fossil fuel production. In any case, the climate regime does not prescribe particular measures for states to implement, instead adopting a flexible approach of good faith measures (see e.g. US). Ultimately, the aim of the climate treaties is to reduce emissions produced from a state's territory which requires taking into account the use of carbon capture utilization and storage technologies, energy efficiency and offsets whether from forests or other ecosystems. Consequently, "[t]here are no grounds to believe that the State where fossil fuels are produced (extracted) has a greater scope of obligations than, for example, the State that buys fossil fuels from abroad and produces other goods from them" (Russia). Canada reminded the court that permanent sovereignty over natural resources within state territory was a general principle of international law, then pointed to Article 4 of the UNFCCC where explicit reference is made to the need for developed State parties when implementing response

measures to consider the needs and concerns of developing countries and especially “[c]ountries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products” (UNFCCC Article 4(8)(h),(10)). Furthermore, the COP28 Global Stocktake decision from 2023, calls on states to transition “away from fossil fuels in energy systems, in a just, orderly and equitable manner.”

By contrast, climate vulnerable states went beyond the climate regime to consider other sources of international law, including IHRL, the CIL rules of due diligence and prevention of transboundary harm, that centre climate justice. For example, OACPS stated that “certain States, for decades, have produced, licensed, and subsidised fossil fuels knowing full well that the resulting massive greenhouse gas emissions would dangerously interfere with the climate system” and this conduct has “already inflicted serious harm.” In the climate context, due diligence requires “prompt, deep and sustained emissions reductions” and these are “impossible to achieve without phasing out fossil fuel production and related subsidies”, an obligation that also arises under IHRL. Failure to comply with this due diligence obligation constitutes an internationally wrongful act triggering legal consequences under the law of State responsibility, and must be viewed as a composite act as “the cumulative effect [over decades] … has gravely undermined the climate system and disproportionately harmed States in Africa, the Caribbean, and the Pacific – regions long subjected to colonial exploitation and now at the frontline of the climate crisis.” OACPS then urged the ICJ to clarify that “guarantees of non-repetition require legal safeguards against the development and use of geoengineering technologies” which are heavily promoted by the fossil fuel industry with their promise used to justify continued production, despite these being unproven and inviting “new dangerous interferences with the climate system with unimaginable risks to human and peoples’ rights.”

While similar views were expressed in the submission of the COSIS, the focus for COSIS was upon the importance of foregrounding the best available science of the IPCC and the need to not exceed the remaining carbon budget for 1.5 degrees. Accordingly, “States have an obligation to take all necessary measures to transition away from fossil fuels to ensure protection of the climate system and other parts of the environment from anthropogenic GHG emissions. This is the necessary conclusion of taking account of the best available science to inform the obligations of States under customary and conventional international law.” (COSIS; see also Vanuatu and the MSG).

3. The Geographic and Normative Scope of States’ International Human Rights Obligations

Conceptualizing the geographic scope of the state duty to protect human rights from environmental harms necessitates moving beyond the bright line of the territorial vs. extraterritorial dichotomy prevalent in IHRL, to account for the nuanced spatial dimensions of ecological relationships, whether transboundary, global commons, or, as with climate change, a common concern of humankind. The geographic scope of the state duty has grave climate justice implications, perhaps especially in relation to corporate climate accountability, and is informed by the normative scope, notably, recognition of the right to a clean, healthy and sustainable environment.

The geographical scope of states IHRL obligations has important implications for the BHR normative framework which is built around the idea that states have IHRL obligations to regulate the domestic and transnational conduct of business actors domiciled within their territory and to provide effective remedies where violations occur. In the context of the AO proceedings, the global division on this issue appears to be split along north/south lines, although it is less clear cut than the question of the applicable international law discussed above. 33% of states did not address this issue. Burri's study shows that 19% argued that such obligations are limited to a state's territory and 33% contended that such obligations do extend beyond a state's borders. A number of carbon major home states and other fossil fuel producing states argued that the applicable law was confined to the climate regime, and they ignored the issue of the scope of human rights. Others, such as the PRC, argued that human rights obligations were territorially restricted. Canada also supported this view and noted that "only under very specific exceptions" can states incur extra-territorial [IHRL] obligations." The EU submitted that states' IHRL "obligations as regards the detrimental effects of climate change may apply extraterritorially, within the limits of States' jurisdiction/effective control."

In contrast, climate vulnerable states asserted that IHRL obligations apply beyond state boundaries and that the notion of jurisdiction should be interpreted broadly. The MSG, for example, stated that even the ICCPR with its jurisdictional provision, imposes obligations on states to respect and protect the human rights of persons subject to their power or effective control beyond state boundaries and that persons in other states affected by climate change fall within the jurisdiction of a state, where the latter has the ability to regulate the source of its GHG emissions. Vanuatu pointed to the transnational dimension of IHRL obligations in relation to various human rights treaties, the right of self-determination and the right to a healthy environment. Drawing on the IACtHR AO on the Environment and Human Rights, OACPS noted that in relation to the human rights implications of environmental harm, the notion of state jurisdiction must be broadly interpreted to include persons beyond a state's boundaries that are affected by its conduct.

The second question of relevance to BHR that was posed at the conclusion of the oral proceedings was from Judge Aurescu who sought clarity on the legal content of the right to a clean, healthy and sustainable environment in international law, and its relationship with other human rights. Not surprisingly, several fossil fuel producing states denied that this right exists in IHRL (US) or that it has entered "the corpus of international law" (Saudi Arabia), or that it has "crystallized in customary international law" (Russia). Of note, Canada chose not to respond to this question. However, in its written statement it noted that, while it was supportive of the "international momentum" behind the right, there was a lack of international agreement as to the right's content and scope. EU contended, in its written statement, that the right was an emerging rule of CIL but did not yet reflect the necessary state practice and *opinio juris*.

By contrast, climate vulnerable states were clear that the right to a clean, healthy and sustainable environment not only exists, but is firmly established as a human right that is indispensable for the enjoyment of other human rights including to life, food, health, water, housing, culture and self-

determination (OACPS). The right has “crystallised into a norm of customary international law” and “also exists as a general principle of law recognised by the community of nations” (OACPS; see also Vanuatu and the MSG). At least 53 states and international organizations recognized the right in their submissions, and “some four-fifths of States have recognized this right in their domestic law, at the national or the regional level” (COSIS). Furthermore, due to its essential link with the right to self-determination, the right to a clean, healthy and sustainable environment may be a *jus cogens* norm (COSIS; Vanuatu and the MSG). The substance of the right includes a safe climate, as well as thriving ecosystems and biodiversity. It is a right with both individual and collective dimensions, and a universal value, that applies to present and future generations. Moreover, the scope of the right applies to both the prevention and curtailment of environmental harm that threatens individuals within the state’s jurisdiction while also extending beyond political borders due to the transboundary character of climate harm OACPS; COSIS; Vanuatu and the MSG).

Conclusion

The AO proceedings could have important ramifications for a number of areas of international law, including BHR. A significant number of states believe that the law applicable to the determination of state obligations to address GHG emissions includes CIL and IHRL, going beyond the climate regime. Should the ICJ conclude that the CIL obligations of due diligence and prevention of transboundary harm apply (as we believe they must), any further clarifications with respect to fossil fuel producing states could also inform the obligation to *protect* under IHRL more generally and reinforce the obligation to take steps to regulate private actors and provide effective remedies. Should the ICJ find that the applicable law includes IHRL, it could also clarify the geographical and normative scope of such obligations. The geographical scope of the IHRL *obligation to protect* remains contested, particularly by home states of transnational corporations (like Canada) who maintain that, if IHRL does impose border-crossing obligations, they are exceptional. Based on Burri’s data there are many states who see these obligations as not territorially limited but the portion of states that did not address this issue was not insignificant. The lack of submissions on this point could reflect two positions: that IHRL was not applicable to the determination of the state obligations with respect to GHG emissions and its geographical scope was therefore irrelevant; or (preferably) an assumption that the answer is obvious in the climate change context given that climate change is a common concern of humankind, and due to the principle of common but differentiated responsibilities and capabilities, according to which developed states, and especially fossil fuel producing states responsible for historic emissions, bear a greater responsibility than climate vulnerable states. Finally, the ICJ may clarify the normative status of the right to a clean, healthy and sustainable environment, with broad implications for BHR. It is to be hoped in a time of global ecological crisis that such a clarification will be responsive to the voices of climate vulnerable states and their peoples, including the youth who took the initiative to seek this important AO in the first place.

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Birds eye view of forest with court symbol in the centre
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An Epitome of Modern Environmentalism: Canada’s Contribution to the ICJ Advisory Opinion on Climate Change

by Christopher Campbell-Duruflé

Introduction

Canada and the United States of America made a foundational contribution to the development of international environmental law by submitting to the *Trail Smelter arbitration* after a sulphur dioxide-

emitting smelter in British Columbia caused damage to farmlands in the State of Washington in the 1920s. The arbitration famously concluded in the existence of an international obligation of states to refrain from causing transboundary harm, breached by Canada:

> [U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. (p. 1965)

A century later, Canada is involved once again in the development of this obligation, since then known as the harm prevention rule, affirmed in the 1992 Rio *Declaration on Environment and Development* (Principle 2), and recognized as part of customary international law. This time, however, Canada is not in the respondent's position, and the harm does not arise between contiguous states. Rather, on March 29th, 2023, the United Nations ("UN") General Assembly unanimously requested an advisory opinion by the International Court of Justice ("ICJ") on states' obligations regarding the Earth's climate system. The request was spearheaded by the Republic of Vanuatu as a result of successful campaigning by Pacific Islands Students Fighting for Climate Change, a 2019 initiative by law students at the University of the South Pacific.

This article provides a critical appraisal of Canada's written and oral submissions to the ICJ from a doctrinal point of view. I assess three key legal arguments made by Canada in light of international legal sources, namely that 1) there is no obligation under customary international law, including the harm prevention rule, that applies to protecting the climate system, 2) the *UNFCCC* and the *Paris Agreement* displace more general rules from customary international law and other treaties, and 3) there are significant limits to international human rights law in this context, including an absence of positive, extra-territorial, or inter-generational obligations.

My perspective is also critical. I argue that Canada's approach to international law reflects what Usha Natarajan and Kishan Khoday describe as "modern environmentalism." This approach is characterized by two contradictions: the meaning about the environment that is generated by international lawyers prioritizes perspectives from Global North countries despite growing North-South inequalities, and nature is defined as an object of limitless capture despite the Earth's clear planetary boundaries. Both contradictions run through Canada's arguments, despite a repeated commitment to 'do its part' in response to the climate emergency.

Canada's Commitment to 'Do its Part'

Time and again, Canada affirmed its commitment to take effective climate action. The Conservative Government's pre-*Paris Agreement* pledge from 2015 asserted that "Although Canada represents only 1.6% of the world's greenhouse gas emissions, Canada remains committed to doing our part to address climate change." The following Liberal Government reasserted that "Canada is committed to

doing its part to fight global climate change and to achieve its NDC and net-zero emissions by 2050" in the 2021 Nationally Determined Contribution. The same note was struck at COP 29 last November by the Minister of Environment and Climate Change: "We will do our part to drastically reduce global emissions while creating good-paying jobs in the clean economy. Canada understands its responsibility".

Other branches of government have expressed the same understanding. In 2021, Parliament adopted the *Canadian Net-Zero Emissions Accountability Act*, affirming that "climate change is a global problem that requires immediate and ambitious action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians." Likewise, the Supreme Court of Canada recognized in its *References re Greenhouse Gas Pollution Pricing Act* that "Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions."

