Justice between States: The International Court of Justice[1]

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After my 4 years in Africa, I wrote a book. I put a quotation in the preface – I didn't really give it a lot of thought. Since I am going to be referring to the Ukraine v. Russia case and the South Africa v. Israel case, I suppose it's appropriate that the quotation was by a Jewish mystic, who was born and died in Ukraine, Israel Ben Eliezer.

Listen attentively and above all remember that true tales are meant to be transmitted - To keep them to oneself is to betray them

It reminds me of the old saw that truth is rarely pure and never simple. To which I would add, but it's the only truth we have. And that brings me on to the function and purpose of the International Court of Justice, and the proper function of an international court, or indeed any court.

I applied to join the Australian branch of the International Commission of Jurists after reading an interview given by the then President John Dowd[2]. He was asked by his interviewer - if you

[1]This article pays tribute to the humanitarian impulse behind the conference and its exploration of historical precedent for conflict resolution in the modern age

[2] John Dowd AO KC

could give one piece of advice to aspiring lawyers, what would it be? John Dowd replied:

"'As Oscar Wilde said, if you tell the truth, sooner or later you will be found out.' I urge students to strictly adhere to the truth, both in cases and in their personal lives."

The first session of the international court took place on 6 February 1946, six days after the formal dissolution of its predecessor, the Permanent Court which had been brought into being by the League of Nations in 1922 but which had nevertheless not been part of the League.

Stop there for a second.

Why did the Powers That Be which gathered at the San Francisco Conference in 1945 feel it necessary to create a new international court?

There were several reasons. An interesting one is that there was a feeling in some quarters that the Permanent Court formed part of an older order in which European states had dominated the political and legal affairs of the international community and that the creation of a new court would make it easier for states outside Europe to play a more influential role[3].

[3] https://www.icj-cij.org/history

Hold onto that thought. We will be coming back to it.

Like its predecessor, the International Court has jurisdiction to give a binding decision on any legal dispute between states in accordance with international law. There is no appeal from its decisions. It also has jurisdiction to give an advisory opinion upon any legal dispute or question referred to it by UN organs like the Security Council or the General Assembly. Advisory opinions are non-binding, because they are advisory, but "when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice"[4].

Article IX of the Genocide Convention stipulates that disputes between state parties to the Convention concerning the Convention, including those relating to the responsibility of a State for genocide, ***must*** be submitted to the International Court of Justice.

Any dispute between state parties to the Torture Convention concerning its interpretation or application **may** be referred to the International Court of Justice.

I will turn to the South Africa v. Israel case in a moment.

[4] Western Sahara, Advisory Opinion, Declaration of Judge Gros, ICJ Reports 1975, p. 73, para. 6.

First though, the case brought by Ukraine against Russia. As you'll know, armed conflict erupted in the Donbas region of eastern Ukraine in 2014 between the Ukrainian armed forces and two groups referring to themselves as the Donetsk People's Republic and the Luhansk People's Republic.

The armed conflict rumbled on into 2022.

On 21 February 2022 the Russian Federation formally recognised the two entities as independent states.

The same day, 21 February, President Putin said that his decision to recognise these entities had been taken in the light of attacks against the Donbas communities and he accused the western world of looking on "as if this horror and genocide... do not exist"[5].

The next day, Russia concluded what it said were treaties with the two self-declared entities. And at 6 am on the 24 February 2022 Russia invaded Ukraine.

Ukraine responded, not only militarily but with some creative legal argument[6].

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[5] Preliminary Objections Judgment of the International Court of Justice, 2 February 2024, para.30

[6] Marchuk, Iryna; Wanigasuriya, Aloka: The Curious Fate of the False Claim of Genocide: On the ICJ's Preliminary Objections Judgment in Ukraine v. Russia and Beyond, VerfBlog, 2024/2/24, https://verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide/, DOI: 10.59704/e2c707d41bd8eab0.

It submitted an application to the ICJ on 26 February, on the second day after the invasion.

