The ICJ Has Been Weaponized Against Israel - Why is Israel Giving it Additional Jurisdiction?

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In December 2023, the State of Israel was caught by surprise when South Africa filed an application before the International Court of Justice (ICJ) over alleged Israeli violations of the Genocide Convention during its war against Hamas. When Israel joined the Genocide Convention in 1950, nobody could fathom its use as a politicized tool wielded by allies of a terrorist organization against a state victim of genocidal attacks.

Nevertheless, Israeli officials should not have been surprised. Mahmoud Abbas announced in May 2011 on the pages of the New York Times his intention to achieve wider recognition of Palestinian statehood as part of a broader campaign of diplomatic and economic warfare against the Jewish state, that would include lawfare at the International Court of Justice.[1] Since then, the Palestinians have purported to accede to the jurisdiction of the ICJ as the State of Palestine, and they have filed a still-pending ICJ suit against the United States demanding it remove its embassy to Israel from Jerusalem.[2] They also extracted from the UN General Assembly a request for an ICJ advisory opinion regarding territorial claims to Judea, Samaria, Jerusalem, and Gaza, and a short time ago, the ICJ obliged, denying Israel any sovereign rights in those territories, demanding the immediate expulsion of all Jewish residents, and erasing all historical connection of the Jewish people to their ancestral lands.[3]

Hamas's decision to join in the lawfare against Israel by collaborating with South Africa in using the Genocide Convention as a weapon against Israel in the ICJ was simply the logical

1 Mahmoud Abbas, "The Long Overdue Palestinian State", the New York Times. 16.06. 2011. https://www.nytimes.com/2011/05/17/opinion/17abbas.html

2 Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)

3 Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem

extension of three long-term trends: the ICJ's longstanding bias against the Jewish state, the Palestinian embrace of lawfare, and the ICJ's use of the Genocide Convention to expand its jurisdiction into every imaginable political and diplomatic conflict.

These trends require Israel to urgently reconsider its relationship with the ICJ.

The jurisdiction of the ICJ rests upon state consent.[4] Article 36 sets out the sources of ICJ jurisdiction over "cases… and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Broadly, states may assent to the ICJ's jurisdiction in one of three ways: **(1)** by unilateral general declarations ("compulsory jurisdiction"); **(2)** by agreeing to the court's jurisdiction in a particular dispute ("special agreement jurisdiction"); or **(3)** by including compromissory clauses in bilateral or multilateral treaties. These compromissory clauses grant the ICJ jurisdiction in disputes related to the treaty; ICJ jurisdiction based on them is called "optional jurisdiction."

In October 1950, the State of Israel accepted the ICJ's compulsory jurisdiction[5], subject to reciprocity with the other state party to the dispute, but in 1985, Israel withdrew its declaration accepting the ICJ's compulsory jurisdiction. Israel was following the United States' example; the US had withdrawn in protest of the ICJ's finding of jurisdiction over a dispute brought against it by Nicaragua.[6] Therefore, compromissory clauses are the only basis upon which the State of Israel can be subjected to ICJ jurisdiction. As such, South Africa's application filed against Israel in December 2023 for the supposed violation of the Genocide Convention is based upon Israel's ratification of the Convention and the ICJ's jurisdiction, contained in Article IX of the Convention.

Compromissory clauses are both on the decline as states are hesitant to accede to them in new treaties and are increasingly used as legal "hooks" to drag other states to ICJ arbitration.[7] Israel ratified the Genocide Convention in 1950, expressing its commitment to the post-Holocaust and post-Second World War human rights regime. It was taken by surprise in December 2023 when South Africa used the Genocide Convention as a tool to allow the ICJ to rule on the legality of Israel's conduct in its war in Gaza. This oversight cannot be repeated. Therefore, it is incumbent upon the State of Israel to begin a process of review and withdrawal from compromissory clauses. Where it is not possible to withdraw from the compromissory clause alone, Israel should withdraw from the treaty and then re-join it subject to reservations denying ICJ jurisdiction in the case of disputes.

4 Judgement of 4 June 2008 on *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),* ICJ Reports, 2008, p. 177, 200-1, para. 48; Judgement of 30 June 1995 on *East Timor (Portugal v. Australia)*, ICJ Reports, 1995, p. 101, para. 26.

5 Israeli Declaration accepting ICJ Compulsory Jurisdiction, here

6 Anderson, Scott R. "Walking Away From the World Court." Lawfare Media, www.lawfaremedia.org/article/walking-away-world-court.

7 Fontanelli, Filippo. "Once burned, twice shy. The use of compromissory clauses before the International Court of Justice and their declining popularity in new treaties." Rivista di diritto internazionale 104.1 (2021): 7-39.

1 | The ICJ's Systematic Anti-Israel Bias

In a series of decisions and advisory opinions, the ICJ has demonstrated a systemic and built-in anti-Israel bias.

