



## ANARCHISM AND JUSTICE IN CASE OF SOUTH AFRICA VS ISRAEL

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<b>Received</b> December 18 <sup>th</sup> 2023	In response to the outbreak of war between Palestinian – Israel in October 2023, many of the countries in the world try to curse and criticize toward Israel. On the other side they support Palestinian people by giving material support and political support as well as diplomatic one through international organizations in order to end people suffering in the area of Palestine. South Africa as a non-involved of the conflict made a surprising action by filing lawsuit against Israel by accusing Israel committed to do genocide.
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	This paper is to analyze the effort of South Africa in International Court of Justice, considering that Israel's actions are fully supported by superpower state, like The United State of America. Previous cases indicate that if the interest of big powers are involved, justice can be hard to get. By using international anarchism and normative ideas in the opposite spectrum, this paper analyze the endeavor of South African filing lawsuit toward Israel and what are the meanings of the Court decisions toward behavior of powerful states. What is significant of this case is how some states, like South Africa, keep struggling based on norms to safeguard justice. Although they learn from previous cases which show that their struggle has no significant effect in influencing the war between Palestinian and Israel.

**Keywords :** anarchism, power, justice, Geneva Convention, genocide

### 1. INTRODUCTION

On 29<sup>th</sup> of December 2023 South Africa filed a lawsuit against Israel to the International Court of Justice (ICJ) on Israel actions in Gaza Strip in the war of Palestinian – Israel which took break in October 2023. South Africa accused Israel had committed genocide action to the people of civilian Palestinian in Gaza Strip. Israel attacked civilian targets, like hospitals, refugee camps, and public places which had made more than 26.000 civilians death, 10.000 of them were children. HAMAS attack on Israel on 7<sup>th</sup> of October has been claimed to make 1.200 Israeli citizens death, most of them were civilians with 240 taken as hostages, including some of Americans.(1) . The action of Israel attacks on Gaza was based on argument that Israel state and its citizens were in danger as an effect of HAMAS attack. However, Israeli massive attacks on Gaza Strip in order to retaliate HAMAS attack has been considered 'beyond the limit' and irrespective of norms in war. Almost 1.9 million of Gaza inhabitants had to go from their broken houses and took protection at refugee camps. The United Nations stated that situation and condition in Gaza are in humanitarian crises. The war between HAMAS and Israel has made some hospitals broken (Al Shifa, Al Quds, and the Ahli Arab Hospital), cutting electrical so that health instruments in the hospitals did not work properly and many medical personnel were died.

Israel was fully supported by the United States of America in logistic and diplomatic. In the end of October 2023, the President of the United States Joe Biden asked the Congress to give an amount of US\$ 8 billion as a security assistance to Israel and more than US\$ 9 billion for humanitarian aids in Gaza, West Bank, and Israel. (2) The involvement of big power such as the United States in the conflict indicates that the position of the parties in the conflict are imbalance. Meanwhile, Iran was indicated as supporter of HAMAS and supplier of weapon. It is based on the fact that Iran since its revolution is supporter of Palestine. Iran's foreign policy in the Middle East is focused on supporting

the struggle of Palestinian people to achieve their independence. But, in HAMAS attack on October 7, 2023 President Joe Biden had no evidences that Iran was involved in the attack. (3)

Humanitarian crises and number of victims from civilians in Gaza have made apprehension and sympathy from all over the world. In many big cities in Asia and Europe as well as in the United States, big demonstrations have taken place to curse and criticize Israel attacks and on the other side to give oral support to Gaza civilians. Not only in offline world but also in cyber world emerge sites to attack Israel, like Indonesian Julid Fisabilillah (JF). The Julid Fisabilillah is one of online media platform which its members are from Indonesia, Malaysia, and Turkey. They try to counter one side news from Israel and its allies which broadcast news as if they were victims in the conflict and hide the fact of tremendous victims of Gaza civilians.

