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Eliminating the Criterion of *Intent* (*mens rea, dolus specialis*) for Proof of Genocide is Essential to a New *Jus Gentium:* Israel's Military Operations in Gaza 2023-2024

Norman K. Swazo
North South University, Bangladesh
Email: norman.swazo@northsouth.edu

ABSTRACT

For proof of genocide, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) stipulates that a manifested or reasonably inferred intent (*mens rea, dolus specialis*) to destroy a group as such is essential. In the absence of proof of intent, any atrocities committed in armed conflict can be deemed, at most, crimes against humanity or war crimes. Despite technological enhancements of military operations that have altered the destructive capacity of armed forces, the criterion of intent remains a high bar to speedy judicial review and judgment in both the International Court of Justice (ICJ) and the International Criminal Court (ICC). In consequence, wanton death and destruction continue unabated in armed conflicts. Furthermore, all too often there is no mitigating intervention authorized by the United Nations Security Council (UNSC) in situations of alleged genocide, usually because of the exercise of the veto from a permanent member (the USA, Russian Federation, China, the UK, and France). The question arises, therefore, whether it is not past time to revise the Convention for the express purpose of eliminating the criterion of intent entirely. Eliminating the criterion of *mens rea* would allow petitioners to the Courts to submit only the evidence of genocidal acts (*actus reus*). It is argued here that this revision is in the interest of international peace and security and, thereby, international justice, i.e., a new *jus gentium* (law of nations, law of peoples).

Keywords: Genocide Convention; *mens rea*; Kantian deontology; universal law; *jus gentium*; Israeli-Palestinian conflict

The Question at Issue

It is well known among scholars of international law that the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter, Convention) identifies various acts of war (*actus reus*) on the basis of which the International Court of Justice (ICJ) or the International Criminal Court (ICC) may ascertain whether the crime of genocide has been committed (United Nations, 1948). As a matter of definition, Article II of the Convention specifies that these acts of war include any of the following, but—as a *conditio sine qua non*—committed *with intent* to destroy, *in whole* or *in part*, a national, ethnical, racial or religious *group*, *as such*:

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

Essential to any judicial determination of genocide is the *proof of intent* and reference to acts of war against a *group* "as such" (*per se*) in contrast to physical or mental harm or the killing of individuals only. A finding of genocide is a matter of judicial decision rendered by the ICJ or the ICC or, alternatively, *ad hoc* tribunals such as occurred in the cases of Rwanda and the former Yugoslavia. As noted, intent (*mens rea*) is a *conditio sine qua non*—a condition without which there is no legally recognized proof. Thus, the United Nations Office on Genocide Prevention and the Responsibility to Protect distinguishes between "a mental element" and "a physical element" as components of the crime of genocide. The "mental" element is restricted to intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; whereas, the "physical" element includes any one or more of the five acts, "enumerated exhaustively," as cited above. The mental element is termed "special intent" (*dolus specialis*), with "deliberate" targeting of those who become victims of genocide (thus to be distinguished from "random" targeting). Of course, these victims have "real or perceived membership of one of the four groups [national; ethnical; racial; religious] protected under the Convention."[1]

Further, the prohibition of the crime of genocide is recognized as a *peremptory norm* (*jus cogens*) of international law. This means that the crime of genocide is a matter of *universal jurisdiction* (i.e., it holds *erga omnes*, obligatory "towards all"), in which case no State in the present international system is permitted to derogate from this norm of international law. This obligation holds irrespective of whether that State is a signatory ("Contracting Party") to the Convention on the Prevention and Punishment of the Crime of Genocide. Moreover, the ICJ clarifies Article I of the Convention, observing that, while "Article [1] does not *expressis verbis* require States to refrain from themselves committing genocide," nevertheless, "in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide" (International Court of Justice, 2007). Indeed, the ICJ continues, "It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" (International Court of Justice, 2007). Said otherwise, there is a universal obligation to *prevent* the crime of genocide because there is a universal *prohibition* of the crime of genocide.

Notwithstanding the foregoing, there remains the question of how allegations of genocide are to be evaluated from the perspective of international morality, i.e., ethics in international affairs. The operative presupposition in positivist legal theory is that positive law excludes morality, that adjudication is simply a matter of applying and interpreting the constructed law (e.g., treaty law) in relation to the ostensibly objective facts. Thus, it is expected that the ICJ or ICC would render a judgment on the legal merits of a given case in

[1] See Office of Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/office-mandate.shtml, accessed 12 April 2024.

which genocide is alleged, without reference to any "practical rationality" or moral theoretical framework that is part and parcel of the discourse of ethics in international affairs. Quite reasonably, legal proceedings such as pursued by the ICJ or ICC may be deemed inadequate by a measure of practical rationality. In a situation of armed-conflict a party to that conflict may obviously engage in any or all of the actions counting as the physical element of genocide in a judicial venue, thus evident as a matter of observed ("objective") fact. Yet, a State party may not be found guilty of the crime of genocide in the absence of the requisite proof of intent (*mens rea*, *dolus specialis*) to commit any one or more of those actions.

At least as a reflection of one's moral intuitions, this result seems morally repugnant, in the sense of violation of moral feeling (hence one's moral outrage), but also morally indefensible relative to a principle of moral-theoretical rationality. If both moral feeling and moral principle render the criterion of proof of intent morally objectionable, relative to a given standard of moral rationality, then there is manifestly compelling reason to seek redress by way of revision of the extant text of the Convention. Arguably, this is a matter of *interpreting* international law, such that it has normativity grounded in moral principles and not merely in positive law alone (Dworkin, 2013).[2]

Rationale for Revision

Article XVI of the Convention specifies that, "A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General." Political events involving armed conflict since the Convention entered into force, especially the most recent case before the ICJ of *South Africa v. Israel* concerning the Israeli Defense Force's military operations in Gaza since 07 October 2023 and continuing into 2024, elicit concern for the adequacy of the language of the Convention as stipulated above. One may, therefore, contend that it is past time for Article XVI of the Convention to be engaged by responsible State parties in the interest of revision, specifically for the purpose of removing the criterion of proof of intent (*mens rea, dolus specialis*).

