



LAW VISION

How South Africa is challenging Israel at the ICJ: A case of obligation to prevent genocide

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Most recently, South Africa has instituted proceedings in the International Court of Justice (ICJ) against Israel, accusing it of violating the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to its military operations against the Hamas in the Gaza Strip. Aside from the allegation that the actions and omissions of Israel have been genocidal in character and that they have failed to prevent genocide, South Africa has also asked for provisional measures to "protect against further violation of the rights of the Palestinian people under the Genocide Convention" and "to ensure Israel's compliance with its obligations under the Convention."

Both states are parties to this Convention and Israel has announced that they will defend themselves in the legal proceedings. While some states and organisations have lauded South Africa for initiating the proceedings, it must be remembered that the jurisdiction of a court and its power to grant any relief does not revolve around popular sentiment but rather on the legal norms and practices of the court in question.

South Africa has indicated in the application that the proceedings have been initiated due to its obligation as a State party to the Genocide Convention, to prevent genocide and has situated its standing within this obligation. This obligation arises from article I of the Genocide Convention, which states that parties have "to prevent and punish genocide." However, the kind of measures that can be taken to prevent genocide has

not been mentioned in the provision. In its judgment of the Bosnian Genocide Case of 2007, ICJ indicated that the discharge of this obligation to prevent genocide is to be assessed based on the capacity of the parties "to influence effectively the action of persons likely to commit, or already committing, genocide." Further, the judgment elaborated this obligation as a duty to use such means by the parties so as to have "a deterrent effect on those suspected of preparing genocide." This interpretation of ICJ has opened doors to connect the obligation under Article I with Article IX of the Convention, which allows the parties to submit disputes relating to the fulfillment of the Convention, including those relating to the responsibility of a state for genocide to the ICJ. South Africa has mentioned in its application that the request for provisional measures has been made in the context of the calls from the UN experts, the Committee on the Elimination of Racial Discrimination (CERD), and by the State of Palestine to state parties of the Genocide Convention to respect their "obligation to prevent genocide."

Besides, the proceedings of South Africa bring into memory the case of *Gambia v Myanmar*, where Gambia sought provisional measures against Myanmar regarding the alleged genocide committed against the members of the Rohingyas in its territory. Myanmar objected to the standing of Gambia, since Gambia was "a non-injured State" and not a "specially affected State." ICJ believed all state parties to the Genocide Convention have a common interest in ensuring the prevention, suppression, and punishment

of genocide. With reference to its judgment in the Case concerning Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), ICJ reiterated that under the Convention against Torture, all state parties had a common interest to ensure compliance with the relevant obligations under the treaty. As such any party could invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Similarly, under the Genocide Convention, states can institute proceedings before the Court for an alleged breach of obligations *erga omnes partes*, regardless of any special interest. ICJ also mentioned that to invoke the jurisdiction of the court for an alleged breach of obligations *erga omnes partes* under the Genocide Convention, it is not necessary to demonstrate that any victims are the nationals of the state initiating the proceedings.

Thus, the judgment of the ICJ in the Gambia case entitles South Africa to invoke article IX to fulfill its obligations under Article I. In the Gambia case, and subsequently in the case of *Ukraine v Russia*, initiated in 2022, both of which dealt with the Genocide Convention, ICJ granted provisional measures. However, since the actions of Israel involve the invocation of the right of self-defense recognised under article 51 of the UN Charter, whether ICJ grants provisional measures in this instance remains to be seen. In any case, the proceeding, to some extent, has the potential to impact the military activities of Israel in the Palestinian territory.

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RIGHTS ADVOCACY Progressive Legal Development on Abortion

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With the Supreme Court of Mexico decriminalising abortion nationwide on 6 September 2023, Latin America continues to spearhead the movement for liberalising abortion laws. Each country in Latin America has different enforcement mechanisms for abortion laws. Some countries have allowed abortion only under certain circumstances e.g., in case of rape or when there is a health risk to the mother while some allow abortion up until a certain term of pregnancy; with a few banning it under all circumstances.

The path of enacting progressive abortion legislation in Latin America was led by Cuba, when it first decriminalised abortion in 1965. After almost half a century, in October 2012, Uruguay became the second country in Latin America to legalise abortion. Later it was followed by Argentina in 2020 where they not only legalised abortion but also made it free to access.

Colombia is another country that has fought a long battle to legalise abortion. In 1994, the constitutional court of Colombia found that the general prohibition on abortion

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was constitutional. Eventually, in 2005, the constitutionality of key provisions in penalising abortion were challenged on the ground that they run contrary to women's rights to life, health, and physical integrity. In a landmark decision for the region, in May 2006, Colombia's constitutional court decided on the case, partially legalising abortion. Later, Colombia's constitutional court decriminalised abortion for up to the first 24 weeks of pregnancy in February 2022. Mexico has taken a similar path and last year the Mexican Supreme Court decriminalised abortion nationwide.

