

Apartheid as a form of genocide: Reflections on South Africa v Israel

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On 12 December 2023, Mathu Joyini, South Africa's Permanent Representative to the United Nations, told the 10th Emergency Special Session of the United Nations General Assembly, that the large-scale Israeli military operation in Gaza, following the 7 October attacks, had 'illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention'. She added that, '[a]s a UN Member State and owing to South Africa's painful past experience of a system of apartheid, this impresses on us, as Member States to take action in accordance with international law' ([video of session at 1:17:22](#)).



Less than three weeks later, South Africa submitted an [Application Instituting Proceedings](#) against the State of Israel at the International Court of Justice under the International Convention on the Suppression and Punishment of the Crime of Genocide ('1948 Genocide Convention') to which Israel and South Africa are parties, including a request, as a matter of extreme urgency, for provisional measures that is currently under deliberation by the Court – a decision that is expected imminently.

South Africa's application instituting proceedings against Israel under the 1948 Genocide Convention would not have been possible under the International Convention on the Suppression and Punishment of the Crime of Apartheid ('1973 Apartheid Convention'), as neither South Africa nor Israel are parties to that Convention (and even then, owing to the peculiar wording of the dispute resolution clause, both parties would have to agree to refer their dispute to the Court). Even so, South Africa's application contains numerous references to Israel's apartheid policies that could be read as a kind of phantom application pertaining to apartheid, because of the structural similarities between the definition of genocide in Article II of the [1948 Genocide Convention](#), and the definition of the crime of apartheid in Article II of the [1973 Apartheid Convention](#). Indeed, South Africa made multiple references to the crime of apartheid in its application, which it explained formed the broader context of Israel's treatment of the Palestinian people. In his opening statement, Malcolm Shaw KC, Israel's lead counsel, described South Africa's claim that Israel has been practising apartheid against the Palestinian people for 75 years as '[outrageous](#)'. However, he did not challenge the claim directly or allude to the close relationship between the crimes of genocide and apartheid.

As we argue in this post, the 1973 Apartheid Convention recognised that systems of racial domination and institutionalized racial discrimination – such as those that existed in Nazi Germany from 1933-1941 and in Rwanda [prior to 1994](#) – may lead, especially in situations of

armed conflict, involving counterinsurgency or counterterrorism operations, to living conditions calculated to cause a group's 'physical destruction in whole or in part'. In this connection it is necessary to emphasise that the 1948 Genocide Convention not only seeks to punish the perpetrators of the crime, but also to prevent the crime from occurring.

In the following post, we explore the close interdependence between the definitions of the crimes of genocide and apartheid, before taking a closer look at the references to the crime of apartheid in South Africa's application, and the obligation to prevent genocide.

The interdependence between the crimes of genocide and apartheid

The preamble to the 1973 Apartheid Convention observed that certain acts in the 1948 Genocide Convention 'may also be qualified as acts of apartheid'. The definition of the crime of apartheid in Article II (a), (i), (ii), and (b) of the 1973 Apartheid Convention closely correspond to those in Article II (a), (b), and (c) of the 1948 Genocide Convention.

In 1985, the report of the 'Group of Three' established under Article IX of the 1973 Apartheid Convention to monitor compliance with the Convention, drew attention (para. 32) to 'the similarity, in their racist nature, of the apartheid regime and the fascist and Nazi regimes defeated during the Second World War'. The Group noted (at para. 33) that the:

'the crime of apartheid is a form of the crime of genocide and as such falls under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and recommends to the Commission on Human Rights that its resolutions reflect this interdependence, as well as the fact that adherence in the International Convention on the Suppression and Punishment of the Crime of Apartheid is an indication of the implementation of the International Convention on the Prevention and Punishment of the Crime of Genocide'.

Article I (b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity categorized 'inhuman acts resulting from the policy of apartheid' along with the 'crime of genocide' as 'crimes against humanity whether committed in time of war or in time of peace'. In resolution 1985/10, the Commission on Human Rights was 'convinced that the crime of apartheid is a form of the crime of genocide', and called on all states to ratify the 1948 Genocide Convention and the 1973 Apartheid Convention.