Yet Canada's per capita C02 emissions remain among the highest in the world. National emissions have *increased* from 698 MtCO2e in 2021 to 708 MtCO2e in 2022 as part of the pandemic rebound. These levels are insufficient to keep the planet within 2°C of temperature increase, let alone 1.5°C, and are not aligned with fair shares calculation of the dwindling global emissions budget, whereby historical emissions and current capacity to decarbonize are considered.

Canada's Contribution to the Legal Analysis

Alongside 131 other states, Canada co-sponsored UN General Assembly Resolution 77/276, which referred two questions to the ICJ:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment […]?

Canada then contributed to the court's analysis in three ways: 1) a written statement on March 20th, 2024, 2) oral submissions on December 3rd, 2024, and 3) a written reply to questions from the bench on December 20th, 2024. The following key legal arguments can be identified.

a. No Customary Obligation Given the Newness of Climate Change

Canada's core contribution to the legal analysis is the argument that there is no obligation, under customary international law, to avoid causing significant harm to the climate system. The written

statement submits that “Given the relative newness of climate change as a subject at international law, it would be difficult to conclude that there yet exists a norm protecting against the effects of climate change that carries sufficient practice and opinio juris” (para 32). Rather, Canada claims that “In the context of climate change, the earliest international obligations that directly arise are those found in the [UN Framework] Convention and the Paris Agreement,” thereby laying a foundation for the *lex specialis* argument that I discuss below. Canada reiterates this position in its oral submissions and argues that, instead, the harm prevention rule “informs climate action and should therefore, to the extent possible, be interpreted consistently with the obligations found under the climate instruments” (para 19).

Canada’s response to a question posed by the Honourable Judge Sarah Cleveland —what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system?— is aligned with this position. The bulk of the answer focuses on the *UN Framework Convention on Climate Change* (*UNFCCC*) and the *Paris Agreement* and does not engage with how the harm prevention rule could apply. By contrast, Canada notes that the customary principle of cooperation is relevant “when assessing responses to fossil fuel production and its impact on greenhouse gas emissions.”

Canada concludes its oral submission by reiterating that, short of a violation of the obligations contained in the *UNFCCC* and the *Paris Agreement*, a state cannot be found responsible for an internationally wrongful act because of its climate record (para 42). The *Trail Smelter* precedent, it must be understood from this approach, is simply of no moment to climate change.

b. Lex Specialis Derogat Legi Generali

Canada’s second contribution can be described as a *lex specialis* argument, to the effect that the specific obligations contained in the *UNFCCC* and the *Paris Agreement* displace more general rules from customary international law and other treaties. For example, Canada’s written statement submits the following: “While recognizing that States have obligations related to climate change under other treaties, those other treaties should not be interpreted as imposing international legal obligations that are contrary to those carefully negotiated through the international climate regime” (para 10).

This argument gained particular salience after the International Tribunal on the Law of the Sea released its own Advisory Opinion in which it concluded that the *UN Convention on the Law of the Sea’s* (*UNCLOS*) marine pollution provisions apply to greenhouse gases. Canada acknowledges this development in its oral submission, as well as the existence of the international principles of common but differentiated responsibilities, intergenerational equity, polluter-pays and the precautionary principle. But, it retorts that *UNCLOS* and these principles cannot create obligations that are incompatible with those found in the climate regime. At best, it suggests, such principles “might inform the interpretation of legal obligations under the [UN Framework] Convention and the Paris Agreement”.

c. A Limited Human Rights Framing

Early on in its written statement, Canada recognizes the challenges posed by climate change to human rights, including how "diminishing access to traditional food sources exacerbate[s] existing challenges and health stressors for Indigenous peoples" (para 5). In a dedicated human rights section, it also supports the "international momentum to highlight the connection between a healthy environment, climate change, and the enjoyment of human rights" (para 24) and a "human-rights based approach to adaptation and mitigation measures" (para 26).

Canada submits to the ICJ that this human rights framing has many limits. The following are of particular significance: 1) that "there is currently no common or internationally agreed upon understanding of the content and scope of a right to a clean, healthy and sustainable environment," 2) that the right to life does not create "positive obligations on States to protect against any foreseeable threat to the full enjoyment of this right" and is not informed by international environmental obligations, 3) that "the jurisdictional competence of a State is primarily territorial" and that extra-territorial obligations only arise in very specific exceptions, and that 4) "international human rights law does not guarantee rights of future generations but rather seeks to protect and promote individuals' human rights in the present." (paras 24-29 of the written statement, echoed at paras 24-35 of the oral submissions)

Critical Appraisal: An Epitome of Modern Environmentalism

a. No Customary Obligation Given the Newness of Climate Change

Canada's core submission to the ICJ is that there is no customary "norm protecting against the effects of climate change." This approach differs from that taken by many participants in the proceedings, according to which the harm prevention rule applies to excessive levels of greenhouse gas emissions. It also diverges from the International Law Commission's 2001 articles on Prevention of Transboundary Harm from Hazardous Activities. The Commission makes it clear that the rule applies to harm to areas "beyond the limits of national jurisdiction"—known as part of the global commons—and defines hazardous activities broadly and objectively:

> [A]n activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

One of the world's foremost scholars of the harm prevention rule, University of Toronto law dean Jutta Brunnée, has commented that emissions levels are logically captured by this definition: "it should not be difficult to establish the requisite risk. Indeed, we now live in a world of high probability of disastrous climate harm, certainly as far as small island nations are concerned." The Inter-American

Court of Human Rights, in its 2017 Advisory Opinion on the environment and human rights, also indicated that the general rule applies to preventing climate change and has been influential in shaping treaty-making on this topic:

> The prevention and regulation of transboundary environmental pollution has resulted in much of international environmental law, through bilateral, regional or multilateral agreements that deal with global environmental problems such as ozone depletion and climate change. (para 96)

Canada's argument that, given the "relative newness of climate change," there is no customary "norm protecting against the effects of climate change" implies that the harm prevention rule itself does not apply to greenhouse gas emissions. While the argument can be made, it is not a compelling one. It also reflects the contradictions of modern environmentalism by suggesting that this rule could allow excessive emissions to continue when 1.2 billion people, primarily in South Asia and Sub-Saharan Africa, are currently at high risk from climate hazards and by downplaying the scientific evidence readily available since at least the 1979 World Climate Conference. The Center for International Environmental Law responded with the criticism that "major polluters, including the US, UK, Russia, China, Germany, Saudi Arabia, Canada, Australia, Norway, and Kuwait, found themselves isolated in their attempts to play the legal system to serve their self-interests and insulate themselves from accountability."

b. Lex Specialis Derogat Legi Generali

Canada's second submission is the lex specialis argument, according to which the specific obligations contained in the painfully negotiated UNFCCC and Paris Agreement displace more general rules of international law (customary and treaty-based). In this case, the legal debate is structured primarily by the International Law Commission's articles on the Responsibility of States for Internationally Wrongful Acts. Article 55 addresses situations where internationally wrongful acts "are governed by special rules of international law" but, as the Commission points out in its commentary:

> "[f]or the lex specialis principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other."

In another study, the Commission focused on the fragmentation of international law between specialized regimes. It put forward the interpretive principle of harmonization to avoid such inconsistencies in the first place: "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations." (para 4)

Professor Benoit Mayer, from the University of Reading, categorically rejects the *lex specialis* argument: "There appears to be no actual inconsistency between the climate regime and the no-harm

principle or the law of state responsibility, and there is certainly no consensus to exclude the application of general international law to climate-related subject matter." Rather, Mayer argues that the climate regime can assist states in complying with pre-existing rules of international law (e.g., by building political momentum). David Boyd, professor at the University of British Columbia and former UN Special Rapporteur on human rights and the environment, is more trenchant; for him, the suggestion that the climate regime has lessened the legal standard of state behaviour regarding the climate system is a "ridiculous argument."

Again, Canada's stance exemplifies modern environmentalism. The country claims to be 'doing its part' in its UN climate pledges while, at the same time, working to soften the applicable rules through its legal arguments. The "best available science," referred to at Article 4 of the *Paris Agreement*, does not accommodate this contradiction, which also runs counter to the Minister of Foreign Affairs' 2021 clear mandate to "continue Canadian leadership on international efforts to combat climate change."

c. A Limited Human Rights Framing

Canada focuses on a human rights-based approach in its oral submissions, including non-discrimination when taking climate measures, public participation in policy-making, public access to environmental information and education, freedom of expression, association and peaceful assembly as it relates to environmental action, and ensuring access to justice in environmental matters (para 26). This framework is useful to guide initiatives such as renewable energy projects or workforce transition programs but remains highly domestic in focus.

Indeed, Canada's pushback against "positive obligations on States to protect against any foreseeable threat to the full enjoyment" of the right to life makes it unclear where it stands on obligations applicable to *some foreseeable threats*. Addressing these threats, in turn, is important to safeguard human rights in Canada, but also in highly vulnerable countries such as Vanuatu. Obviously, as the Ontario Court of Appeal recently restated in *Mathur v. Ontario*, "s. 7 of the *Charter* has not yet been interpreted to 'place a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person'" (para 39). Yet the scope of the right to life under international human rights law differs and is guided by the well-recognized framework "to respect, to protect and to fulfil" that implies positive duties.

In the European Court of Human Rights' first major climate case, for example, *Verein Klimaseniorinnen Schweiz v. Switzerland*, the Court interprets the right to life as encompassing a "duty […] to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change […] such as to guarantee rights that are practical and effective, not theoretical and illusory" (para 545). Likewise, the Inter-American Court of Human Rights found, in the previously mentioned Advisory Opinion, that "to respect and ensure the rights to life and personal integrity, in the context of environmental protection, States must fulfill a series of obligations with regard to both damage that has occurred within their territory and transboundary damage" (para 125).

The first of these obligations is one of prevention and, as I have argued with Dr. Sumudu Atapattu, teaching professor at the University of Wisconsin, its due diligence standard can logically be applied to greenhouse gas emissions. Taking the opposite route matches what IPCC lead author Dr. Adil Najam has described as "a more parochial approach to domestic policy unencumbered by global responsibility." It epitomizes modern environmentalism once again given Canada's acknowledgement of the harmful impacts of climate change on Indigenous peoples, many communities of whom can be described as pertaining to the Global South within the Global North.

Conclusion

This article scrutinized Canada's written and oral submissions to the ICJ advisory proceedings on climate change. The country played a constructive role, co-sponsoring the request at the UN General Assembly and actively engaging in the legal debate. This goes some way toward answering the call by Payam Akhavan, Human Rights Chair at Massey College, for the country to "strengthen the institutions that are vital for global governance" at this historical juncture.

The substance of Canada's contribution is more disappointing. If it had its way, the ICJ's advisory opinion would conclude that neither the harm prevention rule nor treaties like the *International Covenant on Civil and Political Rights* apply to greenhouse gas emissions and that the main applicable framework is the *Paris Agreement*'s cyclical pledge-and-review architecture. This stance epitomizes modern environmentalism, given the catastrophic consequences that current pledges (associated with 2.1 to 2.8 °C of global warming) would have for all of us, but especially for vulnerable populations around the world.

Canada's contribution might not seem all that surprising from the perspective of domestic politics, where how to 'do our part' continues to sow intense division. The appearance of Canadian officials at the Peace Palace in the Hague may thus have a twin value. Firstly, it gives Canadians an occasion to reflect on whether they prefer a rules-based global response to the climate emergency or one that privileges unilateral action and, more generally, on their complicated relationship with international law . Secondly, it gives them ample notice that customary international law is ever-evolving and that, as in the *Trail Smelter* arbitration, applications against individual states that fall short of due diligence may be forthcoming.