At international organization level, the UN secretary general Antonio Guterres saw the seriousness condition and problem in Gaza and named it as severe risk of collapse of the humanitarian system in Gaza. Antonio Guterres decided to invoke article 99 of the UN Charter. Article 99 of the UN Charter gives the right to the UN general secretary to endorse the UN Security Council to do some measures in the situation that threaten international peace and security.(4)

On December 9, 2023 in the UN Security Council meeting, the proposal for resolution to make both parties involved in the conflict get agreement to ceasefire had been vetoed by the United States. The United States argued that the immediate cease fire in Gaza would "only plant the seeds for the next war". For America as the main supporter of Israel, as long as HAMAS is not disappeared from the surface of the earth, Israel and America's interest in the Middle East are not secure. Consequently, the United States steadfastly support Israel to continue its aggression to Gaza. For America and Israel, ceasefire is not a solution for long term peace because HAMAS is not bounded to the agreement. (5)

In response to emergency condition in Gaza, the UN General Assembly held an emergency special session on 12<sup>th</sup> of December 2023 and in the session they achieve an agreement on how to do something because of its condition. They should do 'immediate humanitarian ceasefire', the immediate and unconditional release of all hostages and 'ensuring humanitarian access.' On December 22, the UN Security Council agreed to issue Resolution 2720 (2023) which among other things contains affirmation to conflict parties an obligation under international humanitarian law, protecting civilians and civil facilities and preparing humanitarian assistance. Besides, the UN Security Council insisted to allow, facilitate, and enable humanitarian assistance to immediately send to Palestinian civilian in Gaza Strip.(6)

The UN Security Council resolution passed smoothly because the two big powers, the United States and Russia abstained. The US abstained because the resolution is not ordering to ceasefire, and the United States agreed for humanitarian pause to end war because of humanitarian argument. On the other side, Russia was disappointed with the resolution 2720 (2023) because it doesn't command Israel to stop aggression. It means to give license to kill to Israel to continue its action in killing the civilian people in Gaza. (7)

Unfortunately, amidst international exclamation and multilateral diplomacy in the United Nations, Israel did not stop its aggression to Gaza. Even though humanitarian assistance has been sent to people settlement and refugee camps, but in Gaza the shadow of war and bombardment from Israeli fighters have not ended. The humanitarian pause was ended in December 2023 and fatalities among Gaza people have achieved more than 26.000people.

Death toll in Gaza and the UN resolution of 2720 did not explicitly order Israel to stop its aggression made South Africa to file lawsuit against Israel in International Court of Justice by accusing Israel to practice genocide toward Palestinian people in Gaza. President of South Africa, Cyril Ramaphosa stated that Israel aggression in Gaza is similar to that of apartheid administration in South Africa which doing social segregation for decades. "Our opposition to the ongoing slaughter of the people of Gaza has driven us as a country to approach the ICJ, "As people who once tasted the bitter fruits of dispossession, discrimination, racism, and state-sponsored violence, we are clear that we will stand on the right side of history." (President Cyrill Ramaphosa) (8).

South Africa propose an 84 pages document to International Court of Justice which contains demands that the International Court of Justice order Israel to stop its aggression on Gaza. Lawyer team of South Africa, headed by John Dugard, stated that the unbearable suffering of Palestinian people is happening in Gaza. One of this lawyer, Adila Hasyim, stated that five Israeli actions that clearly can be categorized genocide actions. These five actions are: mass killing of Palestinian, bodily and mental harm, forced displacement and food blockade, destruction of the healthcare system, and preventing Palestinians births. (9)

After hearing from both sides for three weeks South Africa and Israel, on January 26, 2024 the International Court of Justice decided that Israel must guarantee its troops would not do the action that can be categorized as actions that are prohibited based on article II Geneva Convention of 1948. The court also decided that Israel must retain and punish whoever provoke other people to do genocide toward Palestinian people in Gaza, open humanitarian access to Gaza, prohibiting from destroy the evidence of genocide actions in Gaza. The court also insist on Israel to give report on the above actions within a month. At the last, the court inist that conflicting parties to release hostages since the outbreak of conflict starting on October 7, 2023.