Its main argument was that Russia's use of force and its recognition of the two self-declared People's Republics violated Articles 1 and IV of the Genocide Convention[7]. Its secondary claim was for a declaration that there was no credible evidence that Ukraine had committed genocide in the Donbas[8].

Requests to the ICJ for provisional measures (interim orders) take priority over other cases – so Ukraine's case came on quickly.

Russia said it wouldn't participate in the oral hearing.

On 16 March 2022, the Court made a binding order requiring the immediate suspension of Russia's military operation.

Russia ignored it - and the invasion continued.

The case wound slowly on, as did the war. 33 states intervened in the case - the first time in the Court's history where so many states had chosen to intervene. All of them sided with Ukraine. Unfortunately, the Court gave short shrift to their interventions.

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[7] As developed in the Memorial submitted by Ukraine on 1 July 2022, para. 178, sub-para. (c) and (d)
[8] Memorial (Ukraine), para.178, sub-para.(b)

The Preliminary Objections Judgment in Ukraine v. Russia was delivered this year, on 2 February. The Court decided (by a 12-4 majority) that it lacked jurisdiction under the Genocide Convention to adjudicate on the use of force and recognition of states[9]. The Court separated this decision from Ukraine's secondary claim for a declaration that Ukraine has not been committing genocide in the Donbas[10].

This narrow claim now proceeds to the merits stage.

A disappointing outcome for Ukraine. Even securing that eventual declaration may not help it very much as no one except Russia and Belarus asserts that the allegation is true[11].

However, it had been a rather clever way of turning President Putin's rhetoric into a legal claim and Ukraine may have a future claim under the Genocide Convention for the forcible transfer of children from Ukraine to Russia[12].

On 29 December last year, South Africa instituted proceedings against Israel.

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[9] But note the separate opinion of Judge Charlesworth
[10] Judgment of 2 February 2024, para. 149
[11] Marchuk, Iryna; Wanigasuriya, Aloka: The Curious Fate of the False Claim of Genocide (note 4, above)
[12] Ibid.

It condemned the direct targeting of Israeli civilians and other nationals and hostage taking by Hamas and other Palestinian armed groups on 7 October[13].

It contended Israel had failed to prevent and was committing genocide in the Gaza Strip - and that it had failed to prevent and punish direct and public incitement to genocide by senior Israeli officials.

This is a serious application. It is 84 pages long.

South Africa said it was seeking to protect the rights of Palestinians in Gaza, including their right to exist as a group and their right to be protected from acts and from the risk of acts of genocide, and from related prohibited acts, as well as its own rights to prevent genocide.

South Africa requested the Court to indicate provisional measures to protect the rights invoked from imminent and irreparable loss.

On 26 January, the Court found the rights invoked were plausible. And that there was a plausible need for interim measures to protect those rights. And that there was urgency to make interim

[13] South Africa, Application instituting proceedings and request for the indication of provisional measures

measures as there was a real and imminent risk of irreparable prejudice to those rights.

The Court did not make an interim order for the immediate suspension of Israel's military operations. And it did not make an order requiring Israel to refrain from extending the dispute or making it more difficult to resolve[14].

The last two decisions appear to be indicative of an overly cautious approach.

Israel had made three main arguments against the immediate suspension of military operations.

First, it contended it made no sense to order one side to stop fighting, leaving the other free to carry on. Then, it asserted there was a precedent for declining such a measure in the Court's April 1993 provisional measures ruling in the Bosnia case. Finally, it distinguished the Ukraine v. Russia case in which the Court had made an interim order requiring Russia to stop its military operations[15].

Russia, said Christopher Staker KC, on behalf of Israel, had turned the Genocide Convention on its head by making a false

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[14] South Africa v. Israel, Order of 26 January 2024

[15] South Africa v. Israel, Verbatim record, Thursday 12 January, page 55.

claim of genocide in the Donbas the basis for its invasion of Ukraine.

Using the arguments deployed by Ukraine in that case, Israel argued that the right contended for by Russia to prevent and punish genocide by launching its special military operation was therefore a right plausibly related to the application of the Genocide Convention.

If Russia's right was plausibly related to the application of the convention, Ukraine's right not to be subjected to a military operation was plausibly related to the application of the Convention too.

