

## MATTER OF LAW

## AT THE ICJ: WHEN SOUTH AFRICA ACCUSES ISRAEL OF GENOCIDE

International law prescribes that the right to self-defence of a state is subject to two conditions that also limit the use of excessive force under Article 51: necessity and proportionality.



G.V. RAO  
NEW DELHI

In the history of humankind, travelling through millennia, the Jews have been both a celebrated and persecuted community. Undeniably, no other community faced such recurrent attempts at annihilation and yet survived the ravages of time, to stay well respected. Hitler's Third Reich attempted to exterminate the Jewish people in the last century in a Holocaust, which was followed by World War II. In the aftermath of that horrific war, came to exist a new world order under the United Nations with the promise of peace, security, justice, equality, freedom, and rule of law amongst nations.

Jurisprudential theory propounded by Hugo Grotius, known as the father of "International Law", who wrote in his seminal work *Jure Belli ac Pacis* (1625; *On the Law of War and Peace*) stated that "war is justifiable only if a country faces imminent danger and the use of force is both necessary and proportionate to the threat". As a result, post WWII, global institutions for international law, formally found a home in the UNO and other allied institutions.

The Convention on the Prevention and Punishment of the Crime of Genocide adopted by the UN General Assembly vide Resolution No.260-A (III) on 9 December 1948, was primarily due to the holocaust Jews suffered then. Ironically today,

the State of Israel finds itself being accused of the crime of genocide, a term that was coined for what its citizens had encountered.

Genocide, as defined under the convention meant a "...crime committed with the intent to destroy a national, ethnic, racial or religious group, in whole or in part..."

South Africa petitioned the ICJ, in accordance with Articles 36(1) and 40 of the statute of the Court read with Article 41, 74 (4) and 38 of the Rules of Court alleging against the state of Israel, intent to commit and continuing to commit Acts of Genocide against the Palestinian people, in the Gaza Strip area. The Application filed by South Africa on 29 December 2023 narrates the circumstances post military intervention by Israel of Gaza, After the 7 October 2023 terrorist attack by Hamas, brutally massacring 1,200 innocent citizens and taking hostage another 250, all under 3,000 rocket fires. Israel therefore was compelled to declare a war on Hamas, the governing body of the Gaza Strip since 2007. Israel had voluntarily vacated the Gaza strip under the "disengagement implementation law". The South African application to the ICJ seeks to immediately restrain the state of Israel in its military action, by the Court under the provisional measures of Article 41 of the ICJ statute, against imminent and irreparable loss.

The Israeli government took a decision to act under the right of self-defence to not only dismantle the Hamas terrorist networks in Gaza but also to seek and free the large number of innocent hostages. The Israeli Defense Forces (IDF) undertook a ground operation by entering the Gaza strip in a military action. To quote the IDF Chief of Staff, Herzi Ha-

levy in a media address: the IDF accepts its obligation that all its operations would be conducted according to the principles of international law.

Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

International law prescribes that the right to self-defence of a state is subject to two conditions that also limit the use of excessive force under Article 51: necessity and proportionality. Hence the South-African petition, alleging excessive force indiscriminately with a view to committing genocide impacting civilian life.

There is no doubt that under the principle of self-defence in international law, the armed conflict with Hamas stands completely justified as Israel has every right to self-defence in response to the heinous terrorists' attacks, which are violative of international law.

Israel's Foreign Affairs Ministry, in a published statement on 29 December 2023, described South Africa's application as "blood libel" and that the claim "lacks both a factual and a legal basis and constitutes despicable and contemptuous exploitation of the Court."

Prime Minister Netanyahu responded to an ICC investigation on the situation in Palestine, "the court was established to prevent atrocities like the Nazi Holocaust against the Jewish people is now targeting the one state of the Jewish people."

The 6-member, Israeli legal defence team before the 15-judge ICJ Bench on 12 January 2023 put up a spirited

effort in bringing forth the atrocities committed during the terrorist attack and the dire necessity for ground military invasion, as the entire situation of declaration of war was created by Hamas, compelling Israel to launch its self-defence long-term strategy to free the innocent hapless hostages suffering captivity.

The Israeli legal counsel, while questioning the inappropriate invocation of the jurisdiction of the ICJ by South Africa, met the allegations squarely, of having any genocidal intent, or genocidal actions, or use of excessive force, to affect civilian life, and/or any deliberate prevention of humanitarian aid, all of which they were supporting. They further alleged that since South Africa shares a close personal relationship with the Hamas leadership, which is declared terrorist organization, therefore the application was not based on any objective criteria of a neutral and unbiased government, but was done merely by weaponizing the word genocide. Further, that South Africa failed to make any effort to resolve the matter diplomatically, it was baseless to call it a dispute under the genocide convention. However, most ironically, South Africa also failed to severely condemn Hamas or speak for the immediate release of the hostages.

Finally, that Hamas was a most sophisticated terrorist organization, having diverted billions of dollars in foreign aid to themselves and was not concerned for the welfare of its own people, who are put to constant peril, by using them as human shields. It was further alleged that the terrorist hideouts were being operated from civilian areas such as schools, hospitals, mosques, UN facilities and residential homes, with tunnels running

deep beneath them.

The counsel submitted that, "it was engaged in a war that it did not start and did not want" in Gaza. And mentioned their twin military objectives were to eradicate the existential threat posed by Hamas, (which is the one with genocidal intent) and to free the 136 hostages still held captive. Tal Becker leading the legal submissions stated "Israel is in a war of defense against Hamas, and not against the Palestinian people".

It was further said that issuing provisional measures amounted "to deny Israel its ability to meet its obligations to the defence of its citizens, to the hostages and to over 110,000 displaced Israelis to safely return to their home."

Galit Ragan, counsel for Israel, submitted that there are perils in urban warfare, "... and will always result in tragic deaths, harm and damage, but in Gaza these undesired outcomes are exacerbated because they are the desired outcomes of Hamas." Furthermore, the putting of its own citizens lives at risk was a designed by Hamas itself, "every single hospital searched by Israeli Defense Forces had found evidence of military use by Hamas," the Israel legal counsel submitted.

In conclusion, Israel's actions during the war must adhere to the principles of international law governing armed conflict, and must meet the contours of international humanitarian law. Here the conduct and statements of those in the highest echelons of leadership is important coupled with ground realities of warfare. Hopefully, peace will reign soon with a ceasefire, to bring about a negotiated settlement.

*Dr G.V. RAO is Senior Advocate, Supreme Court of India and Vice-President, Indian Society of International Law.*