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The Law of Genocide: A Legal Analysis of South Africa v. Israel before the International Court of Justice

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Introduction

In October 2023, a sudden escalation of violence between Hamas and Israel plunged the Gaza Strip into a devastating conflict. Hamas's attack on October 7 and the subsequent Israeli military response caused widespread destruction, a humanitarian crisis and mass civilian casualties in Gaza. The Republic of South Africa took the unprecedented step of initiating legal proceedings against the State of Israel before the International Court of Justice (ICJ) on 29 December 2023. South Africa alleges that Israel's conduct in the Gaza war amounts to genocide against the Palestinian people, violating the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (or Genocide Convention).[1] In its submission, South Africa invoked its *erga omnes* obligations under the Convention to prevent genocide, arguing that even as a state not directly affected, it has a legal duty and right to act against genocide wherever it occurs. Invoking the Genocide Convention provided the jurisdictional basis for the ICJ's involvement. Both South Africa and Israel are parties to the Convention without reservation, which means they have accepted the ICJ's authority to resolve disputes under that treaty. This enabled South Africa to bring the case pursuant to Article IX of the Convention.[2] The ICJ's role in this context is to adjudicate state responsibility (determining whether Israel has breached its international obligations) rather than to prosecute individuals. The Court found it "plausible" that acts committed in Gaza might fall under the Genocide Convention's prohibitions and ordered Israel to take all measures within its power to prevent the commission of any genocidal acts. Notably, the Court stopped short of mandating a ceasefire, but it required Israel to facilitate humanitarian relief for the population. Israel's government rejected South Africa's claims as baseless and maintained that its military operations constitute lawful self-defense against the terrorist organization Hamas.

The term "genocide" was first coined in the 1940s by the Polish-Jewish lawyer Raphael Lemkin by combining the Greek term γένος ("race, people") with the Latin suffix *-caedo* ("act of killing"). After the Second World War and the tragedy of the Holocaust, Lemkin thought it

[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[2] Id. art 9.

was necessary to reconsider some principles of international law. In particular, he believed that specific acts of destruction should limit the sovereignty of states and should be a matter of international concern, not domestic affairs. He wrote that "every state should be able to take jurisdiction over such acts irrespective of the nationality of the offender and of the place where the crime was committed".[3] Therefore, in 1933, Lemkin submitted a proposal to the International Conference for Unification of Criminal Law in which he declared the destruction of racial, religious or social groups "a crime under the law of nations (*delictum iuris gentium*)".[4] In this initial proposal, he envisioned two distinct international crimes: the crime of barbarity (the extermination of a group) and the crime of vandalism (the destruction of the cultural and artistic heritage of the group), both punishable by any country. Indeed, he believed that the terms previously used to describe these crimes, like mass murder or extermination, were inadequate and did not fully cover the range of actions committed by the Nazi. However, Lemkin's proposal was not accepted.

Only in 1945, after the Nuremberg Trial, did Lemkin use the word "genocide" in his book *Axis Rule in Occupied Europe*.[5] By looking at the Nazi crimes in Europe and the Armenian genocide, he defined genocide as a "composite crime", involving several actions directed against a group or its members. The actions included deprivation of life, prevention of life (e.g. sterilization) and endangerment of life and health. Such actions must be committed with the criminal intent to destroy or harm permanently the group. However, the International Military Tribunal gave a narrow interpretation of genocide in its Charter, stating that such acts and the persecution of the civilian population were only punishable in times of war.[6] This led Lemkin to rediscuss the legal status of the crime and draft a new resolution during a United Nations General Assembly meeting at Lake Success in 1946.[7] In the first part of the resolution Lemkin defined genocide as the "denial of the right of existence to entire human groups in the same sense as homicide is a denial to an individual of his right to live, and that such a denial is contrary to the aims and purposes of the UN."[8] In the second part, he urged the Assembly to declare genocide an international crime and to ensure international cooperation for its

[3] 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 146.
[4] Ibid.
[5] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944).
[6] Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 279 (Nuremberg Charter) art 6(c).
[7] UNGA Res 96(I) (11 December 1946) UN Doc A/RES/96(I).
[8] 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 149.

punishment and prevention. The draft, titled "The Crime of Genocide", was approved and adopted by the Assembly in 1946. In sum, Lemkin believed that the new law in genocide could not only prevent future atrocities from being committed, but also promote more pluralistic and tolerant societies.

Two years after the resolution, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) on 9 December 1948.[9] It came into effect on 12 January 1951 after 20 countries ratified it without reservations.[10] As the first human rights treaty adopted by the Assembly, it was the first legal instrument to codify the crime of genocide. Article II of the Convention defined the crime as follows:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *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."[11]

The convention further criminalizes complicity, attempt or incitement of genocide. All perpetrators are to be tried regardless of whether they are private individuals, public officials or political leaders. However, the Convention's legal definition of genocide still remains unclear. A specific intent to destroy the group (*mens rea*) is required but the meaning of "destroying a group "as such"" and how to prove such intent are still unresolved matters for courts, as we will see in this thesis. The two main approaches to the issue of intent are the purposive approach (the perpetrator expressly wants to destroy the group) and the knowledge-based approach (the perpetrator understands that destruction of the protected group will result from his actions). Moreover, the Genocide Convention authorizes the jurisdiction of the ICJ to

[9] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[10] As of February 2025, the Convention has 153 state parties.
[11] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2.

adjudicate disputes, leading to ongoing international trials such as *The Gambia v. Myanmar*[12] regarding the Rohingya genocide, *Ukraine v. Russia*[13] and *South Africa v. Israel*[14].

More recently, Dr. Gregory H. Stanton, founding President of Genocide Watch, expanded the definition of the crime of genocide. In 1996, Stanton presented a paper called "The 8 Stages of Genocide" to the United States Department of State, after studying the Holocaust, the Armenian genocide and the Cambodian genocide.[15] He saw genocide as a process composed of eight stages, then extended to ten. The stages are not linear and some of them can occur simultaneously. However, the process is predictable but not inexorable as several preventive measures could stop each stage. The stages are the following:

1. Classification: division of people between “us” and “them” based on perceived differences of ethnicity, religion or nationality.
2. Symbolization: assignment of symbols (labels, stereotypes, hate symbols and propaganda) that reinforce the inferior status and justify violence against the targeted group.
3. Discrimination: exclusion of the targeted group from civil rights, for example through apartheid laws and segregation.
4. Dehumanization: denial of the humanity of the group through symbols.
5. Organization: the start of the genocidal campaign through the establishment of special army units or militias.
6. Polarization: deepening the divisions between groups by intensifying propaganda and hate speech, further eroding civil rights of the targeted groups and attacking the moderates of the dominant group.
7. Preparation: planning of the mass killing by identifying the victims by their belonging to the targeted group. At this stage, a genocidal emergency must be declared.
8. Persecution: isolation and marginalization of the targeted group through expropriation, forced displacement, ghettos or concentration camps.
9. Extermination: execution of the members of the group as they are believed to be “not fully human”.
10. Denial: the perpetrators deny that they committed any crimes.[16][17]

[12] *Application of the Genocide Convention* (The Gambia v Myanmar) (ICJ, instituted 11 Nov 2019).
[13] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation) (ICJ, instituted 26 Feb 2022).
[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel) (ICJ, instituted 29 Dec 2023).
[15] Gregory H Stanton, *The Eight Stages of Genocide* (Genocide Watch 1998).
[16] Ibid.
[17] Holocaust Memorial Day Trust, *The ten stages of genocide* (HMD Trust).

To avoid this process from happening, Stanton suggested several preventive measures including passing laws that prohibit hate speech and discrimination (e.g. full citizenship and voting rights for everyone), international sanctions and arms embargoes on governments and citizens involved, creation of international investigative commissions, mobilization of humanitarian assistance or intervention and, in the case of stage 9 and 10, an armed intervention and punishment by an international tribunal or national courts.

This thesis is a case study of the ongoing case *South Africa v. Israel* before the ICJ. It addresses South Africa's allegations of genocide and Israel's defense amid an active armed conflict. The case is significant on multiple counts. In terms of international humanitarian law (IHL) and the Genocide Convention, *South Africa v. Israel* represents a rare instance as the mechanisms of state accountability are invoked amidst an ongoing conflict, rather than in its aftermath. Previous ICJ genocide cases (such as *Bosnia and Herzegovina v. Serbia*[18] or *The Gambia v. Myanmar*) addressed crimes that had already occurred or were at a lower intensity by the time of litigation. Moreover, by ordering measures to safeguard civilians and ensure humanitarian aid, the Court reaffirmed that the duty to prevent genocide is an ongoing obligation of all states, even when a definitive determination of genocide has not been made. The case also highlights the *erga omnes partes* character of obligations under the Genocide Convention (the idea that the Convention's duties are owed to the international community as a whole). South Africa's standing to bring a case on alleged crimes occurring abroad, without itself being directly injured, reflects the global interest in enforcing peremptory norms and preventing genocide; any state party can hold any other party accountable for genocide, reinforcing the collective responsibility embedded in the Genocide Convention. Finally, *South Africa v. Israel* complements ongoing proceedings in other forums such as investigations by the International Criminal Court (ICC), by pursuing state responsibility together with individual criminal responsibility. A judgment in this case could clarify states' legal obligations to prevent and punish genocide, potentially influencing how future conflicts are managed. It may also set a precedent regarding the evidence required to substantiate genocide claims against a state.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43.

The thesis is structured into three chapters, each addressing a different dimension of the case, moving from the factual and procedural background to the legal analysis and broader implications. The first chapter provides a background of the Israel–Hamas war and the Gaza humanitarian crisis. It chronicles the events from the Oslo Accords (1993) to the outbreak of the ongoing hostilities, contextualizing South Africa's genocide allegations in light of a 75-year conflict. The second chapter examines the first phase of the case, the provisional measures proceedings. It outlines the written and oral proceedings, analyzing the jurisdictional arguments raised by the parties and the Court's rationale in its interim orders. Special attention is given to the Court's jurisdictional basis and South Africa's *locus standi* to bring the case. The third chapter is an analysis of the arguments presented by both South Africa and Israel regarding the merits of the genocide claim. It explores the standards of proof required to establish a state's responsibility for genocide, especially the need to prove *dolus specialis*, the specific intent to destroy a protected group. Precedents from past ICJ jurisprudence are examined to shed light on how the Court might assess evidence like official statements, patterns of conduct and inferences of intent. The legal analysis integrates legal doctrine, court records and academic commentary to provide a thorough evaluation of the case. The thesis will not only address the genocide allegations in the Israel–Palestine conflict but also examine how international law operates when confronted with a genocide allegation amid ongoing conflict.

Chapter I

Historical and Political Context:

From the Oslo Process to the Israel-Hamas War

1.1 Introduction

Before analyzing the procedural aspects of *South Africa v. Israel* case, currently before the International Court of Justice (ICJ), it is essential to first retrace the key historical developments of the long-standing Israeli-Palestinian conflict. The ongoing proceedings at the ICJ are not isolated legal events; they are deeply embedded in a broader historical and political context, with roots that can be traced back to the establishment of the State of Israel in 1948, the subsequent Arab-Israeli wars, and the Israeli occupation and Palestinian displacement that followed.

In particular, the Oslo Accords of 1993 have significantly shaped not only the political landscape of the region but also the legal framework through which international bodies such as the United Nations and the International Criminal Court (ICC) have addressed alleged violations of international law.

As one scholar notes, "the Oslo Process has formed the primary basis for the claim to statehood by the State of Palestine at the United Nations, which has also triggered the ICC's jurisdiction"[19]. In this light, understanding the Oslo Accords provides crucial context for the legal arguments and jurisdictional questions that will be examined later in this thesis.

[19] Handmaker, J. (2023, November 7). ICC and Palestine Symposium: The (NON) effects of oslo on rights and status. Opinio Juris.

1.2 The Oslo Process

The Oslo Accords are not a single agreement but rather a series of diplomatic and legal instruments concluded between 1993 and 1995 that, together, constitute what is commonly referred to as the Interim Agreements for the West Bank and the Gaza Strip. These accords were designed to provide for the realization of a two-state solution and the establishment of the Palestinian Authority (PA)[20] as a provisional self-governing administrative body with limited powers and jurisdiction.

The PA was expected to govern the West Bank and the Gaza Strip for a transitional period of five years, during which Israel and the Palestine Liberation Organization (PLO)[2] would negotiate the remaining "final status" issues: the status of Jerusalem, borders, security arrangements and the right to return of Palestinian refugees. However, as discussed later in this chapter, these issues were deliberately left unresolved and remain today among the most contentious elements of the Israeli-Palestinian conflict.

The "Oslo Process" refers to the cycle of negotiations, interim agreements and suspensions that characterized the accords. It began with the secret negotiations between Israel and the PLO representatives in 1993 and culminated with the Camp David Summit in 2000. The latter's failure, followed by the outbreak of the Second Intifada[21] in the late 2000s, marked the end of the Oslo Process as a viable peace process. The following is an overview of the agreements that constitute the Oslo Accords:

a) Letters of Mutual Recognition between Israel and the PLO (1993)

b) Declaration of Principles on Interim Self-Government Arrangements ("Oslo I") (1993)

c) Protocol on Economic Relations (1994)

d) Agreement on the Gaza Strip and the Jericho Area ("Cairo Agreement") (1994)

[20] The official representative body of the Palestinian people, recognized by the United Nations, the EU and most countries around the world. It was established in 1964 by the Arab League with the goal of liberating Palestine and achieving Palestinian self-determination. It is an umbrella organization, bringing together several Palestinian political groups, including Fatah (the dominant party), the Popular Front for the Liberation of Palestine (PFLP) and the Democratic Front for the Liberation of Palestine (DFLP).

[21] The Second Intifada (lit."the second uprising") was the second major uprising by Palestinians against Israeli occupation. It began in September 2000 and was provoked by the failure of the Camp David Summit and the provocative visit of Ariel Sharon (at the time Israeli opposition leader) at the Temple Mount (Haram Al-Sharif). Initially emerging as a civilian protest movement, the uprising escalated into a violent conflict after the Israeli military's response caused the death of 100 Palestinians. The conflict was characterized by shootings, suicide bombings and large-scale military operations. The hostilities continued for almost five years until the Sharm el-Sheikh Summit of 2005.

e) Agreement on Preparatory Transfer of Powers and Responsibilities (1994-1995)

f) Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ("Oslo II") (1995)

g) Protocol Concerning the Redeployment in Hebron (1996)

h) Wye River Memorandum (1998)

i) Sharm el-Sheikh Memorandum (1999)

Given the scope of this thesis and in the interest of relevance and clarity, the chapter's analysis will focus on three main instruments: the Letters of Mutual Recognition, the Declaration of Principles (Oslo I) and the Interim Agreement (Oslo II).

1.2.1 Letters of Mutual Recognition (1993)

The three letters were exchanged between Israel and the Palestine Liberation Organization (PLO) on September 6, 1993, just days before the signing of the Oslo I Accord. In this exchange, Israeli Prime Minister Yitzhak Rabin and the PLO Chairman Yasser Arafat, agreed to cooperate for the realization of a peaceful solution to the Israeli-Palestinian conflict. This exchange is arguably the most important document of the Oslo Process since the two states formally recognized each other for the first time.

In its letter, the PLO "recognized the right of the State of Israel to exist in peace and security", committed itself to "a peaceful resolution of the conflict" and declared that "all outstanding issues relating to permanent status will be resolved through negotiations". The PLO also renounced "the use of terrorism and other acts of violence"[22] and accepted UN Security Council Resolutions 242 and 338, both of which outlined a peaceful resolution of the Arab-Israeli Conflict. Resolution 242, adopted after the 1967 Six-Days War, called for the withdrawal of Israeli armed forces from the Occupied Palestinian Territories (OPT) and affirmed the "inadmissibility of the acquisition of territory by war"[23]. Resolution 338, adopted during the 1973 Yom Kippur War, demanded an immediate ceasefire, the implementation of

[22] United Nations. (1993, September 9). Israel-PLO recognition - exchange of letters between PM Rabin and chairman Arafat/Arafat letter to Norwegian FM (Non-UN documents) - question of Palestine. United Nations.
[23] United Nations. (1968). Resolution 242 (1967) /. United Nations.

Resolution 242 and emphasized the urgency of initiating negotiations. In response to Arafat, Yitzhak Rabin affirmed that the "Government of Israel [recognized] the PLO as the representative of the Palestinian people"[24] and agreed to commence negotiations with it.