There is ample reason to question the central doctrine of the Convention that requires proof of intent as essential (*conditio sine qua non*) to the juridical finding that the crime of genocide has been committed. It is a fact of political history that the concept of the nation-state (the "State" as such) has its provenance in political modernity, i.e., in the Treaty of Westphalia

[2] As a legal philosopher, Ronald Dworkin (2011, 405 & 406) rejects the two-system conception of the relation of law and morality and instead "treat[s] law as a part of political morality." Thus, he accounts for "how personal morality might be thought to flow from ethics" and "how political morality might be seen to flow from personal morality." Hence, he contends: "A theory of law treats legal rights, but it is nevertheless a political theory because it seeks a normative answer to a normative political question: Under what conditions do people acquire genuine rights and duties that are enforceable on demand…?" Whenever there is a "moral emergency" in relation to ostensibly "valid law," then there is a patent need to distinguish between supposedly valid law and law that, while valid because of its legislative provenance, nonetheless must be trumped on appeal to a supervening concept of *justice*, itself deriving from some framework of practical rationality, i.e., political morality.

of 1648 that officially ended the Thirty Years War in Europe. As a matter of political philosophy, there is nothing sacrosanct or essential to "the State" *per se* or to the extant system of international states as a form of political association. The international system as we know it today is a historically contingent phenomenon. It is recognized that: (1) 'State' refers to "an abstract entity" or "a corporate person;" (2) States "can act only by and through their agents and representatives;" (3) "acts of genocide are always committed by individuals, albeit under the authority of an entity which is the real orchestrator of these acts;" and—as a matter of ontology (theory of being, theory of reality)—(4) only "a living person" is recognized to have "a mind which can have knowledge or intention or be negligent" and who "has hands to carry out his intentions" (Smith, 2017). Thus, as Schabas (2000, 444) puts it, "[i]t is hard to conceive of a State with a specific intent," i.e., with what is otherwise understood in criminal law and international criminal law as *mens rea* or "intention." Clearly, proof of intent necessarily refers to proof that is discoverable from the evidence *ascribed to words or deeds of living persons* who are thereafter to be held to account as a matter of applicable law, even if there is a reasonable sense of attribution of "State responsibility," e.g., as understood in the Principle of State Responsibility to Protect.[3]

It is of relevant interest that the ICJ ruled on allegations of genocide in the cases of *Bosnia and Herzegovina v. Serbia and Montenegro* (case introduced in 1993, culminated in 2007) and *Croatia v. Serbia* (case introduced in 1999, culminated in 2015) and more recently acknowledged its jurisdiction and allowed proceedings in the case of *The Gambia v. Myanmar* (institution of proceedings in 2019, with a finding of jurisdiction on 22 July 2022, a finding on the merits pending ongoing judicial proceedings (International Court of Justice, "List of All Cases). It has been said that in the former two cases "the ICJ made the Genocide Convention almost unenforceable against States" (Corsoni and Stanton, 2022). In the two cases referenced, Giada Corsoni and Gregory Stanton complain, "the Court held that to prove genocidal intent, destruction of part of a national, ethnic, racial or religious group must be the **only** intent that could reasonably be inferred from the acts of States. The Court held that 'ethnic cleansing' [rather than genocide] was another possible intent of Serbia. Therefore, special intent (*dolus specialis*) to commit genocide was not Serbia's only intent, and Serbia could not be conclusively proven to have violated the Genocide Convention." In short: "The ICJ applied a logic of exclusion. *If there could be any other possible intention, then the special intent to destroy could not be conclusively proven*" (Corsoni and Stanton, 2022).

As a matter of legal assessment what is problematic in the Court's logic? Corsoni and Stanton (2022) explain: "This concept of intentionality does not accord with international criminal law or even with ordinary criminal law. It would make it impossible to convict any

[3] United Nations Office on Genocide Prevention and the Responsibility to Protect, "Responsibility to Protect." The Principle was "articulated in the 2005 World Summit Outcomes Document (A/RES/60/1)" with reference to "atrocities committed in the 1990s in the Balkans and Rwanda, which the international community failed to prevent, and the NATO military intervention in Kosovo." The relevant paragraph 138 stipulates, "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."

murderer if the killer also had some other intent such as robbery. Nearly every human act has multiple intentions. Actions of States in all their complexity and their many officials must have even more intentions than acts of individuals." Thus, if legally the doctrine of intent remains problematic in the foregoing argument, i.e., if *dolus specialis* is to be interpreted in the foregoing manner, then morally it is even more problematic, since it judges acts to be atrocities, e.g., only crimes against the humanity of persons or war crimes, but which do not rise to the level of genocide (Cherkassky, 2009).[4] Indubitably, such acts violate the moral conscience of humanity at large when principles of morality are applied to find such acts condemnable with reference to one or another practical rationality even as they are morally repugnant as a matter of moral feeling, hence moral outrage.

Kim (2016a) reminds that, "Compared with other core international crimes such as crimes against humanity and war crimes, this crime definition of genocide is unique in that there does not exist an objective contextual element equivalent to a 'widespread or systematic attack against a civilian population' (crimes against humanity) or 'international [non-international] armed conflict' (war crimes)." Moreover, the attention to the criterion of intent to destroy "a group *as such*" leaves it entirely unclear *at what point* in the unfolding chronology of events a genocide obtains, since it is presumed that one must distinguish (as a matter of proof) between (a) the murder of a single individual or more than one individual *as individuals* and (b) murder of an individual or individuals *as members of a group* as defined in the Convention. Further, there are two interpretive approaches at work: "Some suggest that the scope should be restrictively circumscribed to the internal volition of an individual, while others say it can be extended to some degree by means of cognitive knowledge. The former position is generally referred to as the purpose-based approach and the latter the knowledge-based approach" (Kim, 2016b, 5).

But one may ask reasonably: Why *should* (moral 'should') this be a controlling legal distinction? Consider the proposition of the type 'the only good *x* is a dead *x*'—where *x* is the deliberately targeted "group" identifier but nonetheless obviously given factually in any individual representative of that group. Thus, e.g., with reference to claims of genocide in recent international political history, it can be said in each case:

'The only good Armenian is a dead Armenian.'
'The only good Jew is a dead Jew.'
'The only good Bengali is a dead Bengali.'
'The only good Tutsi is a dead Tutsi.'
'The only good Bosnian Muslim is a dead Bosnian Muslim.'
'The only good Rohingya is a dead Rohingya.'
'The only good Palestinian is a dead Palestinian.'

[4] Cherkassky comments: "The Courts and Tribunals which have jurisdiction over genocide have had to canvass the vague wording of the provisions for themselves. This lack of clarity leads to a frustrating reliance on the next available offence: crimes against humanity. This dilemma not only releases the perpetrator from the moral stigma attached to genocide, but includes a risk of humanity crimes becoming the popular 'catch-all category' in international law."

