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Following through on the Union's values: The role of international law in setting legal limits on supporting Israel in its war on Gaza

By Jesse Peters

For six months, Israel has been waging a brutal offensive on Gaza, killing over 30.000 Palestinians, destroying more than 60% of the homes in Gaza, and making Gazans account for 80% of those facing famine or catastrophic hunger worldwide. High Representative Borrell described the situation as an 'open-air graveyard', both for Palestinians and for 'many of the most important principles of humanitarian law'. Yet, the Union and its Member States seem unwilling to use their capacity to deter Israel from further atrocities. European leaders continue to express steadfast political support for Israel and to provide material support for the war by upholding pre-existing trade relations, including arms exports. This blogpost examines to what extent this continued support displayed by the Union and its Member States constitutes a violation of Union law. It does so in light of two recent rulings, both delivered by courts in The Hague, which suggest support for Israel in the current context might be problematic not just from a moral, but also from a legal standpoint. The central argument developed in this post is that Union law, when interpreted in a manner that respects - or at least does not undermine - the fundamental norms of international law, establishes sufficiently concrete obligations that the Union and its Member States currently do not meet given their continued support for Israel.

The ICJ Order in *South Africa v Israel*

On 26 January 2024, the ICJ delivered its landmark Order indicating provisional measures in *South Africa v Israel*. South Africa had initiated proceedings against Israel under Article

IX of the Genocide Convention, accusing Israel of breaching multiple obligations under the Convention, the most serious one being the commission of genocide. In its request, South Africa asked the ICJ to take provisional measures to prevent extreme and irreparable harm pending the ICJ's determination on the merits. The ICJ found it at least plausible that Israel violates the rights of Palestinians in Gaza protected by the Genocide Convention and thus required Israel to take all measures within its power to prevent genocide.

Several scholars and civil society organisations have stressed that this ruling also has consequences for third states (as for example argued by Salem, Al Tamimi and Hathaway). The Genocide Convention contains the duty to prevent genocide (Article I), and prohibits complicity in genocide (Article III(e)). As previously held by the ICJ, this means that States are obliged to use all reasonably means with a deterrent effect to prevent genocide, as soon as they learn of the existence of a serious risk of genocide. Since all EU Member States are party to the Genocide Convention, and the Convention has *jus cogens* status, these obligations are binding on the Union and its Member States. Notwithstanding the valid observation that the ICJ Order in and of itself might not meet the evidentiary threshold for establishing the required 'serious risk', the ICJ's findings on genocidal intent, as well as the strong factual substantiation of the judgement provide enough reason to carefully (re)assess any support for Israel in light of the obligations under the Genocide Convention.

Relevant obligations under Union law

Such clearly defined obligations to attach consequences to behaviour of a third State indicating a serious risk of genocide are not expressly laid down in Union law. Despite the Treaties being littered with aspirational, high-sounding references to peace, security, fundamental rights, human dignity, and the observance of international law, Union law still leaves extremely wide discretion to the Union and the Member States in deciding how they deal with third states engaging in serious violations of international law. Certainly, the Treaties do *allow* for various policy responses, like adopting economic sanctions, suspending agreements with the concerned third state, or targeting disinformation, to name a few of the measures adopted to counter the Russian aggression in Ukraine. The issue, however, is that Union law does not clearly *prescribe* adopting such measures.

An exceptional legal limit within Union law to political discretion in this regard is laid down in Article 2(2)(c) of the Council's Common Position 2008/944/CFSP. It obliges Member States to deny export licenses for arms in case of 'a clear risk that [they] might be used in the commission of serious violations of international humanitarian law'. However, enforcement of this obligation on the Union level is effectively impossible. The CJEU cannot interpret or apply the instrument because of its limited jurisdiction in the Common

and Foreign Security Policy area, stemming from Articles 24 TEU and 275 TFEU. Moreover, the Council on its part refuses to monitor compliance with the Common Position, leaving it entirely up to Member States to give effect to the instrument.