The ICJ's newly appointed chief justice is Nawaf Salam, a Lebanese judge who, since joining the court in 2018, has twice been considered a candidate for the Lebanese premiership. According to Article 16(1) of the Statute of the ICJ: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature." Salam also served as Lebanon's ambassador to the United Nations, where he repeatedly cast votes against Israeli conduct in Judea and Samaria. His previous ambassadorship similarly violates Article 17(2) of the Statute: "No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties…" Salam also has a history of anti-Israel statements on social media.[8] It should be underscored that Lebanon and Israel are in a state of war. According to Lebanese law, it is a criminal offense to "normalize" with Israelis, including having a simple conversation.[9]

As an organ of the United Nations, the ICJ relies almost exclusively on documentation provided by the United Nations, despite the inherent anti-Israel prejudice often built in. In the Wall Advisory Opinion, the ICJ relied entirely on a report by UN Secretary-General and several accompanying statements.[10] In his separate opinion from March 28, 2024, in the Genocide Convention Case, ad hoc Judge Barak criticizes the Court for completely ignoring contrary evidence provided by Israel:

> Israel, in its written observations, presented concrete evidence of its efforts to address the humanitarian catastrophe in Gaza. The Court did not engage with any of these arguments, which are crucial to the question of intent. Instead, it simply dismissed this evidence by quoting a statement by the High Commissioner for Human Rights, who stated that "hunger, starvation and famine is a result of Israel's extensive restrictions on the entry and distribution of humanitarian aid". The Court conveniently refrains from evaluating Israel's evidence that points in a different direction and dismisses over 20 pieces of evidence by reference to a declaration by one official…

8 See Kittrie, Ordre F. "The ICJ's New Chief Judge Has a History of Bias Against Israel" Wall Street Journal, www.wsj.com/articles/icjs-new-chief-judge-has-a-history-of-bias-against-israel-lebanon-hague-96889d53. Accessed 21 July 2024.

9 Koteich, Nadim, et al. "Anti-Normalization Laws: A Powerful Weapon in the Fight against Peace." The Washington Institute, www.washingtoninstitute.org/policy-analysis/anti-normalization-laws-powerful-weapon-fight-against-peace. Accessed 21 July 2024.

10 See Separate Opinion of Judge Higgins, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Par. 40

> The Court's overall treatment of evidence is problematic. The Court's conclusions are grounded in several declarations by United Nations officials and reports by intergovernmental organizations that were not submitted by either Party…[11]

The ICJ, although a separate body from the United Nationals General Assembly, can and has been weaponized by it. In December 2022, the General Assembly adopted Resolution 77/247, which, among other things, requested the ICJ to provide an advisory opinion on Israeli actions in the "Occupied Palestinian Territory". Resolution 77/247 was sponsored by Algeria, Brunei, Cuba, Egypt, Iraq, Jordan, Lebanon, Mauritania, Namibia, Qatar, Saudi Arabia, Senegal, Tunisia, the PA, Djibouti, Kuwait, Pakistan, Somalia, Venezuela, and Yemen. The majority of these countries do not have diplomatic ties with Israel, and several refuse to recognize Israel as a legitimate state. Major democracies opposed the motion, such as the United States, United Kingdom, Germany, Italy, Australia, Canada, Austria, and the Czech Republic, and the request was adopted by plurality vote. The ICJ ultimately issued a scandalously biased opinion, accepting all anti-Israel accusations as fact (even where completely fabricated), and ordered Israel to end its presence in Judea and Samaria as rapidly as possible, end settlement activity, and make reparations to the Palestinians.

While the ICJ's bias against Israel has accelerated in recent years, it is not an entirely new phenomenon. In 2003, in Resolution ES-10/14, the General Assembly requested an Advisory Opinion about the legality of Israel's anti-terror barrier. As with the recent Advisory Opinion, the General Assembly's request pronounced Israel guilty in advance and asked the Court to pronounce on the "legal consequences" of Israel's presumed guilt, and the ICJ readily complied. In 2004, the ICJ issued its opinion that Israel has no right to self-defense against Palestinian terrorism and that Israel must remove its security barrier from Judea and Samaria. The ruling implied that Israel is not permitted to take any action to prevent Jewish residents of Judea and Samaria from being murdered by Palestinian terrorists.

It is important to note that the anti-Israel bias is deeply rooted in multiple institutional factors, including the judicial appointment process. As the years have passed, the ICJ has become increasingly beholden to the biases of the General Assembly in its rulings.[12] Given the General Assembly's well-documented bias against Israel, there is little reason to hope that the ICJ will change. No less importantly, judges are appointed in a process that locks in General Assembly prejudices: judges are selected by regional group, with quasi-reserved seats for permanent members of the Security Council, and must win approval in the General Assembly and Security Council. In the history of the ICJ, no Israeli has ever been appointed as a regular justice.

11 Request for the modification of the Order of 28 March 2024 indicating provisional measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel). Dissenting opinion of Judge ad hoc Barak. Par. 19 and 22

12 Pomerance, Michla. "The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial." *American Journal of International Law* 99.1 (2005): 26-42.

2 | The Decline of New Compromissory Clauses

Only 74 states accept compulsory jurisdiction of the ICJ. Six states used to accept such jurisdiction, but withdrew: Israel, the United States, France, Colombia, South Africa and Iran. Iran rejoined in June 2023. The fact that the ICJ enjoys the confidence of Iran, but not of the United States is telling.