With these efforts to challenge super power party, South Africa has mad decision to take some measures that make some parties to be worried. Result of decision made by the ICJ explicitly does not mention Israel as the doer of genocide and does not insist that Israel stop aggression as proposed by South Africa. This decision makes many supporters of Palestine feel disappointed. This paper will try to analyze on how South Africa file a case againts Israel to

the International Court of Justice seen from analysis of anarchism and justice. This theme is considered interesting because so far cases to the ICJ has not been applied correctly. It is because the ICJ has not compulsory apparatus which enable the conflicting parties obey to the decision. South Africa decision to file lawsuit against Israel is interesting to be observed and discussed.

### 2. THEORY AND METHODS

In International Relations, many experts in the field see that international condition is in the situation of anarchy, have no higher authorities above the state. State's action is in the name of their own sovereignty and national interest. In this situation, the most suitable adage is might makes right. In the anarchical international system, each state must rely on its own power and capabilities to be existed or give up to other power. (10). Power is the only hope to be survive till the end.

Anarchism can be described as the unpleasantly jungle, where the strongest and fittest can survive and multiply its species (state of nature). According to Thomas Hobbes, in the condition of state of state of nature, every state must ready to make war, a state of war all against all. (11). State is the main actor in anarchical international system, so that the state has final decision in its foreign policy decision making. Consequently, its capabilities to execute its foreign policy are depended on its power. Based on this argument, states with super power status will maintain its status and its position in the scene of international system as well as enlarge its power. Meanwhile, middle power states will maintain and enlarge their position and try to avoid to be dominated by super powers. John J Mearshimer describes the behavior of the states in the concept of offensive-realism to describe state behavior in acquiring limitless power. On the other side, the concept of defensive realism to describe the states which try to acquire power for defensive reason. (12)

In the system of anarchy, is there no law which can be used as guide of behavior? In the condition of anarchy, international law and norm can be applied if states, especially superpower, can get benefit from them. Consequently, international law and norm can only be tool of national interest of super power. If international law and norm have no benefit and useful for the interest of big power, the big power can change or abandon it. It can be applied to international organization too, where the existence of international organization is of function and benefit of individual state. If states can get some advantages from the organizations, they will support and cooperate with the organizations.

On the opposite spectrum from international anarchy, there is argumentation that support ideas of order and justice. This approach is based on idea that relation between actors which is based on power exercise will not support peace, where the situation will be full of prejudice and negative perceptions between states. The states actually need conducive condition and peace to build, create, and increase welfare of their citizens. For that purpose, they need regulations to constrain behavior of the states which endanger international peace. Various international problems can only be solved with international cooperation. Problems such as international terrorism, ozone depletion, human trafficking, narcotics, and so on. In the 20<sup>th</sup> century, this pattern of cooperation was easily to do because of development of transportation and communication technologies.

Order and justice are not only fought for regulate behavior of the states, but also for individual human right. Dark history of holocaust by Germany NAZI toward jew people made leaders of the world speak about declaration of human right. In post World War II many states tried to build various international institutions and plan many agreements to avoid next wars. The United Nations with its special bodies and apparatus was created, as continuation of League of Nations, with the purposes of creating international peace and security and accommodation of cooperation in various fields among its members and protecting human right. Experts of the world also discussed about human right whether it will be universally or under national jurisdiction.(13) The discussion and debate on human right have not reached an agreement, so that the concept of right to protect (R2P) is emerged. The concept of right to protect normative is based on assumption that other states have the right to protect human right of other state citizens. But this concept has not reached as international norm because many states insist that human right of their citizens be part of responsibility and duty of state where the citizens live.

One of normative effort which nations fight for after the World War II was convention to prevent genocide; that is the 1948 convention on the prevention and punishment of the crime of genocide. This convention defines genocide as the action that intentionally is aimed at destroying part or all of ethnic group, race, or religious group. This action includes the act of killing, destroying seriously both physical and mental, intention to make suffering of groups, partially or fully, the act to prevent birth and force children move from their own group to the other.