This he distinguished from the situation in the Gaza Strip.

But as I've already mentioned, in the ICJ's Preliminary Objections Judgment in Ukraine v. Russia on 2 February this year, the Court found that it had no jurisdiction under the Genocide Convention to examine issues pertaining to the use of force – so I am not sure that the last of those arguments still holds water.

The provisional measures ordered by the Court in Bosnia in April 1993 failed to stop the "great suffering and loss of life" caused by

the continued war to the population in Bosnia-Herzegovina, as a clearly frustrated Court acknowledged a few months later[16].

As to Israel's contention that it made no sense to order one side to stop fighting, leaving the other free to carry on, I think the Court could have been less cautious and more creative in its response.

The rights that will form the basis of a judgment in exercise of jurisdiction under the Genocide Convention at the merits stage include the right of Palestinians in Gaza to be protected from acts and from the risk of acts of genocide.

A measure requiring Israel to suspend military operations against Palestinian population centres, medical centres and water systems, sanitation systems and bakeries, would have been a proportionate measure to protect those rights.

The Court also failed, inexplicably – there is no reasoning about this at all in its ruling – to order Israel to refrain from extending the dispute or making it more difficult to resolve.

Why the last of these measures is needed is because Israel's Prime Minister is still promising to invade Rafah, where around 1.5 million Palestinians, living primarily in makeshift tents, are squeezed into a tiny area with nowhere else to go. A "non-aggravation" clause would have put Israel on notice not to extend

[16] Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro), Order of 13 September 1993, page 348.

its military operations into Rafah – which is currently Israel's stated intention.

One should not forget that by adjudicating these matters, in which legal issues are invariably mixed with matters of intense political interest, the Court is invariably exposed to the rough gales blowing in from some of the world's most powerful countries.

As you will know, in 2004 the Court gave an advisory opinion on the legal consequences of Israel's construction of a Wall in the territory occupied by Israel since 1967.

In giving that opinion, the Court recalled that in 1997, a decision on Israeli settlements in the occupied West Bank had been blocked by the negative vote of the United States. And that in 2003, a draft resolution on the Wall had again been blocked by the negative vote of the United States.

In 2004, the Court went on to advise that the construction of the Wall inside the Green Line was contrary to international law. It said Israel was under an obligation to dismantle those parts of it already built inside the Green Line. And that all states were under an obligation not to recognise the illegal situation resulting from its construction. The decision was by fourteen votes to one.

Charles Krauthammer, a journalist writing in the Washington Post, attacked the ICJ as corrupt[17].

"It must be noted", he wrote, "that one of the signatories of this attempt to force Israel to tear down its most effective means of preventing the slaughter of innocent Jews was the judge from Germany. The work continues."

The Judge concerned, Judge Bruno Simma, was one of the 14 to 1 majority. Yet he was singled out because of his German nationality.

Meanwhile, an American Judge, Thomas Buergenthal, the sole dissenting Judge on the 15-member panel, had his motives questioned by other voices because of his Jewish background.

We continue to see these pressures on the Court today.

Before the interim ruling on the case brought by South Africa, a US government spokesman called its application "meritless". I would advise him to read the 84-page application.

The day after the ruling, the UK Government issued a statement: "Our view is", said the UK Government, "that Israel's actions in Gaza cannot be described as a genocide, which is why we

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[17] Charles Krauthammer, "Travesty at the Hague," Washington Post, July 16, 2004.

thought South Africa's decision to bring the case was wrong and provocative.[18]"

As the Bar Human Rights Committee has already noted - and as the UK Government well knew - the Court has not made any finding of genocide, as this will be for the Court after argument and evidence presented by both parties during the merits stage. The UK Government's statement did not address the issue of the serious **risk of genocide** or the ICJ's findings of plausibility and the UK's obligations to comply with the order and the interim measures[19].

The same day, the UK and eight other states including the US, Canada and Australia, announced the immediate suspension of funding for UNRWA due to Israeli allegations (raised with the UN relief agency that morning, the day after the ICJ ruling) that 12 of the agency's staff had taken part in the attacks on 7 October.