At the same time, state ratification of new compromissory clauses is in decline as well. In his important article *Once Burned, Twice Shy*, Filippo Fontanelli argues that the decline in state confidence in the ICJ is the result of increasing use of ICJ jurisdiction as a means of lawfare. Even if ICJ arbitration does not resolve the conflict, the Court can be used as a political soapbox to air grievances, score propaganda points and gain favorable legal rulings on issues significant to the wider political and diplomatic dispute.[13]

In his 2009 article, Christian Tams outlines the decline of new compromissory clauses in (what was then) recent decades. During the two decades of its existence, the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), attracted 400-500 compromissory clause. By comparison, the number of ICJ compromissory clauses hovers around 300 in its 70 years. 1976 was the turning point in which no compromissory clauses were agreed upon; states entered into 32 new compromissory clauses during the 1970s, and only 11 during the 1980s. Between 1994 and 2003, states entered into 22 multilateral treaties containing compromissory clauses, yet all of them were "opt-in" mechanisms subject to declarations and reservations.[14] Almost twenty years separate the conclusion of the last two multilateral compromissory clauses – the Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes, signed in May 2023, and the International Convention for the Protection of All Persons from Enforced Disappearance, signed in December 2006.[15]

Inversely measured with the conclusion of new compromissory clauses, the clauses compromise the overwhelming majority of the basis of the Court's jurisdiction. Between 2011 and 2020, 27 cases were brought before the Court, 19 of which were brought based on optional jurisdiction.[16]

Former Israeli diplomatic and international law professor Shabtai Rosenne wrote that using the ICJ as a tool by one state against another was perceived as "an unfriendly act":

13 Fontanelli, Filippo. "Once burned, twice shy. The use of compromissory clauses before the International Court of Justice and their declining popularity in new treaties." *Rivista di diritto internazionale* 104.1 (2021): 7-39.

14 Tams, Christian J. "The continued relevance of compromissory clauses as a source of ICJ jurisdiction." Available at SSRN 1413722 (2009). P. 16-21

15 ICJ List of Treaties, https//:www.icj-cij.org/treaties

16 Fontanelli ,p9 .

> "Unilateral proceedings have been instituted without previous notice, accompanied by a request for the indication of provisional measures, in a large number of instances of political tension between the States concerned. At the same time, diplomatic relations between those States have become strained, if not broken."[17]

According to Maurice Kamto, a UN International Law Commission member, seizure of the Court by one state against another is regularly interpreted as "a form of judicial aggression."[18] As such, as long as the State of Israel remains a party to compromissory clauses, it is at risk of such hostile diplomatic acts.

3 | Compromissory Clauses as Jurisdictional "Hooks"

In a recent article, Tullio Treves describes "two recent developments [that] may have an impact on possible resort to international courts or tribunals in order to deal with global crises. The first concerns the practice of seizing the ICJ by invoking multilateral treaties containing a compulsory dispute-settlement clause, as the Convention for the Elimination of Racial Discrimination (CERD), *in order to expose to the Court and to public opinion egregious cases of human rights violations*. The second includes cases in which a State resorts to all or many compulsory dispute settlement clauses available with the purpose to score points in a political controversy."[19]

Iran has demonstrated how obsolete, long-forgotten treaties can be used to litigate contemporary diplomatic conflicts in a series of ICJ cases it brought against the US. In 1955 – under the completely different regime of the Shah - the United States and Iran signed a Treaty of Amity, Economic Relations and Consular Rights. Principally a free trade treaty, it has been disused and effectively discarded since the Iranian Revolution and U.S. Embassy seizure in 1980.

However, Clause 2 of Article XXI establishes the ICJ's role in dispute resolution: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means." The Treaty of Amity has served as the basis of the ICJ's jurisdiction in a series

17 Rosenne, Shabtai. The perplexities of modern international law: general course on puiblic internatioinal law. Vol. 291. Martinus Nijhoff Publishers, 2002. P. 96 and footnote 135

18 Kamto, Maurice. «Volonté de l'État et ordre public International.» Recueil des Cours de Droit International 310 (2004). P.389

19 Treves, Tullio. "Litigating Global Crises: Setting the Scene – Legal and Political Hurdles for State-to-State Disputes." *Questions of International Law*, 2020, www.qil-qdi.org/litigating-global-crises-setting-the-scene-legal-and-political-hurdles-for-state-to-state-disputes/. Emphasis added

of claims by both the US and Iran.[20]

In July 2015, China, France, Germany, Russia, the EU, the UK, the US and Iran adopted a multilateral Joint Comprehensive Plan of Action (the "JCPOA") to monitor Iran's nuclear program. In 2018, the United States withdrew from the JCPOA, expressing concern that the Plan did not effectively prevent Iran from developing nuclear weapons. Subsequently, the President of the United States announced that it would re-impose sanctions against Iran and Iranian nationals, which had been repealed in 2016, and add additional sanctions.[21]