Based on the conception of anarchy and justice above, this paper will analyze qualitatively on policy of South Africa to challenge Israel in the International Court of Justice by accusing of genocide. Sources of data used to answer the main question are from various literature and then the data will be analyzed to get confirmation toward proposed argument.

### 3. ANALYSIS

South Africa has long experiment of oppression and racial discrimination since the era of British colonial. Nelson Mandela from African National Congress had been trying to end and abolish apartheid system. Relation between Nelson Mandela and Third World countries emerging from colonialism was so close that they support each other and calling for solidarity to call out the right of oppressed people. African National Congress has close relation with Palestinian

Liberation Movement of PLO, even when Nelson Mandela was in jail of apartheid regime of South Africa. In his speech in 1990, Nelson Mandela said, "we identify with the PLO because, just like ourselves, they are fighting for the right of self-determination." After released from the jail in 1994, Mandela was still a vocal supporter of PLO. This solidarity sentiment has been deep rooted in the mind of people of South Africa, as mentioned by Michael Walsh (visiting scholar at the University of California, Berkeley) in the interview with Vox news agency. Walsh stated that : "South Africa has been involved on the Palestinian issue since this country ended apartheid system. Palestinian issues are regarded as main issue of South African leaders". (14)

Proposal of lawsuit against Israel to the International Court of Justice was not a sudden action, because since the outbreak of war on October 7, 2023, leaders of South Africa often have made statements to curse Israel actions in Gaza. Parliament of South Africa had voted in the meeting to drive away ambassador of Israel in Praetoria and to pull back its ambassador in Tel Aviv. But department of foreign affairs launched initiative to file a lawsuit against Israel to the International Court of Justice.

American support to Israel in Palestinian-Israel war indicates that domination of super power states plays critical role which significantly has influenced peace in Middle East. America vetoed proposal of ceasefire in the UN Security Council on December 9, 2023, with the argument that ceasefire will only give HAMAS an opportunity to continue the war. The support of super power state like the United State gave room for Israel to pursue its national security argument to destroy Gaza Strip. HAMAS fighters, on the other side, hid among civilian people in Gaza, including refugee camps and hospitals. For this reason, Israel attacks civilian targets in Gaza.

South Africa took a difficult effort to fight for justice through the International Court of Justice. There are two reasons why action taken by South Africa is categorized as difficult. First, the ICJ has no compulsory apparatus to force Israel if Israel does not obey the ICJ decision. Compulsory apparatus that can force Israel to comply the ICJ decision should be more capable and stronger than Israel's supporter; that is the United States of America. The absence of compulsory apparatus makes states in the world feel pessimism about effectivity of international law and international organization. As mentioned in the theory above, international law and international organization are, in the end, function of interest of super power states.

Second, accusation of genocide is hard to be proven. The phrase and definition that genocide means intentionally act to kill or wound a group of people is hard to be proven. How to prove that the act is intentional, because the accused party often state that its action is based on self-defense argument or because of security threatening argument. Those arguments can be used by Israel as a counter argument to South Africa which filed lawsuit against Israel to the ICJ. Israel could show evidences of videos which contain HAMAS attack and Palestinian Islamic Jihad attack to Israeli cities and settlement which caused 1200 men killed and taken 240 civilians as hostages. To counter lawsuit of South Africa against Israel, Israel accused that Praetoria gave political support to HAMAS.

Article II of Geneva Convention has explicitly stated that genocide as an intentionally act that is aimed at destroying, part or all, ethnic, nation, race, or religious group by doing: (article 2: Geneva Convention, 1948)

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

Michael Becker, an expert of international humanitarian law of Trinity College, Dublin, states that he feel pessimistic about South Africa accusation concerning genocide committed by Israel in Gaza. This accusation is difficult to be proven. Following is his statement interviewed by Vox:

In this case — quite unusually — South Africa will not be limited to reliance on circumstantial or contextual evidence alone. It can also point to a significant number of statements by Israeli government and military officials that arguably provide direct evidence of genocidal intent, although the real meaning and legal significance of these statements will be fiercely contested." (15).