In 1985, 88 states out of 159 UN members were parties to the 1948 Genocide Convention. In the same year, 82 of the 159 UN member states were parties to the 1973 Apartheid Convention. Accordingly, those states that were not parties to the 1948 Genocide Convention, but that were parties to the 1973 Apartheid Convention, could prosecute individuals domestically for crimes that corresponded to those in the Genocide Convention where they had enacted domestic legislation to provide for this. These included the '[d]eliberate imposition' of 'living conditions' calculated to cause a protected group's 'physical

destruction in whole or in part' which is mentioned in both definitions (compare, for example, Article II (b) of the 1973 Apartheid Convention to Article II (c) of the 1948 Genocide Convention).

Despite the close correlation between the definitions of the crimes of genocide and apartheid in these treaties most states distinguish between these crimes in their domestic laws. The Rome Statute of the International Criminal Court also makes a distinction between the crimes by defining the crime of genocide in Article 6, separately from the definition of crimes against humanity in Article 7, where the crime of apartheid is listed.

The main distinction between the crimes of apartheid and genocide is the question of intent. Intent in the crime of apartheid is defined in the Elements of Crimes as an intention 'to maintain' 'an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups'. In contrast, intent in the crime of genocide is defined as one in which the perpetrator intended 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.

In other words, the crime of apartheid is a context-specific crime that focuses on the regime, or structure of government, in which multiple crimes against humanity occur. Accordingly, it is possible for genocide to occur in an apartheid system. Indeed, after decades of systematic discrimination, domination, and persecution, genocide may be the end goal. This is what happened, for example, in Germany prior to the Holocaust (1941-1945) and in Rwanda prior to the genocide against the Tutsi. In fact, Rwanda, which has a long history of ethnic violence, had strict laws in place to prevent discrimination against any 'ethnic group, region, nation, race or religion' – as it explained in its reports to the Group of Three in 1983, 1986, and 1988.

The references to apartheid in South Africa's application

South Africa's ICJ Application contextualises the allegations of genocide and incitement to genocide committed in Gaza with reference to the long-time existence of apartheid imposed on Palestine. For example, while the alleged genocidal acts and incitement to genocide are illustrated for the most part by reference to acts and omissions since 7 October 2023, the application prominently and consistently put the genocidal acts and incitement 'against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and the ongoing denial of the right of the Palestinian people to self-determination' (para 4). The application refers (at para 13) to South Africa's 17 November 2023 referral to the International Criminal Court (ICC), along with four other ICC states parties – Bangladesh, Bolivia, the Comoros, and Djibouti – that makes reference to the crime of apartheid (para 2.2). The application also refers to the institutionalised system of discriminatory laws, policies and practices as an 'apartheid regime' (para 35) with a reference to a long footnote (note 140).

Crucially, the Application goes on to state that it is South Africa's case that such 'other violations of international law' are genocidal in character, 'as they are committed with the requisite specific intent (*dolus specialis*) to destroy Palestinians in Gaza as a part of a broader Palestinian national, racial and ethnical group' (para 2 ICJ Application). It should be noted that one of the inhuman acts listed as constituting the crime of apartheid in the 1973 Apartheid Convention, is the '[d]eliberate imposition on racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part'. Whether specific conduct will be deemed an act of 'genocide' or of 'apartheid' will depend on its context and purpose. State policy as a whole, or state violence in a particular instance, may therefore be both genocide and apartheid, depending on the application of the elements and purpose.

Genocide in the context of a system of apartheid

The link between genocide and apartheid has never been adjudicated. The South African Constitutional Court on occasion noted *obiter dicta* that 'the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes'. The possible link between genocide and apartheid was not explored by the Constitutional Court, however it has been suggested that some of the policies of and conduct by the apartheid state (e.g. the chemical and biological weapons programme and its anti-fertility research) could be construed as conspiracy to commit genocide. An historic first apartheid trial in South Africa commenced in 2023 and concerns two individuals accused of kidnapping and murdering members of an anti-apartheid student group in the early 1980s. It is alleged that the accused committed the crimes for the purpose of maintaining the apartheid system. The prosecution is based on the crime of apartheid under customary international law. A prosecution based on custom is challenging from a legality point of view, but since South Africa is not a state party to the Apartheid Convention and in the absence of a statutory incorporation of the crime that would cover the timeframe of the alleged conduct, the only way forward for the prosecution is to rely on custom. At any rate, it is suggested that the definition of apartheid in the Apartheid Convention does give content to both the customary prohibition on apartheid and to the prohibition in Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). It would be more difficult to construct the case against the accused former security officers as one of genocide. Indeed, the indictment aligns more closely with the construction of apartheid as a crime against humanity and as one would find it in Article 7 of the Rome Statute and not as a form of genocide.