In July 2018, forty years after the breakdown of diplomatic relations between the countries, Iran brought a claim against the US before the ICJ, arguing that the American sanctions regime violated the 1955 Treaty of Amity terms. The United States rejected the ICJ's jurisdiction, arguing that the dispute between the parties did not relate to the "interpretation or application" of the 1955 Treaty. Rather, the sanctions dispute related solely to the interpretation of the JCPOA, which contained no compromissory clause. The US further argued that the Amity Treaty itself excludes measures essential to US national security interests. The ICJ refrained from recognizing "the real dispute" as based on the JCPOA and accepted the Amity Treaty as the basis of the Court's jurisdiction. For the Court, the need to interpret the treaty's national security exemption implies preliminary jurisdiction. The exemptions may be relevant at the merits stage of the proceedings.[22]

Iran claimed that the sanctions violated several provisions of the Amity Treaty: fair and equitable treatment of nationals and companies and their property; no restrictions on transfers of funds to or from the territories of the parties; favorable and reciprocal treatment of imports and exports; and freedom of commerce and navigation between the Parties. Iran did not cite the violations of the JCPOA in its ICJ application.[23]

State Department Legal Adviser Jennifer Newstead argued:

> … Iran's Request warrants another observation before I proceed. It rests on the basis of a treaty whose central purpose—friendship with the United States—Iran has expressly and repeatedly disavowed since 1979 in its words and actions, by sponsoring terrorism and other malign activity against United States citizens and

20 See Kashani, Farshad. "What Is the 1955 Treaty of Amity with Iran?" *The National Interest*, 9 Oct. 2018, https://nationalinterest.org/blog/middle-east-watch/what-1955-treaty-amity-iran-32537.

21 Sanger, David E., and David D. Kirkpatrick. "Why Trump Pulled the U.S. Out of the Iran Nuclear Deal." *The New York Times*, 8 May 2018, www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html.

22 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures*, Order, 3 October 2018, par. 27-44

23 Chachko, Elena. "Treaties and Irrelevance: Understanding Iran's Suit Against the U.S. for Reimposing Nuclear Sanctions." Lawfare Media, www.lawfaremedia.org/article/treaties-and-irrelevance-understanding-irans-suit-against-us-reimposing-nuclear-sanctions.

> interests. In other words, the situation that the Parties find themselves in today is nowhere near what was contemplated when the Treaty was concluded in 1955. In spite of this, Iran invokes the Treaty in an effort to force the United States to implement an entirely separate, non-binding arrangement—the JCPOA—which contains its own dispute resolution mechanism that purposefully excludes recourse to this Court ...[24]

Similarly, in the Certain Iranian Assets Case brought by Iran in 2016, the Islamic Republic argued that American measures against Iranian assets in the US as compensation to victims of terror violated the 1955 Treaty of Amity. The United States argued that the real dispute concerned alleged violations of customary international law regarding sovereign immunities, not the 1955 Treaty.[25] Once again, the Court refused to characterize "the real dispute", with the Amity Treaty only serving as a legal hook to bring the wider conflict before the ICJ.[26]

In October 2018, the United States announced its withdrawal from the Amity Treaty, reacting to the ICJ's ruling ordering it to lift some sanctions against Iran. Secretary of State Pompeo explained:

> "We ought to have pulled out of it decades ago… Today marked a useful point with the decision that was made this morning from the ICJ. This marked a useful point for us to demonstrate the absolute absurdity of the Treaty of Amity between the United States and the Islamic Republic."[27]

Speaking to attempts to bring a wider dispute to the Court under the guise of an available compromissory clause, the Court ruled:

> Certain acts may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. … [however,] the Court cannot infer the subject-matter of a dispute from the political context in which the proceedings have been instituted, rather than basing itself on what the applicant has requested of it.[28]

Another glaring example of using compromissory clauses to "cookie-cutter" conflicts to

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24 Verbatim Record in case concerning Alleged violations of the 1955 Treaty of Amity,Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America). Ms Newstead, Par. 8. https://www.icj-cij.org/files/case-related/175/175-20180828-ORA-01-00-BI.pdf

25 Preliminary Objections of the United States 1 ,May ,2017 paras.8.1 ,1.5

26 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgement*, 13 February 2019, para. 36

27 Morello, Carol. "U.S. Terminates 1955 Treaty with Iran, Calling It an 'Absolute Absurdity'." The Washington Post, 3 Oct. 2018, www.washingtonpost.com/world/national-security/us-terminates-1955-treaty-with-iran-calling-it-an-absolute-absurdity/2018/10/03/839b39a6-3bcf-42b1-a2d5-04bfe1c5f660_story.html.

28 *Alleged Violations of the 1955 Treaty of Amity*, par. 56, 59.

bring them before the ICJ can be found in parallel applications launched by Armenia and Azerbaijan in September 2021. Both applications allege violations of the 1966 UN Convention on the Elimination of all Forms of Racial Discrimination (CERD), relying on the compromissory clause found in Article 22.