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A girl next to a house destroyed by war.
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‘Preventing births’ as a gender-neutral harm: Making sense of reproductive violence in South Africa’s genocide case against Israel

by Heidi Matthews

Introduction

In its genocide case against Israel at the International Court of Justice (“the Court”), South Africa alleges that, in the period since October 7, 2023, Israel has imposed measures intended to prevent births within the Palestinian group in Gaza. To the extent that South Africa’s case for ‘preventing births’ relies on the traditional framing of reproductive justice, wherein violations are conceptualized in terms of restrictions on reproductive (read: women’s) health and capacity, it risks advancing the human rights of ‘women and children’ at the expense of a more progressive development of the law of genocide. This article uses the ongoing genocidal violence in Gaza to argue that ‘preventing births’ should be decoupled from an attachment to conflict-related sexual and gender-based violence which, despite some limited advances to include men and boys within its purview, remains overwhelmingly dedicated to advancing the rights of women and girls in war.

While South Africa’s memorial, filed with the Court on 28 October 2024, is not yet public, its general case theory can be gleaned from its Application Instituting Proceedings (“Application”), its oral submissions relating to its request for provisional measures, and its public dossier of openly available evidence. On the basis of the information available, this article critically engages South Africa’s case with a view to (re)constructing its approach to ‘preventing births’ as a genocidal act. In short, it argues that Gaza offers us an opportunity to interpret and apply the law on ‘preventing births’ in a way that adequately accounts for reproductive violence committed against all genders.

(Re)constructing South Africa's argument

Article II of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* ("*Convention*") enumerates five acts that, when committed against members of a protected 'national, ethnical, racial or religious group' with the 'intent to destroy' that group, 'in whole or in part', constitute the international crime of genocide. Of all these acts, 'imposing measures intended to prevent births' has received the least judicial and scholarly attention. Indeed, 'preventing births' has never been prosecuted as an act of genocide before an international court.

In its Application, South Africa alleges that Israel is imposing measures intended to prevent births as a standalone act of genocide under Article II(d) of the *Convention* (Application, paras. 114, 125, 144). It also alleges that such measures constitute or contribute to adverse 'conditions of life' within the meaning of Article II(c), which makes 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' a genocidal act (Application, paras. 1, 4, 43, 95–100). The Application, which references evidence covering the short period between October 7 and December 29, 2023, details multiple acts allegedly amounting to measures intended to prevent births. These include killing Palestinian women and girls, including intentional killings of pregnant women; forcibly displacing pregnant women and babies under severe conditions of deprivation of food and access to medical care, shelter and hygiene; and the deprivation of critical medical supplies and other basic necessities of life. The latter has led to the deterioration of conditions of life in which women are now forced to give birth without adequate care, pain relief and medicines. There are also sharp increases in otherwise medically unnecessary hysterectomies, placental abruptions and a general deterioration of maternal and newborn health. South Africa emphasizes the differential impact of Israel's military activities on women, noting that women and children made up 70% of individuals killed through direct attacks in the Strip. Since that time, the UN Office of the High Commissioner for Human Rights has confirmed this casualty distribution, reporting that as of April 30, 2024, over 46% of fully identified casualties were women and girls.

In its oral submissions on provisional measures, South Africa framed 'preventing births' as a form of gender-based violence. Referencing reproductive violence exclusively in terms of harm to women's reproductive capacity, it submitted that "blocking the delivery of life-saving aid, including essential medical kits for delivering babies, in circumstances where an estimated 180 women are giving birth in Gaza each day" constitutes a measure intended to prevent births within the Palestinian group. In its first order indicating provisional measures against Israel, the Court 'takes note' of the then UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator's view, as of January 5, 2024, that: "A public health disaster is unfolding. Infectious diseases are spreading in overcrowded shelters as sewers spill over. Some 180 Palestinian women are giving birth daily amidst this chaos."

Reproductive violence and the limitations of the 'women and children' frame

At the January 11, 2024 hearing on provisional measures, South Africa overtly adopted the reproductive justice frame when addressing its case for 'preventing births' as an act of genocide. It

relies heavily on a statement by the UN special rapporteur on violence against women and girls, its causes and consequences, which itself constructs 'preventing births' in terms of "an assault on the reproductive rights of Palestinian women and their new-borns". Noting that these acts "inflicted by Israel on Palestinian women, newborn babies, infants, and children" could constitute measures intended to prevent births within the meaning of the Article II(d) of the *Convention*, the special rapporteur's approach constrains our understanding of reproductive violence as violence directed primarily—and perhaps only—at women and girls.

Although not the subject of a charge against the accused, the 1998 *Akayesu* trial judgment at the International Criminal Tribunal for Rwanda made some observations about the content of 'preventing births' as an act of genocide. It stated that the measures in question "should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages", as well as mental harm. Here, the Tribunal singled out the psychological harm associated with rape: "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate". Akayesu was convicted of abetting genocide committed through the killing of members of the Tutsi group and the infliction of serious bodily and mental harm on member of that group, in part through acts of sexual violence, sexual mutilations and rape.

The first draft of what would become the *Convention*, prepared by the UN Secretariat's Human Rights Division, listed 'restricting births' as an act of genocide where such restriction was done 'with the purpose of destroying [a protected group] in whole or in part, or of preventing its preservation or development' (Article II(2)). The draft listed three discrete acts amounting to the restriction of births, including 'sterilization and/or compulsory abortion', 'segregation of the sexes', and 'obstacles to marriage' (Article II(2)(a)–(c)). The next draft convention, prepared by an ad hoc drafting committee of the Economic and Social Council, included the language that would later be adopted in Article II(d) of the eventual *Convention* (Article II(4)), and distinguished between 'physical' and 'biological' genocide, the latter of which was captured by 'preventing births'.

The distinction between 'physical' and 'biological' genocide was first conceptualized by Raphael Lemkin, the Polish jurist who coined the term 'genocide' and who was a major influence in the *Convention*'s drafting process. Lemkin understood biological genocide as the destruction of a protected group's continued capacity for survival through reproduction, which included forced sterilizations, abortions and *castrations*, limitations on marriages and the transfer of children. Lemkin's views reverberate through the views of states today. For example, in their joint intervention in The Gambia's genocide case against Myanmar at the Court, Canada, Denmark, France, the Netherlands and the United Kingdom take the view that: "Whereas physical destruction focuses on the annihilation of the existing group, biological destruction is aimed at the regenerative power of the group".

The joint interveners advance a line of reasoning influenced by *Akayesu* that strongly associates biological genocide with the harm caused by sexual and gender-based violence, noting that this kind of violence "can directly affect the physical ability to procreate and can create other barriers to

procreation, including through the impacts of social stigma." In this modernized approach to biological genocide, the genocidal impact of sexual and gender-based violence is transplanted from the UN Security Council's 'Women, Peace and Security' agenda which, according to the interveners, is based in part on the view that "sexual and gender-based violence can be used to humiliate, subordinate, and destroy entire communities".

This approach to 'preventing births' reflects aspects of the pervasive 'common sense' narrative about the harm of conflict-related sexual and gender-based violence, wherein this violence is understood as the 'worst' harm that women and girls can suffer during war, in part because of racially, ethnically and religiously essentialized notions about the role of shame and stigma in generating group-based harm. As Karen Engle describes, this narrative "takes for granted shame culture, especially in the predominantly Muslim and African communities that tend to be the focus of investigation. As such, it relies upon ethnic and cultural essentialisms to define the harm of rape, while also limiting the repertoire of "normal" individual and communal responses to it" (p. 9).

Dominance feminists, principle among them Catherine MacKinnon, have long argued for a rape-as-genocide approach, citing aspects of this essentialized narrative that we find reproduced from *Akayesu* through contemporary understandings of conflict-related sexual and gender-based violence articulated in the joint intervention. In the early days of the war in the former Yugoslavia, MacKinnon militated in favour of an analytical approach wherein the harm of sexual violence was inextricably linked to its genocidal aspect. When sexual violence was committed by ethnic Serb forces against Bosnian Muslim or Croatian women it needed to be understood as "rape as genocide, rape directed toward women because they are Muslim or Croatian" (p. 9).

The rape-as-genocide view invites an understanding of sexual and reproductive violence as something that is done *to women*. On this approach, the murder of some 8,000 Bosniak men at Srebenica could constitute genocide only within the limited context of Article II(a) of the *Convention* ('killing members of the group'), and not within a more expansive frame which might view the mass killing of men and boys as a separation of the sexes intended to prevent births within the Bosnian Muslim group.

To the extent that South Africa's case for preventing Palestinian births as genocide is rooted in gender-based harm directed toward women and girls as a matter of the violation of their reproductive rights it comes close to MacKinnon's rape-as-genocide view. This approach to 'preventing births' is both a response to—and a perpetuation of—a series of dangerous conceptual conflations: because reproductive justice is primarily understood in terms of women's rights, and because women's rights in conflict are systematically reduced to the need to be protected from sexual and gender-based violence as the centrepiece of the 'Women, Peace, and Security' agenda, we are offered an interpretation of 'preventing births' filtered exclusively through the lens of sexual and gender-based violence directed against women and girls. As I will review below, this approach comes at a significant cost to the reproductive rights of Palestinian men and boys and an inclusive understanding of wider processes of genocidal violence.

‘Preventing births’ as both ‘conditions of life’ and as a standalone act of genocide

As already noted, rape and other forms of sexual violence are now firmly established as predicate acts constituting physical genocide under Article II(b) and (c) of the *Convention*. To reduce ‘preventing births’ to another form of sexual or gender-based violence, as the South African approach risks, would be to miss the biological component of group destruction that formed the basis for including ‘preventing births’ as an act of genocide in the first place.

As Ciara Laverty and Dieneke de Vos have argued, reproductive violence has mostly entered the discourse and practice of transitional justice “through the lens of sexual violence”, which has served to foreground sex and background autonomy interests. However, at the merits stage of South Africa’s case it is open to the Court to consider evidence of alleged measures intended to prevent births under both Article II(d) and (c) of the *Convention*. This approach would accord with William Schabas’ observation that the genocidal aspect of the harm of ‘preventing births’ is rooted in the fact that these acts are “directed against the reproductive capacity of women”, which is “a matter of the survival of the national, ethnic, racial or religious group to which women belong”. Here, “the intent of the offender is to destroy the group to which women victims belong, *not the women as a group*” (p. 201; emphasis added).

Read together, these observations demonstrate that South Africa—and the Court—do not have to choose as between ‘preventing births’ as a form of physical destruction under Article II(c)—which may or may not be specifically or primarily directed against women and girls on the basis of sex or gender—or as a gender-neutral harm directed against the regenerative capacity of the Palestinian group as such under Article II(d). Both readings are possible. This approach would offer an internally coherent reading of South Africa’s case while at the same time openly recognizing the pitfalls of centring the ‘women and children’ frame in what may be the first direct international judicial treatment of ‘preventing births’ as a genocidal act.

From ‘women and children’ to reproductive capacity

Israel’s conduct of military operations in Gaza in the period since South Africa began proceedings demonstrate that ‘preventing births’ is not exclusively a feminist issue. There is now strong evidence indicating that Israeli forces have targeted the reproductive capacity of men and boys in addition to that of women and girls. In its September 2024 report, the *Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (“the Commission”) noted that between October 2023 and July 2024 some 14,000 men and boys across Gaza and the rest of the occupied Palestinian territory have been arrested and detained in Israeli prisons (this number is now almost certainly far higher). The Commission highlighted several cases of sexual violence as a ubiquitous practice during arrest, detention and transfer, with detainees being stripped naked, sexually assaulted and subjected to sexualized threats. Male detainees report having their genitals “beaten, kicked, pulled or squeezed”. Other acts include burning detainees’ anuses with electrical probes, and instances of rape and gang rape with objects like sticks, broomsticks, and

vegetables. The Commission concluded that these acts “were motivated by extreme hatred towards and a desire to dehumanize the Palestinian people.”