These letters, which served as the preamble to the Oslo I Accord, laid the foundation for both the agreement itself and the broader peace process it initiated. However, if the letters were the seed of the Oslo Process, then the flaws they contained were bound to shape, and ultimately compromise, the trajectory of subsequent negotiations. Most notably, Israel's only formal commitment was the recognition of the PLO, underscoring the inherent asymmetry of the process: negotiations were held between a recognized state and a national liberation movement, reflecting a structural imbalance of power that would persist throughout the peace process.

1.2.2 The Oslo I Accords (1993)

The Oslo-I accords, officially known as the Declaration of Principles on Interim Self-Government Arrangements (DOP), were signed on 13 September 1993 between Israel and the Palestinian Liberation Organization (PLO) in Washington, DC. They were the outcome of several rounds of secret negotiations mediated by the Norwegian Foreign Minister since, at the time, Israeli law prohibited direct contacts between Israel and PLO officials. The accords marked a new approach to resolving the Israeli-Palestinian conflict by initiating the first open, direct talk between Israel and the PLO.

In the preamble of the accords, the parties declared their shared goal of ending the conflict, recognizing "their mutual legitimate and political rights" and establishing a "lasting and comprehensive peace settlement"[25]. The main provisions of the accords included the principle of mutual recognition, the formation of a Palestinian Interim Self-Government, composed of the Palestinian Council and the Palestinian National Authority (PNA or PA), and Israeli withdrawal from parts of the West Bank and the Gaza Strip. The Palestinian Council was to be elected through free and democratic elections, eventually leading to a permanent Palestinian state based on UN Resolutions 242 and 338.

[24] United Nations. (1993, September 9). Israel-PLO recognition - exchange of letters between PM Rabin and chairman Arafat/Arafat letter to Norwegian FM (Non-UN documents) - question of Palestine. United Nations.
[25] Israel and the Palestine Liberation Organization. (1993). Declaration of Principles on Interim Self-Government Arrangements (Annex II, Article VI, para. 2). United Nations.

The jurisdiction of the Council would cover the Gaza Strip and the West Bank as a single territorial unit, excluding Jerusalem (Article IV). According to Article VI(2) of the Agreed Minutes to the Declaration of Principles, the transfer of authority would proceed after "Palestinians inform the Israelis of the names of the authorized Palestinians who would assume the powers, authorities and responsibilities that would be transferred to the Palestinians according to the Declaration of Principles in the following fields: education and culture, health, social welfare, direct taxation, tourism, and any other authorities agreed upon"[26]. However, the withdrawal of the Israeli military government would not prevent Israel from exercising the powers and responsibilities not transferred to the council such as external and internal security, and the public order of the settlements.

The accords established a five-year interim period during which the parties would negotiate a permanent agreement on the core issues that had been deferred: the status of Jerusalem, the fate of the Palestinian refugees, Israeli settlements, security arrangements, borders and the possibility of a Palestinian state. This transitional period officially started with Israel's partial withdrawal from the Gaza Strip and the Jericho Area, formalized in the Gaza-Jericho Agreement [27] signed in Cairo on 4 May 1994 (commonly known as the Cairo Agreement), and was supposed to end with a comprehensive peace settlement.

The Gaza-Jericho Agreement provided for the establishment of the Palestine Authority (PA) in the Jericho Area of the West Bank and in the Gaza Strip. The PA was granted legislative, judicial and executive powers (excluding foreign affairs), and was to operate through the Palestinian Legislative Council (PLC). This was a major institutional development since, prior to the Oslo I Accord, Palestine had neither a functioning government nor a parliament.
However, Article III of the agreement stated the following:

> "Israel shall transfer authority as specified in this Agreement from the Israeli military government and its Civil Administration to the Palestinian Authority, hereby established, in accordance with Article V of this Agreement, *except for the authority that Israel shall continue to exercise as specified in this Agreement*"[28].

[26] Israel and the Palestine Liberation Organization. (1993). Declaration of Principles on Interim Self-Government Arrangements (Annex II, Article VI, para. 2). United Nations.
[27] Gaza–Jericho Agreement (Israel–PLO, 4 May 1994) 33 ILM 622.
[28] Israel and the Palestine Liberation Organization. (1994). Agreement on the Gaza Strip and the Jericho Area (Article III, para. 1). United Nations.

While Israel promised to partially withdraw from Gaza and Jericho within three weeks of signing, it retained full control over the Rafah border crossing and the Israeli settlements in the Gaza Strip, with the right to re-enter those regions in the event of hostilities or imminent threats. On 20 January 1996, the first PLC elections were held and Yasser Arafat was elected as its first president. His government retained the name Palestinian National Authority (PA). The Gaza-Jericho Agreement was later incorporated into and superseded by the Oslo II Accords.

1.2.3 The Oslo II Accords (1995)

The Oslo II Accords (officially known as the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip), signed in Taba, Egypt, on 24 September 1995, were conceived as a continuation and expansion of the Oslo I Accords. Despite initial hopes that the process would pave the way for a lasting resolution, subsequent negotiations failed to produce a stable and comprehensive peace agreement. The central objective of Oslo II remained the establishment of a Palestinian interim self-government, this time through the formal creation of the Palestinian Council. The agreement is extensive, over 300 pages and organized into five chapters. What follows is a brief overview of its content.

In the Preamble, Israel and the PLO acknowledge the accords' roots in UN Security Council Resolutions 242 and 338, the Madrid Conference of 1991[29] and the previous interim agreements. They reaffirm the principles and objectives stated in Oslo I (mutual recognition, political rights, a lasting and comprehensive peace settlement) and confirm that the permanent status negotiations would start as soon as possible and no later than May 4, 1996.

Chapter One outlines the transfer of authority and the structure of the Palestinian Legislative Council (PLC), composed of 82 representatives. The accord states that powers and responsibilities should be transferred from the Israeli military government and its Civil Administration to the PLC, to be exercised by the PA. Upon the establishment of the PLC, the Civil Administration in the West Bank was to be dissolved and Israeli troops withdrawn from the region. However, Israel would continue to exercise those powers and responsibilities not transferred to the PLC.

[29] The Madrid Conference was a peace conference held in 1991 and co-sponsored by the United States and the Soviet Union. It marked the first time representatives from Israel, the Palestinian territories and the Arab states met to negotiate the Arab-Israeli conflict. It is considered a precursor of the Oslo Accords.

The structure of the Palestinian Council was outlined as follows: the Council and its Executive Authority had to be "directly and simultaneously"[30] elected by the people of the West Bank, Gaza Strip and Jerusalem for a transitional period of five years. Second, the government had to be open, with Council meetings open to the public, except in cases involving security, commercial issues or personal confidentiality. Third, the Council's powers and responsibilities included:

> "Formulate and conduct Palestinian policies and to supervise their implementation, to issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of Palestinian self-government, the power to employ staff, sue and be sued and conclude contracts"[31].

However, as already stated in the DOP, the Council had no authority in foreign relations or diplomatic functions[32]. It could only conduct negotiations or sign agreements with other states and international organizations on specific matters, including economic, cultural, scientific and educational issues.

Chapter Two focuses on Israeli redeployment, security arrangements and confidence-building measures, and clarifies that the West Bank and the Gaza Strip should be considered a single territorial unit. The redeployment in the West Bank (divided in Area A, B and C) was to be carried out in three phases at six-month intervals and completed 22 days before the Palestinian elections.

Internal security would be managed by the Palestinian Police while Israel retained responsibility for external security (e.g. external threats from the sea and from the air), as well as responsibility for the internal security of Israeli settlements. Israel would "have all the powers to take the steps necessary to meet this responsibility"[33]. Additionally, no armed forces had to be established in the Palestinian territories, except for the Palestinian Police and the Israeli military forces.

[30] Israel and the Palestine Liberation Organization. (1995). Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Chapter 1, Article III, para. 3). United Nations.
[31] Id. Chapter 1, Article IX, para. 2.
[32] Meaning that it could not establish embassies, consulates or other foreign missions, nor permit their establishment in the West Bank or in the Gaza Strip.
[33] Israel and the Palestine Liberation Organization. (1995). Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Chapter 2, Article XII, para. 1). United Nations.

To foster mutual trust and good faith, the chapter also lists confidence-building measures such as Israel's release of Palestinian prisoners and the protection of Palestinians from acts of harassment and persecution.

Chapter Three addresses legal and technical issues, specifically the jurisdiction and legislative powers of the Palestinian Council. Territorial jurisdiction was to include the Gaza Strip (excluding settlements) and the West Bank, except for Area C which was to be transferred to Palestinian authority at a later stage. The Council and Israel also had to cooperate on legal matters in criminal and civil cases through a dedicated Legal Committee. All legislation adopted by the Council had to be referred to Israel through the Israeli side of the Legal Committee. The chapter also establishes mechanisms for dispute resolution, namely arbitration and conciliation, and provides for the creation of an Arbitration Committee.

Chapter Four governs the relationship between Israel and the Council. Both parties were required to "abstain from incitement, including hostile propaganda, against each other" and "must refrain from the introduction of any motifs that could adversely affect the process of reconciliation"[34]. The Joint Israeli-Palestinian Liaison Committee, established by the DOP, was tasked with handling issues requiring coordination and common disputes. One of its subcommittees was also formed to monitor the implementation of the Agreement.

Finally, Chapter Five contains arrangements for the safe passage of people and transportation between the West Bank and the Gaza Strip, as well as the management of international crossings and crossings with Egypt and Jordan.

Following the signing of the Oslo II accords, Palestinians assumed control over parts of the West Bank, including Bethlehem and Hebron. After the Gaza-Jericho withdrawal in 1994, Israel withdrew from 80% of Hebron, as stated in the Hebron Protocol of 1997. However, with negotiations at an impasse, no further redeployment occurred. In 1998, the parties signed the Wye River Memorandum, which aimed at resuming the implementation of the Oslo II accords and Israel withdrawals, but implementation was soon delayed and eventually halted.

[34] Israel and the Palestine Liberation Organization. (1995). Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Chapter 4, Article XXII, para. 1,2). United Nations.

1.2.4 Legal and Political Consequences of the Oslo Process

The Oslo process produced several notable accomplishments. First, Israel's right to exist in peace was formally recognized by the Palestinians for the first time. Second, the Palestinian Authority (PA) was established and became a permanent administrative body. Moreover, limited self-rule was granted to parts of the Gaza Strip and Jericho in the West Bank following Israel's withdrawal from those territories.

The West Bank was divided into Area A, B and C, with Area C, which constitutes approximately 60% of the region, remaining almost exclusively under Israeli control (see Figure 1)[35]. According to a 2008 World Bank report, Palestinians now retain less than 1% of Area C and are facing restrictions on construction and development, making it almost impossible to build new villages in the region[36].

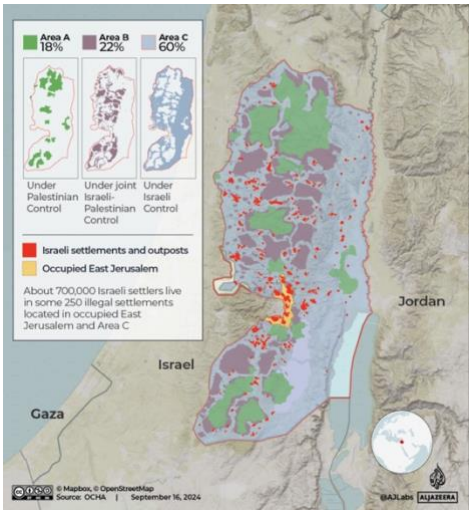

Figure 1. Map showing the division of the occupied West Bank into Areas A, B, and C, as defined by the 1993 Oslo Accords.

The Israeli Civil Administration, which was originally expected to be dismantled after the establishment of the PLC, is still operational. It was integrated into the Coordinator of Government Activities in the Territories (COGAT), a unit of the Israeli Ministry of Defense,

[35] Al Jazeera, 'Ten maps to understand the occupied West Bank' (Al Jazeera, 16 September 2024).
[36] World Bank, *West Bank and Gaza – Area C and the Future of the Palestinian Economy* (2 October 2013) 4.

which will be discussed in greater depth in the following chapters. Perhaps most significantly, direct negotiations between the two parties were initiated for the first time, establishing a channel for future dialogue.

However, the ultimate objective of the Oslo Process remained unfulfilled. The five-year interim period ended in 1999 without the conclusion of a permanent agreement based on UN Security Council Resolutions 242 and 338. Negotiations stalled after the assassination of Yitzhak Rabin in 1995[37] and the Camp David Summit in 2000. The summit, attended by the U.S. President Bill Clinton, Israeli Prime Minister Ehud Barak and the PA Chairman Yasser Arafat, was an ambitious attempt to resolve the "permanent status" issues and restart the peace process but it ultimately failed due to irreconcilable differences, particularly over the status of Jerusalem and the Temple Mount/Al-Aqsa[38].

In the aftermath, the summit produced contradictory narratives that contributed to the outbreak of the Second Intifada. During the uprising, Israel reoccupied many areas it had previously redeployed and ceded to the Palestinians, and the Israeli peace movement started to decline. In the end, the Oslo Accords failed to achieve their main objective: the creation of a sovereign Palestinian state.

1.2.5 The Failures of the Oslo Process

The declared objective of the Oslo Accords was to achieve a "just, lasting and comprehensive peace settlement and historic conciliation"[39]. However, by the end of the five-year transitional period, marked by violence from both sides, the Israeli reoccupation of much of the West Bank and the failure to meet most of the Oslo deadlines, it became clear that the Oslo process had largely failed. This failure can be attributed to several factors: its unique methodology, the absence of effective enforcement mechanisms, the expansion of Israeli settlement, the limited and inadequate Palestinian sovereignty, the rise of violence, popular dissent and the fragmentation of the Palestinian political field.

[37] Rabin was assassinated by Yigal Amir, an Israeli student and a radical ultranationalist who opposed the peace negotiations and the Oslo Accords in particular.
[38] The Temple Mount is a holy site in the Old City of Jerusalem venerated for thousands of years by many religions including Judaism, Christianity and Islam. The sovereignty of the site is a crucial issue of the Israeli-Palestinian conflict and a cause of dissent during the Camp David Summit since both Barak and Arafat insisted on their respective sovereignty.
[39] Israel and the Palestine Liberation Organization, Declaration of Principles on Interim Self-Government Arrangements (Preamble, 1993) United Nations.

i. Methodology

From a methodological perspective, the Accords were "uniquely structured", as Joel Singer, a legal adviser on Israel's negotiating team, described them[40]. Typically, in international negotiations, the parties begin by agreeing on a general framework that outlines the fundamental issues of the dispute, leaving the details of the implementation for subsequent agreements. Oslo reversed this logic: it focused in detail on the "day to day administration of [the] five-year transitional period"[41], while deferring the "final status issues" to future negotiations.

In his article *More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords,* legal scholar Orde F. Kittrie identifies four key methodologies underlying Oslo's "special diplomacy"[42], designed to build trust and confidence [43]:

(i) Gradualism: "solving what was solvable, moving gradually forward and building trust along the way"[44]

(ii) Bilateralism: Israelis and Palestinians negotiated directly, with the third party (mostly Norway and the U.S.) serving as a facilitator.

(iii) Constructive ambiguity: deliberate use of vague or ambiguous language that could easily be interpreted by each side in a way that protected its own interests.

(iv) Reciprocity: each party's performance was conditioned upon the performance of the other, thus reinforcing a cycle of mutual accountability.

Oslo logic assumed that confidence and mutual trust would grow over time, leading to better negotiations. The interim nature of the accords was thus necessary, as neither side was ready to engage in the "final status" negotiations. However, as Shamir Hassan pointed out, the Oslo Accords lacked any "palpable effort to resolve the core issues that collectively define the

[40] Joel Singer, *Capitol Hill Briefing* (14 September 1997) LEXIS, Nexis Library, Federal News Service File.
[41] Ibid.
[42] Orde F Kittrie, 'More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords' (2003) 101 *Michigan Law Review* 1661.
[43] Ibid.
[44] Ibid.

Israeli-Palestinian conflict "[45], making them more of a "security arrangement" than a true peace agreement.

(i) Expansion of Israeli Settlements

While Palestinians have met most of the obligations listed in the accords, for instance by establishing the Palestinian Civil Police Force to maintain internal order and by amending the Palestinian National Charter[46], the Israeli government and military failed to meet theirs. Among the most contentious issues was the expansion of Israeli settlements which became one of the main obstacles to peace and to the viability of a two-state solution. Indeed, between1993 and 2000, the Jewish settler population in the West Bank and Gaza Strip grew from 115,700 to over 203,000[47].