It is not easy to file genocide lawsuit to the International Court of Justice. Previous case, such as Ukrainian lawsuit against Russia on 26<sup>th</sup> February 2022. Ukraine filed lawsuit to the ICJ about Russian attacked on Eastern part of Ukraine in February 2022. According to Russia, Its attack was done because Ukraine committed genocide toward people of Donnets and Luhanks. Ukraine tried to make proof that there was no genocide action in Eastern Ukraine, so Russia had no reason to launch military action to the region. More than 20 states in Europe supported Ukrainian lawsuit to the ICJ. On the opposite side, Russia lawyers urged judges of the ICJ to throw out the case, because the case was defect and the ICJ had no authority in dealing with Ukrainian-Russian war. In March 2022, the ICJ decided that Russia had to stop its military campaign in Eastern Ukraine, but Russia abandoned it. (16)

On November 11, 2019, Gambia, supported by OIC, filed lawsuit to the ICJ against Myanmar military junta which was considered to commit genocide toward Rohingya ethnic group in Rakhine state. Gambia refer to article 9 of Geneva Convention 1948 to challenge Myanmar military junta. On January 23, 2023 the ICJ decided that the military junta had to stop all of its genocide actions in Rakhine and urged that all of witness and proof of genocide be protected. The

government of Myanmar had the obligation to report the case within four month and each six months afterward. But according to report done by human right groups, the government of Myanmar continued to do human right abuses in Rakhine States and did not comply the ICJ decision. Based on article 42 (1) of the ICJ statute, the Court could file the case to the UN Security Council to do some concrete action to force Myanmar. Unfortunately, this case is dead-lock so far. (17)

The case filed South Africa to the ICJ against Israel have moderate solution. The Court just ordered Israel not to do genocide action but not to stop its aggression. Other significant charge that Israel had committed genocide in Gaza was not mentioned in the decision of the ICJ. If the ICJ decided that it was a proof that Israel had committed genocide in Gaza, at least European states would postpone their support and assistance to Israel. After the decision was published, Israel continued to launch military action in Gaza Strip and made hundreds of civilians' death. Besides its aggression to Gaza, leaders of Israel often publish statements that indicate to continue its commit to genocide. As aired by Al Jazeera, Heritage Minister Amichay Eliyahu (far – right Jewish Power) advised Israel to drop nuclear weapon in Gaza and state that there were “no uninvolved civilians” in the territory.(18)

Disobedience of Israel can be enough reason to file the case to the UN Security Council based on article 42 (1) of the ICJ statute, but American interest in Palestinian-Israeli conflict make the United States will cancel all of resolution draft that urge to take action against Israel. This probability is based on previous cases, such as Russian attitude in the case Ukrainian vs Russia, Russian's and China's attitude in the case of Gambia vs Myanmar. Where big power states have interest in the case, so the case will be difficult to decide based on justice. In the condition where super power states arrange and determine result of interaction, justice is only the idea that needs to fight for. Ethnic group of Rohingya or civilians of Gaza as victims of conflict should wait whether their life and death are in accordance with interest of big power states.

#### **4. CONCLUSION**

In anarchical international system, it is difficult to fight for justice even in the world first rank organization like the International Court of Justice. What South Africa does to challenge Israel on the case of genocide in Gaza can be seen as an effort based on moralistic idea which see oppression and injustice of Palestinian people in Gaza. When moralistic exclamation from all over the world could not stop Israel and America to end their military campaign, South Africa was sure that the ICJ as bearer of justice mandate of the UN would be capable to give justice for people in Gaza. Although cases of genocide filed to the ICJ previously had not resulted decision as hoped by conflicting parties.

War is common phenomenon in the interactions among states. We see wars between states happened in many centuries. But war must be civilized also. There are some norms that must be obeyed by belligerents, one of which is not intentionally sacrifice the life of non belligerents for war purposes. Normatively, conflicting parties should obey norm of war, but reality of war show that how to do with the norm is based on perception of the parties, especially if the war involving super power states. Norms of war are norms determined by those super power states. This is an anarchical situation, where might makes right.

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