In its subsequent March 2025 report on Israel’s systematic use of sexual, reproductive and other forms of gender-based violence the Commission revisited these harms. It described how in one instance a male detainee’s “genitals were kicked so severely that he vomited and lost consciousness.” Another victim reported that a “guard inserted a metal stick in my penis on several occasions, about twenty times in total.” In addition to this evidence, doctors who have worked in Gaza report instances of intentional genital targeting. One physician reported that male victims “would come in with no other injuries and would lose their testicles. They’re healthy young men, but they will never have kids”.

The Commission concluded that such acts constitute instances of sexual and gender-based persecution. It further found that these “crimes were intended to inflict severe humiliation on the victims and … to intimidate the larger community.” While the Commission was careful to note that “gender-based discriminatory intent intersects with other grounds for persecution”, including Israel’s “systematic discrimination against Palestinians based on nationality, ethnicity, culture and religion”, it stopped short of describing the harm associated with these acts in terms of genocidal reproductive violence. Given the now voluminous evidentiary record outlining potential harm to men and boys’ reproductive capacity and their willingness to procreate in the future, these acts should be investigated as instances of ‘preventing births’ alongside evidence relating to violence against women and girls. Acts committed in the circumstances of detention should specifically be investigated as measures segregating the sexes for the purpose of ‘preventing births’.

Conclusion: Towards gender-inclusive framing in genocide law

In view of the ongoing violence against the Palestinian people, the Rohingya people, the Uyghur people and Indigenous peoples in Turtle Island recently there has been renewed attention to ‘preventing births’ as a discrete genocidal act. For example, as part of its settler colonial policy in the Xinjiang region, China has imposed various policies to change the demographic composition of the territory, including forced sterilization and birth control measures. In 2019, the final report of Canada’s National Inquiry into Missing and Murdered Indigenous Women and Girls found that Canada bears state responsibility for a historic and ongoing race-based colonial genocide that particularly targets Indigenous women, girls and gender diverse individuals. In so finding, the Inquiry demonstrated the continuity between twentieth century eugenics policies that included forced sterilizations and that disproportionately impacted Indigenous peoples, and contemporary patterns of forced and coerced sterilization.

In his request for warrants of arrest against Israeli Prime Minister Benjamin Netanyahu and former defense minister Yoav Gallant, the Prosecutor of the International Criminal Court noted that Israeli leaders have pursued collective punishment of Gaza’s civilian population, “whom they perceived as a threat to Israel”. As part of this punishment, Palestinians of all genders have been subjected to widespread and systematic biological violence aimed at impairing the capacity of the Palestinian group

to regenerate itself as such. The Commission has found that, in conditions of detention, this violence has disproportionately victimized Palestinian men and boys. The South African allegation of 'preventing births'—already an undertheorized and undercharged act of genocide—presents a unique opportunity to rethink genocidal processes of collective punishment as a form of 'carceral eugenics'. A more inclusive, gender-neutral approach to 'preventing births' would provide the Court and genocide scholars alike with a wider—and richer—lens through which to understand all forms of genocidal destruction.

Citation: Heidi Matthews, "'Preventing births' as a gender-neutral harm: Making sense of reproductive violence in South Africa's genocide case against Israel" in *Human Rights, Justice and Accountability at the International Court of Justice – Challenges and Opportunities: a special issue of the PKI Global Justice Journal* (2025) 9 PKI Global Justice Journal 5.

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Anti-discrimination at the ICJ: Ukraine, Palestine and the Freedom to Advocate for Human Rights in Canada

by Faisal A. Bhabha

Introduction

In 2024, the ICJ released two judgments that dealt, at least in part, with the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD"). This is an opportune moment to (1) examine doctrinal developments in international law pertaining to racial discrimination arising from these two judgments; and (2) consider the possible practical implications of these developments. The question that is considered in this paper is whether the ICJ rulings can offer a legal counter-weight to the domestic political pressures that prevent Canada from being clear, credible and consistent in opposing all international human rights abuses.

There is presently a paradox in official Canadian policy regarding the status of the Occupied Palestinian Territory ("OPT"), which produces a tension in Canadian anti-discrimination law arising from the pressure being exerted politically to extend the scope of the prohibition on discrimination to the illustrative examples contained in the International Holocaust Remembrance Association ("IHRA") definition of antisemitism. If this approach to antisemitism becomes the definition of anti-Jewish discrimination under domestic anti-discrimination law, it will be certain to target and punish innocent defenders of Palestinian human rights who advocate against discrimination themselves.

This article situates this contest over the meaning of discrimination in the context of the two 2024 ICJ judgments dealing with ICERD, concluding that the world court has breathed modest new life into international anti-discrimination law. In particular, the Court ruled that the non-violent tactic of Boycott Divestment Sanctions (BDS) is not only defensible, but obligatory, in the circumstances of institutionalized racism and apartheid.

CERD – Defining Racial Discrimination

Article 1 of ICERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

The Committee on the Elimination of Racial Discrimination ("Committee") interprets ICERD by examining state reports, issuing concluding observations and recommendations, and developing general recommendations to guide the implementation of the convention. The interpretations of the Committee carry persuasive weight but are not law.

The ICJ is the ultimate arbiter of disputes between states. While its role is not to proactively define legal concepts and rules, when a matter comes before it requiring interpretation of a legal concept or obligation, the Court will define and prescribe as needed, without being bound by external authority, including Committee recommendations.

Prior to 2024, the ICJ had only heard two cases involving ICERD and neither case reached the merits stage. For this reason, Ukraine's case against Russia and the advisory opinion with respect to the

OPT were two timely opportunities for the ICJ to explicate international anti-discrimination law.

Judgment in *Ukraine v Russia*

On January 31, 2024, the ICJ released its decision in *Ukraine v Russia*. Ukraine had sought remedies for Russia's wrongful conduct in Crimea after the Russian invasion and annexation of that region in 2014, relying on the International Convention for the Suppression of the Financing of Terrorism as well as Articles 2 and 4 through 7 of ICERD. While the ultimate result was disappointing for Ukraine, the judgment offers some modest development to the international law of anti-discrimination.

The facts of the case pertained to Russia's treatment of Crimean Tatars and ethnic Ukrainians under Russian occupation. The most direct move to solidify Russian political control over the peninsula came in 2016, when Russia banned the Mejlis of the Crimean Tatar People ("Mejlis"), the highest representative political body of the Muslim Tatar population of Crimea. Russia accused the Mejlis of spreading "aggression and hatred" towards Russia and inciting ethnic nationalism and "extremism" in society. The Mejlis was officially listed as a banned extremist organization.

These events spurred Ukraine's appeal to the world court in January 2017. Three months later, the ICJ issued provisional measures, including an order that Russia lift the ban on the Mejlis, which Russia ignored (para 398). The case proceeded in the main as the Court considered a raft of allegations, including claims of physical violence, biased policing, media curtailment, and restrictions on culture, language and education within Crimean Tatar and ethnic Ukrainian communities.

In its final judgment, the ICJ found that there was insufficient evidence to conclude that Russian measures were targeting the local population on the basis of their ethnic origin rather than their political and ideological opposition to Russian control (para 214). With the exception of finding discriminatory implementation of Ukrainian-language school education in the occupied territory, the Court ruled that Russia's policy in occupied Crimea was not discriminatory within the meaning of ICERD (paras 244, 370). The Court noted that Russia was in violation of the interim order pertaining to the Mejlis, though it also refrained from concluding that the ban on the Mejlis was related to the Crimean Tatars' status as an ethnic minority and not due to political and ideological differences (para 272).

In reaching its conclusions, the ICJ clarified and developed the doctrine of adverse effects discrimination under ICERD. Basing its case on a view of discrimination that looks behind facially neutral state policies, Ukraine argued that there are three required elements to establish racial discrimination under the ICERD definition in Article 1: (1) a "distinction, exclusion, restriction or preference"; (2) "based on" a protected ground, namely "race, colour, descent, or national or ethnic origin"; and which has (3) "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" (para 181).

In support of its position, Ukraine pointed to the ICERD Committee's General Recommendation No. XIV regarding the definition of racial discrimination. It provides that if a measure has a disproportionate impact on a protected group, it will satisfy the third branch of the test and will constitute racial discrimination unless it can be justified as being in line with the Convention (para 2). Justification is based on necessity; the pursuit of a legitimate objective; and striking the right balance between the measure's stated objective and its impact (para 183).

While Russia did not dispute that the scope of racial discrimination under the Convention includes both purpose and effects-based discrimination, Russia rejected Ukraine's understanding of indirect discrimination based on imputed motive or unstated bias (para 186). Russia argued to the Court that "disparity of results between ethnic groups does not by itself constitute racial discrimination, unless it is an objective consequence of a distinction, exclusion, restriction or preference based on race, colour, descent, national origin or ethnic origin" (para 189). In other words, any harm experienced must be provably caused by race-based differential treatment. The kind of inference that Ukraine was asking the ICJ to draw, regarding the rationale behind Russia's use of violence and restrictive policies in Crimea and the invidious impact on members of affected communities, was not sufficient to prove that the hardship experienced was an "objective consequence" of race-based adverse treatment.

According to Russia, to establish an ICERD breach, the measure must be "causally linked" to an act of discrimination based on the protected grounds (para 189). Under a strict causal theory of discrimination, disparities that produce a collateral or secondary adverse effect would not necessarily amount to a breach, significantly limiting the potential protective scope of ICERD. In addition, Russia argued that a measure would not be discriminatory if it could be reasonably justified as proportional in relation to legitimate objectives (para 191).

The ICJ resolved the doctrinal question by embracing a more expansive conception of discrimination on the one hand, while narrowing the scope of application on the other. The expansive conception of discrimination is one that protects against both direct and indirect, or adverse effects, discrimination. Under this doctrine, an individual is capable of being found to have committed an act of discrimination by causing adverse effects even without a discriminatory mindset or purpose. However, the scope of protection is narrowed by drawing a bright line between adverse effects that are "based on" a prohibited ground on the one hand and adverse effects that are "collateral or secondary" to prohibited grounds on the other (para 196).

Using this narrowed understanding, the Court was able to acknowledge the fact that Crimean Tatars and ethnic Ukrainians experienced violence and other harms adversely impacting their enjoyment of civil, political, social and cultural rights while at the same time maintaining that ICERD is inapplicable because the nexus between the treatment and the affected groups' ethnicity was tenuous in light of the evidence of political and ideological reasons for persecution. The availability of this alternative explanation—something plausible that is unrelated to the protected grounds alleged—was sufficient to

prevent drawing the inference that would link the adverse treatment to the ethnic identities of the population (paras 237-244).

The broad conception but narrow application of anti-discrimination law to the conditions of the Russian occupation of Crimea left open questions about how international anti-discrimination law would be applied to the prolonged Israeli presence in the OPT.

Advisory Opinion on the Occupied Palestinian Territory

In December 2022, well prior to the start of Israel's all-out assault on Gaza, a UN General Assembly resolution asked the ICJ: "What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination… and from its adoption of related discriminatory legislation and measures" (para 18(a)). The case relied substantially on ICERD.

On July 19, 2024, after the ICJ had already issued three sets of interim orders in relation to the risk of genocide in Gaza, the Court released its long awaited advisory opinion, concluding that: Israel's continued presence in the OPT is unlawful and must end as rapidly as possible; Israel must cease immediately all new settlement activities and remove the settler population from the OPT; and Israel owes Palestinians reparations for the damage its prolonged presence and practices have caused (paras 267-272). The Court further found that all states are under an obligation not to recognize the validity of Israel's presence in the OPT or to aid or assist in its maintenance, and to work cooperatively to bring an end to the human rights violations. (paras 273-279). The Court ordered international organizations, including the UN, to not normalize the situation arising from Israel's unlawful presence in the OPT and suggested that the General Assembly should consider what specific steps would be needed to bring the occupation to a rapid end (para 285).