For each of these token propositions, the fact is that there *can* be *but one (namable) individual* identified for a crime of genocide to be committed, despite the criterion of identified "group" *per se*.[5] Despite historical revisionist attempts to question the evidence of the Nazi genocide of the Jews that more than six million European Jews were murdered in acts of genocide as part of Hitler's "final solution" policy, the debate about proof has not been about numbers *per se*—i.e., whether it "really" was "six million" or "three million" or "thousands" of European Jews (Zimmerman, 2000; Shermer and Grobman, 2000). The actual number is irrelevant in view of the acts (*actus reus*) themselves that are undeniable. Kim reminds, in view of "*travaux préparatoires*" (preparatory or preliminary works) of the 1948 Genocide Convention, "the French delegation ardently argued that, if there exists a genocidal intent, *an attack on a single individual could still constitute the crime of genocide*."[6] Again, the actual number of murdered individuals is irrelevant when the murder of a single individual suffices, irrespective of the criterion of *dolus specialis*.

Further, Kim cites Pieter Drost's argument that, "if a perpetrator's *mens rea* is directed against killing a multiplicity of victims, his act of killing only one member of a group can still constitute genocide"—i.e., it is assumed the single act of murder includes "intent to commit similar acts in the future and in connection with the first crime."[7] Drost, of course, maintains the primacy of the criterion of intent, despite the hypothetical fact of murder of a single individual of an identifiable group, rather than murder of a multiplicity of members of that group. Yet, as Kim reminds, with reference to the case of the International Criminal Tribunal for the former Yugoslavia, "judges are very reluctant to proceed to convict defendants of genocide without there being a certain level of objective scale of violence or destruction." But, one asks, why must an "objective scale" measure—the "substantiality requirement"—be mandatory for a finding of the crime of genocide? How many hundreds, thousands, millions, etc., does it take to satisfy the measure of "objective scale"? The very idea of objective scale is morally repugnant and shocks the conscience of reasonable men and women who esteem the inviolable dignity of even a single human person's life, whatever the national, ethnic, religious, or group identity of that person.

Kim is correct to point out that "the case law of the *ad hoc* tribunals" muddles the situation. Referring to "the *Krstić* Appeals Chamber," Kim (2016b) opines that in this case it was "clear that the genocidal intent and the requirement of 'targeting a whole or a substantial part of a group' constitute the *two* key 'requirements' of genocide. The Chamber states that '[t]he gravity of genocide is reflected in the stringent requirements […]—the demanding proof

[5] In the reputed film Judgment at Nuremberg, Spencer Tracy portrayed the presiding judge Dan Haywood as Burt Lancaster had the role of Nazi Reich Minister of Law Ernst Janning. In one impressive scene after the Tribunal's judgment was issued, Janning told Haywood, "those people, those millions of people [meaning here the European Jews and others who were murdered in the death camps], I never knew it would come to that." Judge Haywood, in a poignant moment of moral-legal lucidity, replied: "Herr Janning, it came to that the first time you sentenced a man [i.e., a Jew] to death [whom] you knew to be innocent."

[6] Kim refers to UN doc. A/C.6/SR.73, pp. 90-92 (http://www.legal-tools.org/doc/74af49/), italics added.

[7] Kim cites Pieter Drost, *The Crime of State: Genocide* (Leiden: Sythoff, 1959), 84-86.

of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part […].' These developments, without any doubt, tell us that *genocide is not a 'crime of mens rea'*" (Kim, 2016b; italics added).[8] That is to say, it is not a crime *only* of *mens rea* if the second requirement, *actus reus*, is considered essential and manifestly in evidence. And, more pertinently, so long as the second requirement is interpreted to be a *substantive* requirement for proof of genocide, then the mental element may not be the essential criterion (i.e., a *conditio sine qua non*) after all. The evidence associated with the physical element assumes more weight for judicial assessment. And, arguably, the latter is surely more weighty for moral evaluation.

Thus, since armed conflict continues to bring these questions to the forefront of both international law and ethics in international affairs, it is important to clarify what is essential and what is not essential to a defensible finding of the crime of genocide. This is so in the current case of *South Africa v. Israel* now before the ICJ. In this case, the State of Israel decries South Africa's application for "delegitimizing Israel's 75-year existence" and having presented a review of *actus reus* as a "sweeping counterfactual description of the Israeli-Palestinian conflict." Israel complains that South Africa's "submissions" sound "barely distinguishable from Hamas' own rejectionist rhetoric." Further, Israel characterizes Hamas's acts on 07 October 2023 as "the largest calculated mass murder of Jews in a single day since the Holocaust," thereby linking this particular assault to the Nazi genocide as if Hamas's assault were itself the equivalent of an act of genocide against Israeli Jews motivated by Hamas's genocidal intent to eliminate the State of Israel.[9] Thus, in oral proceedings before the ICJ justices, the counsel for the State of Israel remarked that, while "civilian suffering in this war, like in all wars, is tragic" and "heartbreaking," nonetheless, "the Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population, even when the use of force raises 'very serious issues of international law' and involves 'enormous suffering' and 'continuing loss of life'" (International Court of Justice, 2024). In this counsel's

[8] Kim is concerned with the "collective mindset of perpetrators" in contrast to individual *mens rea* to commit genocide. Concerning the French position mentioned earlier, Kim writes in footnote 13, p. 4, "During the seventh meeting of the Ad Hoc Committee on Genocide in 1948, a representative of France emphasized on the importance of taking note of the intention behind the physical acts in order to determine whether the crime of genocide had been committed. It is noteworthy that he made this point in connection with the involvement of a State. Intention in this context should be viewed as a bigger concept than that of an individual…('…Genocide could be committed by an individual or by a group of individuals not connected with the State or without the intervention of the State. It could also be committed at the instance and with the complicity of the State. In that case the State itself could be considered guilty of the crime. […] The crime committed by the Nazis and Fascists had been committed by the State itself…')…."

[9] It may be argued, quite reasonably, that Hamas's opposition to political Zionism and the State of Israel concerns the political apparatus of State, the State *per se* as an illegally occupying power on Palestinian homeland, which opposition does not equate to genocidal intent or genocidal acts or opposition to Jews as such or to Judaism, despite Israeli rhetoric and propaganda (*hasbara*) that deliberately recasts Hamas's motivations and actions in the worst light possible. In its 2017 Statement, Hamas says: "The Islamic Resistance Movement 'Hamas' is a Palestinian Islamic national liberation and resistance movement. Its goal is to liberate Palestine and confront the Zionist project." see https://www.middleeasteye.net/news/hamas-2017-document-full, accessed 12 April 2024. This is not, of course, either morally or legally to justify Hamas's attacks on Israeli civilian entities or the death and injury of civilians, in contrast to legitimate military targets.

judgment, the actions of the IDF in Gaza are part and parcel of normal armed conflict in which civilian casualties are foreseen but not intended, consistent with the just war principle of discrimination of Hamas "militia" combatants and non-combatant Palestinian civilians. Yet, it starkly ignores the fact of advances in weapons technologies that, when employed, deliver far more indiscriminate destruction than imagined at the time the Convention was drafted.