In his book *Oslo & International Law,* Professor Geoffrey R. Watson observes that while the Oslo Accords did not explicitly outlaw existing settlements, they nevertheless "impose some restrictions on new settlements, especially in the West Bank and the Gaza Strip"[48]. He further argues that, while "voluntary, private settlement" settlements might be permissible under Article 49 of the Fourth Geneva Convention, "state-sponsored and subsidized" settlements constitute "an impermissible "transfer" of civilians to occupied territory", thus violating Article 49 and international law[49].

Regardless of their legal ambiguity, settlement expansion was seen by Palestinians as a form of incitement and a violation of territorial integrity and sovereignty, directly contravening UN Resolution 242.[50] It also undermined Israel's commitment, under Article XXII of Chapter Four of the Oslo-II Accords, to refrain from actions that could compromise the peace process.

[45] Shamir Hassan, 'Oslo Accords: The Genesis and Consequences for Palestine' (2011) 39 *Social Scientist* 65.
[46] They removed clauses that explicitly called for the destruction of Israel.
[47] Anne Le More, *International Assistance to the Palestinians After Oslo: Political Guilt, Wasted Money* (Taylor & Francis 2008).
[48] GR Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 136.
[49] Id. pp.141.
[50] UNSC Res 242 (22 November 1967) UN Doc S/RES/242.

(ii) Absence of Enforcement Mechanisms

The Oslo Accords contained several provisions for dispute resolution, including conciliation and arbitration. However, these mechanisms were seldom invoked as both parties were likely reluctant to formally accuse the other of material breaches. In the absence of an effective enforcement mechanism, the Accords were often disregarded, not only due to a lack of coercive power, but also because they lacked perceived legitimacy.

In *The Power of Legitimacy Among Nations*, Thomas Franck argues that compliance with international law is often secured not by enforcement but by legitimacy, defined as "the non-coercive factor, or bundle of factors, predisposing toward voluntary obedience". [51] According to Franck, legal texts lacking legitimacy or issued by institutions perceived as illegitimate, are far less likely to be followed. For a legal instrument to be considered legitimate, it must be legally binding upon signature and demonstrate determinacy, meaning its terms must be clear and unambiguous.

Similarly, Watson notes that although the Oslo Accords do not meet the traditional definition of a treaty (e.g. an agreement between nation-states[52]) since neither the PA nor the PLO are sovereign states, they are nevertheless legally binding agreements between subjects of international law.[53] Historical and legal precedents show that national liberation movements can enter into valid agreements with states, even before attaining statehood[54].

Moreover, Franck emphasizes that indeterminacy often justify non-compliance. In the case of Oslo, the vagueness surrounding the "permanent status" and the absence of clearly defined costs and consequences of violations (settlement expansion and acts of terrorisms), significantly weakened compliance by both parties.

[51] T M Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990).

[52] As defined by the Vienna Convention on the Law of Treaties.

[53] GR Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000).

[54] He justifies his conclusion by referencing the several agreements made between former colonial powers and colonial independence movements before the colony declared independence. For example, the 1962 Evian Accords between France and Algeria,or the 1979 Lancaster House Agreements between Zimbabwe and Southern Rhodesia.

(iii) The Problem with Palestinian Sovereignty

While the Oslo Accords acknowledged the legitimacy of Palestinian political rights, they lacked a clear vision for Palestinian statehood. The agreements did not define the borders of a future state, nor did they establish any serious commitment to sovereignty. Instead, they established the Palestinian Authority (PA), a provisional administrative body with limited jurisdiction over certain civilian affairs, without actual sovereign powers.

Under international law, sovereignty refers to the exclusive authority of a state over its territory and population. According to Article 1 of the 1933 Montevideo Convention on Rights and Duties of States, a sovereign state, to be considered such, must possess the following qualifications[55]:

1. a permanent population
2. a defined territory
3. a government
4. the capacity to enter in relations with other states[56]

The convention is often cited by authors when discussing statehood and it is considered by many a codification of customary law. Sovereignty also implies the principles of self-determination, territorial integrity, non-interference[57] and equality among states[58].

Many scholars argue that the Oslo process provided Palestinians with "vestiges of statehood", a facade of governance, while "formalizing the ceiling of Palestinian self-rule" under Israeli control. [59] The PA had no authority over external borders, airspace, the movement of goods and people or natural resources. Following the territorial division of the West Bank, only Area A (18% of the territory) was under full Palestinian civilian and security control. Area

[55] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.
[56] Id. art 1.
[57] States should not intervene in the internal affairs of other states. It preserves state autonomy.
[58] It states that each state, regardless of their size and economic power, is considered a sovereign state with equal rights and duties (also present in Art.2(1) of the UN Charter).
[59] Seth Anziska, *Preventing Palestine: A Political History from Camp David to Oslo* (Princeton University Press 2018).

B (22%) remained under Palestinian civil control but became subject to joint Israeli-Palestinian security control, while Area C (60%) remained under full Israeli control.

This territorial fragmentation weakened the territorial contiguity and viability of a future Palestinian state and introduced a system of legal system and mobility disparities for Palestinians, effectively undermining PA's authority. As a result, the Oslo accords created a self-governmental institution, an "interim autonomy", but did not establish real sovereignty as the PA lacked control over external relations, defense and territorial integrity.

(iv) A Background of Violence

The Oslo process unfolded against a background of violence which further undermined the trust between the countries and repeatedly disrupted negotiations. From the beginning, both Israeli and Palestinian extremist groups sought to derail the process through terrorist attacks and targeted violence.

Just six months after the signing of the Oslo I Accord, 29 Palestinians were killed in the Cave of the Patriarchs massacre by an Israeli extremist. In response, Hamas carried out its first suicide bombing, killing eight Israelis and injuring 34. A week later, a second attack in Hadera resulted in five deaths and 30 injured.

Israeli academic Efraim Karsh noted that "more than 1,600 Israelis have been murdered and another 9,000 wounded since the signing of the Declaration of Principles, nearly four times the average death toll of the preceding twenty-six years" [60].

The growing frequency of terrorist attacks, culminating in the Second Intifada in 2000, shattered any remaining trust between the parties. For many Palestinians, negotiations were simply a cover for ongoing occupation and settlement expansion, while many Israelis came to view the peace process as enabling terrorism under the guise of diplomacy.

(v) Reception

From the outset, the Oslo Accords were met with widespread opposition from civilians and political actors on both sides. Among Israelis, especially among Zionists and religious

[60] Efraim Karsh, 'Why the Oslo Accords Doomed Peace' (2016) 23(4) *Middle East Quarterly* 1.

nationalists, there was deep resistance to negotiating with Yasser Arafat, whom many regarded as a terrorist or terrorist-affiliate. Arafat's role was indeed a subject of discussion and controversies during and after the Oslo process.

Some, including Joel Singer and Orde E. Kittrie, attribute the Oslo Accords' failures to Arafat's alleged unwillingness to negotiate in good faith and to his alleged support of terrorism[61]. In his June 24, 2002, Rose Garden speech, President George W. Bush declared that "peace requires a new Palestinian leadership [...] not compromised by terror"[62].

Conversely, former Israeli Foreign Minister Schlomo Ben-Ami, in his book *Scars of War, Wounds of Peace*, wrote:

> "The PLO was Israel's collaborator in the task of cutting short an authentically democratic struggle for Palestinian independence [...] the Israelis conceived of Arafat as a collaborator of sorts, a *sub-contractor* in the task of enhancing Israel's security"[63].

Similarly, Palestinian-American academic Edward Said, who famously called the Oslo Accords a "Palestinian Versailles[64]", saw Arafat as a subcontractor of Israeli occupation, more concerned with his own political survival than with Palestinian self-determination.

On the Israeli side, many citizens opposed any territorial concessions or redeployments that could compromise their claim to Biblical Israel, also known as the "Promised Land." This religious-historical concept encompasses not only modern-day Israel but also the West Bank, Gaza Strip, and parts of Jordan, Lebanon and Syria. The Biblical texts describe it as stretching "from the river of Egypt to the great river, the Euphrates"[65].

Meanwhile, many Palestinians viewed the agreements as fundamentally unjust. While they were required to recognize Israel's right to exist, Israel did not reciprocate by recognizing Palestinian statehood, leading to widespread skepticism about the fairness and viability of the peace process.

A key flaw in the Oslo Process was indeed its lack of inclusive participation. Ordinary Israelis and Palestinians, those most affected by the agreements, were excluded from decision-

[61] Orde F Kittrie, 'More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords' (2003) 101 *Michigan Law Review* 1661
[62] White House, 'President Bush Calls for New Palestinian Leadership' (Press Release, 24 June 2002).
[63] Schlomo Ben-Ami, *Scars of War, Wounds of Peace: The Israeli-Arab Tragedy* (Oxford University Press 2007) 191, 211.
[64] Edward Said, 'The Morning After' (21 October 1993) 15(20) *London Review of Books*.
[65] *The Holy Bible: New International Version* (Zondervan 2011) Genesis 15:18

making processes. In light of the principle of self-determination[66], many scholars believed they should have been granted the opportunity to determine their future, for example through public referendums or consultative processes. The exclusion of Palestinian political actors, especially Hamas, turned out to be a fatal mistake, further delegitimizing the accords in the eyes of the Palestinian population.

(vi) The Fragmentation of the Palestinian Political Field

At the time of the Oslo Process, Palestine was already politically and institutionally fragmented which weakened its position in the negotiations. Lacking sovereignty, a unified government and state institutions, Palestinians entered negotiations from a position of imbalance and asymmetry compared to Israel, an established state with a clear economic and military superiority.

In his paper *The Fragmentation of the Palestinian Political Field*, sociologist Jamil Hilal traces the events that led to the disintegration of the Palestinian national political field into local "sub geopolitical" spheres.[67] The fragmentation began with the Israeli invasion of Beirut in 1982 and the PLO's subsequent departure from Lebanon but became particularly evident after the signing of the Oslo Accords.

The process culminated in the split of the Palestinian Authority (PA) into two rival governments, each run by a separate political party or movement: one in the West Bank, controlled by Fatah[68], and the other in the Gaza Strip, controlled by Hamas. Although both factions defined themselves as national liberation movements, they assumed the characteristics of territorial governments with "hierarchical institutions and rigid bureaucratic systems"[69].

Hilal argues that this disintegration was driven by both external and internal structural flaws. Initially, the Palestinian Liberation Organization (PLO) was the sole representative of the Palestinian people, incorporating all the Palestinian political factions. It operated as a highly centralized and hierarchical body, with decision-making power concentrated in the hands of a

[66] The principle of self-determination is closely linked to the concept of state sovereignty. It states that people have a right to determine their own political status and freely determine their economic, social and cultural development.
[67] Jamil Hilal, 'The Fragmentation of the Palestinian Political Field: Sources and Ramifications' (2018) 11(1–2) *Contemporary Arab Affairs*
[68] An acronym meaning "Palestinian national liberation movement". Founded in the late 1950s by Yasser Arafat, it is a secular Palestinian political and pluralistic movement with no strict ideology. It is now the largest and most influential political party in the PLO. Its leader is also the president of the PA.
[69] Jamil Hilal, 'The Fragmentation of the Palestinian Political Field: Sources and Ramifications' (2018) 11(1–2) *Contemporary Arab Affairs* 189–206

small elite who prioritized the "national question" (Palestinian statehood) over local political and social issues.

For many years, the PLO leadership often operated and resided abroad, in Lebanon, Syria and Jordan, before ultimately moving to Ramallah and Gaza in 1967. This structure, although intended to overcome Palestinian geographical dispersion, eventually alienated segments of the population.

Over time, the PLO's elitist leadership left many Palestinians without real representation and unable "to initiate policies and actions"[70]. This vacuum enabled alternative local political leaderships, such as Hamas and the Islamic Jihad, to gain support. Furthermore, after the Oslo Accords, the PLO distanced itself from "the fate and the rights of the Arab Palestinian minority in the occupied territories"[71], the right of the Palestinian refugees and the right to a sovereign state, further undermining its legitimacy.

As Hilal concludes, "the Oslo Accords provided the setting for the marginalization of PLO institutions"[72]. In the absence of a unified political leadership and coherent national strategy, Hamas and Fatah have, over the past two decades, retained high levels of public support. Their rise to power was also reinforced by the limited authority of the PLO which lacked control over crossings, natural resources, foreign trade and much of the West Bank and Gaza Strip.

1.3 Israel Withdrawal from the Gaza Strip

Israel's occupation of the Gaza Strip began during the 1967 Arab-Israeli War, during which it also occupied Egyptian territories and the Sinai Peninsula. In the years that followed, Israel established 21 settlements in Gaza, inhabited by approximately 8,000 citizens. However, it soon became evident that the security and economic costs of maintaining the settlements were unsustainable.

After the end of the Oslo Process, Israel's partial withdrawal from the Gaza Strip (and the Jericho area) formally began in 1994, following the signing of the Gaza-Jericho Agreement. After 27 years of occupation, these territories were placed under the provisional control of the

[70] Jamil Hilal, 'The Fragmentation of the Palestinian Political Field: Sources and Ramifications' (2018) 11(1–2) *Contemporary Arab Affairs* 189–206, 195.

[71] Id. at 198.

[72] Id. at 202.

PA. As discussed earlier in this chapter, Israeli redeployment was to occur in three phases, at six-month intervals, and be completed within 18 months.

In the early 2000s, amid rising tensions between settlers and Palestinians and the escalation of violence during the Second Intifada, Israeli public support for withdrawal grew. In addition, Israeli leaders were increasingly preoccupied with the so-called "demographic issue": as Palestinians began to gradually shift from the fight for independence to demands for equal voting rights, many Israelis feared that this would compromise the "Jewish character" of the state. The response was a policy that would "maximize the Jewish population and minimize the Palestinian population"[73].

1.3.1 The Disengagement Plan

In December 2003, Prime Minister Ariel Sharon proposed a "Disengagement Plan", approved by the Knesset in 2005. The plan called for the evacuation of all Israeli civilians from Gaza (and four settlements in the West Bank), as well as the removal of most Israeli military forces from the area. Sharon designed the plan to improve Israel's security and international status in the absence of effective peace negotiations.

The evacuation began on August 15, 2005, and was completed by September 12, 2005. Israel withdrew from the Gaza-Egypt border (which is now under the control of Egypt and the PA) and removed 8,475 settlers from Gaza. However, according to Article 3(1) of the plan, Israel retained control over Gaza's borders, airspace and coastline, and reserved the right to undertake military operations in the region if deemed necessary[74].

Since then, Israel has continued to supply Gaza with water, telecommunication, electricity and sewage infrastructure. At the same time, the Israeli military remained deployed along Gaza's southern border closing its crossings and effectively controlling the movement of people and goods. Additional restrictions include the need for Israeli permits to import basic goods such as milk, to register children in the Palestinian population registry, to fish in Gaza's coastal waters, to export agricultural products and, for Palestinian students, to participate in study-abroad programs. Even financial transactions, including the transfer of salaries, are controlled by Israel.

[73] From an interview with Ehud Olmert, deputy leader of Ariel Sharon. See: Haaretz, 'Maximum Jews, Minimum Palestinians' (*Haaretz*, 13 November 2003).

[74] Israel Ministry of Foreign Affairs, *Revised Disengagement Plan – Main Principles* (6 June 2004).

Ultimately, the Disengagement Plan physically separated the Gaza Strip from the West Bank, in contravention of Chapter Two of the Oslo II Accords which stipulated that the two territories should be regarded as a single territorial unit. This separation led to Gaza's social, political and economic isolation, leaving it dependent on Israel.

1.3.2 Legal Debates on the Status of Occupation Post-Disengagement

The nature and extent of Israel's control over Gaza following the disengagement has sparked an ongoing legal debate. The United Nations, numerous human rights organizations and many legal scholars considered the Gaza Strip to be still under Israeli military occupation.

Sarah Leah Whitson, former Executive Director of Human Rights Watch's Middle East and North Africa Division, stated at the time that Israel "will remain an occupying power with responsibility for the welfare of the civilian population"[75]. She emphasized that "the test for determining whether an occupation exists is effective control by a hostile army, not the positioning of troops. [...] Whether the Israeli army is inside Gaza or redeployed around its periphery and restricting entrance and exit, it remains in control".[76]

On July 19, 2024, the International Court of Justice (ICJ) issued an advisory opinion on the *Legal Consequences Arising from Israel's Policies and Practices on the Occupied Palestinian Territories, Including East Jerusalem*. The Court stated that "the Israeli settlements in the West Bank and East Jerusalem, and the regime associated with them, have been established and are being maintained in violation of international law", specifically Article 49 and 64 of the Fourth Geneva Convention[77]. The Court also found that Israel's conduct violates the 1907 Hague Regulations concerning the appropriation of land and resources[78], and the International Covenant on Civil and Political Rights (ICCPR), particularly provisions prohibiting torture and inhumane treatment, and guaranteeing equal protection under the law[79].