While Advisory Opinions are not legally binding in themselves, they constitute an authoritative statement of international law. Failure to comply with the Court's conclusions by Israel, or by other states or international organizations, could result in accountability for breaches of any of the obligations identified by the Court. Under international law, Israel, other states, and international organizations all bear responsibility for breaching legal obligations identified by the Court (para 280).

On the subject of discrimination, the Court summarized the various formulations of the prohibition on discrimination contained in an array of sources of international law and concluded that the "principle of the prohibition of discrimination […] is now part of customary international law" (para 189). The Court went on to find that "a broad array of legislation adopted and measures taken by Israel" in the OPT "treat Palestinians differently on grounds specified by international law" (para 223). As the Court has noted, this differentiation of treatment cannot be justified with reference to reasonable and objective criteria nor to a legitimate public aim" (para 223). Consequently, the Court concluded, the "régime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory constitutes systemic discrimination based on, *inter alia*, race, religion or ethnic origin", in breach of

Article 2 of ICERD, among others (para 223).

Notably, the ICJ did not conclude, as it did in *Ukraine v Russia*, that the occupied people's opposition to foreign domination created a compelling political opinion ground that could plausibly supplant the foundation necessary to find racial discrimination under Article 2. Instead, the Court was persuaded that Israel's residence permit policy in East Jerusalem, restrictions on Palestinian movement in the OPT, punitive demolitions of Palestinian property, and planning policy in general all constituted racially discriminatory practices (paras 219, 220).

In addition to Article 2 breaches, the Court also found a breach of Article 3, which provides, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction" (para 225). While the Apartheid Convention was not directly invoked in this case, ICERD's explicit reference to "racial segregation and apartheid" in Article 3 leaves open this avenue to characterize apartheid as a human rights violation rather than an international crime. Given that no one has ever been prosecuted for the international crime of apartheid and neither Israel nor any western democracy, including the United States, Canada or Australia, is a party to the Apartheid Convention, the development of the human rights prohibition on apartheid under ICERD offers hope for some form of international accountability for institutionalized state racism.

The Court concluded that "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities" (para 229), in breach of Article 3 of CERD. In a concurring declaration, Judge Tladi characterized the Court's finding as "an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid" (para 36).

The Canadian Paradox

The view that the overall situation in the OPT constitutes discrimination and apartheid and that the prolonged assault on Gaza likely constitutes a genocide has gained traction around the world, including at the ICJ, where orders to prevent genocide have been made while the underlying allegations are adjudicated.

These developments have left Canada scrambling, as it subscribes to multiple, competing narratives. On the one hand, Canada's official policy towards Israel/Palestine is based on international law: the West Bank (including East Jerusalem) and Gaza have been militarily occupied by Israel since 1967. Until a Palestinian state is formed based on mutual agreement between the parties, Israel has specific duties imposed by international humanitarian law and human rights law. Civilian Jewish settlements in the OPT are unlawful; the annexation of Jerusalem is unlawful; population movement control and home demolition are unlawful, and so on. Canada officially subscribes to all of this.

On the other hand, Canada is a close ally of Israel, and the two countries entered into a free trade agreement that treats the OPT as though it were part of Israel for trade purposes. As a result, despite being part of an illegal enterprise, settlements produce goods that enter Canada without distinction from products of Israel proper. Whether human rights advocates launch narrowly tailored strategies—like the push for clear product labelling—or a broad, multi-pronged campaign—like boycott, divestment and sanctions (BDS)—the goal is to align Canadian trade and diplomatic policy with Canadian human rights policy (and international law). Yet, time after time, *Canadian politicians have been quick to disparage Palestinian human rights advocates as extremists and antisemites.*

The delegitimization of BDS was a centrepiece of Justin Trudeau's otherwise progressive agenda during his decade as Prime Minister. In the run-up to his first election victory, on March 13, 2015, Trudeau tweeted: "The BDS movement, like Israeli Apartheid Week, has no place on Canadian campuses." In his first quarter as Prime Minster, Trudeau led the House of Commons in passing a motion condemning "any and all attempts by Canadian organizations, groups or individuals to promote the BDS movement, both here at home and abroad", describing it as the "demonization and delegitimization of the State of Israel", by a vote of 229 to 51. In a rare moment of enthusiastic bipartisanship, almost all Liberals and Conservatives supported the motion.

Later that year, in December 2016, the province of Ontario's legislature passed a similar motion condemning "the differential treatment of Israel, including the boycott, divestment and sanctions movement." An opposition Progressive Conservative member brought the motion, which condemns any group that "promotes or encourages any form of hatred, hostility, prejudice, racism and intolerance in any way" while recognizing "the longstanding, vibrant and mutually beneficial political, economic and cultural ties between Ontario and Israel, built on a foundation of shared liberal democratic values."

The sponsor of the motion, Gila Martow, framed the issue in sufficiently inflammatory terms to stifle reasonable disagreement, articulating in the legislature: "We would not be here supporting a Ku Klux Klan on our campuses, so why are we allowing BDS movements and other anti-Jewish communities and anti-Israel organizations to have demonstrations and use our campuses, which are taxpayer-funded? It's a PR battle, Madam Speaker."

In January 2019, Trudeau spoke again about Jewish students who, he alleged, "still feel unwelcome and uncomfortable in some of our college and university campuses because of BDS-related intimidation.…We need to understand, as well, that anti-Semitism has also manifested itself not just as in targeting of individuals but it is also targeting a new condemnation or an anti-Semitism against the very state of Israel".

If official Canadian policy regarding the status of the OPT was difficult to reconcile with the focus of Canadian politicians prior to October 7, the paradox has been even more evident in the face of the

brutality of Israel's assault on Gaza. As the world converges on an understanding of Israel's treatment of Palestinians as apartheid and its conduct in the OPT as crimes against humanity and genocide, Canada has doubled down on protecting the sensibilities of a (substantial) subset of the Canadian Jewish population who feel strongly attached to Israel and who feel threatened by expressions of solidarity with Palestinian human rights and self-determination.

With the introduction of the International Holocaust Remembrance Alliance Working Definition of Antisemitism (IHRA) and the pressure to enforce it at all levels of state administration, Canada has allowed itself to be placed impossibly between its commitment to international human rights and the demands of a weaponized definition of antisemitism.

International Holocaust Remembrance Alliance (IHRA)

There is enormous political pressure to implement policies, if not laws, that would presumptively cast Palestinian human rights defenders as antisemitic and/or supporters of terrorism. The principal tool for advancing this "new antisemitism" agenda is the IHRA definition of antisemitism, including its illustrative examples. In June 2019, IHRA was officially adopted as part of Canada's anti-racism strategy. While the strategy is not legally binding, it shapes government action and can be used to deny government support or cooperation to groups or individuals that offend it. In many circles, the view that advocacy for Palestinian human rights produces anti-Jewish discrimination is taken for granted. Notwithstanding the prevalence of this prejudice, so far, attempts to use the courts to hold Palestinian human rights defenders liable for discrimination have not succeeded.

The main problem with the IHRA definition of antisemitism is that it is based on a dubious legal theory of discrimination. It has long been criticized as a clumsy, if not dangerous, tool for its failure to distinguish between legitimate criticism of the state of Israel and prejudiced commentary about Jews. The clarity delivered from the ICJ on the relevant facts and principles sets domestic implementation of IHRA on a collision course with international human rights law.

Defenders of Israel complain of discrimination when pro-Palestine students express anti-Zionist and anti-Israel sentiment or when they use certain pro-Palestine slogans and phrases. Advocates for a free Palestine complain of discrimination when they are cancelled or penalized for their use of words, symbols, images and expressions of support for Palestinian human rights. In terms of anti-discrimination law, both defenders of Israel and advocates for a free Palestine have attempted, unsuccessfully, to fit their respective grievances into a discrimination frame. Supporters of Palestinian human rights have been shut out of domestic anti-discrimination protections for the same reason that Ukraine's case failed: they are classified as subscribing to a political viewpoint as opposed to belonging to an identifiable, listed group.

So far, no court or quasi-judicial body in Canada has explicitly or implicitly adopted the IHRA definition

of antisemitism, and no judge has yet acceded to the assertion that anti-Zionism is tantamount to antisemitism.

One case, also from 2024, came close. A judge hearing the University of Toronto's application to have its pro-Palestine encampment declared unlawful opined that the encampment was not inherently violent, and the slogans and phrases used, including 'From the River to the Sea', were not on their face antisemitic. Those findings carry no precedential weight, but they do capture the reasoned analysis of a member of the judiciary considering a highly relevant question that is bound to return to the courts again.

Conclusion

By clarifying the scope of international anti-discrimination doctrine in Ukraine v Russia and demonstrating its application to the facts in the OPT advisory opinion, the ICJ has injected currency into ICERD and credibility into BDS. Up until now, civil society groups have had to convince states and other institutions to sever ties with Israeli entities based on fact-specific allegations that could be easily contested or deliberately muddied; now, there is a judgment by a panel of judges who have reviewed all of the evidence and reached a conclusion which essentially requires states to engage in at least some form of BDS.

None of this should come as a surprise in general. It has been more than 20 years since the ICJ heard the case regarding the separation barrier that Israel constructed almost entirely in the West Bank. The Court in that case confirmed the status of East Jerusalem and the West Bank as occupied territories (the status of Gaza was not an issue); upheld the applicability of the Fourth Geneva Convention in the OPT; affirmed that the Palestinian people exist and have a right to self-determination; declared the illegality of Jewish-only settlements; and found that the construction of the separation barrier violates international law and that "Israel cannot rely on a right of self-defence" or on an assertion of necessity "to preclude the wrongfulness of the construction of the wall" in occupied territory (para 142).

In 2004, the ICJ ordered Israel to dismantle the wall forthwith and to make reparation for all damage caused. Instead of doing that, Israel intensified its separation from and control over the Palestinians, creating the situation that 20 years later the Court had little trouble calling "systemic discrimination" and "apartheid". It remains to be seen what price the engaged citizenry will pay in Canada for expressing opposition to these occurrences and demanding that their government terminate its business-as-usual relationship with Israel.

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Photo: Faisal Bhabha

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Palestinian Flag raised during protest
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Racial Segregation and Apartheid: The International Court of Justice's Advisory Opinion on the Discriminatory Features of Israel's Occupation of Palestine

by Michael Lynk

On 19 July 2024, the International Court of Justice issued its Advisory Opinion on the legality of Israel's 57 year-old occupation of the Palestinian territory (the West Bank, including East Jerusalem, and Gaza). In this seminal ruling, the Court held that the Israeli occupation was unlawful because it was deliberately impeding Palestinian self-determination. As a consequence, it directed that Israel must end the occupation "as rapidly as possible", and that all States in the international community have an obligation not to recognize any changes to the pre-1967 borders and "not to render any aid or assistance to illegal settlement activities" in the occupied Palestinian territory.

The *Legal Consequences of Israeli Policies and Practices* ruling, although non-binding as an advisory opinion, is one of the ICJ's most monumental decisions in its 79-year-old history. It continues the pattern of judgements by the Court focusing on the insistent issues of apartheid, annexation, belligerent occupation and colonial rule, including its rulings on Namibia (1971), Western Sahara (1975), East Timor (1995) and the Chagos Archipelago (2019), as well as Palestine (2004) itself.

