

CONFLICTS, GENOCIDE AND INTERNATIONAL LAW

'The fact of genocide is as old as humanity', wrote Jean-Paul Sartre. The law, however, is considerably younger. The modern law of genocide follows from the observation that, historically, genocide has gone unpunished. Hitler's famous comment, 'Who remembers the Armenians?', is often cited in this regard. Yet the Nazis weren't the only ones to rely on the reasonable presumption that an international culture of impunity would effectively shelter the perpetrators of crimes against humanity. The global community has attempted to establish a judicial order to curtail its occurrence and minimise its devastating effects. Yet, serious violations of International Humanitarian and Human Rights Law are still common in many armed conflicts.

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INTRODUCTION

Since the dawn of civilisation, war has posed one of the most significant threats to human life, liberty, property and indeed the very notion of humanity as a moral and ethical concept. In the words of Isaac Asimov, "Every period of human development has had its own particular type of human conflict, its own variety of problems that, apparently, could be settled only by force. And each time, frustratingly enough, force never really settled the problem. Instead, it persisted through a series of conflicts, then vanished by itself."

The naked violence and utter savagery that often accompanies war or armed conflict has caused unspeakable and unquantifiable suffering to millions upon millions of people throughout the course of human history. On a purely logical plane, it seems astoundingly absurd that the murder of one or a handful of individuals is accorded negative social sanction and is treated as a crime; but

the murder of several thousands or even millions is lauded as a noble act of patriotism or a holy duty. Jean Rostand captures this tendency most eloquently when he says, “Kill one man, and you are a murderer. Kill millions of men, and you are a conqueror.”

Throughout man's longstanding presence on earth as a social animal featuring distinct social characteristics in the nature of cohesion, organisation, division of property, labour and resources, there has always been some form of conflict. Each conflict has ended either conclusively or inconclusively, in both cases only to either manifest itself in some other form at a later juncture or wither away with time and give birth to or lead to another conflict as a new social group occupies a certain territory and adapts to a new social and economic environment. The history of human warfare is therefore replete with examples of the permanence of conflict among social groups, which come to acquire the distinct character of national groups or nation states. The prevalence of war throughout human history makes it so evident that it would be a folly to

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consider warfare as an exceptional form of human behaviour. (*Mary Dudziak, War Time: an Idea, Its History, Its Consequences, Oxford University Press, 2014, p56*) Every epoch in history has seen significant armed conflict between kingdoms, republics, empires and nation states. New conflict has often been a consequence of subsisting differences of opinion or a pre-existing conflict of competing interests. War has been persistent in the recorded experience of humankind. (*Braden R Allenby, The applied ethics of emerging military and security technologies, Routledge, 2015, p34*)

International Law's role in the protection of national, racial, ethnic and religious groups from persecution can be traced to the Peace of Westphalia of 1648, which provided certain guarantees for religious minorities. Other early treaties were intended for the protection of Christian minorities within the Ottoman Empire and of francophone Roman Catholics in British North America. These concerns about the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.

In the third century BCE, Emperor Ashoka in India fought a series of

battles, first with his own brothers to eliminate any succession disputes, and then with rival kingdoms in the region and beyond to consolidate the Mauryan Empire. From the beginning of the first century BCE, the Roman Empire grew exponentially and then collapsed through wars fought over a period of five hundred years. At the same time as the Roman Empire was expanding its influence in the first few centuries of the Common Era (CE), the Gupta Empire in India, with leaders such as Samudragupta also expanded through victorious wars. (*Romila Thapar, The Penguin history of early India: from the origins to AD 1300, Penguin Books, 2003, p156*) From 1095 to 1291, a series of battles were fought in the name of religion between the armies of the Christian West and those of the Muslim Middle East over the control of territory considered holy by both sides.

At around the time of the last Crusade wars being fought, a force rose from the East; one that would shatter the edifice of existing empires and write its own chapter in human history with the blood of its victims. That force was the Mongol expansion across Eurasia; estimates for the number of deaths resulting from the Mongol conquests range from thirty to eighty million as a succession of Khans established the largest empire on a contiguous landmass in history. (*Timothy Michael May, The Mongol conquests in world history, University of Chicago Press, 2012, p23*) At around the same time, the soil in India trembled as the sound of the gallop of Turkic and Afghan horses could be heard far and wide, across the length and breadth of the Indo-Gangetic plains; hordes of invading armies from Central Asia conquered northern India and established empires, most notably, the Delhi Sultanate, founded after the Battle of Tarain in 1192. (*Hari Krishen. Kaul, Historic Delhi: an anthology, Oxford University Press, 2000, p72*)

From 1337 to 1453, the Hundred Years' War saw conflict between England and France over territorial and dynastic claims. (*Anne Curry, The hundred years war, Osprey Publishing, 2003, p68*) The Eighty Years' War, resulted from a mixture of political, religious and economic grievances against the rule of Spain's Philip II, resulting in the birth of the independent Dutch Republic. (*James D Tracy, The founding of the Dutch Republic: war, finance, and politics in Holland, 1572-1588, Oxford University Press, 2007, p86*) Simultaneously, the Thirty Years' War raged on from 1618 to 1648, it was one of the most destructive conflicts in European history, claimed as many as eight million lives and transformed Europe's religious and political landscape. (*Geoffrey Parker et al., The thirty years' war, Routledge, 2007, p30*) From 1622 to 1653, South Asia witnessed two armed conflicts between two of its most formidable powers, Mughal India and Safavid Iran, over the control of Kandahar in Afghanistan.