Finally, Israel's discriminatory legal system towards Palestinians was found to contravene Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which prohibits racial discrimination and apartheid.

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[75] Human Rights Watch, 'Israel: "Disengagement" Will Not End Gaza Occupation' (28 October 2004)
[76] Ibid.
[77] "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". See: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 49.
[78] Id. Article 43, 46, 52 and 55.
[79] Id. Article 7, 2(1) and 26

However, not all scholars agree with the characterization of Gaza as "occupied." Some scholars like Yuval Shany, argue that under traditional law of occupation, Israel can no longer be considered an occupying power because it does not deploy permanent troops within Gaza[80].

Professor Hannah Cuyckens contends that Israel has avoided the obligations imposed by the law of occupation by not deploying troops while still controlling the territory from the outside. She argues that "Gaza is not technically occupied, given that there is no longer any effective control in the sense of Article 42 of the Hague Regulations." Indeed, Article 42 of the 1907 Hague Convention (IV) defines occupation as a territory "actually placed under the authority of the hostile army", in which "the occupation extends only to the territory where such authority has been established and can be exercised."[81]

In support of this view, the European Court of Human Rights (ECHR) made a similar distinction in the case *Chiragov and Others v. Armenia* (2015)[82] which dealt with the displacement of six Azerbaijani nationals during the Nagorno-Karabakh conflict. The Court held that:

> "Military occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion, *physical presence* of foreign troops is a sine qua non requirement of occupation, that is, *occupation is not conceivable without "boots on the ground", therefore forces exercising naval or air control through a naval or air blockade do not suffice*."[83]

While the presence of ground troops has traditionally been the legal threshold for determining occupation, the ongoing legal debate shows how modern conflicts challenge the adequacy of traditional criteria.

[80] Yuval Shany, 'Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 Israel Law Review 68, 72.
[81] International Committee of the Red Cross, *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (1907) art 42.
[82] *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16 June 2015).
[83] Id. para 96.

1.4 The Fatah-Hamas Conflict

Until the First Intifada[84], Fatah was the dominant party within the PLO. With the rise of Hamas as an alternative resistance movement, tensions emerged between the two factions, divided by ideology, strategy and political agendas. The tensions intensified particularly after the signing of the Oslo Accords.

During the Oslo Process, Fatah, led by Yasser Arafat, was the main Palestinian actor involved in the negotiations. The movement supported a two-state solution and the establishment of a Palestinian Authority (PA), viewing the accords as a necessary step towards Palestinian statehood. In contrast, Hamas, along with the Islamic Jihad and the PFLP, opposed the peace process from the beginning. They argued that the accords represented a betrayal of Palestinian rights as they failed to address important issues such as the right of return for Palestinian refugees and the liberation of historic Palestine. Refusing to recognize Israel[85], Hamas was excluded from the negotiations and instead positioned itself as a resistance movement, attempting to sabotage the negotiations through suicide bombings and armed attacks.

Over time, Hamas consolidated its influence by capitalizing on the failures of the Oslo Accords, the perceived corruption and inefficiency of the PA, and increasing public frustration with the peace process. Despite its marginalization from formal politics, Hamas gradually gained popular support, particularly among Palestinians disillusioned with the expansion of Israeli settlements and the stagnation of "final status" negotiations.

Hamas popularity grew further also thanks to its vast social services network, especially in the Gaza Strip[86], which allowed it to present itself as the main opposition to Oslo and a credible alternative to the PLO.

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[84] The first major Palestinian mass revolt against Israeli occupation. It began in 1987 and lasted until the 1990s. Despite involving mass demonstrations, civil disobedience and boycotts, the Israeli military responded with widespread arrests and deaths. It led to the Madrid Conference (1991), the Oslo Accords (1993) and the rise of Hamas.

[85] In their 1988 manifesto, Hamas militants call for the "obliteration" of Israel and its replacement with an Islamic state. As stated in the manifesto, "there is no solution for the Palestinian question except through Jihad". See: Hamas, *The Covenant of the Islamic Resistance Movement* (1988) The Avalon Project, Yale Law School.

[86] Notably, garnering public transport, opening clinics (like Al Quds Clinic), offering accessible healthcare, building schools, distributing food and financial aid. These essential services, administered through Islamic charities, were often more efficient and less corrupt than those offered by Fatah. See: US Department of the Treasury, 'Treasury Targets Hamas-Controlled Charitable Organizations and an Iranian Official Funding Hamas' (US Department of the Treasury, 22 August 2007) And Matthew Levitt, 'Undercutting the Culture of Militancy: Designating Hamas Charities' *The Washington Institute for Near East Policy* (1 January 2003).

1.4.1 The Civil War

The political rivalry between Fatah and Hamas persisted throughout the 1990s and early 2000s, culminating in a civil war after Arafat's death in November 2004 and the subsequent election of Mahmoud Abbas. When Hamas won the legislative elections on January 25, 2006, securing 44% of the vote and 74 of 132 seats, tensions escalated into a constitutional crisis as the two factions repeatedly failed to form a coalition government.

The international community, in particular the U.S. and the EU, responded by imposing severe sanctions and suspending foreign aid to the PA (on which the Palestinian economy heavily depended) unless Hamas complied with the so-called Quartet conditions: renunciation of violence, recognition of the State of Israel and acceptance of prior agreements. Hamas rejected these conditions, leading to a period of dual governance, institutional paralysis and financial crisis.

Violence escalated into an open conflict when Hamas launched a military operation and seized control of the Gaza Strip, expelling Fatah and effectively splitting the Palestinian territories between the two governments. Hamas governed Gaza through a new government composed mostly of its members, while Fatah retained control over parts of the West Bank and refused to cooperate with the Hamas-led government.

During the Saudi-brokered Fatah-Hamas Mecca Agreement of February 8, 2007, Fatah and Hamas negotiated the implementation of the 2005 Cairo Agreement[87], the cessation of violence and the formation of a national unity government. On March 17 a new government was formed, with ministers from both factions, but it struggled to address the economic crisis and the collapse of security in the Gaza Strip[88].

In June 2007, after months of violent street clashes, Hamas militants took full control of the Gaza Strip, expelling Fatah. The civil war lasted only five days, from June 10 to 15, but resulted in the deaths of at least 118 people. Human Rights Watch accused both parties of

[87] The declaration affirmed the status of the PLO as sole legitimate representative of the Palestinian people. It also reformed the PLO by including Hamas and the Islamic Jihad and ensuring the participation of all factions according to democratic principles. It was signed by all twelve Palestinian factions including Hamas, Fatah, Islamic Jihad, PFLP and DFLP.

[88] The collapse of security was caused by the multiple competing security forces (like the Palestinian Preventive Security Forces, aligned with Fatah, and the Executive Force, formed by Hamas) and the state of near-anarchy created by street violence.

violating international humanitarian law, including the targeting of civilians and the public execution of political opponents and prisoners[89].

On June 14, President Abbas dissolved the Hamas-led government, dismissed the Prime Minister Ismail Haniyeh and declared a state of emergency, planning to govern Gaza and the West Bank by presidential decree. Hamas rejected the decisions as "worthless" [90] and illegitimate since, under the Palestinian Basic Law, a state of emergency could only last 30 days, after which it required approval from the Palestinian Legislative Council, in which Hamas held the majority. The international community, however, recognized Abbas' emergency government in the West Bank and resumed foreign aid to the PA.

Since then, the PA has been divided into two factions, each claiming legitimacy as the true representative of the Palestinian people: the Fatah-led Palestinian National Authority in the West Bank, and the Hamas government in Gaza.

1.4.2 The Reconciliation Process

Following the political split, numerous attempts were made to restore governmental unity, including the 2011 Cairo Agreement, the 2014 Gaza and Cairo Agreements and the 2017 Cairo Reconciliation deal, none of which were fully implemented.

These negotiations focused primarily on security control and electoral arrangements but both parties appeared more interested in gaining international legitimacy than in committing to the cause. The 2014 agreements led to the formation of a coalition government headed by Prime Minister Rami Hamdallah, an independent figure not affiliated with either faction. However, by 2017, the PA retained some governmental functions and full civilian control in the Gaza Strip but its inability to fully perform them led to Fatah's withdrawal from the region. The reconciliation process formally ended in 2019 with Hamdallah's resignation and the dissolution of the unity government.

The failure of the reconciliation process can also be attributed to external pressures. President Abbas publicly stated that Israel and the US had pressured him not to form a unity government with Hamas. After the 2011 Cairo Agreement, Israeli Prime Minister Benjamin

[89] Human Rights Watch, 'Gaza: Armed Palestinian Groups Commit Grave Crimes' (12 June 2007).
[90] BBC News, 'Hamas Takes Control of Gaza' (15 June 2007).

Netanyahu declared: "The PA must choose either peace with Israel or peace with Hamas"[91]. When a national unity government was formed in 2014, even without Hamas ministers, Israel condemned the decision and imposed sanctions on the PA, including the withholding of tax revenues[92]. The collapse of the 2017 Hamdallah government was fueled both by Fatah's inefficiency and by a longstanding electricity crisis in the Gaza Strip, exacerbated by Israeli blockade.

Additional reconciliation attempts in 2020 and 2022, including plans for elections and governmental unity, were accelerated during the Trump administration but ultimately failed. Since the outbreak of the Israeli-Hamas War in October 2023, all reconciliation efforts have ceased.

1.4.3 Aftermath

Following the Fatah-Hamas conflict, the Gaza Strip suffered the most. Both Israel and Egypt imposed a blockade on Hamas government, while the PA retaliated by cutting salaries of public employees and restricting funding to essential services in an attempt to pressure Hamas into leaving Gaza. However, these retaliatory policies primarily harmed civilians, worsening their living conditions and eroding their trust in the Palestinian leadership. The blockade, along with ongoing armed confrontations, inadequate infrastructure and healthcare, and high unemployment, has led to the humanitarian crisis that continues to this day.

1.5 The Israel-Hamas War

This paragraph offers a brief overview of the ongoing conflict. Specific events and legal-political issues will be addressed in greater detail in Chapters II and III.

[91] B Ravid, 'Abbas reacts: PM must choose between peace, settlements' *The Jerusalem Post* (4 October 2011).
[92] Israel frequently uses the withholding of taxes it collects on behalf of the PA as a means of pressure. They used it after the formation of the 2006 PA government, the 2007 unity government and the 2011 reconciliation agreement.

1.5.1 The 7 October 2023 Attack

On October 7, 2023, the day of the Jewish Sabbath, Hamas launched a surprise attack on Israel, killing nearly 1,200 people and taking 251 hostages, including children and elderly civilians. The attack, referred to by Hamas officials as Operation al-Aqsa Flood, was unprecedented both in scale and strategy, marking the deadliest day in Israel's history.

As Figure 2 shows, the offensive began with the launch of thousands of rockets into central and southern Israel, reaching as far as Tel Aviv[93]. Hamas militants then infiltrated Israeli towns and villages near the Gaza border, where they killed civilians, took hostages and set homes on fire. In the Nova Festival massacre alone, 325 Israelis were killed[94].

Numerous war crimes and violations of international humanitarian law [95] were committed, including breaches of Article 3 of the 1949 Geneva Conventions (prohibiting inhumane treatment of civilians and non-combatants), Article 51 of Protocol 1 (protection of civilian population from attacks) and Articles 7 and 8 of the Rome Statute (crimes against humanity and war crimes). In March 2024, UN investigators reported there were "reasonable grounds to believe" that Hamas militants committed "some forms of sexual violence" against hostages and victims during the October 7 attack[96].

Mohammed Deif, former leader of Hamas' military wing, stated that the assault was in response to the 16-year blockade of the Gaza Strip, settler violence against Palestinians and settlements expansion. However, some interpreted the attack as an attempt by Hamas to provoke a permanent state of war and revive international interest in the Palestinian cause. Documents recovered from a Hamas tunnel indicate that one of the organization's chiefs viewed the attack as an "extraordinary act" necessary to revive the Palestinian cause[97].

[93] Al Jazeera 'How the Hamas Attack Unfolded' (9 October 2023).

[94] Associated Press, 'Hamas Militants Storm Israeli Towns in Surprise Attack; Israel Retaliates with Airstrikes on Gaza' (7 October 2023) *AP News*

[95] Council on Foreign Relations, 'What International Law Has to Say About the Israel-Hamas War' (20 October 2023).

[96] United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Israel/West Bank: Mission of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict* (3 May 2024) United Nations.

[97] Maria Abi-Habib and Warren P Strobel, 'Hamas Wanted to Torpedo Israel-Saudi Deal with Oct. 7 Attacks, Documents Reveal' (1 December 2023) *The Wall Street Journal*

Figure 2. Geography of the 7 October 2023 Hamas attack on Israel, showing locations of rocket fire, airstrikes, and ground incursions along the Gaza-Israel border.

1.5.2 Israel Military Response

In response, Israel declared war with the stated aim of eradicating Hamas from the Gaza Strip. Within hours of the attack, the Israeli Defense Forces (IDF) launched an intensive campaign of airstrikes, bombardments and ground operations targeting Hamas infrastructure and leadership.

On October 9, Israeli Defense Minister Yoav Gallant announced a "complete siege" of the Gaza Strip, blocking the entry of food, water, medicine, fuel, electricity and humanitarian aid. Following international criticism, including from Human Rights Watch (HRW), Israel eased some restrictions and allowed limited aid into Gaza. On October 27, Israel invaded northern Gaza, accompanied by heavy bombardment (see Figure 3), including the widely condemned Jabalia refugee camp massacre[98], which resulted in high civilian casualties. Israel defended the strike by claiming it targeted Hamas commanders.

In December 2023, Israel issued evacuation orders but, due to blackouts and communication disruptions, many civilians were unable to follow or receive the instructions.

[98] The IDF struck the refugee camp, killing 50 civilians and injuring 150, mostly women and children.

In multiple instances, areas designated as safe zones, such as Rafah and Kahn Younis, were later bombed. Amnesty International reported once again a lack of evidence for Hamas targets in those areas. In February 2024, during a bombing campaign in Rafah, Israeli forces opened fire on a group of civilians waiting for food aid, killing approximately 100 Palestinians, an episode referred to as the “Flour Massacre”.

In May 2024, the IDF officially invaded Rafah, again ordering civilians to evacuate to the southern areas of the city (see Figure 3). After a second offensive in Khan Younis, a temporary ceasefire was negotiated in January 2025, involving prisoner exchanges and humanitarian aid deliveries. However, the ceasefire ended after Israel accused Hamas of failing to release the remaining hostages and resumed military operations.

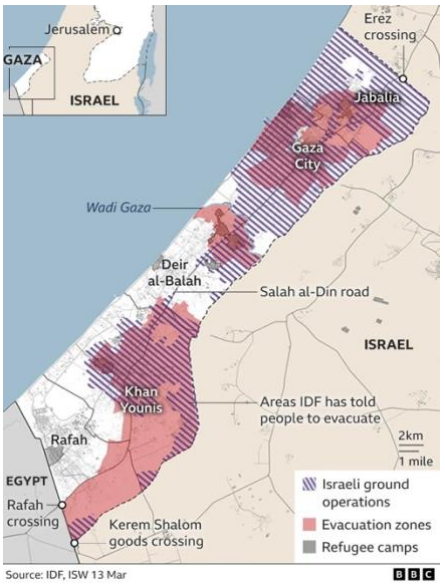

Figure 3. Satellite image showing fires and smoke plumes in Israel and the Gaza Strip on 7 October 2023, following the outbreak of conflict.

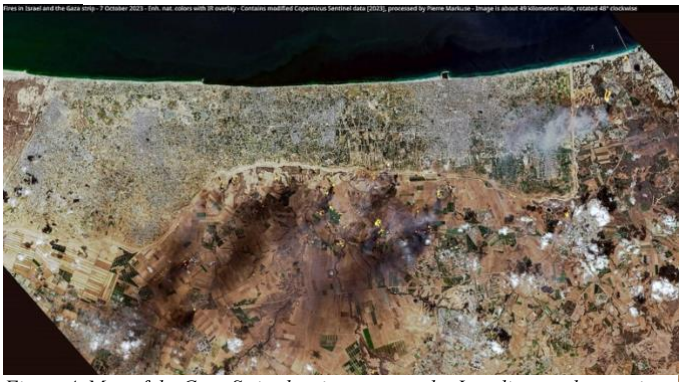

Figure 4. Map of the Gaza Strip showing areas under Israeli ground operations, evacuation zones and refugee camps.