The ICJ's Advisory Opinion was delivered in response to a formal request by the United Nations General Assembly in December 2022 to provide its judicial views on the legal consequences of Israel's prolonged occupation, settlement and annexation of the occupied Palestinian territory (OPT). Included in the General Assembly's resolution was a request for the Court to examine the legal consequences arising from Israel's "adoption of related discriminatory legislation and measures." During the arguments made before the Court in February 2024, 24 states and organizations – led by South Africa and Namibia – submitted that Israel has imposed a regime of apartheid in the OPT and urged the ICJ to make such a finding.

More than any other single issue in the Advisory Opinion, the Court's analysis of racial segregation and apartheid reveals the compromises that must have taken place in the judges' chambers as they sought to reach a majority consensus. The ICJ ruling devotes 49 paragraphs to discussing the question of Israel's discriminatory legislation and measures in the OPT, the longest single section of the Opinion, but arrived at a quiet conclusion on the issue. Yet, notwithstanding the ICJ's *sotto voce* ruling on this issue (more on this later), I argue that the Court's analysis can only be read as finding that Israel has created a system of apartheid and racial segregation in the OPT.

This short essay will review the ICJ's discussion on Israel's system of racial discrimination in the OPT. The Court's findings on this issue contribute to the growing international understanding that Israel's occupation has curdled into apartheid, a conclusion that prominent organizations in the international human rights movement, in particular, Human Rights Watch and Amnesty International, have already accepted.

Racial superiority and segregation were an integral part of the colonial empires established by European powers throughout most of the globe from the 16th century onward. In Nigeria, India, Cuba, Indonesia, the American south, Brazil and elsewhere where colonialism reigned, your race was the defining marker that shaped every aspect of your life: your rights, your occupation, your health, your housing, your education, your life expectancy and your family. These entrenched systems of racial discrimination and oppression continued well into the 20th century, until the anti-colonial movement and the rise of the Global South began to dismantle them in the decades after 1945.

An acute system of formal racial oppression – apartheid – was created in South Africa in 1948 with the formal enactment of legislation that segregated the African, South Asian and Coloured peoples from the ruling white population and entrenched a legal regime of racial privilege through "apartness".

Apartheid was soon afterwards imposed in Rhodesia (later Zimbabwe) and Namibia. While the creation of apartheid in southern Africa drew relatively little condemnation from Europe and North America in its early years, the rapidly emerging bloc of newly independent states from the Global South meant that apartheid soon became a pivotal issue for the United Nations.

Beginning in the 1960s, the UN General Assembly adopted several landmark conventions opposing racial discrimination and apartheid. In 1965, the UNGA endorsed the International Convention for the Elimination of All Forms of Racial Discrimination (CERD), which expressly prohibited racial segregation and apartheid. And in 1973, the General Assembly enacted the Convention on the Suppression and Punishment of the Crime of Apartheid, which declared that apartheid was a crime against humanity and a serious threat to international peace and security. Separately, the High Contracting Parties to the Geneva Conventions – the beating heart of international humanitarian law regulating the rules of war and occupation – declared in 1977 that the practice of apartheid was a war crime. Today, the prohibition against apartheid is accepted as a peremptory norm of international law, meaning that, like the prohibition against torture, there can be no permissible exceptions or derogations.

Apartheid South Africa finally collapsed in 1994. Four years later, 120 countries adopted the Rome Statute of the International Criminal Court, which criminalized apartheid and refined a three-part test from the 1973 Convention Against Apartheid to determine its presence. According to the Statute, apartheid is:

i. An institutionalized regime of systematic racial oppression and discrimination,
ii. Established with the intent to maintain the domination of one racial group over another, and
iii. Which features inhuman(e) acts committed as an integral part of the regime.

This test is forward-looking and uses these three features as the foundation for its legal inquiry. This modern test for the presence of apartheid is not dependent on how similar or disparate the features of a contemporary oppressive racial regime resemble the particular practices of pre-1994 South Africa.

To determine whether Israel's policies and practices in the OPT amounted to racial discrimination in violation of international law, the ICJ addressed three primary features of Israel's occupation.

First, the ICJ examined Israel's residence permit policy in occupied East Jerusalem. The Court observed that the 235,000 Israeli citizens and non-Israeli Jews living in the illegal Israeli settlements in East Jerusalem enjoy the same full spectrum of legal and political rights as Israeli citizens living within the pre-1967 Israeli border. In contrast, the Palestinian Arabs in East Jerusalem – close to 400,000 – who are not Israeli citizens, are regarded by Israel as foreign nationals who must hold a valid residence permit, even though their families may have lived there for centuries. Since 1995, these Palestinians have had to prove that their "centre of life" has remained in East Jerusalem for the

previous seven years to retain their residence permit, a requirement that Israeli Jews in East Jerusalem do not have to demonstrate.

According to the Court, this " …differential treatment imposed by Israel's residence permit policy in East Jerusalem is not justified, because it does not serve a legitimate public purpose." Specifically, it ruled that the residence policy amounted to prohibited discrimination as defined by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

Second, the ICJ assessed the restrictions on movement that Israel has imposed on the almost three million Palestinians living in the occupied West Bank. It observed that Israel has created more than 300 Jewish-only settlements – which are illegal under international law – in the West Bank and East Jerusalem, where more than 700,000 settlers live. Connecting these settlements to each other and to Israel is a segregated road network which Palestinians living under occupation are forbidden to use. In contrast to the fulsome freedom of movement enjoyed by the settlers, the ICJ noted that the Separation Wall, the lower quality Palestinian-only roads and the more than 560 Israeli roadblocks and checkpoints throughout the West Bank severely restrict Palestinian movement. As well, Israel enforces significant constraints on the movement of Palestinians between East Jerusalem, the West Bank and Gaza.

The Court noted that, while Israel may have security concerns for which it justifies its restrictions on movement:

> …it is the Court's view that the protection of the settlers and settlements, the presence of which in the Occupied Palestinian Territory is contrary to international law, cannot be invoked as a ground to justify measures that treat Palestinians differently.

These policies restricting the Palestinians' freedom of movement were found by the ICJ to violate international human rights law.

And third, the Court considered Israel's practice of demolishing Palestinian homes and properties in the West Bank and East Jerusalem. It accepted evidence that, since 2009, almost 11,000 Palestinian structures had been razed, either as a punitive measure because a person living in the building had allegedly committed a security offense, or because the building had been constructed without a proper construction permit.

Assessing Israel's practice of destroying Palestinian buildings because of security offences, the ICJ noted that this punitive measure had apparently never been used against Israeli civilians who had committed similar offences. It also observed that the demolitions of homes commonly affect a wide circle of people – frequently, the individual's family or relatives – who were being punished for a crime

that they had not personally committed. The Court held that this amounted to collective punishment, contrary to Article 33 of the Fourth Geneva Convention.

Similarly, the Court found that Israel's practice of demolishing Palestinian buildings and homes which had been constructed without a permit was discriminatory and had "no legitimate public aim." It referred to evidence by the United Nations that more than 90% of Palestinian applications for building permits were denied by the Israeli military authorities, while 60-70% of Israeli requests for building permits in Israeli settlements were approved. As well, those settler constructions which were built without a permit were much less likely to be demolished than Palestinian buildings.

Both of these Israeli practices of home demolitions were ruled by the ICJ as violations of the ICESCR, the ICCPR and the CERD.

In reaching its findings on racial discrimination, the Court accepted that "…the regime of comprehensive restrictions imposed by Israel on Palestinians in the Occupied Palestinian Territory constitutes systemic discrimination." But did this amount, in the ICJ's view, to racial segregation and apartheid?

The ICJ focused on the evidence that Israel's policies and practices in the West Bank and East Jerusalem implemented a near-complete separation between the Palestinians and the Israeli settlers in two decisive ways. First, the separation is physical: Israel's settlement policy – which, at its heart, includes the physical presence of the settlements, the separate road systems and the residence permit policy – has further fragmented the West Bank and East Jerusalem as well as encircled Palestinian communities into enclaves isolated from each other.

And second, the Court found that the separation between the Israeli settlements and the Palestinian communities is also juridical: "Israel's legislation and measures that have been applicable for decades treat Palestinians differently from settlers in a wide range of fields of individual and social activity in the West Bank and East Jerusalem." Two separate and substantively unequal legal systems distinguish the fulsome rights enjoyed by the Israeli settlers from the desert of rights endured by the Palestinians under occupation, who live under an alien military regime that denies them the basic features of a rule-of-law system, such as due process, impartial courts and equality before the law.

In its findings, the ICJ concluded that "…Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities. For this reason, the Court considers that Israel's legislation and practices in the OPT constitute a breach of Article 3 of CERD." The Court expressly noted that "this provision refers to two particularly severe forms of discrimination: racial segregation and apartheid". Article 3 states that:

> *States parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction*. [Emphasis added]

The only reasonable reading of this *sotto voce* finding is that the Court majority held that Israel is practicing both racial segregation and apartheid in the OPT, the first time that an international judicial body has so ruled. While the delicate wording of this passage was almost certainly crafted to bridge an agreement among a majority of the judges on this contentious issue, the meaning of the ICJ's finding – that Israel has imposed apartheid as well as racial segregation on the OPT – yields no other sensible interpretation.

In separate concurring opinions, several of the ICJ judges were more explicit in their conclusions on apartheid. The President of the Court, Nawaf Salam of Lebanon, agreed that Israel's policies amounted to apartheid, writing that:

> *Israel's commission of inhumane acts against the Palestinians as part of an institutionalized régime of systematic oppression and domination, and its intention to maintain that régime, are undeniably the expression of a policy that is tantamount to apartheid*. [Emphasis added]

Similarly, Judge Dire Tladi of South Africa stated that the Court's conclusions that Israel has violated some of the most fundamental tenets of international law should be applauded because:

> *… if we compare the policies of the South African apartheid regime with the practices of Israel in the OPT it is impossible not to come to the conclusion that they are similar. On the basis of the Court's finding concerning the various policies and practices it is hard not to see that Israeli policies, legislation and practices involve widespread discrimination against Palestinians in nearly all aspects of life much like the case in apartheid South Africa. There is for the most part an intentional effort to ensure separation of and discrimination between Israelis and Palestinians: separate roads, separate schools, separate facilities, and separate legal systems*. [Emphasis added]

In contrast, the German judge, Georg Nolte, disagreed with the majority opinion and with Salam and Tladi on the question of apartheid. He declared that the Court had not been presented with sufficient evidence to find that the subjective element of apartheid – a deliberate purpose by Israel's political

leaders to create an institutionalized regime of racial domination – had been established by the various states and organizations presenting on the issue. Similarly, Judge Yuji Iwasawa of Japan (now the new President of the ICJ) took a cautious view that the Court had emphasized the separation of the Israeli settlers and the Palestinians under occupation populations imposed by Israel, but without expressly qualifying it as apartheid.

What should we make of the ICJ's findings on racial segregation and apartheid? Three takeaways stand out.

First, achieving a broad consensus on a contentious issue among fifteen judges representing different parts of the world and different legal traditions is a challenging, but not impossible, task. In its Advisory Opinion, the principal ruling of the Court on racial discrimination states that Israel's policies and practices violate Article 3 of the CERD, which expressly prohibits racial segregation and apartheid. While the Opinion could have stated this conclusion in more direct language, this is the price for achieving a judicial compromise. Digging deeper, only two judges – Georg Nolte and Yuji Iwasawa – issue disclaimers on apartheid by way of separate opinions, and neither of these disclaimers asserted that Israel was not practicing apartheid or racial segregation in the OPT. And none of the four judges who dissented on many of the Court's conclusions made any mention of apartheid in their opinions.