These wars resulted in considerable casualties on both sides. (*Satish Chandra, Medieval India: from Sultanat to the Mughals, Har Anand Publications, 2004, p325*) In the following century, the Seven Years' War from 1756 to 1763 split Europe into separate alliances led by Britain and France. It was the first worldwide conflict and a precursor to the American Revolution. The French Revolutionary and Napoleonic Wars (1792–1815) saw seven million Europeans die, with conflict spreading across much of Europe as France sought first to abolish its monarchy, next to defend the revolution from other European monarchs, and then to overthrow or submit those opponents.

Hundreds of thousands more lost their lives in the devastating American Civil War from 1861 to 1865. In 1914, the outbreak of the First World War brought with it technological advancements that made it possible for armed groups to carry out the mass slaughter of entire populations on an industrial scale. The wartime atrocities committed against the Armenian population in the Ottoman Empire had been met with a joint declaration from the governments of France, Great Britain and Russia, on 24 May 1915, asserting that “in the presence of these new crimes of Turkey against humanity and civilisation, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres.” It was called the ‘war to end all wars’, but didn’t quite live

On 8 August 1945, the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis was concluded. Article 6 specified three types of crimes: (1) crimes against peace (relating to *jus ad bellum*); (2) war crimes (violations of the laws or customs of war); and (3) crimes against humanity.

up to the billing, as soon afterwards, there was another great war, the greatest conflict in human history. The Second World War led to unparalleled loss in human life never before seen in the history of human conflict. Over sixty million people—3 per cent of the entire world’s population at the time—were wiped off the face of the earth. (*International Programs, World Population, US Census Bureau, Demographic Internet Staff, https://www.census.gov/population/international/data/worldpop/table_history.php*) Even the senseless, merciless butchery of the Second World War didn’t shake the collective conscience of humanity enough for it to discard warfare as a means of dispute

resolution; there have been several wars since nuclear bombs were dropped on Hiroshima and Nagasaki, instantly vapourising thousands, and razing the two cities.

There were war crimes trials at the end of the Second World War, mainly in national courts of the victorious powers and of the countries they had liberated. The most famous were the International Military Tribunals at Nuremberg and Tokyo, which tried some Axis war criminals. They constitute the major precedent for implementation of the laws of war through international trials. Today, because new international tribunals for the prosecution and trial of war crimes have been established, these post-1945 international courts merit re-examination.

The bare facts of the two international tribunals are easily summarised. They originated in Allied declarations in London on 13 January 1942 and Moscow on 1 November 1943. The declarations stated that the prosecution of war crimes would be one of the Allies' principal war aims. Trials were to be conducted in the countries where the crimes were committed. However, the problem remained regarding what to do about major figures whose crimes were not tied to any particular location. On 8 August 1945, the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis was concluded. Article 6 specified three types of crimes: (1) crimes against peace (relating to *jus ad bellum*); (2) war crimes (violations of the laws or customs of war); and (3) crimes against humanity.

The significance of the Nuremberg and Tokyo tribunals is notoriously a subject of controversy. Some aspects of the controversy are not relevant to the present inquiry, such as certain procedural deficiencies and the question of whether the charge of waging aggressive war was well-founded in existing International Law, and fairly applied, especially at Tokyo. Three other grounds of criticism are closely related to current problems of applying the law: (1) that the tribunals applied a body of law, some aspects of which, before 1945, had not been clearly enunciated in treaty form, or were in treaties which were not fully applicable to the events under scrutiny; (2) that the tribunals were one-sided, as possible war crimes committed by the Allies were neither fully considered at either tribunal nor dealt with elsewhere; and (3) that large numbers of guilty individuals were either not prosecuted at all, or were treated too leniently. The first and second of these grounds feed into the commonly uttered view that these trials constituted victor's justice.

The first element is the notion of "crimes against humanity". To some extent,

these were simply war crimes writ large, but, in addition, they could encompass actions before as well as during the war and could apply to a government's offences against its own citizens. However, the wording of Article 6(c) of the 1945 Charter of the Nuremberg Tribunal suggested that crimes against humanity had to be committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal"—a curious proviso which blunted the impact of this innovative category.'

A second element regarding the creation of new law arose from the way in which the judgment of the Nuremberg Tribunal asserted the universal applicability of a key part of existing law, the 1907 Hague Convention IV on Land War. Article 2 of the Hague Convention stated that its provisions were applicable only if all the belligerents in a conflict were parties to the Convention. The defence at Nuremberg contended that because some belligerents, Albania being one example, were not parties to the Hague Conventions, Germany was not bound by the Conventions, at least vis-a-vis non-parties. The Tribunal's judgment said that during the Second World War, the Conventions applied to all countries, because by then they had become customary law. With this statement, the judges from the victorious powers were saying that, irrespective of the adherence by states to particular accords, and irrespective of legal niceties and small print, there had to be some minimal universal standards.