The ICJ Application is, of course, not an indictment of specific individuals for the purposes of individual criminal liability in a criminal trial. It is about state responsibility under a treaty regime and concerns conduct and incitement by the State of Israel via its agents and within the context of apartheid and occupation. The way in which purpose (intent) is constructed, allows for an analysis of the conduct of individuals, as long as one can attribute their conduct to the State. The State in question will be responsible if the individual agents acted with the

requisite intent, for instance, to destroy a protected group in whole or in part (genocide) or to maintain a system of racial domination (apartheid). As Miles Jackson correctly noted, a particular agent can act for more than one purpose.

South Africa's ICJ Application constructs the allegations of genocide and incitement to genocide within the context of a system of apartheid. The threat of genocidal violence can also be used to maintain a system of apartheid. There is a significant risk that Israel's military campaign in Gaza could alter the demographic profile of that part of Palestine. The destruction of Gaza, the Prime Minister of Israel's statement that Israel wants to maintain the security of all the land from the river Jordan to the Mediterranean Sea, and the history of illegal Israeli settlements in parts of Palestine, suggest that the current conflict may very well cause a permanent demographic change in Gaza. The large number of children and women killed in Gaza is particularly egregious. Children and women are not only part of the protected group; they are particularly important as the next generation; the generative future of the group. The objective circumstances currently in Gaza show that children and women are being killed in large numbers, not only in absolute terms but also in relative terms (that is, as a percentage of the population of Gaza as a whole).

It is certainly tragic that so many children and women are being killed in the conflict. But is this fact, in itself, indicative of the special intent required for genocide? Killing of children and women may, depending on the facts, constitute violations of international humanitarian law, but in light of the sheer scale of the killing of children specifically, we submit that it is not unreasonable to at least consider the possibility of special intent as inferred from the objective circumstances (targeting of civilian objects where children and women would typically or likely be present) in light of the history of targeting children in Palestine by Israeli forces (e.g., as reported in previous UN commissions of inquiry – see e.g. para 519). A holistic assessment of all the evidence, taken together, can be used to determine the existence of genocidal intent, an approach followed in international case law (e.g., the Appeals Chamber of the ICTY in *Tolimir*, at para 247). The killings are not assessed in isolation. It is assessed in light of all the evidence, including rhetoric employed to dehumanize and to legitimize targeting of civilians including children and women (e.g. statements by Israel's President, the Prime Minister, and the Defence Minister, listed in South Africa's ICJ application at page 59 and further).

In a letter to the UN Security Council, dated 19 January 2024, the Permanent Observer Mission of the State of Palestine to the UN noted that children 'are being deliberately killed, wounded, maimed, starved, orphaned, displaced, left to die from disease, infections, illness and cold.' The demographic profile of Gaza is also being altered by other means. As Andrea Maria Pelliconi has argued, both internal displacements and cross-border deportations are criminalised under the Rome Statute as war crimes and crimes against humanity, but the broader point is that the forceable transferring of populations can permanently alter demographics and may constitute ethnic cleansing. Although ethnic cleansing (actions 'rendering an area ethnically homogeneous by using force or intimidation to remove persons

of given groups from the area') is not an independently defined crime under international law, a UN Commission of Experts established to consider evidence of international crimes committed in the Former Yugoslavia, concluded in a report to the UN Security Council that such acts could fall within the meaning of genocide (para 56). In Bosnia and Herzegovina v Serbia and Montenegro, the ICJ held, at para 190, that 'acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the [Genocide] Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts'. We submit that the disproportionately large number of children and women killed, the spread of disease and starvation, and the publicly stated goal of Israel to take control of Gaza and the concomitant possibility of Israeli resettlement, must be assessed alongside other killings, thus constituting the likely basis for a plausible genocide claim.