In these proceedings before the Court, Israel contends further, "if there have been acts that may be characterized as genocidal, then they have been perpetrated against Israel." Accordingly, "Israel has the inherent right to take all legitimate measures to defend its citizens and secure the release of the hostages." Indeed, as for South Africa's request for the "provisional measure calling on Israel to suspend its military operations," Israel contends, "this amounts to an attempt to deny Israel its ability to meet its obligations to the defence of its citizens, to the hostages and to over 110,000 internally displaced Israelis unable to safely return to their homes" (International Court of Justice, 2024, 16 & 17). Israel continued (para. 29), "this Court is asked to call for an end to operations against the ongoing attacks of an organization that pursues an actual genocidal agenda"—an assertion that fails to distinguish between Hamas's opposition to the State of Israel as an Occupying Power and to "the Zionist project" (on the one hand) and opposition to Jews as Jews (on the other hand) with genocidal intent, which cannot fairly be said of Hamas or the Palestinians in general. However, the Israeli legal counsel's line of argument did not prevail with the ICJ in rendering its provisional orders against the State of Israel. By an overwhelming vote of 16-2, the ICJ ordered provisional measures as it accepted jurisdiction and recognized the *plausibility* of Israel's violation of the Genocide Convention in its military operations underway in the Gaza Strip.[10] Further, given the dire requisite of humanitarian assistance to Palestinians in Gaza, the ICJ rightly issued a "modified provisional orders measure" ordering Israel to comply with this particular measure forthwith (Keitner, 2024).

Yet, one must reflect here. If the precedent of the ICJ's judgment in *Bosnia* and *Croatia* should hold eventually in the case of *South Africa v. Israel*, the State of Israel can claim—as Prime Minister Benjamin Netanyahu has asserted—that its intention is militarily to destroy Hamas as a "terrorist" organization and to eliminate it from the whole of Gaza, thus that Israel pursues a legitimate military objective. For Netanyahu, IDF military operations are legitimately undertaken—irrespective of (1) the mass displacement of approximately 1.5 million Palestinians from northern Gaza to the south near the border with Egypt; (2) the "collateral damage" of more than 33,000 civilian deaths and 75,000+ injuries (Lohani, 2024) (not counting the tens of thousands missing and presumed buried in the ruins and rubble); (3) the use of starvation as a weapon of war (Israel's blockade of all humanitarian assistance to Gaza); along with (4) the massive bombardment and destruction of civilian infrastructures (including residential buildings, mosques, universities, and hospitals) that has occurred in the

[10] International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)," https://www.icj-cij.org/case/192, accessed 13 February 2024.

process; and (5) making the whole of Gaza unlivable except in the event of a massive post-war reconstruction.[11]

Further, even if the State of Israel were to concede to critics that its political and military intent is *ethnic cleansing* of Gaza rather than *per se* genocide of the Palestinians, ostensibly warranted by the broad Palestinian support for Hamas's governmental authority in Gaza, then under the ICJ position articulated in *Bosnia* and *Serbia* there would be no basis for the allegation of the crime of genocide. The intent of *ethnic cleansing* is the most that could be established as a matter of evidence, thus the case in the ICJ and the ICC subject to dismissal, notwithstanding alternative allegations of war crimes and crimes against humanity.

The Moral Argument Against the *mens rea/dolus specialis* Criterion

All of the foregoing commentary points to what is fundamentally problematic with the legal reasoning dominant in efforts to prove a case of genocide. As long as such legal rationale governs the interpretation of intent (*mens rea*, *dolus specialis*), then any State may basically "get away with murder" and pursue sundry military objectives without being compliant with just war principles (just cause, discrimination, proportionality) or recognizing an obligation or responsibility to protect (R2P principle). This would be—and seems to be—so for the State of Israel as it conducts its IDF operations in Gaza, even if one allows for the Israeli war cabinet's claims that it pursues constabulary and military objectives against "Hamas terrorist" actions as part of its right to self-defense and as part of its administrative authority and legal accountability for the Occupied Territories. Problematic here is excessive reliance on positive international law without accounting for the normativity (moral philosophy) that is at the base of this evolving framework of law, i.e., the tradition of natural law or law of nations/law of peoples (*jus gentium*).

The Deontology of Immanuel Kant and Natural Law

It behooves us to recall that, in the moral philosophy of a deontologist such as Immanuel Kant, a living person (irrespective of historically contingent factors such as geography, nationality, ethnicity, social class, or religious belief) is said to be (as a matter of his or her "essence" or "nature") a *rational being* (*vernünftige Wesen*). As such, every human being has an *intrinsic* worth (in reference to that rational nature) and not extrinsic worth (that depends on some contingent feature of his or her existence). It is because of that essential rational capacity that a person is deemed to be morally responsible as a person (*personalitas moralis*) and said to have obligations or duties to act consistent with "the moral law" (Kant, 1996, 50).[12] For Kant

[11] For Netanyahu's remarks see, https://apnews.com/video/israel-israel-government-gaza-strip-hamas-gaza-cfeac45f93014a98bc7d0d0d6d232306, accessed 12 April 2024.

[12] Kant states: "A *person* is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is merely the capacity for being conscious of one's identity in different conditions of one's existence). From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others)." By contrast, "A *thing* is that to which nothing can be imputed. Any object of free choice which itself lacks freedom

the appeal here is to *universal* moral law (*allgemeines Gesetz*) or universal law of Right (*Rechtgesetz*), [13] not to any positive law (*jus civile*) that is contingent on a given State's constitutional structure and guarantees therein or legislation that installs statutes subject to revision according to changing political administrations and political ideologies (Gregg, n.d.).[14] Thus Kant (1996, 123) explains:

> Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth* (*res publica latius sic dicta*). In relation to other peoples, however, a state is called simply a *power* (*potentia*) (hence the word *potentate*). Because the union of the members is (presumed to be) one they inherited, a state is also called a nation (*gens*). Hence, under the general concept of public Right we are led to think not only of the Right of a state but also of a *Right of nations* (*ius gentium*). Since the earth's surface is not unlimited but closed, the concepts of the Right of a state and of a Right of nations lead inevitably to the Idea of a *Right for all nations* (*ius gentium*) or *cosmopolitan Right* (*ius cosmopoliticum*).