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As to the accusation that the Nuremberg and Tokyo trials were one-sided, it is well supported—and it was well articulated by the defence lawyers at the trials—to point out that there had been terrible deeds committed by both sides during the war. On some matters, such as submarine warfare and the bombing of cities, the Allies, just as much as the Axis powers, had ignored existing treaties and legal principles. Moreover, the record of the Soviets regarding the treatment of prisoners had been appalling. However, there was one major category of activity on which the law was clear, and in respect of which there was little comparison between Axis powers and the Allies. In the end, this category was a main basis for the conviction of most of the major war criminals. It concerned,

not combat itself, but treatment of those more or less hors de combat. The Axis atrocities against many of those who were directly under their control, whether Jews, prisoners of war (POWs) or inhabitants of occupied territories, formed the strongest ground for conviction. It cannot have been wrong to punish these acts. They were clear violations of the most elementary principles of decency, as well as being contrary to the 1907 Hague Land War Convention and the 1929 Geneva Prisoners of War Convention. However, the victorious powers committed many similar violations in their treatment of Germans POWs.

Historically, International Law was concerned only with actions of states, while the individuals through whom states acted remained almost entirely outside its purview. Yet, since the end of the Cold War the international legal system has seen a resurgence of the driving ideas behind the Nuremberg and Tokyo trials—that of establishing individual criminal responsibility for grievous atrocities and mass violations of human rights and the laws of armed conflict, under international law, and before international courts, if municipal judicial systems are unwilling or unable to prosecute the offenders. The establishment of the ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the UN Security Council and the development of hybrid, internationalised criminal tribunals such as the one for Sierra Leone finally culminated in the creation of a new, permanent International Criminal Court (ICC). (*S R Ratner and J S Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn., 2001), pp187–225) Yet, all these developments of the past decade dealt with individual and not state responsibility for international crimes. Indeed, it was precisely the need to remove from culpable individuals the protective shield of the state which caused the development of individual responsibility in International Law, as is shown by the quotation from the Nuremberg judgment at the beginning of this article. (*Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of a State', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary, vol. 2* (2002), p1085) This article will endeavour to show that this quotation does not exhaust the inquiry into the responsibility of states for genocide and other international crimes in contemporary law, nor would such responsibility of states debar or diminish the criminal responsibility of individuals.

Modern International Law recognises two distinct aspects of the law pertaining to war. *Jus in bello* and *jus ad bellum*. These two are distinguished on the basis of the places in the chronological, sequential chain that they occupy.

While the latter deals exclusively with the law governing the justification for imposing a war, the former is concerned with the conduct of the war once it starts. This work will fundamentally consider *jus in bello* in general and the rights and duties it confers and imposes in particular.

There are primarily two approaches to the history and background of International Law relating to armed conflict. Lawyers and jurists are divided insofar as their opinions regarding the origin of this stream of international law is concerned; some are of the view that it is a story about the humanisation of war and law; others see it as a story of imperialism and oppression. The majority among lawyers, jurists and thinkers is of the opinion that the laws of war have always existed to limit the destruction of war. All major civilisations, from India to China, Japan, the West and the Islamic

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world, all have their own traditions of rules of warfare. Even though all major civilisations displayed a concern for the regulation of the conduct of warfare, it was not until the nineteenth century that a movement to codify the laws of war began in earnest and modern International Humanitarian Law (IHL) was born.

The Battle of Solferino in 1859 was arguably the most crucial moment in the history of modern IHL. The Swiss businessman Henry Dunant happened to be present at the scene of that battle. He was so horrified by the suffering of injured soldiers that he decided to establish the Red Cross movement, which went on to become the most influential body in IHL as a promoter and custodian of the humanitarian idea and the primary initiation for its transition into IHL. The movement that Dunant started gained momentum and it resulted in the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field in 1864. This Convention marks the start of the Geneva tradition of humanitarian law. It was followed by several other conventions, including the other pre-Second World War Geneva Conventions, the 1907 Hague Convention, the 1949 Geneva Conventions and the 1977 Additional Protocols.

In an age when the nature, intensity and context of armed conflict are rapidly changing, the response of the law must be equally dynamic. It must be applied in a manner suitable to different situations of armed conflict without losing the overarching spirit of the law. The pages that follow will attempt to understand the provisions of international law relating to the rights of the victims of armed conflict. The endeavour is to bring to light the dynamic nature of the law in relation to armed conflicts and the imperativeness of the protection of the rights conferred by the law through its implementation in practice by national and international institutions.

PROTECTION OF CIVILIANS

Armed conflict almost always causes major losses for a country and its inhabitants. In fact, in principle, Humanitarian Law has clearly stipulated the separation between military and civilians. The principle of differentiation is very important in armed conflict, where clarity regarding this distinction has been provided. The mention of the prohibition on attacks on civilians is one of the things that countries involved in armed conflict should know about. Regarding civilians, the rules have even been written clearly in Humanitarian Law. Providing protection for civilians during war is considered very important. Based on International Humanitarian Law, during an armed conflict the principles governing the protection of civilians apply, including:

1. Communities that may not be attacked

International Humanitarian Law (IHL) explicitly states, the general public is prohibited from being used as targets in armed conflict or war. A country that continues to attack the general public has clearly committed a war crime.

2. Special Protection

International Humanitarian Law (IHL) also seeks to provide protection for people or even groups who do not directly participate in armed conflict. Inability to fight is also included in special protection (civilians, children, elderly, medical, etc.).

3. Geneva Convention

International Humanitarian Law (IHL) is based on the Geneva Convention which clearly states its rules for the protection of civilians during times of war.