Israel's actions also fall within the definition of the crime of apartheid, because the destruction of infrastructure and killings could possibly be construed as the deliberately imposition on Palestinian Gazans living conditions calculated to cause their physical destruction in whole or in part within the meaning of Article II(b) of the Apartheid Convention. Article II (c) of the 1973 Apartheid Convention would cover cross-border deportations, whether forcible or not, as one of the inhuman acts constituting the crime of apartheid in that clause includes preventing a protected group of 'the right to leave and return to their country.' In turn, this could potentially also be a genocidal form of ethnic cleansing, if acts are such 'as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the [Genocide] Convention, provided such action is carried out with the necessary specific intent (dolus specialis); that is to say, with a view to the destruction of the group, as distinct from its removal from the region' (ICJ Bosnia case at para 190). Again, the question of special intent must be assessed holistically, as noted earlier.

Conclusion: the obligation to prevent genocide

The subject of South Africa's application for provisional measures under the Genocide Convention is limited by urgency and jurisdictional parameters. The ICJ is not asked, in this instance, to make a conclusive finding on whether Israel is responsible for the crime of genocide, but only *prima facie*. The ICJ may well conclude, if the case gets to the merits, that Israel has not committed genocide.

However, as we argue, Israel is also under an obligation to *prevent* genocide, which, as South Africa argues, is at serious risk of occurring. Parties to the Genocide Convention have a 'direct obligation to prevent genocide' (ICJ Bosnia case at para 165). States are prohibited from themselves committing genocide. For Israel, as a state party, this would mean that Israel is bound not to commit genocide, through the actions of its organs or persons or groups whose acts are attributable to it (ICJ Bosnia case at para 167). At what point in time is this duty to prevent triggered, and what does it entail? The ICJ in the Bosnia case stated:

‘[A] State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. A State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk that genocide will be committed*.’ (ICJ Bosnia at para 431; emphasis added.)

The provisional measures requested by South Africa are directly designed to oblige Israel to ensure that the risk of genocide does not materialise.

All indications are that we are still in the early phases of the current conflict between Israel and Palestinian armed groups in Gaza. Death, destruction, displacement, and starvation in Gaza may continue for months or even years to come. The nature and scope of the conflict remain unpredictable and significant escalation and regional conflict may yet materialise. There is also the very real prospect of mass population expulsions from Gaza. The destruction of vital civilian infrastructure is so widespread that Gaza risks becoming uninhabitable for years to come. The arming of settlers in the West Bank adds to the risk of extreme violence. All of this is occurring in the context of an institutionalised system of discriminatory laws, policies, and practices, as well as numerous public statements that can be interpreted as incitement to genocide (as explained in South Africa’s written application and oral presentation).

The statements referenced in South Africa’s application focus on incitement to kill members of a protected group and on the imposition of conditions calculated to cause the group’s physical destruction in whole or in part and in the context of the ongoing conflict in Gaza (written submission at 59-67). However, eliminationist rhetoric goes beyond the current conflict in Gaza. The Prime Minister of Israel recently stated that in the future, and after ‘total victory’ over Hamas in Gaza, Israel ‘must have security control over the territory west of the Jordan River’ (that is, the entire West Bank, including occupied Arab East Jerusalem). This would preclude any possibility of an independent Palestinian State, constituting a violation of the right to self-determination of the Palestinian people.

Racial domination and the denial of the right to self-determination are key elements of apartheid. We submit that the continuation and deepening of the system of apartheid aggravates the risk of genocide. It is South Africa’s case that the current killings and destruction in Gaza constitute genocidal acts and that Israel has a duty to prevent a genocide and to stop incitement to commit genocide. But the duty to prevent genocide is ‘merely one component of a broader struggle for Palestinian freedom and self-determination’.

This is where the duty to prevent genocide and the crime of apartheid intersect. Without self-determination and under conditions of apartheid, there will remain a risk of genocide, a risk aggravated by the current conflict in Gaza.