1.6 Conclusion

The historical and political context of *South Africa v. Israel* is characterized by rapid escalation and a humanitarian crisis. The attack by Hamas on 7 October 2023 precipitated a devastating armed conflict, prompting Israel to launch a massive military campaign in the Gaza Strip. The resulting offensive has caused extensive destruction in Gaza, with estimates indicating approximately 55,000-60,000 Palestinians killed (as of mid-2025), including 18,000 children[99][100]. Additionally, more than 146,000 individuals have been injured and nearly 90% of Gaza's population has been displaced[101]. Furthermore, the civilian population, under a state of siege, faces severe shortages of food, water, medical supplies and other necessities. Experts have cautioned that there is a considerable risk of famine, with over 100,000 Palestinians potentially facing starvation[102].

Amidst the ongoing violence, inflammatory rhetoric by some Israeli public officials has further intensified international concern. Multiple officials from Israel invoked narratives of complete annihilation and utilized dehumanizing language directed at Palestinians in Gaza. Such remarks, in conjunction with the military offensive, received widespread condemnation and were perceived by many as indicative of genocidal intent.

[99] Associated Press, 'More than 55,000 Palestinians have been killed in the Israel-Hamas war, Gaza health officials say' AP News (10 July 2025).
[100] Mallory Moench, 'Nearly 70% of Gaza war dead verified by UN are women and children' BBC News (online, 8 November 2024).
[101] UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Reported Impact: Snapshot – Gaza Strip (as of 30 July 2025)' (OCHA, 30 July 2025).
[102] Emma Graham-Harrison and Malak A Tantesh, 'Famine under way in Gaza, UN-backed experts say, as war death toll passes 60,000' *The Guardian* (29 July 2025).

Given the extent of the destruction and the severity of violence, the conflict in Gaza has also become a matter of international legal accountability. In December 2023, South Africa instituted proceedings against Israel before the International Court of Justice (ICJ), alleging that Israel's actions in Gaza violate the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). South Africa contends that Israel's conduct and rhetoric are of a genocidal nature and demonstrate an intent to destroy, in whole or in part, the Palestinian population.

The developments outlined in this chapter (including the historical context, Hamas' attack, Israel's military operations and the ensuing humanitarian crisis) form the evidentiary and political basis of *South Africa v. Israel*. Having established the factual and political underpinnings of the dispute, the analysis now proceeds to examine the ICJ's initial involvement in the case through the provisional measures proceedings, where the Court was required to evaluate the plausibility of South Africa's genocide claim and to order urgent relief.

Chapter II

The Provisional Measures Proceedings

2.1 Introduction

Following the outbreak of war in Gaza on October 7 and the resulting humanitarian crisis, South Africa took the step of instituting proceedings against Israel before the International Court of Justice (ICJ). On December 29, 2023, South Africa filed an application initiating proceedings against Israel at the ICJ, alleging violations of its obligations under the Genocide Convention(1948), particularly in regard to Article IX (1)[103], concerning Palestinians in the Gaza Strip. The case is now known as the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

In ICJ proceedings, once a state has filed an application alleging violations of international law, the case generally proceeds through two distinctive phases: the provisional measures phase and the merits phase. The provisional measures phase occurs at an early stage, when a party requests urgent, temporary orders to prevent irreparable harm before the Court has issued a final judgment. Although binding, such measures are not a determination on the merits of the dispute; they are intended to preserve the rights of the parties and prevent an escalation of the conflict, such as ordering a temporary ceasefire or suspension of certain actions. By contrast, the merits phase constitutes the main stage of the proceedings, during which the Court carefully examines the substantive legal claims and defenses. In this phase, both parties submit written pleadings, present oral arguments and respond to the judges' questions. The Court ultimately issues a final judgment, determining whether international law has been violated, assessing responsibility and prescribing eventual reparations. Whereas

[103] "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." See: Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 9.

provisional measures address urgent risks, the merits phase resolves the legal dispute and produce a judgment that is final and binding on the parties.

This chapter analyzes the procedural phase of the case, covering developments from the filing of the application in December 2023 through the Court's orders up to mid-2025. After providing a brief overview of the Gaza Strip and the West Bank to establish context for the proceedings, the chapter outlines the genesis of the case. It explains the content of South Africa's application, including the initial provisional measures requested. It then examines the Court's jurisdictional framework and the issue of South Africa's *locus standi*, drawing on precedent cases and the concept of obligations *erga omnes partes*. The core of the chapter is a chronological account of the provisional measures phase, divided into subsections for each oral hearing, request and order issued by the Court from January to May 2024, with a final section covering procedural developments after May and third-state interventions.

2.2 Territorial Background: The Occupied Palestinian Territories (OPT)

The so-called Occupied Palestinian Territories (OPT) and the State of Palestine[104] consist of two separate geographical areas: the Gaza Strip and the West Bank, including East Jerusalem.

The Gaza Strip is a narrow strip of land situated along the Mediterranean Sea, bordering Egypt and Israel. It covers approximately 365 square kilometers and is one of the most densely populated areas in the world, with 2.3 million residents, nearly half of whom are children[105]. More than 80% of Palestinians in Gaza are refugees or descendants of refugees, victims of the mass displacement (the Nakba), caused by the establishment of the State of Israel.

The Strip is divided into five districts: North Gaza, Gaza City, Deir el-Balah, Khan Yunis and Rafah. North Gaza hosts the Jabalia refugee camp, the largest of the Strip, and, with its population of 114,000 refugees, is one of the most densely populated places on earth. Gaza City is home to over 700,000 residents and hosts several UN compounds, including those of UNRWA and the UN Development Programme (UNDP). Deir el-Balah, located in the middle of the Strip, is home to four refugee camps and has the only operating power plant in Gaza. Meanwhile, Khan Yunis hosts the Khan Yunis refugee camp, which is home to approximately

[104] On 29 November 2012 it was accorded non-member observer status in the United Nations, still not reaching full recognition in the international stage.
[105] Al Jazeera, 'The Gaza Strip Explained in Maps' (Al Jazeera, 7 August 2022).

87,000 people. Lastly, Rafah is best known for its two crossings: the first, the Rafah Crossing, to Egypt, and the second, the Karem Abu Salem crossing, to Israel. Both are regularly closed. Rafah is the only exit available for Gazans who want to travel to other countries since the only functional airport in the Strip was bombed and destroyed by Israel in 2001[106].

As discussed in the previous chapter, since 2007, Israel has maintained complete control over Gaza's airspace, territorial waters, land crossings, water, electricity, electromagnetic sphere and civilian infrastructure, as well as over key government functions (despite being officially disengaged from the Strip). Entry and exit by air and sea to Gaza are prohibited, with Israel operating the Rafah Crossing (for goods) and the Beit Hanoon / Erez Crossing (for pedestrians). Palestinians can leave the Strip through these crossings only with special permits for urgent medical treatment or, in most cases, for low-skilled workers to be employed in Israel or Israeli settlements. However, this process usually takes weeks or months, depending on the situation at the border. The World Health Organization (WHO) reported that 839 Palestinians died between 2008 and 2021 while waiting for medical permits[107].

The West Bank, the second occupied territory, is located near the Israeli eastern border and borders Jordan, taking its name from the west bank of the Jordan River. Covering 5,650 square kilometers, it is surrounded by Israel, Jordan and the Dead Sea. The West Bank is home to approximately three million Palestinians, including 871,000 registered refugees (distributed among 19 refugee camps)[108].

The territory is divided administratively into 11 governorates, which are grouped into three main population areas: the north (including the governorates of Nablus and Jenin), the center (Ramallah and Al-Bireh), and the south (Hebron and Bethlehem) (see Figure 5). These three territories are, in turn, divided into six cantons, each containing 68 ghettos, all of which are under the control of the Israeli army. The UN Office for the Coordination of Humanitarian Affairs (OCHA) in 2007 found that approximately 40% of the West Bank was occupied by Israeli infrastructure [109].

Regarding land control, the Oslo Accords divided the West Bank into Area A, Area B, and Area C (see sections 1.2.3 and 1.2.4)[110]. Officially, 465,000 Jewish settlers live in the 132

[106] Human Sciences Research Council, *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law* (HSRC 2009) 7–10.
[107] World Health Organization, *Right to Health in the Occupied Palestinian Territory: 2018–2021 Biennium Report* (WHO 2022) 16
[108] Al Jazeera Staff, 'A Simple Guide to the West Bank' (Al Jazeera, 31 August 2024)
[109] UN Office for the Coordination of Humanitarian Affairs, *The Humanitarian Impact of the West Bank Barrier on Palestinian Communities – Update June 2007* (OCHA oPt 2007) 3
[110] Area A is under full Palestinian civil and security control; Area B is under Palestinian civil control and joint Israeli-Palestinian security control; and Area C is under full Israeli control.

settlements in Area C, which are legal under Israeli law (plus more than 20,000 settlements not even recognized by the Israeli government)[111]. According to Israel, the settlements are necessary for security because they serve as a buffer against surrounding Arab states (especially Iran) and are not explicitly prohibited by the Oslo Accords (as discussed in section 1.2.5).

Figure 5. Map of the West Bank and Gaza Strip showing Palestinian governorates and urban centers.

The settlements are connected by a network of roads reserved for Israeli use and protected by the Israeli separation wall built in 2012 and declared illegal by the ICJ's advisory opinion in 2019 (see Figure 6)[112]. The wall is considered one of the key pieces of evidence supporting the claim of an Israeli apartheid state, as it has severely impacted Palestinians' lives by restricting their access to resources and work. Closures, roadblocks and permits limit their freedom of movement while incursions and raids by the Israeli army and settlers create a discriminatory and punitive environment[113]. The Committee on the Elimination of Racial Discrimination (CERD) confirmed that the laws and practices to which Palestinians are subjected in the West Bank constitute an apartheid state[114]. Similarly, the South African Human Sciences Research Council (HSRC) noted that Israel practices the three pillars of apartheid used in South Africa: (i) legally dividing the population into racial groups, granting special privileges to one group; (ii) segregating the population into different geographical areas through movement restrictions and relocations; and (iii) implementing "draconian" security

[111] Israel Policy Forum 'West Bank Settlements Explained' (Israel Policy Forum).
[112] International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) [2024] ICJ Rep 2024, 1
[113] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank* (July 2007) 5-6.
[114] Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel* (12 December 2019) UN Doc CERD/C/ISR/CO/17-19, para 22.

laws[115]. In 2022, Amnesty International joined Human Rights Watch and B'Tselem, an Israeli rights group, in accusing Israel of apartheid by publishing a 278-page report describing the conditions of Palestinian citizens in Israel (approximately 20% of the total population)[116]. Israel dismissed the report as biased, antisemitic and delegitimizing.

Figure 6. Israeli separation wall near Abu Dis, East Jerusalem.

Conversely, other scholars note that, under international law, the legal definition of apartheid requires the intent to maintain racial domination, systematic oppression and the perpetration of inhumane acts, as outlined in Article 7(2)(h) of the Rome Statute of the International Criminal Court (ICC)[117]. They argue that these criteria are not met as Israeli policies are driven by security concerns (particularly to address the increase in attacks and suicide bombings after the Second Intifada) rather than racial ideology[118]. Furthermore, the Israeli-Palestinian conflict is rooted in territorial disputes; it is not a conflict between racial groups. Therefore, these scholars consider the West Bank to be under military occupation

[115] Human Sciences Research Council, *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law* (Pretoria, May 2009), 8-9.

[116] Palestinians in Israel have citizenship, the right to vote and the opportunity to reach the highest ranks in fields like business, law, medicine and entertainment. However, they still face discriminatory policies such as property seizures and forced evictions, deprivation of economic and social rights, and segregation into enclaves. See: Amnesty International, 'Israel's Apartheid Against Palestinians: A Cruel System of Domination and a Crime Against Humanity' (1 February 2022).

[117] "The crime of apartheid' means inhumane acts […] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." See: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(2)(h).

[118] However, it is important to note that Zionism has been criticized as a settler colonial movement (and thus a racialized ideology) aimed at establishing a "pure" Jewish state by excluding and eliminating Palestinians. Theodor Herzl, the father of Zionism, famously wrote in his 1896 manifesto *The Jewish State* that such a state in Palestine would be "an outpost of civilization against barbarism": Theodor Herzl, *The Jewish State: An Attempt at a Modern Solution of the Jewish Question* (first published 1896, Dover Publications 1988) 30. Indeed, a recurring claim in Zionist discourse is that Palestinians did not truly exist at the time of Israel's creation. In 1969, Israeli Prime Minister Golda Meir stated: "It was not as though there was a Palestinian people in Palestine […] They did not exist": Alasdair Soussi, 'The Mixed Legacy of Golda Meir, Israel's First Female PM' (Al Jazeera, 18 March 2019). In 1975, the UN General Assembly formally recognized Zionism as a form of racism and racial discrimination in Resolution 3379, later revoked due to political pressure: UNGA Res 3379 (10 November 1975) UN Doc A/RES/3379(XXX); revoked by UNGA Res 46/86 (16 December 1991) UN Doc A/RES/46/86.

(governed by the laws of armed conflict) or systemic discrimination, which are very different legal regimes from apartheid[119].

2.3 Initiation of the Proceedings

Israel responded to the October 7 attack with a heavy bombing campaign and a complete siege of the Gaza Strip, leading to a serious humanitarian crisis involving thousands of civilian deaths, mass displacement and widespread destruction of infrastructure. As the conflict escalated, several political leaders and international experts warned that such violence could amount to genocide. United Nations special rapporteurs cautioned in October that, given "statements made by Israeli political leaders and their allies, accompanied by military action in Gaza," there was a "risk of genocide against the Palestinian people", and urged the international community to act to prevent it[120]. Likewise, several heads of state, from countries such as Brazil, Spain, Belgium and Turkey, publicly described Israel's actions in Gaza as "genocide".

South Africa, led by President Cyril Ramaphosa and Foreign Minister Naledi Pandor, has become one of the main critics of Israel's campaign in Gaza. Drawing on its own historical experience, South Africa compared its history with apartheid and the 1994 Rwandan genocide to the ongoing events in Gaza. On 30 October 2023, South Africa's Department of International Relations and Cooperation (DIRCO) issued a statement warning that "the crime of genocide, sadly, looms large" in Gaza[121]. Speaking before Parliament on November 7, Minister Pandor mentioned Rwanda, noting that "in 1994, a genocide occurred on the African continent with much of the whole world watching as innocent people were massacred", and emphasizing that South Africa "could not stand by and allow that to happen again"[122].

Therefore, South African diplomats delivered a formal démarche to the Israeli Ambassador on 19 November 2023, condemning Hamas's attacks but asserting that Israel's military response was unlawful and urging an investigation of Israeli leaders for "crimes including genocide"[123]. Later that month, South Africa joined several other countries in

[119] Abraham Bell and Eugene Kontorovich, 'Beyond the Apartheid Analogy' (Hoover Institution, 2020).
[120] UN Human Rights Office of the High Commissioner, "Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity; call for prevention of genocide against the Palestinian people" (Press release, 16 October 2023) UN Doc A/HRC/.
[121] DIRCO, "South Africa calls for the international community to hold Israel accountable for breaches of international law" (30 October 2023).
[122] Ministerial Statement on the Ongoing Israeli-Palestinian Conflict by Dr GNM Pandor, Minister for International Relations and Cooperation, in the National Assembly, House of Parliament (7 November 2023).
[123] Department of International Relations and Cooperation (South Africa), *DIRCO démarches the Ambassador of the State of Israel* (Media Statement, 10 November 2023) para 1–2.

referring the situation in Palestine to the Prosecutor of the ICC, explicitly requesting an investigation of potential genocide and other international crimes. Then, at a special BRICS[124] meeting on 21 November 2023, President Ramaphosa described Israel's siege of Gaza (the "deliberate denial of medicine, fuel, food and water") as "tantamount to genocide"[125].

South African representatives also used United Nations forums to warn Israel. During the UN General Assembly's Emergency Special Session on 12 December 2023 (in a debate where Israel was present), South Africa's UN ambassador stated that the events in Gaza showed Israel was "acting contrary to its obligations in terms of the Genocide Convention"[126]. In a document published by the Ministry of Foreign Affairs on 6 December, Israel denied the accusations, calling them "not only wholly unfounded as a matter of fact and law," but also "morally repugnant" and "obscene"[127].