Armenia and Azerbaijan are locked in a long-standing conflict over Nagorno-Karabakh, a formerly Armenian-majority territory that formed a part of Azerbaijan under the Soviet Union and which Azerbaijan today claims. Following the dissolution of the Soviet Union, Nagorno-Karabakh declared its independence, and aided by the Armenian military, a de-facto Armenian-controlled territory was created within Azerbaijan's borders. Most recently, Azerbaijan launched a large-scale offensive against the autonomous region in September 2023, provoking the exodus of almost the entire Armenian population and leading to the dissolution of the Armenian entity.

In their respective applications, both sides accused the other of racial and ethnic discrimination against the other side's co-ethnics, as well as including violations unrelated to CERD. Armenia joined CERD in 1993 and Azerbaijan in 1996. Azerbaijan, for example, detailed Armenia's supposed policy of ethnic cleansing "between 1987 and 1994". Armenia's application mentions Azerbaijani forces subjecting Armenia civilians and prisoners of war to cruel and inhumane treatment, crimes outside the purview of CERD.

As described by Fontanelli:

> The CERD disputes between Armenia and Azerbaijan belong in a pattern of applicants trying to make jurisdictional ends meet. Actionable compromissory clauses are few and no State is keen to stipulate new ones, so would-be-litigants must squeeze old ones. CERD's open-ended texture beckons the CERD-ification of disputes that are only incidentally about race discrimination, but feature inter-State animosity, and reference to the "equal enjoyment of human rights" facilitates cross-fertilisation with other sources. Animosity, of course, is common in international conflicts, so the arrival of new CERD disputes with immense stakes looming in the background is not surprising, and the States' strategy is "blindingly obvious." The CERD-angle, moreover, is still wider than the Genocide-angle, the closest available option.[29]

It should be noted that the ICJ's approach which brings the larger conflict before the Court by virtue of compromissory clauses is at odds with the jurisprudence of tribunals based on the UN Convention on the Law of the Sea (UNCLOS). In the Chagos Arbitration between Mauritius

29 Fontanelli, Filippo. "The Disputes Between Armenia and Azerbaijan: The CERD Compromissory Clause as a One-Way Ticket to The Hague." EJIL: Talk!, 19 Jan. 2021, www.ejiltalk.org/the-disputes-between-armenia-and-azerbaijan-the-cerd-compromissory-clause-as-a-one-way-ticket-to-hague/.

and the United Kingdom, the Permanent Court of Arbitration (the PCA) asked whether the dispute was "primarily a matter of interpretation and application of the term 'coastal State'" or "primarily concern[ed] sovereignty" over the Chagos archipelago.[30] Similarly, in the South China Sea arbitration case, the PCA stressed that it would not address issues of sovereignty over territories disputed by the Philippines and China which fall outside of UNCLOS.[31]

In September 2018, the Palestinian Authority brought a claim against the United States before the ICJ, claiming that moving the American embassy to Israel to Jerusalem violated the Vienna Convention on Diplomatic Relations (VCDR). The United States is a signatory to the Optional Protocol to the VCDR, which contains a dispute settlement compromissory clause. The Palestinians argued that Article 3 of the VCDR requires that the functions of the diplomatic missions be performed on the territory of the receiving state. According to the Palestinians, Jerusalem is not Israeli territory, and therefore, the embassy move was a violation of the VCDR.

According to the longstanding Monetary Gold principle, the ICJ will not adjudicate on claims involving third parties' legal interests without their consent. Assuming that the Palestinians' tendentious interpretation of the VCDR is correct, it is unclear why "Palestine" should have legal standing to bring a claim about supposed VCDR violation on Israeli territory. However, it is clear that the Embassy Case is another example of Palestinian lawfare against Israel and the United States using any treaty available. As will be discussed further, this application prompted the Trump Administration to withdraw from the Optional Protocol to prevent its misuse by the Palestinians.[32]

4 | Israel and the Genocide Convention

Alongside CERD, the Genocide Convention is another common "jurisdictional hook." During its entire history, the ICJ has only decided on four cases based on the Genocide Convention, three of which were in the past five years.

The Genocide Convention's popularity was cemented in the 2019 decision of Gambia v. Myanmar. Gambia, a small African nation, brought an application against Myanmar, charging it with genocide against its Muslim Rohingya minority. In its decision, the Court ruled that the

30 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdsom)*, PCA Case No. 2011-03, Award, 18 March 2015, par. 211

31 Harris, Callista. "Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty." *The Law & Practice of International Courts and Tribunals* 18.3 (2020): 279-299.

32 Milanovic, Marko. "Palestine Sues the United States in the ICJ Re Jerusalem Embassy." EJIL, 30 Sept. 2018, www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/.

prohibition of genocide was *erga omnes partes*, meaning that each party to the Convention shares in the duty to prevent genocide, even if they have no connection whatsoever to the alleged genocidal events. Therefore, Gambia did not need to demonstrate direct damage or interest in the application against Myanmar.