CONCEPT OF GENOCIDE IN INTERNATIONAL LAW

Winston Churchill called genocide “the crime without a name”. A few years later, the term ‘genocide’ was invoked by the Polish jewish lawyer Raphael Lemkin in his 1944 work, *Axis Rule in Occupied Europe*. Rarely has a neologism had such rapid success. Within little more than a year of its introduction to the English language, it was being used in the indictment of the International Military Tribunal, and a year later, it was the subject of a United Nations General Assembly resolution, but the resolution spoke in the past tense, describing genocide as crimes which ‘have occurred’. By the time the General Assembly completed its standard setting, with the 1948 adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, ‘genocide’ had a detailed and quite technical definition as a crime against the law of nations. Yet the preamble of that instrument recognises ‘that at all periods of history genocide has inflicted great losses on humanity’.

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The word ‘genocide’, immediately invokes a set of memories of the horrors of the Holocaust and the Second World War and the methodical, organised extermination of millions of human beings. The moral and social stigma carried by this word is one of the primary reasons why states and other political actors use it in international discourse, or more often, desperately try not to use it. (*S Power, A Problem from Hell: America and the Age of Genocide* (2002), at pp1–85) However, there is a marked difference between the ordinary, lay meaning of the word ‘genocide’, or even the concept of genocide in anthropology or other social sciences, and the legal concept of genocide, or better yet, the concept of genocide in international law. (See Carrasco and Fernandez, ‘In re Pinochet’, 93 AJIL (1999) 690. See also the judgments of German

courts in the case of Bosnian Serb Nikola Jorgić, Oberlandesgericht Düsseldorf, 2 StE 8/96, judgment of 26 September 1997, Bundesgerichtshof, judgment of 30 April 1999; Bundesverfassungsgericht, judgment of 12 December 2000.) To the average lay person, genocide is any organised, planned mass murder of human beings on account of their race, ethnicity, religion or other personal characteristic. Yet, to the international lawyer genocide is a term of art, with a meaning strictly defined by Article II of the 1948 Genocide Convention, and reflected in customary law: (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277)

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

International Human Rights Law can also trace its origins to the law of armed conflict, or International Humanitarian Law. Codification of the law of armed conflict began in the nineteenth century. In its early years, this was oriented to the protection of medical personnel and the prohibition of certain types of weapons. The Hague Regulations of 1907 reflect the focus on combatants but include a section concerning the treatment of civilian populations in occupied territories. In particular, Article 46 requires an occupying belligerent to respect family honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.

The new world order that emerged in the aftermath of the First World War, and that to some extent was reflected in the 1919 peace treaties, manifested a growing role for the international protection of human rights. Two aspects of the post-war regime are of particular relevance to the study of genocide. First, the need for special protection of national minorities was recognised. This took the form of a web of treaties, bilateral and multilateral, as well as unilateral declarations. The world also saw the first attempt to establish an international criminal court, accompanied by the suggestion that massacres of ethnic minorities within a State's own borders might entail both State and individual responsibility.

The wartime atrocities committed against the Armenian population in the Ottoman Empire had been met with the earlier cited joint declaration from the governments of France, Great Britain and Russia, It has been suggested that this

constitutes the first use, at least within an international law context, of the term 'crimes against humanity'. At the time, United States Secretary of State Robert Lansing admitted what he called the 'more or less justifiable' right of the Turkish government to deport the Armenians to the extent that they lived within the zone of military operations'.

Genocide and crimes against humanity are simply different as a matter of international law, while the moral condemnation every sane person must attach to such atrocities should not depend on the outcome of legal academic debates.

An international court, however, should not adopt either an expansive or a restrictive definition of genocide, but the legally correct one, which is in conformity both with the text and the preparatory work of the Genocide Convention and the jurisprudence of international tribunals. There would otherwise be no point in making the distinction in the first place, yet this is exactly what states did when they adopted the Convention in 1948. It is the extreme mens rea of genocide which draws the distinction between genocide and crimes against humanity

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as a genus; murder, extermination or deportation are all crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack. They only become genocide if the perpetrator commits them with the intention of physically or biologically destroying a protected group, in whole or in part.

PRINCIPLES OF INTERNATIONAL LAW IN GEOPOLITICAL CONFLICTS

International law governs relations between states via treaties, customs, judicial decisions, and recognised principles. Central problems relevant to geopolitical conflicts include sovereignty and non-interference, which stipulate that no state should intervene in the internal affairs of another, a fundamental principle enshrined in the United Nations (UN) Charter. (*Introduction to International*

Law, What Convention https://www.whatconvention.org/en/intro_il) Grounded on decolonisation, self-determination empowers people to choose their political stance and pursue development, often leading to conflict when it clashes with state territorial integrity. While several states justify military intervention by citing national security or humanitarian aid, the UN Charter prohibits the use of force, hence restricting military action to self-defence or approval by the Security Council. Human rights law operates in both peacetime and wartime, focusing on fundamental rights, while Humanitarian Law, or International Humanitarian Law, seeks to safeguard civilians during conflict by regulating the methods and means of warfare. (International Committee of the Red Cross, International Humanitarian Law: Answers to Your Questions. <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0703.pdf>) Numerous worldwide institutions uphold these principles. The maintenance of peace relies on the UN Security Council (UNSC), which encounters challenges due to rivalries and the veto power of its permanent members namely, the United States, Russia, China, France, and the UK, resulting in frequent delays in implementation. (Council on Foreign Relations, *Backgrounder: The UN Security*. <https://www.cfr.org/backgrounder/un-security-council>.) Despite its voluntary jurisdiction, which limits its scope, the International Court of Justice (ICJ), the principal judicial body of the UN, adjudicates legal disputes between states and provides advisory opinions. The International Criminal Court (ICC) prosecutes individuals for war crimes, genocide, and crimes against humanity; nevertheless, its effectiveness is undermined by certain countries' rejection of its authority and the politicisation of its cases in highly publicised conflicts.