Second, the ICJ's Advisory Opinion contributes to the growing international consensus on the prevalence of apartheid as an integral feature of Israel's occupation of Palestine. Besides the comprehensive findings by Amnesty International and Human Rights Watch (noted earlier), a number of other bodies have recently issued reports which have come to the same conclusion. This includes the United Nations Special Rapporteur on human rights in the OPT, Al-Haq and the Al-Mezan Centre for Human Rights (prominent Palestinian human rights groups), and B'Tselem and Yesh Din (leading Israeli human rights organizations). Prominent international personalities such as Ban Ki-moon (the former United Nations Secretary General), Naledi Pandor (the former foreign minister of South Africa), Michael Ben-Yair (the former Attorney General of Israel) and Ilan Baruch and Alon Liel (former Israeli ambassadors to South Africa) have all concluded that Israel's policies and practices in the OPT amount to apartheid. The Rev. Desmond Tutu of South Africa declared in 2014 that: "I know firsthand that Israel has created an apartheid reality within its borders and through its occupation. The parallels to my own beloved South Africa are painfully stark indeed."

And third, given the certainty that Israel will continue to defy the tide of public, diplomatic and judicial opinion that it must immediately end the occupation and facilitate Palestinian self-determination, there is a strong likelihood that the United Nations General Assembly will again ask the ICJ for another advisory opinion on Israel's obligations sometime in the near future. If so, the issue of Israel's discriminatory regime will likely be argued again, and the ICJ, in all probability, will provide a more direct and robust answer to the issue of racial segregation and apartheid. Israel's utter disregard for international law through its permanent occupation and its brutal assault on Gaza – and the Global

North's acquiescence in Israel's defiance – have badly eroded the post-1945 international legal order. The Court and the UN General Assembly are two of the last bastions of international legitimacy that can provide the legal and moral clarity to guide us away from the abyss that we are marching towards, with our eyes wide shut.

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Ardi Imseis speaking at the ICJ
Photo: International Court of Justice, 28 April 2025

Paradigm Shifts and the Palestine Moment:

On the International Court of Justice and the Quest to Save International Law

By: Ardi Imseis

The history of international law is littered with paradigm shifts. Moments of tumult in the international order have given rise to evolutions in how humans govern themselves and conceive of the world, which have in turn required developments in the law to consolidate new ways of thinking and being. Examples include the Peace of Westphalia (1648), the Congress of Vienna (1815), the Berlin

Conference (1885), the Treaty of Versailles (1919), the Kellogg-Briand Pact (1928), and the Dumbarton Oaks Conference (1945), to name a few.

Depending on one's relative power, not all of these evolutions were benign or just. This is particularly true of the divide between what is today called the Global North (i.e. Western Europe and its settler-colonial and other affiliates) and the Global South (i.e. the rest of the world). Thus, for example, it was at the Berlin Conference that the European colonial powers sought to negotiate their so-called 'scramble for Africa', expanding further their imperial exploitation of the non-European world begun in the fifteenth century. Likewise, it was at Versailles that European powers introduced the League of Nations as an ostensibly new form of global governance based upon Wilsonian principles of self-determination of peoples, despite maintaining the old colonial order under a different guise as manifested in the mandate system.

In so far as doctrinal historiography is concerned, by far the most important of the paradigm shifts affecting contemporary international law was the creation of the UN Charter-based international order in 1945. The origin story of this order posits that, following the Allied defeat of Nazi fascism in World War II (WWII), 'We the peoples of the United Nations" were "determined to save succeeding generations from the scourge of war". Never again would humans inflict the kind of atrocities upon one another that had been so marked a feature of that period, the height of which was of course the attempted destruction of European Jewry. The new order was accordingly rooted in key principles, foremost of which were the general prohibition on the use of force in international relations, the obligation to respect self-determination of peoples, and the promotion of individual human rights for all. The international community thereafter underwent a legislative revolution promulgating scores of international treaties, beginning with the UN Charter itself, but branching out into other areas, including international human rights and humanitarian law. Whether the International Bill of Rights, comprised of the 1948 Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, respectively, or the scores of other human rights treaties that followed, or the 1949 Geneva Conventions, with their 1977 Additional Protocols, a whole corpus of law was created effectively consolidating the 'Never Again' principle. Through this, we were told that our commitment to ensure collective security through universal application of an international rule of law was what separated our new world order from that which preceded it.

But as it happens, some things don't last forever. Indeed, for the more critically minded, it may be that some things never really changed. Whatever one's proclivities, what is clear from the monstrous time in which we now live, marked poignantly and singularly by a single word – Gaza – is that if the Never Again imperative is to hold for future generations, we must act now to live up to the principles we have purportedly held as sacrosanct for the past 80 years. If we do not, we may very well be compelled to face yet another paradigm shift. If Palestine is the moral issue of our time, Gaza is the inflection point for world order.

Since the 7 October 2023 attack on Israel by Palestinian paramilitaries resulting in the killing of some 1,200 Israeli combatants and civilians (a number of whom were killed by Israeli friendly fire) and the

capture and abduction of some 250 more, Israel has deployed a level of violence against the Palestinian people not seen anywhere this century. Total war has descended upon the occupied Gaza Strip with over 70,000 tons of bombs unleashed on the most densely populated place on earth, over half of whose population are children. That's more munitions than were dropped on Dresden, Hamburg and London combined during WWII, only in this case the bombarding air force has complete aerial supremacy over Gaza, meaning it is literally engaged in a turkey shoot of people who cannot defend themselves in any meaningful way. According to the UN Office for the Coordination of Humanitarian Affairs, over 57,000 Palestinians have been killed so far, two-thirds of whom women and children, and another 134,000 have been injured, many for life. A further 1.9 million (some 90% of the population) has been forcibly displaced multiple times, with indiscriminate bombardment, scorched earth tactics and starvation as a tool of war deployed against them. The data and images of destruction and depravity abound, with over 1,400 Palestinian families having been erased from the civil registry following their killing by the occupying power; over 17,000 thousand Palestinian children killed, including by sniper fire, bombardment and being trapped or burned alive in the rubble of their targeted homes and refugee shelters; to dozens of Israeli soldiers posting video clips and pictures of themselves committing war crimes, including misogynistically rummaging through the lingerie of the scores of Palestinian women they have killed or displaced from their homes, to bragging about the flattening of Palestinian property with no military justification, including every university and most of the hospitals in the territory. If that were not enough, humanitarian aid has been repeatedly blocked by Israel, as objects indispensable for the survival of the civilian population continue to be arbitrarily withheld – life saving medicines, anesthetics, food, fuel, water, electricity. And – most astoundingly – all of this has been accompanied by hundreds of open and repeated statements of genocidal intent uttered by Israeli officials and military officers of the highest rank, as well as other public personalities, including mainstream media and entertainment figures. The list of these statements is far too long to recite (see here, here, here, and here), but among them include former Defence Minister Yo'av Gallant's 9 October 2023 reference to Palestinians as "human animals", and President Isaac Herzog's 12 October insistence that "[i]t's an entire nation out there that is responsible [i.e. in Gaza]. It is not true this rhetoric about civilians not aware, not involved." And then there is the particularly opprobrious and repeated public invocations by Prime Minister Benjamin Netanyahu of genocidal passages of the Hebrew Bible when referring to Palestinians. For example, on 28 October 2023, as the Israeli armed forces were commencing their full-scale ground operation into Gaza, he exhorted his soldiers to "remember what Amalek did to you", likening the Palestinians to a people whom God commanded the ancient Israelites to obliterate, including women and children ("go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses!"). More than merely public utterances issued by political and military leadership in the heat of the moment, overwhelming evidence demonstrates that each of these genocidal statements and others like them has been understood and acted upon by Israeli forces operating on the ground who have publicly referred to Palestinians as "human animals", asserted that there are "no uninvolved civilians" in Gaza, and have likened Palestinians to "Amalekites".

If the principles underpinning the post-WWII international legal order mean anything, one would have expected its main sponsors in the Global North, led by the United States, to have been the first to rein their ally Israel in. But with the exception of lip service only now being lightly paid by three members of the G7 (Canada, France, and the United Kingdom), no reduction in actual material support (i.e. military, diplomatic, economic, intelligence) for Israel from these countries, and most particularly not from Israel's major benefactor, the United States, has been forthcoming. Indeed, as shown by 20 months of UN Security-Council debates on Gaza, where the US has used its veto to at least five times block ceasefire resolutions to stop the carnage, Washington is not only complicit in Israel's onslaught, but it is a full party to it. If the Western States, led by the US, were to have only one one-hundredth of the concern for occupied Palestine as they have shown for occupied Ukraine where the exact same legal principles are in play, the world might not be in the catastrophic situation it is in today. What has become of the West's earlier invocations of the so-called 'responsibility to protect' or 'humanitarian intervention' doctrines? Having been so well deployed and honed to justify the invasion of more than one safely peripheral country in the not-to-distant past, where are the Western champions of these much-ballyhooed principles aimed at protecting the most vulnerable from atrocity crimes? Might it be that they have now been consigned to oblivion because the party needing to be restrained and held to account is an ally of the West with purported "shared values" status?

Judging by patterns of voting in the UN General Assembly on Gaza, it is clear that the vast majority of States in the world are aware of the inflection point that has become Gaza. As I have elsewhere written, critical international legal historians and scholars have long understood the Question of Palestine to be a litmus test for the international legal order. But the situation that has prevailed in the Occupied Palestinian Territory (OPT) since October 2023 has stretched the system to a place never before seen. Under the weight of Western hegemonic support of Israel's onslaught against the Palestinian people, middle and smaller powers, mostly but not exclusively from the Global South, have turned to the International Court of Justice (ICJ) for redress. And they have thereby collectively help sharpen the proverbial crossroads at which humanity now finds itself, forcing us to choose between protecting the old post-WWII "Never Again" order, or replacing it with an even older much more dreadful future where law is subsumed by brute force or has become so emaciated that it cannot halt the collective slide into oblivion.

As at the time of writing, at least four separate judicial proceedings have been pursued at the ICJ relating to events in the OPT in what can only be described as a counter-hegemonic attempt to save the international legal order as we know it. In the most publicly prominent of these, in December 2024 South Africa launched an *Application on the Convention of the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, alleging that Israel is violating its obligations under the Convention in Gaza. By provisional measures Order of 26 January 2024, the Court found "the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts" under the Convention to be "plausible" (para. 54). The Court accordingly issued a binding order upon Israel to "to take all measures within its power to prevent the commission" of Genocidal acts in Gaza, "to prevent and punish the direct and public incitement to commit genocide" against Palestinians in Gaza, and to

“take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip” (para. 86). Subsequently, and in the face of Israel’s continued policy of starvation of the civilian population of Gaza, by Order dated 28 March 2024, the Court required Israel to

> “Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary; [and to]
>
> Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance” (

In the face of continued Israeli obstinance, by Order dated 24 May 2024, the Court, *inter alia*, reaffirmed the provisional measures indicated in its Orders of 26 January and 28 March 2024, requiring that they “be immediately and effectively implemented” by Israel (para. 57). Given Israel’s ongoing blockage of any independent outside observers into Gaza, the Court further indicated that Israel shall “[t]ake effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide” (para. 57). Unsurprisingly, Israel has failed to allow any independent outside investigative body into Gaza, not only from the UN but also international media. Procedurally, in October 2024 South Africa delivered its Memorial to the Court and Israel has been given until January 2026 to respond. It is unclear when the case will be heard on the merits, but it will take time given at least 13 other States, including the State of Palestine, have sought to intervene in the matter. Notwithstanding, because of its attempt to call Israel to account for its actions in Gaza, South Africa has become the diplomatic spearhead of the Global South in testing how faithful Israel’s Western backers, in particular Washington D.C., are to their long-touted support for the post-WWII international legal order.