Kant's moral-philosophical view contrasts with the moral framework of utilitarianism or consequentialism, of course, which does not speak of universal law *per se* but only of a *principle of utility*, according to which the task of moral deliberation is to calculate an optimum utility in a measure of benefits/goods and risks/costs, assuming impartiality in the calculation. The goal of the calculation is to achieve the greatest happiness of the greatest number who stand to be affected by the moral decision under consideration. The fact is that neither an ostensible "optimum utility" nor a supposed "risk/benefit balance" of consequences of given actions (options) related to the conduct of war provides a reasonably compelling standard for moral evaluation of the high crime of genocide (the "crime of crimes").[15] Hence, if one is to

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is therefore called a thing (*res corporalis*)." Further, Kant specifies: "A deed is *right* or *wrong* (*rectum aut minus rectum*) in general insofar as it conforms with duty or is contrary to it (*factum licitum aut illicitum*)…A deed contrary to duty is called a *transgression* (*reatus*). An *unintentional* transgression which can still be imputed to the agent is called a mere *fault* (*culpa*). An *intentional* transgression (i.e., one accompanied by consciousness of its being a transgression) is called a *crime* (*dolus*)."

[13] Kant (1996, 56) argues: "Thus the universal law of Right [*Rechtgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law is indeed a law [*Gesetz*], which lays an obligation on me…"

[14] Gregg cites the Roman jurist Gaius (130-180) who wrote: "Every people that is governed by statutes and customs observes partly its own peculiar law and partly the law common to all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile* as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind." For Kant (1996, 51), "The supreme principle of the doctrine of morals is…Act on a maxim that can also hold as a universal law. Any maxim that does not so qualify is contrary to morals." Further (Kant, 1996, 56): "Any action is *right* if it can coexist with everyone's freedom in accordance with universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."

[15] See here Immanuel Kant's principal moral-theoretical works: *Groundwork of the Metaphysics of Morals*; *Critique of Practical Reason*; and *The Metaphysics of Morals.* Also, one notes that Dworkin (2011, 414) reminds of historical change in perceptions: "Once…the idea that individuals have rights as trumps over the collective good—natural rights—was very widely accepted. Jeremy Bentham [a prominent utilitarian theorist] declared

stipulate moral criteria on the basis of which an alleged crime of genocide is to be evaluated, the criteria cannot reasonably be grounded in a principle of utility. Only an appeal to the authority of universal moral law suffices for that purpose. Only a principle of universal moral law allows for the evaluation of the subjective maxims that inform decisions of national security policy and formulation of associated military objectives, with a view to eliminating any envisioned acts that are immoral insofar as they are not grounded in objectively valid maxims of conduct that count simultaneously as universal moral laws. Maxims that would entail the violation of the dignity of human persons, even as there may be a violation of the rights of a collective of which these persons may be members, are not to be followed.[16]

Kantian scholars such as A.P. D'Entrèves (1970) understand Kant to have been a prominent critic of legal positivism,[17] as Kant insisted on the centrality of individual moral autonomy (thus the principle of autonomy) over heteronomy (e.g., deference to "the will of the sovereign" on matters of justice). As Smith (2016) reminds, "Generally speaking…natural law theories maintain that ethical and political principles can be justified by reason alone, that they are objective and universal in scope, and that they do not depend on the subjective feelings or desires of individuals or originate in the decrees of government."[18] What matters in Kant's moral philosophy is his principle of universalizability, i.e., that, "We may not demand that others do x while exempting ourselves from the same rule, nor may we exempt others from the same moral standards that we apply to ourselves. As Kant put it: 'The first principle of morality is, therefore, act according to a maxim which can, at the same time, be valid as a universal law. – Any maxim which does not so qualify is contrary to morality'" (Smith, 2016). This formulation of the principle is often called "the Categorical Imperative," thus distinguished for its "unconditionality" from hypothetical imperatives ('If x, then do y') that are conditional as guides to human conduct. Insofar as a maxim is a rule chosen to guide conduct, no such maxim is morally acceptable unless it can be universalized, thus stating an imperative from which there can be no derogation. It is in this sense that it is meaningful to say that there are moral limits to governmental power, despite the willingness and tendency of governmental authorities

natural rights nonsense on stilts, and lawyers of that opinion created the idea of absolute parliamentary sovereignty. Now the wheel is turning again: utilitarianism is giving way once again to a recognition of individual rights, now called human rights, and parliamentary sovereignty is no longer evidently just."

[16] Obviously, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are formulated to assure additional protections as a matter of positive international law, but these covenants are nonetheless grounded in a concept of right that proceeds from natural law, thus natural rights.

[17] A.P. D'Entrèves, *Natural Law: An Introduction to Legal Philosophy*, 2nd Ed. (1970), p. 110, as cited by George H. Smith (2016).

[18] Granted, there are those who are proponents of legal positivism who consider all appeals to natural law to be anachronistic and without meaningful weight. Thus Leonard Krieger (1965, 191) observes: "In its outward appearance the doctrine of natural law would seem to be a complex of ideas which, like many other, has served its time and should be allowed to rest in peace." That said, Krieger (p. 192) acknowledges that the appeal to natural law continues into the present despite its supposed historical "terminus" in the latter nineteenth century: The category of natural law "susceptible of such reincarnations should make us wary of premature conclusions about its final decease." Thus, he adds (p. 193), "Our own age is witnessing a revival of natural-law thinking, particularly in the field of jurisprudence."

to exceed what they deem to be their legitimate moral authority, even granting here the usual presuppositions of *Realpolitik* with its insistence on State interests exclusive of normative restraints on State conduct.