It would thus appear that there is a conflict between the Union's foundational values expressed in Articles 2, 3, and 21 TEU, and the lack of effective legal limits set on the Union level to continued support for a third state that disregards humanitarian law to the extent of using starvation as a weapon of war. The main argument of this blogpost is that a part of the solution to this apparent conflict lies in interpreting Union law consistently with fundamental norms of international law. Specifically, obligations stemming from international law can play an important role in defining effective legal obligations that limit the discretion enjoyed by the Union and the Member States when interpreting and applying Union law in the face of a crisis such as the war in Gaza.

The interplay between public international law and the Union's legal order is the subject of complex case law and academic debate (for an overview, see Wessel and Larik). The general picture emerging from these debates is the following. On the one hand, the ECJ expressed on multiple occasions that the EU legal order is 'autonomous', which shields the internal allocation of powers within the EU from being affected by international agreements (for instance in Opinion 2/13, paras 179f, or *Kadi I*, para 282). On the other hand, binding international agreements to which the Union is a party, as well as binding rules of customary international law, are both considered to form an 'integral part' of Union law and are binding upon the institutions of the Union when they adopt acts (see for instance *ATAA*, paras 101-102). Within the hierarchy of norms, this places international law in between primary Union law and secondary Union law. Furthermore, the ECJ specified that secondary Union law needs to be interpreted 'as far as possible in the light of the wording and purpose of' international obligations of the Union, including those stemming from customary international law (for example in *Hermès*, para 28, and *Poulsen*, para 9). As Ziegler notes, the duty to interpret Union law consistently with international law can even extend to obligations under international law that do not rest on the Union particularly, but only on the Member States, given that under the principle of sincere cooperation, the Union ought to avoid creating conflicting obligations for Member States.

Given the status of the Genocide Convention as *jus cogens*, and the fact that all Member States are party to the Convention, secondary Union law must be read in accordance with the obligations to prevent genocide and avoid complicity in genocide. While this may sound rather abstract at first, around two weeks after the ICJ Order a ruling by a Dutch national court in The Hague showed how the exercise of concretising Union law through consistent interpretation with international law could look like.

The ruling of the Hague Court of Appeal

On 12 February 2024, The Hague Court of Appeal ruled in favour of the applicants (Oxfam Novib, Pax, and The Rights Forum), and decided that the Dutch State was obliged to halt any transfer of F-35 plane parts to Israel. The case was previously discussed in contributions on other blogs, such as those by Yanev and Castellanos-Jankiewicz. For the purposes of this blogpost, it remains particularly relevant to analyse in detail the legal reasoning adopted by the Hague court of appeal (hereinafter: 'the court of appeal').

The court of appeal established first that there exists a 'clear risk' that Israel commits serious violations of international humanitarian law, and that it uses F-35 planes in those acts. Then, it went on to unpack the legal consequences of this finding. The Dutch State had granted a permit in 2016 that allowed for transfers of goods as part of the 'F-35 Lightning II-programme', also to Israel. An important feature of this permit is its unlimited duration, not requiring a reassessment under any circumstance.

The Hague court went on to assess the legality of this lack of any mandatory reassessment. To understand the court's reasoning, it is necessary to briefly introduce the three legal instruments that the court used for this assessment. The first instrument used was the Dutch Decision on strategic goods, on which the general permit was based. This instrument outlaws the granting of permits that violate international obligations. In the explanatory note to the Decision, the legislator referred in this regard to the earlier mentioned Council Common Position, the second relevant legal instrument. Article 1bis of the Common Position 'encourages' Member States to reassess permits if new information becomes available. On first reading, the provision does not seem to *require* a reassessment, as the Dutch State argued. To determine whether a reassessment was however indeed mandatory, the court took recourse to a third instrument, namely the Geneva Conventions, which lay down the core principles of international humanitarian law. Hereby, Common Article 1 of the Conventions holds that States must 'undertake to respect and ensure respect for the present Convention in all circumstances', while the Conventions lays down the core principles of international humanitarian law.