GEOPOLITICAL CONFLICTS AND INTERNATIONAL LAW: ANALYSING CASE STUDIES

Conflicts between Russia and Ukraine

Russia's ongoing struggle with Ukraine, which escalated with the annexation of Crimea in 2014 and the full-scale invasion in 2022, is a clear violation of international legal rules. Russia's activities are widely condemned as infringements on Ukraine's sovereignty and territorial integrity, as well as contraventions of the UN Charter and norms of International Law. Russia's justification of its actions, which includes armed attacks by Ukrainian troops and paramilitary units in the separatist Donbas region, the protection of Russian-speaking

individuals and concerns over NATO's eastward expansion, underscores the tension between geopolitical strategy and national sovereignty. The UN General Assembly has condemned the annexation of Crimea, while Russia's veto power has incapacitated the UNSC. The Russia-Ukraine conflict also highlights the limitations of global institutions. The case brought by Ukraine against Russia at the ICJ has, for jurisdictional reasons, had to fit through the eye of the needle of the Convention on the Prevention and Punishment of the Crime of Genocide. In February 2024, the Court gave its decision on jurisdiction, rejecting some of Ukraine's claims. The result is that Ukraine's case on the merits will have to focus on an alleged lack of credible evidence that the Ukrainian government and its forces

are responsible for genocide in Eastern Ukraine. Moreover, the crisis-driven emphasis on the war has perhaps led international lawyers to overlook some other aspects of the conflict. However, the International Criminal Court issued an arrest warrant against President Vladimir Putin for carrying the deportation and transfer of children: around 20,000 children who are alleged to have been forcibly removed from disputed Eastern Ukraine to Russia for their protection, according to Russian authorities. This has resulted in advocacy for a special tribunal for aggression, possibly based on an agreement between Ukraine and the Council of Europe. In the words of Charles Worth, this crisis has become the 'heroic mission' of many international lawyers. The ICJ ordered that Russia cease military operations in Ukraine; but the absence of enforcement mechanisms made compliance inapplicable. Despite political obstacles and jurisdictional limitations hindering its operations, the ICC is investigating potential war crimes by both warring parties in Ukraine. (*Ehsan Mohseni, Zainab M. Ibrahim, & Shahrzad B. Malekpour, The Effect of Environmental Policy on Economic Growth: Evidence from the Middle East and North Africa Region, 9 Eurasian Economic Review 353 (2022)*)

In stark contrast to the multiple allegations of genocide brought by States of the former Yugoslavia, that were the first genocide cases before the Court, the applicants are no longer only the States directly affected by alleged violations of the Convention's rights.

The Israeli-Palestinian Conflict

The Israeli-Palestinian conflict, rooted in issues of self-determination,

territorial disputes, and human rights violations, is one of the most enduring geopolitical confrontations. International Law is significantly at stake, particularly via UN resolutions, the Geneva Conventions, and human rights agreements. Despite the UN's adoption of many resolutions affirming the Palestinian right to self-determination and calling for the dismantling of Israeli settlements in occupied territories, the implementation of these decisions remains unfeasible. The United States, a major ally of Israel, has exploited its veto power in the United Nations Security Council to obstruct resolutions that criticise Israeli actions. (*United Nations Regional Information Centre, Israel-Palestine: <https://unric.org/en/israel-palestine-the-role-of-international-justice/>*) The ICJ intervened in 2004, issuing an advisory opinion that deemed Israel's construction of the separation wall in the West Bank as contrary to international law. The discord illustrates again the significant divergence between legal concepts and political realities.

The 2024 Genocide Case: South Africa v. Israel

The 2024 genocide case brought by South Africa against Israel at the ICJ marked a pivotal moment in the contemporary application of international law. South Africa's petition, filed under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, alleged that Israel's military campaign in Gaza constituted an act of genocide, arguing that the Israeli Defense Forces (IDF) engaged in systematic destruction of Palestinian lives and infrastructure. (ICJ, 2024) The case focused on three core allegations: mass civilian casualties, the destruction of essential infrastructure, and the forced displacement of Palestinians by Israeli military operations. According to reports from UN agencies and human rights organisations, the conflict has resulted in tens of thousands of Palestinian deaths, including a disproportionately high number of children and non-combatants, alongside the targeting of hospitals, refugee camps, and humanitarian aid convoys. (*B'tselem (2024). Gaza 2023–24: Documentation of War Crimes. [NGO Report]*) The case represents one of the most significant legal challenges to Israel in recent history, testing the credibility and impartiality of the ICJ within a deeply politicised international legal order. In its preliminary ruling, the ICJ issued provisional measures, calling on Israel to take all possible action to prevent genocidal acts and allow the entry of humanitarian aid into Gaza. However, the Court stopped short of demanding an immediate ceasefire, a decision that

diverged from past ICJ rulings when it sought to impose stronger legal restraints on adversarial states. (Tladi D (2019). *The ICC and the Security Council: A Functional Relationship?* *Journal of International Criminal Justice*, 17(2), pp251–271) This measured approach raised concerns over double standards in the ICJ's handling of cases involving Western allies versus those concerning geopolitical adversaries.