Important to Kant's framework of morality is his attention to the work of Gottfried Achenwall, whose *Natural Law* informed Kant's views on natural law and universal moral law. Achenwall (2020, 180) explained that, "the universal law of nations teaches the natural laws that should be observed by nations with regard to each other, it hands down the rights and obligations that naturally fall to a nation, it explains the natural mutual duties of nations and also the transient sovereign rights." What matters to Achenwall's conception is his argument that, "any nation whatsoever with regard to another nation is a moral person in a natural state, and consequently *several nations amongst each other should be considered as many free persons*. For this reason, *nations use purely natural law*, i.e., they enjoy the rights and are bound by the obligations that naturally fall to persons in a state of natural liberty" (Achenwall, 2020, 180-181). Further, the particular political structure of a given nation—monarchy, aristocracy, democracy, despotic society, a body of federated republics, a subordinate republic—does not eliminate its status as a moral person obligated by natural law. For Achenwall (2020, 181), insofar as a nation is a people, it is the people who possess "the highest public overlordship by force of origin," in which case even though "any monarch, council of aristocrats or people's council, indeed also the head of state represent their nation," each such representative authority possesses only "transient sovereign rights" but are, by the temporary transfer of sovereign right, subject to the authority of the law of nations. Essential to the concept of "the natural law of nations" is that it is "*eternal, unchangeable, universal and necessary law*."

The Moral Argument in the Case of Palestine

Important to the foregoing position is the distinction of a "people" or "nation" on the one hand and a "State" on the other. Permanent sovereignty remains with the former, and those who are at the helm of the State as such hold only transient sovereignty subject to the vagaries of electoral politics or deformations thereof (rebellion, revolution, *coup de'etat*, etc.). Thus, applied to the Israeli-Palestinian conflict, it is clear that the people of Palestine, Palestinians in the Occupied Territories, count as a "nation" with the full public right of a nation irrespective of the lack of formal recognition of a "State of Palestine" in the UN General Assembly or by the UN Security Council (resolutions thereof expressions of binding positive international law). Hence, other nations, including especially the State of Israel, are obligated to respect those rights. The law of nations such as Achenwall conceives it does not permit foreign occupation of a territory that is already occupied by an identifiable nation or people[19], in which case the

[19] The political Zionist slogan that Palestine was "a land without a people for a people without a land" was never a true assertion or representation. See here Edward Said (1980). Also see Zachary J. Foster (2017). Foster (2014) accounts for "the emergence of Palestinian nationalism, beginning in the 1910s throughout the 1920s and 1930s," arguing that, "the Palestinian national identity developed not as an accidental product of external historical developments (e.g., Zionism or British colonialism), but rather through a directed effort by the Palestinian

Palestinians, as indigenous to Palestine (the "Occupied Territories") prior to 1948 and the onset of the political Zionist settler colonialist project of dispossession, have every right of restoration and continuing possession of those territories as already recognized by numerous UN Security Council resolutions.

Thus, one notes that Achenwall (2020, 195) asserted, "*A wronged nation has the right to public war in as far as it cannot otherwise obtain its right."* The Palestinians have long characterized their armed conflict with the State of Israel by the word '*intifada*,' meaning "uprising" and manifesting acts of resistance to an occupying power, thereby essentially undertaking an ongoing war of liberation since 1948. The fact is that Israeli occupation has motivated and engendered Palestinians to become resistance/freedom fighters, thus the various units that have included Fatah and its "military arm, al-Asifa (the Storm)," the Palestine Liberation Organization (PLO), the Popular Front for the Liberation of Palestine (PFLP), Black September, the Democratic Front for the Liberation of Palestine (DFLP), the Popular Front for the Liberation of Palestine—General Command, Abu Nidal, Saina Abu Musa, and Hamas (Gordon and Lopez, 2000).

Gordon and Lopez (2000, 103) remind, "the purpose of Palestinian terrorism is not to kill innocent people but to advance certain political goals…[A] terrorist act is always a means, and, therefore, its political objective always transcends the act itself." What is this goal? The answer is starkly clear: "The Palestinians wanted recognition from the international community that they had been dispossessed and that they too deserve a homeland"—their homeland that has been illegally and immorally expropriated by European settler colonialists abusing the Shoah (Holocaust) of the Jews as an instrument of political Zionist ideology that in its secularism betrays the fundamental values, principles, and imperatives of Judaism (as elucidated in the Torah and Talmud). In this case in particular, any definition of terrorism that is restricted to "subnational groups or clandestine agents" (as in the definition employed by the U.S. Department of State) (The White House, 2002) and fails to include acts of State terrorism (such as perpetrated by the State of Israel over decades in the Occupied Territories) remains instrumentally political but contrary to the requisites of international jurisprudence and international justice.

Under no circumstances can it be said as a matter of historical evidence that the Palestinian claim to their homeland is "a spurious right," i.e., what is "falsely alleged to be a right." On the contrary, both the State of Israel and the international community of nation-states are obligated to respect this right with reference to the law of nations. Achenwall (2020) argued that, "Because a wrong is a cause that justifies war as a necessary means to protect one's right—whether the wrong has been done, is actually being done or is imminent—a war of nation

intellectual class to endow the ethnic community with a *Palestinian* national consciousness." For a Palestinian historical perspective see Rashid Khalidi (1997/2010). Khalidi's central thesis is that "national identity is constructed; it is not an essential, transcendent given," hence Palestinian national identity also being an evolving historical construct. Nonetheless, the historical fact as Khalidi (1997/2010, xxvi) interprets it is that "the Palestinians…are tormented by their own profound existential crisis as a people, one born [*inter alia*] of their traumatic historical experiences suffered at the hands of Zionism and Israel over the past century."

against nation is *rightful with regard to the end if its end is the nation's indemnity, defense or security*." The State of Israel's sustained occupation of Palestinian homelands in Gaza, the West Bank, and East Jerusalem has undermined the public welfare, public health, and public security of the Palestinian nation since 1948 and particularly since 1967. Whether as intifada or as defense against Israeli acts of ethnic cleansing, war crimes, crimes against humanity, and especially acts of genocide, the Palestinians have a sustained moral right to throw off the incubus of Israeli occupation, insist on an end to Israeli apartheid practices (even as ostensibly "legitimated" by the Israeli "nation-state law" of 2018) (Berger, 2018), and demand a two state solution that preserves its recognized right to its homeland as a people and nation. Only thus are both Fatah and Hamas likely to cease hostilities against Israelis in general.

Krieger (1965, 194) observed that, "the rejection of natural law in the 19th century was the dissolution of the total conjunction between the *is* and the *ought*, and its replacement first by increasingly tenuous partial conjunctions and later by frank disjunction." Thus some argue that one may not logically derive *ought* (a prescription) from *is* (a description), what in informal logic is called the naturalistic fallacy. Yet, as Kant clarified the matter, "the moral law does not refer to what happens, but refers to what ought to happen" (Ilting, 105).[20] In such an evaluation, the sphere of normativity accessed by reason is separate from the realm of matters of fact accessed through sensory experience. Hence, moral authority derives from the exercise of reason, thus from a practical rationality, and not from lived experience, the former having its universality whereas the latter always has its contingency. In this sense the universal "ought" superintends whatever "is" at any given occasion of moral evaluation.