In 2022, Ukraine engaged in a creative legal strategy to bring Russia and its invasion before the ICJ. Ukraine argued that Russia was falsely alleging genocide against ethnic Russians in Ukraine in order to justify its war. Ukraine sought provisional measures ordering Russia to halt its war, "to protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention."[33] In its decision on Provisional Measures from March 16, 2022, the ICJ ordered Russia to immediately end its Ukrainian invasion.[34]

In December 2023, South Africa brought applications against Israel for supposed genocide in its war against Hamas in the Gaza Strip. South Africa's goal was two-fold: using the Court as a soapbox to reframe the narrative around the war and inducing the Court to issue provisional measures ordering Israel to end the war. South Africa's written and oral presentations emphasized the supposedly disproportionate nature of Israel's response and the extent of the suffering of the Palestinian population of Gaza. South Africa minimized or ignored the threat that Hamas continues to pose to Israeli civilians, its use of human shields, the plight of the Israeli hostages, the continued rocket attacks against Israel, or Israel's extensive efforts to mitigate Palestinian civilian suffering.[35] Regardless of the final decision many years in the future, South Africa has managed to legitimize the view of Israel as a genocidal state, a staple of modern antisemitic discourse.[36]

Beyond its propaganda value, South Africa relied on the wildly differing standards of proof required by the ICJ at its preliminary and merits stages. The crime of genocide is considered the most serious crime under international law, and the ICJ has set an extremely high standard of proof to infer genocidal intent from actions. In the Bosnia v. Serbia case, the Court ruled that "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."[37] Israel's abidance by the

33 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* Request for Provisional Measures, par. 12

34 *Allegations Of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order 16 March 2022

35 See Cohen, Amichai, and Yuval Shany. "South Africa vs. Israel at the International Court of Justice: A Battle Over Issue-Framing and the Request to Suspend the War." *Israel Democracy Institute*, 16 Jan. 2024, en.idi.org.il/articles/52388

36 Klaff, Lesley. "Holocaust inversion." *Israel studies* 24.2 (2019): 73-90.; Johnson, Alan. "Antisemitism in the guise of Anti-Nazism: Holocaust Inversion in the UK during Operation Protective Edge." *Paper delivered at the Anti-Zionism, Antisemitism and the Dynamics of Delegitimization Conference, Indiana University, Bloomingto*n. 2016.

37 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, par. 373

rules of law and its specific humanitarian measures meant to protect Palestinian civilians make it impossible for an objective court to rule in South Africa's favor on the case's merits, and it is unlikely that even a biased ICJ will accept the South African claims. However, at the preliminary stage, the Court's threshold is simply one of "plausibility", which is quite low. Plausibility, although never fully defined in the Court's jurisprudence, has been described as requiring simply a plausible link between the claimed rights and the relevant treaty and that facts were alleged before the Court, claiming that these rights were violated without establishing their veracity.[38]

Indeed, in its provisional orders decision issued in May 2024, the ICJ ordered Israel to immediately halt or limit its Rafah offensive. ICJ Vice-President Sebutinde, in her dissenting opinion, called out South Africa's abuse of the Court's jurisdiction and accused it of "invit[ing] the Court to micromanage the conduct of hostilities between Israel and Hamas. Such hostilities are exclusively governed by the laws of war (international humanitarian law) and international human rights law, areas where the Court lacks jurisdiction in this case."[39]

5 | Withdrawal from Treaties

Having established that compromissory clauses open the door to hostile acts of lawfare, it is incumbent upon the State of Israel to begin the process of identifying treaties signed subject to ICJ jurisdiction and withdrawing from them. These treaties can later be re-ratified subject to the ICJ's jurisdiction reservation. It must be stressed that Israeli withdrawal from human rights treaties does not reflect a lack of commitment to international standards of human rights but rather an objection to the persistent abuse of international law for lawfare purposes.

Below is a list of several significant human rights treaties that have been identified as problematic. The majority of them contain express clauses detailing denouncement and withdrawal.

38 Schondorf, Roy. "Implausible Confusion: The Meaning of 'Plausibility' in the ICJ's Provisional Measures ." EJIL, 6 May 2024, www.ejiltalk.org/implausible-confusion-the-meaning-of-plausibility-in-the-icjs-provisional-measures/.

39 Dissenting opinion of Vice-President Sebutinde, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, 24 May 2024, Par. 2

TREATIES WITH ICJ COMPROMISSORY CLAUSES

TREATIES	ISRAELI ASCENSION	OTHER STATES' RESERVATIONS	DENUNCIATION	DATE OF ASCENSION
Convention on the prevention and punishment of the crime of genocide (Art. IX)	Israel signed and ratified. No ICJ reservation	ICJ jurisdiction reservations: Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Montenegro, Morocco, Serbia, Singapore, UAE, USA, Venezuela, Vietnam, Yemen		9 March 1950
Convention relating to the status of refugees (Art. 38)	Israel signed and ratified. No ICJ reservation	No reservations to ICJ jurisdiction	**Art. 44** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General	1 October 1954
Convention on the political rights of women (Art. IX)	Israel signed and ratified. No ICJ reservation	ICJ reservations: Albania, Argentina (not for territories under its sovereignty), Bangladesh, Yemen, Nepal	**Art. VIII** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General	6 Jul 1954