In the face of the knowledge that Israel does not act alone in Gaza, but relies heavily on a small number of Western backers, a less prominent case was brought in March 2024 by Nicaragua against Germany for its alleged violations of its obligations deriving from the *Genocide Convention*, the Geneva Conventions of 1949 and their Additional Protocols, “intransgressible principles of international humanitarian law” and other norms of general international law in relation to the OPT, particularly the Gaza Strip. This case is particularly important because it focuses on the role of one particularly important Western third state that has apparently aided and assisted Israel in its course of

conduct in the OPT (other key states, including the US, were out of reach given they have not agreed to the compulsory jurisdiction of the Court). Success in any measure on the merits will, it is hoped, have a ripple effect on compelling other third states in the West to cease their collusion with the commission of atrocities in Palestine.

In yet another case concerning the situation in the OPT, this time commenced by the passage of General Assembly resolution 79/232 of 19 December 2024, the ICJ was asked the following "urgent" question:

> "What are the obligations of Israel, as an occupying Power and as a member of the United Nations, in relation to the presence and activities of the United Nations, including its agencies and bodies, other international organizations and third States, in and in relation to the Occupied Palestinian Territory, including to ensure and facilitate the unhindered provision of urgently needed supplies essential to the survival of the Palestinian civilian population as well as of basic services and humanitarian and development assistance, for the benefit of the Palestinian civilian population, and in support of the Palestinian people's right to self-determination?"

Proceedings in the case concerning the *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory* are ongoing. Oral hearings (in which I appeared before the Court) took place in the last week of April 2025, and the issuance of the Court's opinion is pending. The law in the case is relatively straight forward, but what is particularly interesting is that this time around, it was a smaller but progressive Western State, Norway, that led the charge in sponsoring the draft resolution that led to the passage of the referral resolution invoking the jurisdiction of the Court.

Finally, each of the above cases needs to be read within the context of another recent case at the ICJ that precedes them and in which I also had the honour of serving as legal counsel. On 30 December 2022 the UN General Assembly passed resolution 77/247 placing the question of the legal status of Israel's 'temporary' then 57-year occupation of the OPT before the ICJ. The Court was asked two questions, the nub of which was to ask the Court to opine on the legal status of Israel's continued presence in the OPT in view of various of its policies and practices over time. On 19 July 2024, the ICJ ruled that Israel's continued presence in the OPT is indeed unlawful, along with a number of key findings. It is no understatement to say that the case concerning the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* constitutes a seismic and structural change in the international law and practice on the question of Palestine. In one fell swoop, the ICJ has shifted what was hitherto an almost exclusive focus of the international community on how Israel has administered its 58-year occupation of the OPT under international humanitarian law (IHL) and international human rights law (IHRL), to the requirement that Israel end its occupation of that territory as "rapidly as possible", in the words of the Court. This shift from what I have called the 'managerial' and 'humanitarian' approach of the United Nations on the

OPT to one that is *emancipatory* in outlook, is the single most important takeaway of the case.

The Court commenced its substantive analysis of the questions put to it by noting that under IHL "occupation is a temporary situation to respond to military necessity, and it cannot transfer title of sovereignty to the occupying Power" (para. 105). It then examined the legality of various Israeli policies and practices in the OPT. This assessment is rooted, first and foremost, in Israel's illegal settlement policy – a violation of article 49 of the Fourth Geneva Convention (paras. 111-119). From there, among the other policies and practices determined by the Court to be illegal, all of which are connected to the settlement policy, are the following:

- Confiscation or requisitioning of Palestinian land in violation of arts. 46, 52, and 55 of the 1907 Hague Regulations (paras. 120-123);
- Exploitation of Palestinian natural resources in violation of art. 55 of the 1907 Hague Regulations (paras. 124-133);
- Extension of Israeli law and regulatory authority in the OPT in violation of art. 43 of the 1907 Hague Regulations and art. 64 of the Fourth Geneva Convention (paras. 134-141);
- Forcible transfer of the Palestinian population in violation of art. 49 of the Fourth Geneva Convention (para. 142-147);
- Failure to protect and ensure Palestinian rights to life, humane treatment and freedom from violence in violation of art. 46 of the 1907 Hague Regulations and art. 27 of the Fourth Geneva Convention (para. 148-157).

Far from amounting merely to discrete violations of IHL or IHRL, the Court then considers their cumulative effect over 57-years. It indicates, in no uncertain terms, that Israel's policies and practices "amount to annexation of large parts" of the OPT because they "are designed to remain in place indefinitely and to create irreversible effects on the ground" (para. 173). It then concludes that "to seek to acquire sovereignty over an occupied territory, as shown by the policies and practices adopted by Israel in East Jerusalem and the West Bank, is contrary to the prohibition of the use of force in international relations and its corollary principle of the non-acquisition of territory by force" (para. 179).

The Court then turns to assessing whether Israel's "legislation and measures" related to its "policies and practices" in the OPT are "discriminatory" (Opinion, paras. 180-184). Professor Lynk has covered this well in his contribution to this special issue. Suffice to say, the principal conclusion of the Court in this regard is its opinion "that Israel's legislation and measures constitute a breach of Article 3 of CERD" by which States parties – including Israel – "particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." (paras. 224-229).

Moving from there, and building on its rulings in the *East Timor*, *Wall* and *Chagos* cases which held that the obligation to respect self-determination of peoples is of *erga omnes* character, the Court indicates for the first time that "in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law" (paras. 230-235). The Court

then determines after careful analysis that “Israel’s unlawful policies and practices” that it has reviewed under the IHL and IHRL “are in breach of Israel’s obligation to respect the right of the Palestinian people to self-determination” (para. 243).

At this stage, the Court does not have very far to go to come full circle with its analysis. It recalls that “the Israeli policies and practices” that it has assessed to be in violation of IHL and IHRL “have brought about changes in the physical character, legal status, demographic composition and territorial integrity of the Occupied Palestinian Territory” and that “[t]hese changes manifest an intention to create a permanent and irreversible Israeli presence in the Occupied Palestinian Territory” in violation of the law governing use of force (para. 252). The Court then correctly affirms that “occupation cannot be used in such a manner as to leave indefinitely the occupied population in a state of suspension and uncertainty, denying them their right to self-determination while integrating parts of their territory into the occupying Power’s own territory” (para. 257). It then concludes that:

> “The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and continued frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel’s presence in the Occupied Palestinian Territory unlawful.” (para. 261)

There is little doubt in my mind that the *Israeli Policies* Advisory Opinion constitutes a paradigm shift in the law and politics of the Palestine question. This is because it has provided a long-awaited legal endorsement of the boycott, divestment and sanctions movement that can now be used as a tool to fuel that movement. Being an unlawful ongoing use of force, Israel’s continued presence in the OPT amounts to an aggression of a continuing character against the territorial integrity and political independence of the State of Palestine and a violation of the right of the Palestinian people to self-determination contrary to the UN Charter and general international law. As *jus cogens* (or peremptory) norms, and as noted by the Court, neither of these violations can be justified under any circumstance. This includes on grounds of purported ‘security’ or ‘self-defence’. Not only is Israel under an unambiguous obligation to end its illegal presence in the OPT unconditionally, totally and “as rapidly as possible” in line with the law of State responsibility, but it must also make full reparation for damage caused to any natural or legal persons concerned going back to 1967, including restitution, compensation and satisfaction (paras. 270, 285). Furthermore, the Court has found that third States and international organizations, including the United Nations, are under an obligation to not recognize as legal the situation arising from Israel’s continued presence in the OPT, nor render aid or assistance in the maintenance of that situation (para. 285).

In point of fact, in its resolution ES-10/24 of 18 September 2024, the General Assembly received the advisory opinion and set out what can only be called the ‘Mother of All Resolutions’ on the OPT. In it, the Assembly has demanded, inter alia, that Israel vacate the occupied territory within 12 months of the date of the passage of the resolution (para. 2). In addition, it has reaffirmed the obligation of all

States:

“to distinguish between Israel and the Palestinian territory occupied since 1967, including by:

(i) Abstaining from treaty relations with Israel in all cases in which it purports to act on behalf of the Occupied Palestinian Territory or a part thereof on matters concerning the Occupied Palestinian Territory or a part of its territory;

(ii) Abstaining from entering into economic or trade dealings with Israel concerning the Occupied Palestinian Territory or parts thereof which may entrench its unlawful presence in the Territory, including with regard to the settlements and their associated regime;

(iii) Abstaining, in the establishment and maintenance of diplomatic missions in Israel, from any recognition of its illegal presence in the Occupied Palestinian Territory, including by refraining from the establishment of diplomatic missions in Jerusalem, pursuant to Security Council resolution 478 (1980) of 20 August 1980;

(iv) Taking steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory, including with regard to the settlements and their associated regime;

(v) To take steps to ensure that their nationals, and companies and entities under their jurisdiction, as well as their authorities, do not act in any way that would entail recognition or provide aid or assistance in maintaining the situation created by Israel’s illegal presence in the Occupied Palestinian Territory;

(vi) To take steps towards ceasing the importation of any products originating in the Israeli settlements, as well as the provision or transfer of arms, munitions and related equipment to Israel, the occupying Power, in all case where there are reasonable grounds to suspect that they may be used in the Occupied Palestinian Territory; and

(vii) To implement sanctions, including travel bans and asset freezes, against natural and legal persons engaged in the maintenance of Israel’s unlawful presence in the Occupied Palestinian territory, including in relation to settler violence.”

Following the passage of this resolution, a number of States have begun to take action. On 22 October 2024, the Norwegian government issued a warning to its nationals (individuals and corporations) to not engage in trade dealings with Israel that help perpetuate its occupation of the OPT. Likewise, on 1 November 2024, 54 Member States of the United Nations called for an immediate arms trade embargo on Israel.

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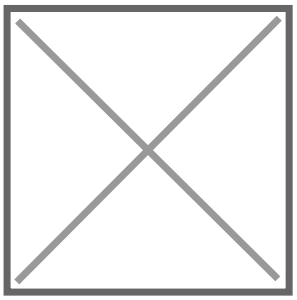
It is apparent from the above described counter-hegemonic resort to the ICJ, that the pressure upon

Israel and its small coterie of Western backers is not going to cease until it ends its physical presence and racial segregationist and apartheid regime in the OPT. Needless to say, despite the resolution requiring withdrawal within 12 months (i.e. by 17 September 2025), it is apparent Israel will not do that, as their ministers continue to expedite their quest to displace and replace the Palestinian population in the OPT as they have done for decades, most particularly now in the Gaza Strip. Until such time as Israel changes its course and withdraws, third states will remain under an obligation to adjust their bilateral relations with Israel in all sectors of engagement. Like apartheid South Africa before it – in particular following the Court's seminal opinion issued in the *1971 Namibia* case – Israel's status as a full-fledged pariah of the international community has been consecrated by the World Court. And its diplomatic, economic, political, cultural, academic isolation will inevitably pick up pace until the Palestinian people are free. There is no telling when this will happen. But what is certain, is that it cannot happen without requisite pressure being brought to bear in order to impose costs on the occupying Power and those that deal with it. In this light, having recourse to the ICJ demonstrates the incremental and important gains that can be achieved when the global subaltern class makes creative use of international law to push back against the hegemonic powers that be. A structural change has happened. It is now up to all of us to collectively activate it. At issue is the prospect that the principles upon which the post-WWII legal order rest may be cast into oblivion, if they haven't already. As was movingly noted by Judge Antônio Cançadao Trindade in his separate opinion in the *Case of the Moiwana Community versus Suriname*: "*It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times*…".

**The statistics cited in this paper are current as of July 5, 2025*.

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