It behooves us to recall that in the Nuremberg Tribunal proceedings against Nazi party ideologues, the third count of the indictment specifically included the term genocide. It characterized genocide as a "deliberate and systematic" act of "extermination," not only of "racial and national groups" but, importantly for present context of judgment, also "against the civilian populations" for the express purpose of "destroy[ing] particular races and classes of people and national, racial, or religious groups..." (Owens, 2024). In the case of the Israeli military engagements in Gaza, Israeli Prime Minister Benjamin Netanyahu does not recognize a Palestinian "nationality" *per se* and, therefore, he dismisses the very idea and prospect of a Palestinian "State" as a legitimate political association of the Palestinian people as a whole in the Occupied Territories, regardless of whether they are represented by the Palestinian Authority/Fatah or Hamas. Similarly, he does not concern himself with the religious beliefs of the Palestinian people as Muslims but rather identifies them racially as descendants of

[20] Ilting remarks that G.E. Moore objected to Kant's moral theory: "What Moore objects to mainly in Kant are two fundamental mistakes: the fallacy of supposing moral law to be analogous to natural law, and the fallacy of supposing moral law to be essentially analogous to law in the legal sense and, consequently, to be an imperative." But, as he notes, this is a matter of meta-ethics and not substantively a critique of Kant's normative ethics. Further, without getting into the intricacies of Kant's moral philosophy, it is important to note that "for Kant moral truths are synthetic a priori judgments, i.e., judgments which are formulated without recourse to sense experience and whose truthfulness is not determined by the meaning of its component terms—thus they can be known by reason…" (Osmola, 2017).

"Amalek" (as narrated in the Torah)[21] and, therefore, as enemies of Israelis *qua* descendants of the "ancient Israelites," itself a mythical construction that, while "biblical," is not "historical" (Sand, 2008; Long, 1999). It is in this sense that Netanyahu is determined to destroy "Hamas"/"Amalek," inclusive of the Hamas militia and the Palestinian civilians in Gaza, hence all IDF operations undertaken as "collective punishment" of the Palestinian civilian population, in retribution of their political support for Hamas rather than Fatah (Palestine Liberation Authority). At no time does Netanyahu recognize the humanity of the Palestinians, hence the transfer of his ideological construct to the military operations of the IDF in the whole of Gaza and the rhetoric of Israeli Defense Minister Yoav Gallant that reduces Palestinians as a whole to "human animals" (Karanth, 2023)—thus emphasizing the "animality" rather than the "rationality" of the Palestinian people and thereby automatically advancing an act of dehumanization that initiates a comportment preliminary to acts of genocide. This rhetoric and consequent IDF military conduct manifestly violate the deontological principle that insists on the application of universal moral law and the recognition of the Palestinians as fully human and as rational beings whose dignity as moral persons is by no means to be violated.

Before the codification of the Genocide Convention in December 1948, the United Nations General Assembly (55th Plenary Meeting, 11 December 1946) characterized the crime of genocide as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is *contrary to the moral law* and to the spirit and aims of the United Nations."[22] Salient to the present deliberation is the choice of words here, i.e., that genocide is contrary to *the moral law*. One must ask, of course: Which moral law? Clearly, it is not the positive international law of the day that is a matter of treaty and thus treaty law and legal "duty" stipulated by treaty. Rather, 'moral law' here concerns *evident conduct* (*actus reus*)—not merely intent (*mens rea* or *dolus specialis*)—that shocks the *conscience* of *humanity as a whole*, the conscience being the seat of moral judgment in every human being. It is *conduct* that is determinative of opprobrium here, *not* intent.

Thus, the reference in natural law is not merely to this or that "State" that happens to be a contracting party to a treaty and which is thereby obligated by the traditional expectation of *pacta sunt servanda* to prevent acts of genocide. The obligation instead proceeds from a higher principle, a moral principle, and not merely a legal principle. If it is to be said that the prohibition and prevention of genocide is "part of the unalienable *jus cogens*" (insisting here on the feature of *unalienability*), that as such "it is even among *the highest of all unconditional obligations* under international law because it affects *the most fundamental conditions* of the very *existence* of the international community," then it is first and foremost because of the

[21] See here Lanard (2023) regarding Netanyahu's remarks and Kampeas (2024) concerning Netanyahu's rejection of the interpretation of those remarks.

[22] United Nations General Assembly, Resolution A/RES/96(1), "The Crime of Genocide," https://documents.un.org/doc/resolution/gen/nr0/033/47/pdf/nr003347.pdf?token=Lk3wOczjh9wSrzIsuh&fe=tru e, accessed 11 February 2024. Italics added.

primacy of the universal moral law that grounds all such positive law (Schiffbauer, 2018, italics added). The very concept of *jus cogens* and an obligation that is *erga omnes* presuppose a universal moral law as a *conditio sine qua non* of any positive international law. Murphy (1978, 59) asserts that, "The Genocide Convention has efficacy as a statement of moral purpose" insofar as the Convention protects "principles of human dignity," and the protection of human dignity is central to Kantian deontology. Thus, it is apposite to recall that Raphael Lemkin (1933) wrote: "The concept of offences against the law of nations (*delicta iuris gentium*) comes from the interdependent struggle of the civilized world community against criminality."[23] He (1933) spoke of a "principle of universal repression" according to which an individual offender "can be brought to justice in the place where he is apprehended (*forum loci deprehensionis*), independently of where the crime was committed and the nationality of the author," precisely because he is concerned with an offence "against the law of nations" (*jus gentium*) that, as a law of "peoples" and not of "States" is never merely expressed by what is extant as positive international law.

The evidence on the ground in Gaza, as presented by South Africa before the ICJ and as reported by the Special Rapporteur in her recent report,[24] makes it clear that one can no longer assume that "A combat soldier [in this case a combatant of the IDF] engaged in action against hostile troops [in this case not an organized army but the militia group of Hamas resistance fighters] does not have the requisite intent since he merely intends to destroy the opposition forces [in this case Hamas resistance fighters] and not a national group [in this case, the civilian Palestinians in Gaza]." [25] On the contrary, the IDF has imposed collective punishment on the civilian population throughout Gaza, indiscriminately murdering civilians as if they were Hamas combatants. Thus, as Murphy (1978, 53) has opined, "While each government is obligated under the convention to punish 'constitutionally responsible rulers, public officials or private individuals' responsible for genocidal acts, it is naïve to believe that the government in power would punish a person carrying out its own program." This is surely so in the case of the State of Israel as long as Netanyahu and his "war cabinet" remain in power and prosecute the war in Gaza according to Netanyahu's intent fully to eradicate Hamas as both a political and militant entity, even if that includes total ethnic cleansing of the Palestinians from that territory.