On 21 December, South Africa submitted a Note Verbale to the Embassy of Israel in Pretoria, formally stating its legal position and concerns. This diplomatic note asserted that credible reports indicated that acts meeting the threshold of genocide had been committed (or were at risk of being committed) against Palestinians in Gaza, reminding Israel of its obligations under the 1948 Genocide Convention. The note called upon Israel to cease all hostilities that could constitute genocide or related acts and to refrain from conduct that might breach its Convention obligations, including the obligation to prevent and punish direct and public incitement to genocide by public officials. It also urged Israel to ensure the delivery of humanitarian aid to the civilian population. President Benjamin Netanyahu, however, rejected these allegations, dismissing them as outrageous, false and antisemitic. He maintained that "Israel was fighting a law-abiding war to defend itself from Hamas terrorism"[128].

By late December 2023, with Israel's campaign in Gaza ongoing and no progress through the UN Security Council, due to geopolitical deadlock, South Africa turned to the International Court of Justice as the forum of last resort to address the Palestinian situation.

[124] An intergovernmental political and economic organization, comprising ten emerging countries: Brazil, Russia, India, China, South Africa, Egypt, Ethiopia, Indonesia, Iran and the United Arab Emirates.
[125] Presidency of South Africa, "Remarks of President Cyril Ramaphosa at Extraordinary BRICS Leaders Meeting" (21 November 2023).
[126] United Nations General Assembly, Emergency Special Session No. 10, *Verbatim Record* A/ES-10/PV.45 (12 December 2023) 11–12 (South African UN representative).
[127]The document was later updated and reproduced on the website of the IDF. See: Israel Defense Forces, 'The War Against Hamas: Answering Your Most Pressing Questions' (IDF, 2024)
[128] Office of the Prime Minister of Israel, 'Prime Minister Benjamin Netanyahu's Statement Following the ICJ's Decision' (26 January 2024).

2.4 Content of South Africa's Application Instituting Proceedings (with Request for Provisional Measures)

On 29 December 2023, South Africa filed an application with the ICJ to initiate proceedings against Israel, titled *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* marking the first time genocide allegations are brought to the ICJ while the alleged crimes are ongoing**.** The document alleged that Israel's actions during its military operations in the Gaza Strip violated the 1948 Genocide Convention. Specifically, South Africa claimed that Israel has committed, is committing and risks further committing genocidal acts against the Palestinian people in Gaza.

In the introduction, South Africa asserts that acts and omissions of the Israeli government and military are genocidal because they are committed with the required specific intent (*dolus specialis*) "to bring about the destruction of a substantial part of the Palestinian national, racial and ethnic group" in the Gaza Strip[129]. The acts include "killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction"[130]. Israel is not only accused of committing genocide but also of failing to prevent it "by failing to prevent or punish the direct and public incitement to genocide by senior Israeli officials and others."[131]

Most importantly, the Application situates the current violence in the historical context of Israel's treatment of the Palestinian people, referencing Israel's conduct towards Palestinians during its "75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory, and its 16-year-long blockade of Gaza"[132]. By emphasizing the broader historical and political contexts of systematic discrimination and oppression (see Chapter I), South Africa argues that the recent events in Gaza are not isolated incidents but part of a systemic pattern.

The Application acknowledges that many of Israel's past and present actions (such as targeting civilians or imposing a blockade) constitute serious breaches of international law, namely war crimes, crimes against humanity and violations of humanitarian treaties. However,

[129] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 6-10.
[130] Id. 6.
[131] Id. 10.
[132] Id. 8.

South Africa contends that even acts that could be classified as war crimes are being committed with the specific intent to destroy the Palestinians in Gaza and, therefore, qualify as genocidal. Indeed, genocide often occurs as the culmination of a broader pattern of persecution, a "continuum" in Raphael Lemkin's terms. The International Law Commission Articles on State Responsibility also state that "the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful,"[133] as these crimes "tend to occur concurrently in the same situation rather than as isolated events"[134]. This shows that the prevention of genocide is inherently linked to the prevention of these other crimes. Therefore, the decades of dispossession and violence against Palestinians provide the context in which Israel's intent in Gaza must be considered.

2.4.1 Alleged Genocidal Acts Committed Against the Palestinian People

The core of the Application details the factual basis for the genocide allegations. South Africa provides a timeline of events from 7 October through late December 2023, relying on United Nations and NGO reports as well as eyewitness accounts, including those of Palestinian journalists.

The Application explicitly references the definition of genocide as codified in Article II[135] of the Genocide Convention and argues:

> "The conduct of Israel (through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence) in relation to Palestinians in Gaza, is in violation of its obligations under the Genocide Convention, including *Articles I, III, IV, V and VI, read in conjunction with Article II*."[136]

It claims that Israel's conduct includes several of the listed genocidal acts:

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[133] United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, Second Edition, 2023, p. 214 (Article 15. Breach consisting of a composite act), Commentary: para 9.
[134] *UN Human Rights Council, Prevention of genocide: Report of the Secretary-General, A/HRC/41/24 (8 Oct. 2019), para. 3.*
[135] "*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:* (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." See: Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2.
[136] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 164.

a) *Killing members of the group* (Art. II(a)): By 27 December 2023 (the latest data before filing), Israel's bombardment and assault on Gaza had killed over 21,100 named Palestinians, including 7,729 children, with thousands more civilians still missing and presumed dead. The Application stresses several times that "nowhere is safe in Gaza"[137].

b) *Causing serious bodily or mental harm* (II(b)): At the time, over 55,243 Palestinians were wounded, many with life-altering injuries[138]. The Application cites a report by Save the Children indicating that 80% of Palestinian children experienced emotional distress, resulting in pathologies like reactive mutism and self-harm. Furthermore, the lack of healthcare and education could severely impact their health and development, in addition to the risks of starvation, dehydration and disease[139].

c) *Deliberately inflicting conditions of life calculated to destroy the group* (II(c)): This criterion includes, first, the forced displacement of over 1.9 million people (approximately 85% of the population) who were evacuated from their homes and confined to small areas in southern Gaza through so-called "evacuation orders."[140] The International Committee of the Red Cross (ICRC) stated that these directives are incompatible with international humanitarian law. The orders affected 36% of the territory, were often issued via leaflets that did not specify where people should relocate and were practically inaccessible for many Palestinians who lacked electricity or other means to view the maps showing supposed "safe zones."[141]. Second, the Application describes how Israel's tactics destroyed entire neighborhoods and vital infrastructure: over 355,000 homes were damaged or destroyed, along with hospitals, schools, places of worship, markets, farms, and power and water facilities. Third, Palestinians were deprived of access to adequate food and water. Humanitarian conditions worsened further when Israel's defense minister, on 9 October 2023, called for a "complete siege" of Gaza[142], with no electricity, food, water, or fuel allowed, and limited humanitarian aid. South Africa argues that this intentional deprivation of necessities has "pushed [the Palestinians] to the brink of famine". In fact, according to UN OCHA, Palestinians in

[137] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 40-42, 76.
[138] Israel has reportedly employed "dumb" (i.e. unguided) and heavy bombs, which have a lethal radius of up to 360 meters and can cause severe injuries at distances of up to 800 meters. Given that Gaza is a densely populated territory of 365 square kilometers, the use of such bombs increases the risk to civilian life. See: Berman, Lazar, Alex Horton, and Sarah Dadouch. 2023. Unguided 'dumb bombs' used in almost half of Israeli strikes on Gaza, The Washington Post (4 December 2023).
[139] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 84-86.
[140] Id. 88.
[141] Ibid.
[142] Id. 94.

Gaza experience the highest levels of food insecurity ever recorded by the Integrated Food Security Phase Classification (IPC). Fourth, Palestinians were deprived of access to adequate shelter, clothing, hygiene and sanitation as most of them live in UNRWA facilities consisting of schools and tents. Lastly, they were denied proper medical assistance as the Gaza healthcare system has been severely attacked. More than 61 hospitals and medical facilities have been destroyed or damaged while other facilities have become unusable due to the cutoff of electricity and fuel, leading to several deaths among patients.

d) *Imposing measures intended to prevent births* (II(d)) in the population: South Africa argues that Israel's destruction of Gaza's healthcare system (through attacks on hospitals and restrictions on medical supplies) has severely damaged maternal and neonatal care to such an extent that it "prevent[s] Palestinian births", thereby jeopardizing the future of the Palestinian community[143][144]. The inadequate healthcare system leaves many women unable to have children and generally hampers reproductive health, leading to an increase in miscarriages, premature births and stillbirths. The UN Special Rapporteur on violence against women and girls stated that "reproductive violence" is being committed against Palestinian women, which "could be qualified as acts of genocide under Article 2 of the [Convention]"[145].

Here is a complete list of some alleged violations of the Genocide Convention attributed to Israel.

(a)failing to prevent genocide in violation of Article I.
(b) committing genocide in violation of Article III (a).
(c) conspiring to commit genocide in violation of Article III (b).
(d) direct and public incitement to commit genocide in violation of Article II).
(e) attempting to commit genocide in violation of Article III (d).
(f) complicity in genocide in violation of Article III (e).
(g) failing to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, in violation of Articles I, III, IV and VI.
(h) failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide, conspiracy to commit genocide, incitement to genocide, attempted genocide, and complicity in genocide, in violation of Article V.

[143] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 94.
[144] Moreover, as stated before, approximately 70% of the war are estimated to be women and children.
[145] Id. 138.

> (i) failing to allow and/or directly or indirectly impeding the investigation by competent international bodies or fact-finding missions of genocidal acts committed against Palestinians in Gaza, including those Palestinians removed by Israeli State agents or forces to Israel, as a necessary and corollary obligation pursuant to Articles I, III, IV, V and VI.[146]

2.4.2 Expressions of Genocidal Intent by Israeli Officials

To satisfy the strict legal standard for genocide, it is crucial to prove specific intent to destroy a group (*dolus specialis*), a requirement discussed in detail in Chapter III.

South Africa's application devotes significant attention to establishing this intent by citing a series of public statements made by Israeli leaders and state officials which, in its view, demonstrate genocidal intent towards Palestinians in Gaza. For instance, the application references Prime Minister Benjamin Netanyahu's use of Manichean rhetoric, portraying Palestinians as "bloodthirsty monsters", "children of darkness" and "barbarians", in contrast to Israelis who are depicted as "the Good", "children of light" and the embodiment of "humanity" and "civilization"[147]. It also references Netanyahu's invocation of the Biblical trope of "Amalek", a command given by God to Saul, calling for the destruction of an entire people, the Amalekites[148]. The application further recalls President Isaac Herzog's attempt to justify strikes on Gazan civilians by claiming: "It's an entire nation out there that is responsible […]. We will fight until we break their backbone."[149] It also highlights Defense Minister Yoav Gallant's widely condemned description of Palestinians in Gaza as "human animals" as he announced the total siege of the Strip, vowing to "eliminate everything" within it[150].

These statements and similar remarks by high-ranking officials are presented as evidence of a broader mindset aimed at destroying or permanently eliminating a significant portion of the Palestinian people. The Application states that such rhetoric amounts to direct and public incitement to genocide, which violates Article III(c) of the Genocide Convention, especially when it is accompanied by consistent military actions targeting civilians. South Africa also notes that this incitement has gone "unchecked and unpunished" within Israel[151].

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[146] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 166.
[147] Id. 140.
[148] The passage reads: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses." (1 Samuel 15:1-34, NRSV).
[149] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 142.
[150] Id. 142.
[151] Id. para 53.

Instead of disciplining officials who promote the destruction of the enemy as a group, Israel's government has, in effect, implemented aspects of that rhetoric on the ground[152].

2.4.3 Request for the Indication of Provisional Measures

Given the urgency of the situation in Gaza, the Application included a request for provisional measures of protection (essentially, emergency injunctions) to "protect and preserve [Palestinian] rights as well as its own rights under the Convention, and to prevent any aggravation and extension of the dispute."[153]

By citing the alleged genocidal acts committed by Israel as compelling circumstances requiring the indication for provisional measures, South Africa requested the Court to order Israel to immediately suspend its military operations in Gaza, cease any acts that could constitute or encourage genocide and ensure humanitarian access for civilians. South Africa justified this relief (effectively a temporary ceasefire) by the extreme risk to civilian lives and the need to stop ongoing atrocities.

These are all the provisional measures requested by South Africa in the Application:

> (1) The State of Israel shall immediately suspend its military operations in and against Gaza.
>
> (2) The State of Israel shall ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to [in] point (1) above.
>
> (3) The Republic of South Africa and the State of Israel shall each, in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people, take all reasonable measures within their power to prevent genocide.
>
> (4) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people as a group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention, in particular:
>
> *(a)* killing members of the group;
>
> *(b)* causing serious bodily or mental harm to the 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; and
>
> *(d)* imposing measures intended to prevent births within the group.

[152] The Application references online videos of Israeli soldiers' singing motivational speeches and chants with mottos such as "there are no uninvolved civilians" and "may Gaza be erased": Id. 152.

[153] *Application instituting proceedings (29 December 2023) – Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ICJ General List No 192, 170.

(5) The State of Israel shall, pursuant to point (4) *(c)* above, in relation to Palestinians, desist from, and take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent:

(a) the expulsion and forced displacement from their homes;

(b) the deprivation of:

(i) access to adequate food and water;

(ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;

(iii) medical supplies and assistance; and

(c) the destruction of Palestinian life in Gaza.

(6) The State of Israel shall, in relation to Palestinians, ensure that its military, as well as any irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in (4) and (5) above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.

(7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence.

(8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court.

(9) The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve." [154]

The filing of this case and the accusation of genocide by another State were met with outrage in Israel: Israeli officials strongly denied the allegations and condemned the application as a politically motivated abuse of the convention. An Israeli government spokesperson called South Africa's claim "absurd," even comparing it to a "blood libel" and promised to "dispel [South Africa's] absurd allegation" at The Hague[155]. Israel's Foreign Ministry accused South Africa of acting as "the legal arm of Hamas" and called the case "one of the greatest shows of hypocrisy in history," asserting that Israel's military campaign was a lawful exercise of self-defense rather than an act of genocide[156].

[154] *Application Instituting Proceedings* (South Africa v Israel) [29 December 2023] ICJ General List No 192, 190-194.
[155] Eylon Levy, quoted in 'Israel Promises to Defend Itself against Genocide Accusation at ICJ' *Al Jazeera* (2 January 2024).
[156] Ministry of Foreign Affairs (Israel), 'MFA Spokesperson: South Africa Is Serving as the Legal Arm of the Hamas Terrorist Organization' (1 February 2024).

Despite these protests, the ICJ proceeding officially began with the December 2023 Application, marking the first time a State attempted to hold Israel accountable for genocide through the Court and one of the few instances where a country has sued another for genocide outside the applicant's own territory.

2.5 *Prima Facie* Jurisdiction and *Locus Standi* before the International Court of Justice

Before turning to the hearings on provisional measures and the Court's subsequent orders, it is essential first to clarify our understanding of *jus cogens*, outline the jurisdictional framework of the case and explain South Africa's legal standing to bring this claim. These elements provide the necessary context for interpreting the Court's reasoning and assessing the significance of its decisions.

2.5.1 *Jus Cogens* and Legal Consequences

According to Article 53 of the Vienna Convention on the Law of Treaties (1969), *jus cogens* (or peremptory norms) denotes those fundamental principles "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"[157] and modifiable only by a subsequent norm of the same status.

Despite not being a comprehensive list of identified *jus cogens* principles, an agreement evolved between states on the indisputable belonging of some rules to it. The former Draft Article 19 of the Articles on State Responsibility (initially accepted by the International Law Commission (ILC) and proposed by Special Rapporteur Robert Ago) mentioned the existence of norms laying down obligations "so essential for the protection of fundamental interests of the international community that their breach [is] recognized as a crime by the community as a whole" (referencing here obligations *erga omnes*). [158].

In 2000, the International Criminal Tribunal for Yugoslavia (ICTY) identified as *jus cogens* most norms of international humanitarian law, in particular the prohibition of war crimes and crimes against humanity[159].

[157] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (art 53).
[158] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission 1980, vol II, Part Two, 34 (Draft Article 19).
[159] *Prosecutor v Tadić* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72, Appeals Chamber (2 October 1995), reasserted in *Prosecutor v Tadić* (Judgment) ICTY-94-1-T (26 January 2000) para 99.

More recently, in 2019, the ILC adopted a set of 23 draft conclusions on the topic[160]. An annex (draft conclusion 22) contained a non-exhaustive list of peremptory norms, including the prohibition of aggression, genocide, crimes against humanity, racial discrimination and apartheid, slavery and torture, the basic rule of international humanitarian law, prohibition of racial discrimination and the right of self-determination[161].