The most relevant feature of the ruling is the Hague court's combined usage of the teleological and consistent interpretation methods. The court's reasoning can be reconstructed into four steps. First, the court interpreted the Geneva Conventions as forbidding States to 'shut their eyes' to serious violations of humanitarian law, which would be the case if no actual consequences would be attached to such violations. Secondly, it stated that the Common Position should be interpreted as far as possible in a way that does not conflict with the Geneva Conventions. Thirdly, the court found that it was indeed possible to interpret the Common Position consistently with the Geneva Conventions. By reading the Common Position as *requiring* a reassessment of permits in cases of serious

violations of humanitarian law, Member States consequentially are not allowed to 'shut their eyes' to those violations, which satisfies the Geneva Conventions' obligations. Moreover, such an interpretation makes sense in light of the object and purpose of the Common Position. If the Common Position would allow Member States to grant permits of unlimited duration, without requiring their reassessment, they would be able to completely undermine the instrument. Thus, interpreting the Common Position in light of the obligations under the Geneva Conventions, and in light of its object and purpose, led the Hague court to find a duty to reassess in this case. Finally, the court interpreted the Dutch Decision on strategic goods in a way that is consistent with the Common Position, by reading into the Decision an obligation to reassess the granting of a permit under certain circumstances, like those of the present case. This last step reflects the Dutch constitutional duty to interpret national law as far as possible consistently with international law.

Consequently, the court drew a red line and explicitly limited the typically wide political discretion of the Dutch State in foreign and security policy. The court observed that if the Dutch State had undertaken the mandatory reassessment (properly), it should have applied the refusal ground of Article 2(2)(c) of the Common Position and halt the transfers. In the face of such a clearly defined legal obligation, the court simply dismissed arguments of the Dutch State that halting the transfer of F-35 parts would harm its relations with the United States and Israel or would endanger Israel's existence.

Looking ahead

The ICJ's observations in the proceedings started recently by Nicaragua against Germany for allegedly failing to do everything possible to prevent genocide, or even facilitating genocide, can further specify these legal limits. However, the serious risk that the Union and its Member States are breaching fundamental norms of international law by refusing to attach considerable political or economic consequences to Israel's conduct in Gaza already requires taking a new look at the obligations stemming from Union law. Complying with the duties of the Genocide Convention and Geneva Conventions should be done as much as possible by interpreting any rule of secondary Union law in a way that respects, or at least does not undermine, these international obligations. As the ruling of the Hague court demonstrates, interpreting Union law consistently with international law can also help to give full effect to the purpose of the Union instrument itself, especially when that instrument at first glance does not contain clear obligations.

In line with the ruling of the Hague court, an interpretation of the Common Position could integrate the obligations under the Geneva Conventions by prohibiting further arms exports to Israel. Given the lack of enforcement on the Union level, it is up to other Member

State courts to adopt and apply such an interpretation. For example, an argument before German courts to read Article 6(3) of the German War Weapons Control Act in line with the Common Position could be made, as was already suggested by Stoll and Salem.

Other instruments of Union law that could be interpreted in a similar way are the legal bases for trade relations with Israel and Israel's status as an associated country receiving funding under Horizon Europe, including for the development of drone technology and spyware, which has drawn criticism from MEPs. Both Article 2 of the EU-Israel Association Agreement and Article 16(3) of the Regulation establishing Horizon Europe condition association with Israel explicitly on 'respect for human rights'. It would be difficult to determine any legal value of this condition if Israel's current behaviour would not be considered sufficient disrespect for human rights to trigger the suspension of these instruments.

The importance of concretising the abstract values that undergird Union law into concrete rules of law, thereby setting legal limits to political discretion, cannot be overstated. As this post demonstrates, integrating obligations from international law can develop interpretations of secondary Union law that allow the Union to follow through on its values, something particularly crucial in light of the current immense suffering of Palestinians in Gaza.