While UNRWA was kept waiting for evidence of the allegations (it had immediately terminated the contracts of nine of these individuals, another was dead and two were yet to be identified), these nine States including the UK suspended all funding to the agency, which provided support for around two million Palestinians in Gaza.

[18] https://www.gov.uk/government/news/statement-on-the-interim-icj-ruling-in-south-africa-vs-israel
[19] BHRC Letter to MPs on Ceasefire for Gaza, 20 February 2024

There are separate Advisory proceedings with regard to Israel and the Occupied Palestinian Territory taking place before the Court at the moment. The UN General Assembly has asked the Court for an advisory opinion on the "Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem"[20].

Oral hearings in the proceedings took place last month, from 19 to 26 February. The vast majority of the more than 50 participating States contended that Israeli practices in the occupied territory had deprived Palestinians of their right to self-determination.

In summary, most of these States contended that Israel's 56-year occupation was illegal, because its annexation of occupied territory, including through widespread colonization by illegal settlements, was intended to be permanent, in violation of the prohibition on the acquisition of territory by force.

Israel declined to attend the oral hearings but it said in a written statement that the request by the General Assembly was "contrary to the established legal framework governing the Israeli-Palestinian conflict, and an abuse of international law and the judicial process"[21].

It said this was because the two sides had "agreed to resolve through direct negotiations precisely the subject-matter placed

[20] https://www.icj-cij.org/case/186
[21] https://www.icj-cij.org/case/186/written-proceedings

before the Court: the permanent status of the territory, security arrangements, settlements, and borders".

Israel said, that "despite all challenges, both sides and the international community as a whole, continue to affirm the validity of the terms of reference and established legal framework embodied in these bilateral agreements".

As many since noted, these are the same bilateral agreements that Israel's current Prime Minister keeps attacking on a regular basis (and he refuses to accept a two-state solution[22]).

The US and the UK, along with Hungary, aligned with the arguments put by Israel. The UK and Hungary urged the Court not to return an answer to the UN General Assembly at all.

We can assume that if the Court finds it has jurisdiction and it gives an opinion, if the opinion is not to Israel's liking it will not accept the Court's opinion. After all, we are now 20 years on from the advisory opinion on the construction of the Wall – and the Wall remains standing, with very little fuss made about it by the UK or the EU.

In summary, we are still at the mercy of King John, the Robber Barons and John's not so merry men. But remember this: it took only a few months for King John to break the terms of Magna

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[22] https://www.jpost.com/breaking-news/article-782999

Carta. But it is to Magna Carta that we look back today, not King John.

The ruling in the Gaza case has shown that Israel has a case to answer. It is for the Court to decide. That in itself is important.

Cases before the International Court can set the record straight. They also force aggressors to disclose important information that may lead to further action to secure legal rights.

Addressing the International Court last month, Riyad Mansour the permanent representative of the state of Palestine to the United Nations, told the Judges:

“For Palestine, the law continues to be only a measure of the severity of breaches, rather than a catalyst for action and accountability”[23].

Yet others have observed that “something as shifted” in recent times and that “There seems to be a growing understanding, particularly in the global south, that countries in the global south should be using the international instruments they have.[24]”

[23] South Africa v. Israel, Verbatim record, 19 February 2024, page 111, para. 6
[24] Heidi Matthews of York University, Toronto; reference in https://www.justiceinfo.net/en/129172-is-the-icj-the-new-nuclear-weapon-of-small-states.html

In the advisory proceedings before the ICJ last month, Professor Phillipe Sands on behalf of Palestine said to the Court:

"No one in this Great Hall of Justice is starry-eyed about international law, but it is what we have"[25].

Thirty minutes ago, I invited you to hold on to a thought about one of the reasons for the establishment of the International Court of Justice almost eighty years ago.

It was to help less powerful countries to play a more influential role in the political and legal affairs of the international community.

Hopefully, the message is at last getting through.

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[25] South Africa v. Israel, Verbatim record, 19 February 2024, page 94, para. 22