Therefore, the prohibition of genocide is a paradigmatic example of *jus cogens*; it is universally acknowledged as a norm of the highest order in international law (also recognized as such by the ICJ in its Judgement in the *Democratic Republic of the Congo v Rwanda* case (2009)[162] and in its judgement on the merits in the *Bosnia and Herzegovina v. Serbia and Montenegro* case (2007)[163]).

One legal effect of this status is that, under Article 53 of the Vienna Convention, any treaty that conflicts with a *jus cogens* norm is void. States cannot, by treaty or custom, lawfully authorize or excuse these violations as such attempts would be null and void *ab initio*.

Another effect is that *jus cogens* norms create obligations owed to the whole international community (obligations *erga omnes*), meaning any state may invoke responsibility for a breach of the genocide prohibition even if not directly injured. Indeed, breaches of peremptory norms entail enhanced consequences under the law of state responsibility: for a "serious breach" of a *jus cogens* obligation (such as genocide), all states are under a duty to cooperate to bring the breach to an end and to refrain from recognizing as lawful or rendering aid to the wrongful situation.

Finally, *jus cogens* status has implications for jurisdiction. Since there is a universal interest in repressing international crimes, under customary international law, the alleged authors of the crime might be prosecuted and punished by any state if the suspect or the accused is on the territory of the state where jurisdiction is exercised. This is the so-called universality[164] principle. In light of the *erga omnes* nature of the genocide prohibition, it is widely accepted that genocide is subject to universal jurisdiction, permitting national courts (and *ad hoc* international tribunals) to prosecute perpetrators regardless of where the crime occurred or the nationality of the accused. At the same time, the peremptory nature of a norm does not

[160] International Law Commission, *Draft conclusions on peremptory norms of general international law (jus cogens), with commentaries* (2019) UN Doc A/74/10, ch V.
[161] ILC, *Draft conclusions on jus cogens* (2019) UN Doc A/74/10, ch V, annex (draft conclusion 22).
[162] "The DRC further contended […] that the Genocide Convention contained ius cogens.": *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Judgment, 3 February 2006) [2006] ICJ Rep 6, para 64.
[163] "The Court explicitly affirmed that the prohibition of genocide is a peremptory norm of general international law.": International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment, 26 February 2007) [2007] ICJ Rep 43, 161
[164] Antonio Cassese, *International Law*, 3rd ed. (Oxford: Oxford University Press, 2021), 285–287.

automatically create adjudicative jurisdiction in the ICJ without consent: the Court has cautioned that the *jus cogens* character of the genocide prohibition, while unquestionable, "cannot of itself provide a basis for the jurisdiction of the Court" in the absence of a jurisdictional agreement[165].

The establishment of an alleged peremptory rule within this group of high-ranking norms is embedded in the judicial mechanism of the ICJ. However, as of today, no dispute has arisen between states regarding the *jus cogens* nature of a certain rule. Indeed, as Judge Robinson explained in his separate opinion in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* case (2019)[166], the ICJ's case law shows a clear reluctance and hesitation in engaging with *jus cogens*. This is explained by the fact that states are still inclined to act out of self-interest, meaning they are willing to contest the inconsistency of a treaty with *jus cogens* only when it promotes their interests. Indeed, the ICJ referred to the consequences of breaches of obligations *erga omnes* only in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)* [167] and *Chagos Archipelagos*[168] cases but did not produce any definitive judgment on the issue. Furthermore, the legal consequences of such breaches are missing from cases concerning *jus cogens* like *The Gambia v. Myanmar* (2019), *Bosnia and Herzegovina v. Serbia*, *DRC v. Rwanda* and *South Africa v. Israel*. In neither of these cases did the Applicants claim an aggravated responsibility nor consequences of the breaches. Only in *Canada and The Netherlands v. Syrian Arabic Republic* (submitted 8 June 2023 and currently pending before the ICJ)[169], Canada and The Netherlands have requested the Court, for the very first time, to determine the legal consequences of breaches of obligations *erga omnes* (in that case, prohibition of torture under Article 2 of the Convention against Torture).

Returning to *South Africa v. Israel*, Luciano Pezzano, Professor of Human Rights at the University of Business and Social Sciences (UCES), argues that South Africa can and must request the ICJ to determine the consequences of Israel's breach of a peremptory norm of international law due to its failure to fulfill its obligations under the Genocide Convention, as

[165] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6.
[166] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.
[167] "No State shall recognize as lawful a situation created by a serious breach […], nor render aid or assistance in maintaining that situation.": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 155–157.
[168] "Since respect for the right to self-determination is an obligation erga omnes, all States have a legal interest in protecting that right" and "all Member States […] are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.": *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180.
[169] *Canada and The Netherlands v Syrian Arab Republic* (Application Instituting Proceedings) (ICJ, 8 June 2023).

already done by Canada and The Netherlands. Such a request would be explained by the fact that the alleged breach, genocide, is an international crime (compromising both individual and state responsibility) and "the most serious breach of a jus cogens norm" [170]. Such a pronouncement would offer legal certainty on the topic and clarify the special regime of consequences for its violations. Indeed, *jus cogens* is a set of higher norms and, as such, requires a "special regime of consequences for their violation", not just through international cooperation (Article 41 of the Convention) but through aggravated responsibility for the accused State. Without these special consequences, "the hierarchical superiority of jus cogens could become illusory"[171].

2.5.2 Jurisdictional Basis under the Genocide Convention

The ICJ's jurisdiction in this dispute is based on Article IX of the Genocide Convention, which states that:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[172]

In initiating proceedings, South Africa explicitly invoked Article IX in its Application, claiming that Israel's alleged failure to prevent and its commission of genocidal acts gave rise to a dispute under the Convention. Both States are parties to the Genocide Convention without reservations (Israel ratified the Convention in 1949 and South Africa in 1998), meaning the compromissory clause is active between them: by consenting to Article IX, both States have accepted the Court's jurisdiction for disputes regarding the Convention's interpretation, application or fulfillment. In short, the ICJ has *prima facie* jurisdiction *ratione materiae* (over the subject of genocide prevention and punishment) and *ratione personae* (over the parties through their treaty consent) in this case.

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[170] Luciano Pezzano, 'Legal Consequences of Peremptory Norms: A Missing Part in the South Africa v. Israel Case and an Opportunity to Reinforce *Jus Cogens*' (Opinio Juris, 23 January 2024)
[171] Ibid.
[172] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 9.

Under the Court's jurisprudence, the existence of a legal dispute between the parties is a prerequisite for establishing jurisdiction. Indeed, during the January 2024 provisional measures hearings, although Israeli representatives expressed skepticism (bristling at the notion that a country thousands of miles away could claim to represent Gaza in the Court), Israel chose to focus its opposition on the absence of a dispute and the inapplicability of the Genocide Convention to the facts. Israel argues that no genuine dispute exists with South Africa, contending that South Africa did not give "a reasonable opportunity to respond" to the genocide allegations before filing the case[173]. Israel highlights the lack of any direct bilateral exchanges (apart from the late 2023 *Note Verbale*) and claims it even proposed a meeting to discuss the issues, which South Africa ignored. Additionally, Israel maintains that the acts alleged fall outside the scope of the Genocide Convention because the required *dolus specialis* (specific intent to destroy a protected group) has not been established *prima facie*.

South Africa, by contrast, asserts that it did warn Israel of its concerns through public statements and multilateral forums (for example, in the U.N. General Assembly's Emergency Special Session and through the *Note Verbale*). According to South Africa, these statements and Israel's dismissive responses demonstrate that "the claim of one party is positively opposed by the other," which is a key indicator of a dispute in the ICJ's view[174].

In determining whether a dispute exists, the Court examines the communications between the parties (e.g., statements, documents, exchanges in multilateral settings and international forums), considering the authors, intended recipients and content of the statements. As the Court observed in *Ukraine v. Russian Federation*:

> "The Court's determination of the existence of a dispute is *a matter of substance, and not a question of form or procedure*. It must be demonstrated that, on that date, the respondent was aware, or could not have been unaware, that its views were *positively opposed* by the applicant […] Nor is it always necessary for the respondent to have expressly opposed the claims of the applicant, since the silence of the respondent may be sufficient in certain circumstances for the Court to infer the existence of a dispute."[175]

[173] State of Israel, *Observations on the Request for the Indication of Provisional Measures Submitted by the Republic of South Africa* (11 January 2024) ICJ Pleadings, 10–12.
[174] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Order on Provisional Measures) [2024] ICJ Rep, 30
[175] International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures, Order of 19 April 2017) [2017] ICJ Rep 104, 136 [73].

In its Order of 26 January 2024 on provisional measures, the Court concluded that, at least on a *prima facie* basis, a dispute does exist between South Africa and Israel under the Genocide Convention. The Order noted that Israeli officials had explicitly rejected and denied South Africa's genocide allegations (for example, the previously mentioned IDF document publicly dismissed the genocide claim[176]). These opposing positions demonstrated that the Parties "held clearly opposite views" on Israel's compliance with its obligations under the Genocide Convention[177].

Accordingly, the Court found that the jurisdictional requirement was met *pro tempore* (both States are bound by the Convention and the acts complained of by South Africa could fall within the Convention's provisions). This finding, made at the provisional measures stage, does not prejudge any future decision on jurisdiction; however, it allowed the Court to indicate provisional measures and let the case advance through preliminary stages.

2.5.3 South Africa's *Locus Standi* and Obligations *Erga Omnes*

The most novel aspect of the case is South Africa's legal standing (*locus standi*) to bring a genocide claim regarding events in a foreign territory (Gaza) that affect people who are not its own nationals. Normally, under international law and especially principles of state responsibility, a state must demonstrate a specific legal interest in the matter or show that it has been "specially affected" by the respondent's conduct to have standing before the ICJ. In this case, South Africa is not directly harmed or targeted by Israel's actions, as the victims of the alleged genocide are Palestinians in Gaza with no particular connection to South Africa.

However, South Africa argues that it is entitled to sue because of the unique obligations under the Genocide Convention. It invokes the concepts of obligations *erga omnes partes* and the *jus cogens* status of the prohibition of genocide, asserting that, as a State party to the Convention, it has a direct interest in ensuring that the obligations of the Genocide Convention are upheld universally, even though the alleged crimes occur outside its territory. In other words, every Contracting State of the Convention shares a common interest in preventing and punishing genocide wherever it occurs. South Africa's counsel, John Dugard, highlighted this point during the initial hearings, stating that State parties are guardians of the convention. The

[176] Israel Defense Forces, 'The War Against Hamas: Answering Your Most Pressing Questions' (IDF, 2024).
[177] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 26 January 2024) [2024] ICJ Rep, para 30.

Convention, he noted, "does not treat the ending of genocidal acts as a bilateral affair between States" but rather allows a State, "acting on behalf of the international community as a whole," to seize the Court's jurisdiction as a matter of urgency to prevent genocide[178]. This collective enforcement perspective underpins South Africa's claim to *locus standi* despite its lack of direct injury.

The legal basis for such *actio popularis*-type standing[179] is the doctrine of *erga omnes partes* obligations, treaty-based commitments owed by each State party to all the other parties collectively. This concept builds on the broader idea of obligations *erga omnes* (owed to the international community as a whole) first recognized by the ICJ in the *Barcelona Traction* case (1970). In *Barcelona Traction*, the Court noted that certain fundamental obligations (such as the prohibition of genocide) are owed *erga omnes*, meaning all States have "a legal interest in their protection"[180]. However, at that time, it was still unclear whether this principle allowed a third-party State, with no direct injury, to bring a claim for breach of such obligations. Subsequent developments, especially within specific treaties, have clarified this issue. In *Belgium v. Senegal* (2012), the ICJ clarified that all State parties to a convention addressing universal crimes can be considered to have a legal interest in compliance, implying broader standing. The doctrine was later tested and confirmed in *The Gambia v. Myanmar* case. In the latter, The Gambia (on behalf of the Organization of Islamic Cooperation) sued Myanmar over atrocities in Rakhine State despite having no nationals or direct stake there. The ICJ, in its 2022 *Judgment on Preliminary Objections*, affirmed this "new" form of standing. It held that:

> "All the States parties to the Genocide Convention have a *common interest* to ensure the prevention, suppression and punishment of genocide. [This] implies that the obligations in question are owed by any State party to all the other States parties to the Convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case."[181]

[178] *South Africa v Israel* (Oral Proceedings, 11 January 2024) CR 2024/2, 19 (Dugard).
[179] The expression *actio popularis-type standing* is used by analogy with the Roman law concept of *actio popularis*, which allowed any citizen to bring a claim to protect public interests without having to demonstrate direct personal harm. In international law, there is no unlimited *actio popularis*, but some treaty-based obligations (particularly *erga omnes partes* obligations) allow any state party to bring a case to protect collective interests, even if it is not directly injured. This form of standing has been recognized by the ICJ in cases such as *Belgium v. Senegal*, *The Gambia v. Myanmar* and reaffirmed in *South Africa v. Israel*. See Antonio Cassese, *International Law*, 3rd ed. (Oxford: Oxford University Press, 2021), 59–60, 285–287.
[180] *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32 para 33.
[181] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections, Judgment of 22 July 2022) [2022] ICJ Rep, para 107.

This means that when a State breaches the Genocide Convention, it is considered a violation against all other contracting States, giving each of them the standing to invoke responsibility. Commentators have described the Court's acceptance of this principle as almost revolutionary for human rights enforcement because it provides an essential legal tool to advocate for and protect victims who have no State to speak on their behalf through collective standing.

South Africa's Application references cases like *The Gambia v. Myanmar*, *Belgium v. Senegal* and the pending *Canada & Netherlands v. Syria* to emphasize that treaty partners can intervene when fundamental *erga omnes* obligations are at stake. By viewing violations of the Genocide Convention as a concern of all States Parties, South Africa establishes *locus standi* without needing to show any special damage to itself. Additionally, it argues that Israel's alleged genocide in Gaza triggers its own duty under Article I of the Genocide Convention "to prevent and to punish" genocide. In other words, South Africa claims it must act against Israel's conduct to fulfill its own obligation to prevent genocide, transforming its standing argument into one of legal necessity and moral obligation: if it fails to act amid potential genocide, South Africa fears it may be complicit in breaching its duty under the Convention.

While the Court has shown it is open to allowing *erga omnes partes* standing, such cases still involve procedural issues. One concern is that when a proxy State (like South Africa) litigates on behalf of victims in a third territory, the directly affected State (in this case, Palestine) is not a party to the case. This can cause several problems with procedural fairness and completeness. For example, because Palestine is absent, Israel cannot file any counterclaim against the party it considers truly at issue (such as bringing Hamas' actions before the Court) since Article 80 of the ICJ Rules allows counterclaims only against an opposing party in the case. This might encourage States to bring claims through uninvolved third-party States to avoid direct liability or counterclaims, potentially undermining party equality.[182]

Another potential problem is the *inter partes* effect of ICJ judgments (as outlined by Article 59 of the ICJ Statute[183] and Article 94 of the UN Charter[184]): the Court's rulings are only binding on the parties involved in the case. This means that any provisional measures or final judgment would legally bind only South Africa and Israel, not Palestine or Hamas. In

[182] Shannon Raj Singh, "Standing on 'Shared Values': The ICJ's Myanmar Decision and Its Implications for Atrocity Prevention," *Opinio Juris*, January 29, 2020; Antonio Cassese, *International Law*, 3rd ed. (Oxford: Oxford University Press, 2021), 285–287.
[183] "The decision of the Court has no binding force except between the parties and in respect of that particular case.": Statute of the ICJ, *Statute of the International Court of Justice (adopted 1945; entry into force 24 October 1945)* art 59.
[184] "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.": UN Charter, *Charter of the United Nations (signed 1945; entry into force 24 October 1945)* art 94(1).

practical terms, an order to prevent genocide or to preserve evidence would create obligations for Israel, but not for the Palestinian authorities or other groups not appearing before the Court. This imbalance may limit the effectiveness of certain measures and raise questions about how well the ICJ's relief can address situations involving multiple actors when only some are present in the courtroom.

As discussed in the previous paragraph, during the provisional measure's hearings, Israel did not challenge in legal terms South Africa's reliance on *erga omnes partes* standing, focusing instead on the issue of the existence of the dispute. This tactical choice perhaps reflects the reality that the ICJ's recent jurisprudence (especially after *The Gambia v. Myanmar*) strongly supports South Africa's right to bring the claim. By not directly contesting *locus standi* at the provisional stage, Israel tacitly acknowledged that any State party can invoke the Genocide Convention's enforcement mechanism when genocide is alleged. Indeed, in its 26 January Order, the Court reaffirmed its earlier view that the Genocide Convention provisions create obligations *erga omnes partes*.