Conclusion

Lemkin anticipated such conduct as collective punishment when he wrote in 1933:

> we find that some offences concern attacks on individual human rights (when they are of such importance that they interest the entire international community), while other offences relate to the relations between the individual and the collective…However,

[23] The document was originally published in French under the title, "Les actes constituant un danger general (interétatique) consideres comme delites des droit ges gens," here in English version as translated by Jim Fussell.
[24] Human Rights Council (2024), "Anatomy of a Genocide."
[25] Modifying and applying here the words of Michael P. Murphy (1978).

> there are offences which combine these two elements. In particular these are *attacks carried out against an individual as a member of a collectivity*. The goal of the author [of the crime] is not only to harm an individual, but, also to cause damage to the collectivity to which the [latter] belongs. Offenses of this type bring harm not only to human rights, but also and most especially undermine the fundamental [*sic*] basis of the social order.

Surely, this is precisely the sort of ongoing military attacks that the IDF perpetrates in the whole of Gaza, murdering individuals without discriminating between civilian and combatant, thus harming not only the human rights of the Palestinians but also undermining the fundamental basis of the Palestinian social order in the whole of Gaza as it is reduced to a wasteland of rubble. For Lemkin, all such attacks are acts of barbarity and as such offenses against the law of nations *qua* law of peoples. Thus, he (1933) adds that the act of barbarity "injures the moral interests of the international community" and not merely the interests of the individual or particular collective of which that individual is a member. It is in that sense that there is expressed among the global public sustained moral outrage against the barbarity of IDF operations in Gaza engaged without regard for the lives of Palestinians, be they Hamas militants or civilian men, women, and children.

Thus, the question of practical rationality here concerns not only the legal dimension of the obligation to prevent the crime of genocide and punish those who are responsible. It concerns morality, i.e., a universal morality such as Kant and Lemkin understood. As a matter of legality, the prevention of genocide is a function of "due diligence" concerning evident intent and evident conduct. But, it is the latter that is all the more important when the former is ambiguous, tacit, or even deliberately clandestine in the expressed policies and political decisions that motivate the commencement of such conduct, whether authorized by State authority (e.g., a Prime Minister) or following from uncontrolled conduct of subordinates both political and military (soldiers "on the ground," in the theater of combat operations).[26] Jessica Wolfendale (2024) provides the relevant change of orientation requisite in the case of the Israeli-Palestinian conflict. She reminds,

> Establishing Israel's explicit intentions is central to South Africa's legal case against Israel, *but not for the moral evaluation of Israel's actions*. Following decades of occupation, Israel's actions in Gaza—its choice of weapons, tactics, and targets—have seriously threatened the cultural, psychological, and physical survival of Palestinians in the Occupied Territories and devastated familial and generational relationships. Even if the ICJ finds that Israel's actions do not meet the legal definition of genocide, focusing on *the experience of Palestinians* rather than on *Israel's intentions* provides a

[26] Notably, Israeli Defense Minister Yoav Gallant expressly stated that IDF soldiers could proceed with their assaults in Gaza without any restraint such as normally expected by *jus in bello* principles of military engagement. See here The Times of Israel, https://www.timesofisrael.com/gallant-israel-moving-to-full-offense-gaza-will-never-go-back-to-what-it-once-was/.

> reason to consider a moral case for using "genocide" to describe the ongoing destruction in Gaza. (Wolfendale, 2024; italics added)

It is against all such acts (*actus reus*) that the international community is called upon to take requisite concerted and sustained political action to prohibit, prevent, and punish such acts—even if and when the defendant is the State of Israel, notwithstanding the experience of European Jews in the Nazi genocide and the purported commitment of Jews "Never again" to see a Holocaust or similar atrocity perpetrated. As the British Chief Prosecutor at Nuremberg put it,

> Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction…Yet international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is entitled to the protection of mankind when the State tramples upon its rights in a manner that outrages the conscience of mankind… (as cited by Beres, 1989).

Undoubtedly, the State of Israel is an Occupying Power and subject to the law of the Geneva Conventions in the manner of its treatment of the Palestinian people.[27] In relation to international positive law (the Geneva Conventions, the Convention on the Prevention and Punishment of the Crime of Genocide, etc.) and the morality central to the *jus gentium*, the State of Israel is by no means to be excepted in the way it decides to conduct itself vis-à-vis the Palestinian people in the Occupied Territories, including Gaza. The Palestinians throughout the Occupied Territories are entitled as a matter of *jus gentium* to the full protection the international community of nations can muster on those grounds. Thus, Louis Rene Beres (1989, 29) is entirely correct to remind that, the Genocide Convention, along with other "human rights 'regime'" treaties and declarations, "represents the end of the idea of absolute sovereignty concerning non-intervention when human rights are in grievous jeopardy." And, this certainly applies in the case of Israel's war being waged against the Palestinian people in Gaza (with spillover effects in the West Bank and East Jerusalem as the IDF supports settler Israelis in their hostile acts of dispossession and displacement of the Palestinians in those quarters). Hence, the stark reality of *actus reus* in Gaza is sufficient reason to revise the Genocide Convention, eliminate the criterion of *mens rea/dolus specialis*, and remedy a barrier to due justice whenever armed conflict harms international right, i.e., the law of nations *qua* the law of peoples. As Kant (2006, 81) insisted,

> One cannot conceive of international right as a right *to* war (since this would be a presumptive right to determine what is right, not according to universally valid external laws that restrict the freedom of every individual, but rather by means of violence, according to one-sided maxims); one would have to mean by it that it is perfectly just

[27] See Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, and Regulations Respecting the Laws and Customs of War on Land, annexed to the Fourth Convention Respecting the Laws of War on Land, 18 October 1907. Also see UN Security Council resolutions 237 (1967), 446 (1979), 681 (1990), 799 (1992), 904 (1994), and Nicholas Stephanopoulos (2006).

that people who are so disposed annihilate each other and thereby find perpetual peace in the vast grave that covers all the horrors of violence together with their perpetrators.

Far be it from moral philosophers and statesmen today to deny to humanity the idea of perpetual peace and instead to commit the whole of humankind to the "vast grave" of human horrors that arise from this falsely presumed right to war and the highest of all crime that is committed in the crime of genocide.

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