TREATIES	ISRAELI ASCENSION	OTHER STATES' RESERVATIONS	DENUNCIATION	DATE OF ASCENSION
Convention relating to the status of stateless persons (Art. 34)	Israel signed and ratified. No ICJ reservation	No ICJ reservations	**Article 40** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General.	23 Dec 1958
Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery (Art. 10)	Israel signed and ratified. No ICJ reservation	No reservations		23 Oct 1957
Convention against discrimination in education (Art. 8)	Israel signed and ratified. No ICJ reservation	No reservations permitted – Article 9	**Article 16** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General	22 May 1962
Protocol relating to the status of refugees (Art. IV)	Israel signed and ratified. No ICJ reservation	ICJ reservations: Angola, Ghana, Jamaica, Rwanda, St Vincent and Grenadines, Tanzania,	**Art. 44** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General	14 Jun 1968

TREATIES	ISRAELI ASCENSION	OTHER STATES' RESERVATIONS	DENUNCIATION	DATE OF ASCENSION
Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations convention against transnational organized crime (Art. 15, para. 2)	Israel signed and ratified. No ICJ reservation	ICJ Reservations: Algeria, Andorra, Azerbaijan, Bahamas, Bahrain, Bangladesh, Bhutan, China Colombia, Cuba, Ecuador, El Salvador, Eritrea, Ethiopia	**Article 19** State may denounce at any time. Withdrawal takes place one year from date denunciation is received by UN Secretary General	23 Jul 2008
Convention on the Privileges and Immunities of the UN (Art. 30)	Israel signed and ratified. No ICJ reservation	Reservations to ICJ resolution: Albania, Algeria, Belarus, China, Indonesia, Nepal, Qatar, Romania, Russia, Saudi Arabia, South Africa, Ukraine, Vietnam	No denunciation clause: Sec 35: This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.	21 Sep 1949

It must be emphasized that this list is not complete. Israel must start a comprehensive process of reviewing its accession to treaties, including compromissory clauses.

6 | Treaties with No Denunciation Clause

Certain treaties, most importantly the Genocide Convention, contain no explicit withdrawal clauses, which makes their denunciation more complicated and controversial. The existing rules for treaties containing no provisions for termination, denunciation, or withdrawal can be found in Article 56(1) of the Vienna Convention on the Law of Treaties (VCLT):

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
   (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
   (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

The Genocide Convention's special status as codifying *jus cogens and erga omnes* norms may mitigate against any implication of a right of withdrawal. However, it may be sufficient for the State of Israel to declare that it is withdrawing from the Convention in order to rejoin subject to reservation to the ICJ's jurisdiction. In his Second Report on the Law of Treaties, UN Special Rapporteur on the Law of Treaties, Sir Humphrey Waldock, stated that among the treaties that can be denounced absent an express provision are treaties of "arbitration, conciliation or judicial settlement."[40] Israel must, therefore, stress that it does not object to the Genocide Convention's human rights content but rather to its judicial settlement clause. Israel remains committed to its international human rights obligations under the Genocide Convention.

The state practice regarding withdrawal from treaties with no denunciation clause is quite limited. In 2018, the United States announced its intention to withdraw from the Optional Protocol on Compulsory Jurisdiction to the Vienna Convention on Diplomatic Relations (VCDR). Similarly, the United States withdrew from the Optional Protocol for the Vienna Convention on Consular Relations (VCCR) following unfavorable ICJ rulings. However, whether the ICJ recognizes these withdrawals as valid under international law is unclear.[41]

National Security Advisor John Bolton explained the VCDR Option Protocol withdrawal:

40 Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN.4/156 and Add. 1–3 (20 March, 10 April, 30 April and 5 June 1963) 68, paras 15–18. Available at http://untreaty.un.org/ilc/documentation/english/a_cn4_156.pdf (last accessed 10 December 2008).

41 See Anderson ‚Scott R" .Walking Away from the World Court ".Lawfare, 3 Oct. 2018, www.lawfaremedia.org/article/walking-away-world-court.

In addition to the Treaty of Amity, I am announcing that the President has decided that the United States will withdraw from the Optional Protocol and Dispute Resolution to the Vienna Convention on Diplomatic Relations. This is in connection with a case brought by the so-called "State of Palestine," naming the United States as defendant, challenging our move of our embassy from Tel Aviv to Jerusalem. I'd like to stress: The United States remains a party to the underlying Vienna Convention on Diplomatic Relations and we expect all other parties to abide by their international obligations under the Convention. Our actions today are consistent with the decisions President Reagan made in the 1980s in the wake of the politicized suits against the United States by Nicaragua to terminate our acceptance of the Optional Compulsory Jurisdiction of the International Court of Justice under Article 36(2) of the ICJ statute and his decision to withdraw from a bilateral treaty with Nicaragua. It is also consistent with the decision President Bush made in 2005 to withdraw from the Optional Protocol to the Vienna Convention on Consular Relations following the ICJ's interference in our domestic criminal justice system. So our actions today deal with the treaties and current litigation involving the United States before the International Court of Justice. Given this history and Iran's abuse of the ICJ, we will commence a review of all international agreements that may still expose the United States to purported binding jurisdiction dispute resolution in the International Court of Justice. The United States will not sit idly by as baseless, politicized claims are brought against us.[42]