The case also underscores the role of international legal institutions in shaping political narratives rather than enforcing binding constraints. While the ICJ's ruling generated significant diplomatic pressure on Israel, the absence of enforcement mechanisms once again exposed the Court's structural weakness. Unlike the International Criminal Court (ICC), which has the power to issue arrest warrants for individuals, the ICJ can only adjudicate in relation to state responsibility without an enforcement arm to implement its decisions. The failure of the United Nations Security Council

Any suggestion that the Court should refrain from considering genocide allegations in complex political situations including armed conflicts, would effectively deprive it of jurisdiction over the crime of crimes, at odds with the 1948 Convention.

(UNSC) to enforce the ICJ's ruling—due to the US's veto power—demonstrates how legal accountability remains contingent on the interests of the world's most powerful nations. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* (henceforth 'Bosnian Genocide') (Application) www.icj-cij.org/sites/default/files/case-related/91/7199.pdf)

NOVEL FEATURES OF THE NEW WAVE OF GENOCIDE CASES

One question is to what extent the pending genocide cases are different in nature from those that preceded them, raising novel features or objections. In this section we note at the outset what appear to be some newer procedural features that are relevant to the debates and controversies that we address in this contribution.

In stark contrast to the multiple allegations of genocide brought by States of the former Yugoslavia, that were the first genocide cases before the Court, (*A Papanastasiou*, (11 November 2024) www.ejiltalk.org/statehood-as-an-incident-issue-in-international-adjudication-reflections-on-palestines-intervention-request-in-south-africa-v-israel/) the applicants are no longer only the States directly affected by alleged violations of the

Convention's rights, but also States parties acting based on a shared interest in ensuring compliance with the *erga omnes partes* obligations enshrined in the Genocide Convention. This doctrine enables any State party to the Convention, regardless of the existence of harm or a special interest, to bring a case before the ICJ against a State accused of violations to enforce compliance with the Convention's obligations. This form of what might be termed 'public interest' or 'strategic' litigation by States (see Section 6) has enabled violations occurring during several non-international armed conflicts, or egregious wrongs to a State's own nationals or persons without the protection of a State, to be brought before the Court, which would not have been possible otherwise. This includes for example the violations during the ongoing conflict in Myanmar's Rakhine State opposing Myanmar's armed forces and the Arakan Rohingya Salvation Army. Similarly, the Court's engagement with the situation in Gaza in 2024 was made possible by the willingness of South Africa to bring a claim in the collective interest, given Palestine's contested standing to do so. (*Gazan Genocide (Application)* para 3 <www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>; *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany) (Application)* para 86 www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf)

Litigation in the public interest is not limited to enforcing the Genocide Convention and applies to other multilateral treaties safeguarding common interests. However, it holds particular significance in the context of the 1948 Convention because of States parties' explicit obligation to prevent genocide, and the gravity and significance of the wrongs. It is noteworthy that both South Africa and Nicaragua in their claims related to violations of the Convention by Israel and Germany respectively, conceptualised the filing of their applications, instituting proceedings as a way for them to fulfil their own obligations to ensure respect for the Convention and to prevent genocide. (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Order of 16 March 2022) [2022] ICJ Rep 211 paras 81, 86(1))*) This appears to be a new development, and a potentially significant reframing of the role of States as litigants before the Court—with an emphasis on the enforcement of International Law, not only their own interests.

It is also worthy of note that this new wave of litigation may signal a shift towards seeking to use the litigation process to influence conduct in real time; in other words, to fulfill the preventive potential and promise of the Genocide Convention. Increasingly, as noted below, we see the Court being seized not only to settle disputes and pronounce on the responsibility of the belligerents

ex post facto, as was the case with the bulk of the conflict cases of the past (see section 4), but also to intervene in real time, effectively clarifying and insisting on standards of conduct relevant to unfolding allegations and drawing red lines for the conduct of conflict. (*Gazan Genocide (Order of 24 May 2024) para 57(2)(a) www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf*) This effort to secure timely engagement is perhaps seen most clearly through the growing requests to the Court for urgent provisional measures. Such requests have not only grown in volume, but orders have diversified in nature. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Order of 23 January 2020) [2020] ICJ Rep 3 para 86(1)-(2); Ukraine v Russia (n 14) para 86(2); Gazan Genocide (Order of 26 January 2024) para 86(1)-(3) www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf*.)

Notably, the Court has ordered one of the parties to cease their military operations in another State or an area thereof, to refrain from certain conduct, or to take specific action to alleviate the humanitarian situation on the ground during ongoing hostilities. (*Gazan Genocide (Order of 26 January 2024) (n 15) para 86(4); Order of 28 March 2024 para 51(2) <www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>; Order of 24 May 2024 (n 14) para 57(2)(b)*) Another request sought the suspension of military assistance, including military equipment, which the Court declined on the facts, but indicated it

It is fundamental to note the distinction between a Court being asked to determine a political question, and its essential role in determining legal ones, even when they are politically contentious.

was remaining attentive. (*Nicaragua v Germany (n 2) para 5*) In the *Gazan Genocide* the Court ordered increasingly more detailed and robust provisional measures as Israel's offensive in Gaza was mounting, due to Israel's non-compliance with the Court's earlier orders, and the intensifying crises on the ground.