While lauding the legislative development in these countries, it is also important to remember that countries like El Salvador, Nicaragua, and many others in Latin America still have some of the strictest abortion laws in the world—banning this procedure under all circumstances. In contrast, countries like Chile fall somewhere in the middle of this spectrum



as they continue their fight for abortion rights.

If we try to analyse the progress of these countries, we find that countries decriminalising abortion put abortion rights as a matter of reproductive justice and associated it with democratic governance. Another key factor is that social decriminalisation happened much earlier in these countries compared to legal decriminalisation. All these factors played crucial roles in the fight for abortion rights.

If we now look at our country, abortion is a stigmatised concept, accompanied by shame, agony, and drastic legal consequences. Our Penal Code criminalises "voluntary miscarriage" under section 312 unless it is done solely for saving the life of a woman in good faith. In 2020, a writ petition was filed challenging the constitutionality of the penal provisions with regard to abortion, which is yet to be decided.

Despite the penal consequences, abortion is carried out in Bangladesh, at times in the form of menstrual regulation (MR). However, the MR procedures and other clandestine abortion procedures are not always safe as they may lead to complications including hemorrhage, infertility, etc. Some out-of-clinic procedures can even prove to be fatal. Unfortunately, no significant policy-legal measure is currently in place to deal with the risks of unsafe procedures. Perhaps, following in the footsteps of the Latin American countries of approaching legal decriminalisation through social decriminalisation could be key for us. However, this path will certainly be a long and arduous one.

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FOR YOUR INFORMATION

Tax Act and the Anti-Corruption Commission

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After the new Income Tax Act 2023 (the Act) was passed, a debate arose as to whether the Anti-Corruption Commission's (ACC) powers were curtailed by the said law. In this piece I argue that the new law did not curtail the powers of ACC. The argument will get clearer as we look into the provisions of the Act in this regard.

Section 309(1) of the Act provides that notwithstanding anything contained in any other law for the time being in force, all particulars or information relating to the statements prepared, returns filed, accounts or documents prepared under the provisions of this Act; any evidence, affidavit or documents produced in the course of any proceedings under this Act; and anything relating to the assessment or return of tax in any proceeding under this Act, shall remain confidential and shall not be disclosed. Under this sub-section, the confidentiality of one's information relating to income tax has been established in an endeavour to protect the right to one's privacy as enshrined in Article 43(b) of the

Constitution of Bangladesh.

The gist of Section 309(2) of the Income Tax Act 2023 is that notwithstanding anything contained in the Evidence Act 1872, Anti-Corruption Commission Act 2004, or any other law, no court or other authority shall order the production by any servant of the Republic of any tax return, accounts or documents, or any part thereof, any record relating to any proceedings taken under this Act, nor shall demand evidence in matters related to such subjects under this law.

Under this sub-section, Both the court and any other authority, e.g., ACC etc. have been debarred from calling up any return, accounts, documents, or records. This sub-section is the general rule which ensures that no information related to the income tax of an individual shall be called for by any authority, be it the court or the ACC. Thus, this sub-section implies that the information is so confidential that even the court cannot call for them, let alone any other authority.

However, the sub-section mentions that "except as provided in this Act", which means there are exceptions to



this general rule. Indeed, sub-section (3) provides that the prohibitions under sub-sections (1) and (2) shall not apply to the publication of any document, or any statement, return account, testimony, affidavit, or deposition required by any authority for investigation of any offenses under the Penal Code 1860 or Anti-Corruption Commission Act 2004.

The proviso to section 309(3) reads that any documents, statements, return accounts, testimonies, affidavits or depositions necessary for investigation may be published or provided only in those cases where the court empowered to take cognizance, orders to that effect. Here, it is true that the ACC cannot access the income tax returns

of individuals for investigation without the order of the court; however, this doesn't indicate the curtailment of the powers of the ACC. Before passing the Act, the ACC officers, having been empowered under Section 20 of the Anti-Corruption Commission Act 2004 to search and investigate, could collect income tax-related records by issuing a demand letter or requisition.

Now under the new Act, the ACC is to come through the court in order to obtain the required information. The court shall want to know on what basis they are seeking to obtain the information, and if the ACC can show *prima facie* reasons, then the court will allow the information to be provided accordingly. It can therefore be argued that the process of obtaining tax-related information by the ACC has only been made indirect through the new Act. While this may look like curtailment of ACC's powers to some, in reality, this stands in alignment with the law's spirit of protecting people's privacy.

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