7 | Denunciation and Re-Accession with Reservations

Another objection that may be raised is that denunciation and re-accession with reservations may be incompatible with Article 19 of the VCLT. According to Article 19, '[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation'. Therefore, denunciation and re-accession with reservations may be seen as a circumvention of the requirement to formulate a reservation at the moment of accession. However, limited state practice can justify the denunciation and re-accession. Some scholars have also argued that re-accession with a reservation is preferable to leaving the entire convention entirely.[43]

On 21 December 1978, Trinidad and Tobago acceded to the International Convention on

42 White House Press Release, Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor (Oct. 3, 2018), at https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318/ [https://perma.cc/CTX6-W8N5]

43 G. McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', 23 Human Rights Quarterly (2001) p. 769 at p. 812,

Political and Civil Rights (ICCPR) and on 14 November 1980, its Optional Protocol. Following international criticism of its death penalty practices, Trinidad and Tobago denounced the Optional Protocol on 26 May 1998. Similarly, Guayana acceded to the ICCPR on 22 August 1968 and signed the Optional Protocol on 10 May 1993. Due to a negative review before the Human Rights Council, Guayana denounced the Optional Protocol in early 1999. Both countries re-acceded to the Optional Protocol on the same day of the denunciation along with similarly worded reservations, according to which

> ' ... [the State] re-accedes to the Optional Protocol to the International Covenanton Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith.'

Continued criticism of Trinidad and Tobago's treatment of death row prisoners led to a second denunciation in March 2000, with no attempt to re-accede to the Protocol. Several European parties to the Optional Protocol objected to the re-accession with a reservation. Germany labeled it "a bad precedent," while France called it an abuse of the treaty's denunciation procedure. The Human Rights Committee has not decided on the validity of the denunciation and re-accession with reservations.[44]

In 2002, Sweden denounced the Council of Europe Convention on the Reduction of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality. On the following day, Sweden re-acceded with a reservation. None of the other State Parties objected, and in 2007, the State Parties adopted an interpretive agreement allowing all State Parties to denounce the section of the Convention that Sweden had denounced.[45]

Finally, Bolivia denounced and re-acceded with reservation to the 1961 Single Convention on Narcotic Drugs. In 2009, Bolivia attempted to amend the Convention to protect coca leaf chewing, which it views as part of its cultural and indigenous heritage. When the amendment failed to garner enough state support, Bolivia notified the UN Secretary-General in June 2011 that it denounced the Convention. Even before the denunciation took effect, Bolivia deposited its instrument of re-accession along with the following reservation:

> 'The Plurinational State of Bolivia reserves the right to allow in its territory: traditional coca leaf chewing; the consumption and use of the coca leaf in its

44 Arp, Björn. "Denunciation Followed by Re-accession with Reservations to a Treaty: a critical appraisal of contemporary state practice." *Netherlands International Law Review* 61.2 (2014): 150-156.

45 Arp, p. 158

natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.

At the same time, the Republic of Bolivia (sic) will continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf. The effective accession of Bolivia to the aforementioned convention is subject to the authorization of this reservation.'

As the Single Convention requires the objection of one-third of State Parties in order to reject a reservation and the actual number of objectors fell short of one-third, Bolivia's reservation was effective. The United States and the European Union were critical of the re-accession, claiming that it undermined the international anti-narcotics regime. Romania filed a communication to the UN Secretary-General claiming that " the practice of withdrawing and re-acceding to a Convention with the sole purpose of presenting a reservation is inconsistent with the customary rule of international law according to which late reservations may not be allowed" and that "such actions may raise questions with respect to the stability of legal relations, as well as to the principle of pacta *sunt servanda*".[46]

8 | Conclusion

The Genocide Convention was meant to punish the perpetrators of the worst crimes known to mankind. On 7 October 2023, Hamas, a terrorist organization sworn to the murder of Jews worldwide, put its deadly ideology into action, slaughtering over twelve hundred Israeli nationals and taking over two hundred hostage. Despite suffering a genocidal attack, Israel found itself in the defendant's docket at the ICJ. This politicized and perverse abuse of the Convention requires Israel to rethink its acceptance of the ICJ's jurisdiction.

The ICJ's caseload from the past few years demonstrates that such politicized attempts to shoe-horn long-standing conflicts into existing compromissory clauses will only increase. Therefore, Israel must at once withdraw from treaties containing compromissory clauses that expose it to diplomatic lawfare. Israeli actions will likely be challenged as undermining international legal stability. However, the politicized abuse of the Court's jurisdiction has undermined legal stability. There are sufficient examples of States withdrawing from multilateral treaties without denunciation clauses and of withdrawing and re-acceding subject to reservations. The State of Israel's actions may tip the scale towards a wider acceptance of the practice under international law and encourage other states to reevaluate their relationship with the ICJ.

46 Arp, 158-162