The demand for timely rulings by the Court on requests for binding measures in urgent situations, as seen in the *Gazan Genocide* case, may well be one of the factors that is driving applicants to the ICJ. (*S Talmon on X (9 April 2024) <https://x.com/StefanTalmon>*) It may also render provisional measures, proceedings and orders equally—if not more—significant than the ultimate adjudication of the dispute on the merits, years after the institution of proceedings. The lower standard for the indication of provisional measures compared to the merits phase—requiring applicant States to show that the Court has *prima facie* jurisdiction only, and the plausibility of the claim—may also feature amongst the strategic considerations for submitting requests for the indication of provisional measures.

THE COURT, CONFLICT AND (POLITICAL) COMPLEXITY

The Palestine-related litigation has raised questions regarding the role of the Court, as the principal judicial organ of the UN, in resolving disputes that concern politically complex situations and raise ‘political, military and public policy’ issues. (*K Anderson, A Criminology of Genocide: Killing Without Consequence (Routledge, 2017)*)

The charge was led by dissenting judge Sebutinde in the Gazan Genocide case, who noted that complex situations such as Gaza require diplomatic and political solutions, and few would disagree that such solutions are long overdue. (*M Shaw, ‘The General Hybridity of War and Genocide’ (2007) 9 J Genocide Research 461-462*) But her conclusion that the dispute between the parties was essentially political rather than legal, and not therefore susceptible of judicial settlement, is another matter. Objections to the role of the Court in complex and sensitive political contexts, like its role in armed conflict, are unsustainable as a matter of principle and out of step with the Court’s practice.

First, it perhaps goes without saying that genocide has never arisen in a political vacuum. Intense political extremism and polarisation are common contextual features of the crime. (*J Odermatt, B Petkova, ‘A Political Question Doctrine at the International Court of Justice?’ EJIL:Talk! (26 February 2024) www.ejiltalk.org/a-political-question-doctrine-at-the-international-court-of-justice/*) Moreover, genocide has almost always arisen in the context of armed conflicts (both international and non-international). (*Defense for Children International–Palestine v Biden, US Northern District of California (31 January 2024, no 23-cv-05829-JSW 4) <https://ccrjustice.org/home/press-center/press-releases/palestinians-sue-biden-failure-prevent-genocide-seek-emergency>*) Any suggestion that the Court should refrain from considering genocide allegations in complex political situations including armed conflicts, would effectively deprive it of jurisdiction over the crime of crimes, at odds with the 1948 Convention.

More broadly, longstanding practice before the Court reveals that it has always adjudicated politically contentious disputes and contended with conflict-related politics. Similarly, it is hardly unusual that, to meet the problems raised in international legal disputes, diplomatic and political solutions have been imperative, and often lacking. Fierce opposition and criticism of the Court’s rulings are not new either, even if the intensity of States’ responses to its orders for provisional measures in the Gazan Genocide, is rare. It is for the Court to resolve interstate disputes, applying International Law, within its jurisdictional constraints. The Court has explicitly rejected, as others have noted, any exception ‘political question’. (*N Sultany in ‘Episode 28: Unlawful Occupation, Annexation and Segregation:*

The ICJ's Advisory Opinion on Palestine' EJIL: The Podcast! (17 September 2024) available at www.ejiltalk.org/ejil-the-podcast-episode-28-unlawful-occupation-annexation-and-segregation-the-icjs-advisory-opinion-on-palestine/) Such exceptions, and the doctrines of non-justifiability, are relevant—and controversial—in national courts, and have impeded the adjudication of allegations of serious violations in Palestine. Notably, US Courts found they could not address the lawfulness of the Biden administration's policy in respect of Gaza. (*Ukraine v Russia (Preliminary Objections) Joint Dissenting Opinion Sebutinde and Robinson para 5 www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-06-en.pdf*) More significantly, Israeli courts refused to address serious allegations resulting from settlement expansion on the basis that they are non-justiciable (alongside statutes that deny jurisdiction, for example, for alleged war crimes in Gaza).

The Palestine-related litigation has raised questions regarding the role of the Court, as the principal judicial organ of the UN, in resolving disputes that concern politically complex situations and raise 'political, military and public policy' issues.

It is fundamental to note the distinction between a Court being asked to determine a political question, and its essential role in determining legal ones, even when they are politically contentious. If the Court were to refuse to determine disputes on political grounds, it would fly in the face of practice to date, undermine its credibility and universality and, paradoxically, politicise the essential legal function of the Court. It may feed growing concerns regarding selectivity in International Law and practice, and the 'exceptionalisation' of the treatment of violations in Palestine compared to other contexts. (*H Duffy, G Pinzausti 'The International Court of Justice in Conflict: Reflections on the Role and Impact of the Palestine Litigation' (forthcoming)*) In this respect it should be noted that some of these concerns seem to have been raised only in the context of Palestine, despite not being unique to the situation. For example, no members of the Court raised any objections to the Court's handling of a complex political situation in the Croatian Genocide case, or in the context of allegations of genocide in *Gambia v Myanmar*. On the contrary, in *Ukraine v Russia*, Sebutinde (jointly with Judge Robinson) criticised the Court for adopting a restrictive interpretation of its jurisdiction under the Genocide Convention, which exposed militarily weak states 'to the wanton might, use of force and, quite likely, impunity of a militarily stronger State party'. (*H Arendt, see J Goldston, 'Strategic Litigation Takes the International Stage: South Africa v Israel in Its Broader Context' Just Security (31 January 2024)*)

Complex power dynamics lie behind many if not most genocide cases, most conflict-related cases, and indeed most other cases before the ICJ.

‘STRATEGIC’ RESORT TO THE GENOCIDE CONVENTION IN CONFLICT AND THE ROLE(S) OF THE COURT

There are many reasons why a growing number of actors are increasingly focusing attention on the ICJ. These include, of course, the intensity of unfolding violations and the failure of political bodies, but also the role and authority of Court, its jurisdiction (including over genocide), and its potential impact on multiple levels. Some have praised the potential of a ‘strategic’ shift towards the World Court, and others questioned the role of States such as South Africa, Gambia, Canada, the Netherlands and Nicaragua that have brought such claims based on the *erga omnes* nature of the violations, acting in the collective interest.

The ICJ is likely to continue to be called upon, alongside other bodies, to address many of the intractable legal problems arising around the globe, often in contexts where political solutions are proving elusive. As ever expectations should be realistic and carefully managed. Yet, the Court can play, and has played, a variety of roles that complement each other, and can supplement and inform the actions of political actors.

First, through the settlement of interstate disputes arising from conflict scenarios, including those concerning the Genocide Convention, the Court exercises a normative function. It states the law regulating the conduct of the parties, clarifies the obligations of different stakeholders (belligerents, allies, third States and international organisations), reaffirming their importance at times when those obligations are being put to the test. This function, which is independent of compliance with the Court’s pronouncements, is of critical importance to counter the perception that laws are silent in conflict or crisis, or that certain actors are beyond the law. It is not unique to contentious proceedings that are the focus of the present contribution, but also extends to advisory proceedings, even if not binding (as the two ICJ Advisory Opinions on the unlawfulness of the Wall and of the Occupation make clear).

While the Court’s primary function is to interpret and apply the law, it also contributes to legal development or clarification, and may do so through the pending genocide cases. For example, issues regarding the *mens rea* requirements

for State responsibility for genocide, or the relationship between the Genocide Convention and IHL, are contentious in both *Gambia v Myanmar* and *Gazan Genocide* and may be clarified by the Court.

Second, ICJ proceedings perform a truth-telling function. They offer a platform for the airing of evidence about unfolding violations, as epitomised by the extensive evidentiary hearings in the *Gazan Genocide*. Significant media attention to the Court in recent years amplifies this beyond the Great Hall of Justice and academic circles, to the communities the law serves. This has been described as corresponding to Hannah Arendt's vision of Courts as arenas for public debate on crucial moral and political issues of the time. In turn, the Court's pronouncements—whether on the merits, preliminary objections or requests for the indication of provisional measures—also contribute to shaping the narrative. This is especially important in the face of conflicting narratives of those facts, which can themselves fuel divisions, as in the contexts of Ukraine and Gaza.

Third, it bears emphasising that the Court's primary role in the exercise of its contentious jurisdiction is to settle disputes between the parties regarding their compliance or non-compliance with International Law, to establish responsibility and pronounce on appropriate reparation. It thus has an important accountability function, albeit one subject to broad limits. As was mentioned, these include the Court's tight jurisdictional constraints and slow pace, and its effectiveness that is seriously marred by non-compliance. Yet, authoritative judicial decisions, while certainly not resolving the problems, ensure a degree of recognition of wrongs which is in itself one form of accountability and reparation. In addition, the Court's pronouncements can have a catalytic effect on other accountability processes, both at domestic and international level, particularly given the authoritative role and standing of this Court.

Finally, ICJ proceedings have an important expressive function. They assert the role and relevance of international law, at a time when it is under attack. They provide an opportunity for States (whether they are acting as applicant, respondent or intervening States) to address international audiences and to signal their commitment to International Law. The framing of disputed facts as legal arguments, particularly when the framing in question is genocide, holds a unique symbolic force. The act of appearing in the Great Hall of Justice to make submissions before the Court, with the world watching, speaks to the significance of the law rather than obstructing a diplomatic settlement of

the underlying political disputes or conflicts between the parties; through its multifaceted roles, the Court could directly and indirectly facilitate such a settlement. It is indisputable that its role is modest, and it will not resolve the situation of Palestine, but it has a role to play that should not be stymied by the current objections.

CONCLUSION: TOWARDS A MORE CREDIBLE INTERNATIONAL JUSTICE SYSTEM

The ICJ and the ICC have played crucial roles in shaping global legal norms, issuing landmark rulings on territorial disputes, war crimes, and genocide. However, their impact remains fundamentally undermined by selective enforcement and geopolitical manipulation. The failure to apply international law consistently, regardless of a country's geopolitical standing, has led to growing skepticism in the Global South, where the ICC, in particular, is viewed as a tool of Western influence rather than an impartial judicial institution. If these courts are to serve as true pillars of global justice rather than instruments of power politics, meaningful reforms must be enacted to restore their credibility.

Ultimately, international law depends on the will of states to abide by it. The law is merely a tool for peace and justice, but not a guarantee. It is based on consensus and reciprocity between political players. Those who still want a global peace-supporting order must continue to strengthen International Law, trusting in the similar interests of other states, and advocate for its political enforcement at the same time. International cooperation in support of the rule of law can and must play an important role here.

To stay with a picture by Carolyn Moser: "Ultimately, international law for the international community is like medicine for a sick person: it can help to alleviate pain and combat the disease, but only in conjunction with the patient's self-healing powers." The truth is that the medicine must be distributed and taken for it to work. If it does not work (immediately) every time, we should not automatically doubt its basic functionality. 

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