2.6 Chronology of the Provisional Measures Proceedings (January 2024 – April 2025)

Between January 2024 and April 2025, the ICJ held multiple rounds of oral hearings and issued a series of orders addressing South Africa's successive requests for the indication of urgent provisional measures under Article 41 of the Statute and Articles 73 and 76 of the Rules of Court. This paragraph outlines the key procedural developments and legal arguments presented by both parties in relation to provisional measures.

2.6.1 Oral Hearings of January 2024: Request for Provisional Measures

The Applicant (Republic of South Africa)

South Africa, as the Applicant, opened two days of oral hearings on 11 and 12 January 2024 by alleging that Israel was committing genocide against Palestinians in the Gaza Strip in violation of the 1948 Genocide Convention. Specifically, it stated that, based on the materials presented before the Court, "the acts by Israel complained of are capable of being characterized

as at least plausibly genocidal"[185]. The South African counsel described Israel's ongoing offensive, which by that time had killed over 23,000 people according to Gaza health authorities, as aimed at bringing about the destruction of the Palestinian population of Gaza.

During the first oral hearing, South Africa raised several points previously discussed in the Application. First, Adila Hassim addressed the alleged genocidal acts[186] that led to the urgent request for provisional measures, and which violate Article II of the Convention (discussed in section 2.4.1). Hassim emphasized the urgent humanitarian catastrophe in Gaza ("a graveyard for children"[187]) with high civilian casualties, displacement and deprivation. She concluded by asserting that Israel's pattern of conduct indicates genocidal intent and urged the Court to act, stating that nothing will stop the suffering except an order from the Court.

Subsequently, advocate Tembeka Ngcukaitobi argued that Israel's intent to destroy is clear from how its military attack has been conducted, being "systematic in its character and form"[188]. He pointed to "the mass displacement of the population of Gaza, herded into areas where they continue to be killed, and the deliberate creation of conditions that "lead to a slow death"[189]. Second, a "clear pattern of conduct"[190] demonstrates genocidal intent, such as the killing of civilians, the destruction of healthcare infrastructure and the lack of humanitarian aid. Third, Ngcukaitobi notes that this intent has been "nurtured at the highest level of state"[191], citing statements made by Israeli officials (section 2.4.2), and the devastating manner in which military attacks are being conducted. Ngcukaitobi, by citing Article I of the Convention, stressed that genocide is a crime "to prevent and to punish," and Israel's failure to prevent and punish such statements has normalized "genocidal rhetoric"[192].

South Africa's delegation, which included veteran anti-apartheid lawyers, explicitly framed the Gaza crisis as genocide, drawing parallels to past injustices and requesting emergency measures to end the war, in particular, an immediate suspension of Israel's military operations and provisions to ensure the delivery of humanitarian aid to the population.

South Africa's closing oral submissions emphasized its right to act under the Genocide Convention, referencing Article IX and the *erga omnes* duty to prevent genocide. It argued that Israel's conduct in Gaza constitutes at least a plausible case of genocidal acts with specific

[185] *South Africa v Israel* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 11 January 2024) CR 2024/1, 51.
[186] Namely, killing Palestinians in Gaza, causing them serious mental and bodily harm, deliberately inflicting conditions of life calculated to bring about their physical destruction in whole or in part and reproductive violence.
[187] *South Africa v Israel* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 11 January 2024) CR 2024/1, 25.
[188] Id. 32.
[189] Ibid.
[190] Ibid.
[191] *South Africa v Israel* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 11 January 2024) CR 2024/1,35.
[192] Id. 31.

intent, meeting the threshold of a *prima facie* genocide claim. South Africa warned that these ongoing acts pose an imminent risk of irreparable harm to the Palestinian people's right to existence, highlighting the urgency of the situation where their very survival is at risk. Therefore, it urged the Court to intervene and concluded by calling for the indication of urgent provisional measures to protect the rights in question while the case proceeds.

The Respondent (State of Israel)

On the second day, 12 January, Israel presented its response, dismissing the genocide allegations as "false" and "malevolent" and describing South Africa's narrative as both factually and legally distorted, a politicized misrepresentation of reality that omits "both Jewish history and any Palestinian agency or responsibility"[193]. Emphasizing the 7 October 2023 Hamas-led attacks that resulted in 1,200 Israelis' deaths, advocate Becker accused South Africa of ignoring and dismissing the scale of the attack ("the largest calculated mass murder of Jews in a single day since the Holocaust"[194]).

Israel acknowledged that Hamas's crimes, despite being "sadistic and systematic"[195], do not exempt it from its legal obligations. However, Israel still has a legitimate and inherent right to defend itself against a "brutal" and "lawless" terrorist organization, as outlined in Article 51 of the UN Charter[196] and customary international law. In this regard, Israeli representatives highlighted Hamas's brutality against civilians and hostages (by presenting messages, recordings and testimonies from victims and survivors of Hamas' attack describing torture, sexual assault and starvation) and argued that the IDF's operations only targeted terrorists. Israel emphasized that it "did not start and did not want" the war that Hamas imposed[197].

Israel's defense centered around three main points. First, Barack contended that the real genocidal acts have been committed against Israel by Hamas[198]. He responded to South

[193] *South Africa v Israel* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 11 January 2024) CR 2024/1, 13.
[194] Id. 14.
[195] Ibid.
[196] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.": Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.
[197] *South Africa v. Israe* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 12 January 2024) CR 2024/2, 12.
[198] This is a claim shared by several Israeli scholars and academics. Joel Fisherman, historian and Fellow of the Jerusalem Center for Public Affairs, in his paper *Palestinian Incitement and Peace: An Insurmountable Incompatibility*, accuses Hamas of genocidal rhetoric and conduct.

Africa's genocidal rhetoric accusation by citing the "annihilationist language"[199] of Hamas' leaders such as the call to cleanse Palestine "of the filth of Jews", the reference of the October 7 attack as the "Al Aqsa Flood" and the claim, by a senior Hamas member, that "everything [they] do is justified"[200][201]. Second, Israel's military operation is a response to the attack of October 7 and the threat of Hamas. Israel has the right to take legitimate measures to defend its citizens and ensure the release of the hostages. Therefore, a request for a ceasefire by the Court would impede Israel's fulfillment of such obligations. Third, Israel acknowledged the unprecedented suffering of the Palestinian population in Gaza, as described in the Application, but argued that it is an inevitable consequence of Hamas' crimes. Barack continued by calling Palestinian suffering a central part in Hamas' strategy (e.g. its use of human shields[202] and tunnels in civilian areas), citing also Hamas' diversion of humanitarian aid, entrenchment within the civilian population, refusal to build infrastructure in Gaza and use of the existing one as a stronghold for its urban warfare. Israel, most importantly, stressed that the ongoing operation would immediately end if Hamas abandoned this strategy, released the hostages and disarmed.

Legally, Israel clearly stated that no genocidal intent exists. Israel's goal is not to occupy Gaza, displace its population or target civilians but to ensure that the Palestinian people no longer have the capacity to threaten them. To show their lack of genocidal intent, Israel's legal team spent a significant part of the oral hearing describing Israel's military conduct in Gaza. They highlighted how Israeli operations adhere to international humanitarian law in both targeting and engagement, emphasizing that the IDF limits its strikes to military objectives and combatants[203]. As evidence, Israel pointed to its practice of issuing advanced evacuation

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He notes that the incitement to violence and hatred in Palestinian media and educational system constitutes a weapon of political warfare which is one of the basic steps towards genocide (classifiable under Stanton's third step, "Dehumanization") and a violation of Article III(c) of the Genocide Convention. He also cites the example of violent incitement and propaganda in the Rwandan genocide. In the same paper, however, Fishman expresses several strong remarks like the characterization of Palestinian political and religious culture as "committed to death and martyrdom and wiping out the infidel" and the description of the PA as a "oligarchy whose sole purpose is war against Israel". See: Joel Fishman, 'Palestinian Incitement and Peace: An Insurmountable Incompatibility' (2011) 11(3) *Jewish Political Studies Review* 3.

[199] *South Africa v. Israe* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 12 January 2024) CR 2024/2, 15.

[200] Id. 16.

[201] Israel officials and scholars point out the genocidal rhetoric of Hamas' Charter (1988) which explicitly calls for the destruction of Israel (Article 15), reject peaceful resolutions (Article 13), contains antisemitic language (Article 7) and conflates Zionists with Jews. In Israel's view, such document meets the criteria for genocidal incitement under international law, as stated in *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998). Despite having issued a new charter in 2017 (accepting the 1967-border resolutions and differencing between Zionists and Jews) the former charter was never formally revoked. See: Islamic Resistance Movement (Hamas), *The Covenant of the Islamic Resistance Movement (Hamas)* (18 August 1988).

[202] Hamas's use of human shields has been discussed since the 2008 Gaza War. The allegations have been confirmed by several UN and EU delegations, and AP reporting. However, other independent reports (Amnesty International, Human Rights Watch and UN experts) repeatedly found no conclusive evidence and that the embedment of militants and military assets within civilian zones (defined as "human shields tactics" by international law) equate to "using civilians as shields".

[203] However, multiple independent reports (Amnesty International, Human Rights Watch and UN Human Rights Office) document indiscriminate attacks, bombings in civilian areas and a general "indifference" towards civilian deaths. See: Amnesty International, 'New evidence of unlawful Israeli attacks in Gaza causing mass civilian casualties, amid real risk of genocide' (12 February 2024). Human Rights Watch, 'Israel's Crimes Against Humanity in Gaza' (14 November 2024).

warnings to civilians through leaflets, online messages and over 70,000 personal phone calls. Furthermore, Israel highlighted its efforts to facilitate humanitarian aid. Through COGAT (Coordinator of Government Activities in the Territories), a specialized military unit, it works with UN Agencies and others to ensure the delivery and protection of aid such as food, water and medical supplies. Israel also reopened the Kerem Shalom crossing (previously closed due to the war) to increase aid flow and, through COGAT and the IDF, has helped establish four hospitals inside Gaza[204].Such efforts aimed at saving and preserving civilian lives, according to Israel, are inconsistent with an intent to destroy the population and demonstrate the opposite of any possible genocidal intent. If violations of the law occur during the conflict, Israel clarified, those would be addressed by internal competent authorities and accountability mechanisms such as Israel's Supreme Court and military investigations.

Israel also questioned the plausibility of South Africa's genocide claim and the Court's jurisdiction, arguing that South Africa's case misused the Genocide Convention and that it decided unilaterally that a dispute existed.

Lastly, Israel responded to South Africa's reliance on public statements by Israeli officials to prove genocidal intent, stating that it misrepresented a selective set of statements made during a heated conflict, taking them out of context to paint a false picture of the government. Israel acknowledged the "harsh" and "obscene" language from some officials but reiterated that such rhetoric does not reflect state policy, which is decided by the War Cabinet as a whole. As evidence, the Israeli Attorney General stated that "any statement calling for intentional harm to civilians" conflicts with Israel's policy and "may amount to a criminal offence," such as incitement to violence[205]. Indeed, Israel informed the Court that these inflammatory statements are already being examined by the competent authorities for incitement charges. Furthermore, Israel referenced an internal directive issued immediately after October 7, in which Prime Minister Netanyahu instructed to "prevent a humanitarian disaster"[206].

This defensive narrative depicted Israel as fighting a terrorist threat within the bounds of international law and portrayed the genocide accusation as an exploitation and politicized weaponization of the term genocide which subverted the object and purpose of the Genocide Convention. In its closing remarks, Israel described South Africa's use of the Genocide

[204] These structures are not permanent civilian hospital but rather emergency medical units (temporary or mobile).
[205] *South Africa v. Israe* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 12 January 2024) CR 2024/2, 73.
[206] Id. 32.

Convention as dangerous to international law. If the Court accepted that any resort to force in self-defense against a terrorist organization embedded among civilians can be labeled "genocide," Israel argued, it would create an "inevitable tension" between the Genocide Convention and the inherent right of states to defend their citizens[207]. This would pervert the Convention's purpose and weaken the commitment to prevent and punish genocide. Granting South Africa's provisional measures, especially an order to stop military operations, would lead to a "perverse situation" where Hamas could continue its attacks and hostage abuses with impunity, while Israel's hands were tied[208].

In conclusion, Israel's representative urged the Court to reject South Africa's request for provisional measures and to remove the case from the Court's docket, asserting that the Convention has been misinterpreted and that Israel's actions were taken in self-defense.

2.6.2 Order of January 2024: Request for Provisional Measures

On 26 January 2024, the International Court of Justice issued its first order on provisional measures. The Court, led by Judge Joan Donoghue, did not determine whether genocide was occurring, but it held that the Palestinians in Gaza have a "plausible right to be protected from acts of genocide" and that South Africa has the right to invoke Israel's responsibilities under the Genocide Convention in this regard[209]. According to jurisprudence, this represented a relatively low threshold for South Africa to prove since the Court did not have to find that genocidal acts had occurred in Gaza, only that South Africa's claim for the protection of rights under the Genocide Convention was plausible. Therefore, this opinion was considered "relatively unsurprising"[210].

Also unsurprisingly, the Court did not order a ceasefire (as requested by South Africa and as it previously did in *Ukraine v. Russia*) since doing so would have prevented Israel from engaging in defensive military action, hindering its right of self-defense against Hamas. Nonetheless, the judges expressed concern about Gaza's humanitarian conditions and specifically urged Israel to ensure the safety and humane treatment of all civilians.

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[207] *South Africa v. Israe* (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 12 January 2024) CR 2024/2, 74.
[208] Ibid.
[209] *Application of the Genocide Convention (South Africa v. Israel)* (Order on Provisional Measures, 26 January 2024) ICJ [2024] para 54.
[210] Milena Sterio, 'The ICJ's Provisional Measures Order in the *South Africa v Israel* Case: Unsurprising; Politically and Legally Significant' (*Opinio Juris*, 27 January 2024)

Regarding the request for provisional measures, the Court concluded that "at least some of the rights claimed by South Africa and for which it is seeking protection are plausible", referencing "the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention"[211]. The Court also found that "a link exists between the rights claimed by South Africa that the Court has found to be plausible, and at least some of the provisional measures requested" and that the plausible rights in question "are of such nature that prejudice to them is capable of causing irreparable harm"[212].

Since Israel's attempts to alleviate the conditions in Gaza were found to be insufficient and the court's consideration of urgency ("that a real and imminent risk that irreparable prejudice will be caused to the [plausible] rights"[213]), the Court indicated several binding provisional measures, imposing "significant limitations on Israel"[214][215].

a) Israel must "take all measures within its power to prevent the commission of acts within the scope of Article II of the Genocide Convention" against the Palestinian in Gaza;
b) ensure its forces do not commit genocidal acts;
c) "prevent and punish the direct and public incitement to commit genocide" in relation to the Palestinians;
d) "prevent the destruction and ensure the preservation of evidence" related to the allegations of acts under Article II and III of the Convention;
e) submit within a month a report on all the measures taken to abide to the Order; and
f) allow and facilitate rapid delivery of humanitarian relief to the besieged population[216].

On most provisional measures, fifteen out of seventeen judges voted in favor, with only Judge Sebutinde dissenting on all measures and Judge ad hoc Barak approving two of them. Essentially, while the January order reaffirmed fundamental genocide-prevention obligations

[211] *Application of the Genocide Convention (South Africa v. Israel)* (Order on Provisional Measures, 26 January 2024) ICJ [2024] para 54.
[212] Id. para 55.
[213] Id. para 73.
[214] Under Article 41 of the Statute of the Court, orders on provisional measures have binding effects, creating international legal obligation for the party addressed: *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 41.
[215] Milena Sterio, 'The ICJ's Provisional Measures Order in the *South Africa v Israel* Case: Unsurprising; Politically and Legally Significant' (*Opinio Juris*, 27 January 2024)
[216] *Application of the Genocide Convention (South Africa v. Israel)* (Order on Provisional Measures, 26 January 2024) ICJ [2024] 25-26.

(binding on both parties), it did not explicitly require Israel to halt its offensive, reflecting a cautious approach.

In response to the order, Israel's officials publicly expressed relief that no ceasefire was mandated and promised to adhere to the Genocide Convention (all while rejecting the notion that their conduct was genocidal). However, by late February, human rights observers noted that Israel had not significantly changed its tactics: Amnesty International and Human Rights Watch reported that Israel was failing to comply with the ICJ's provisional measures, citing continued bombardment and severe obstruction of aid as conduct that "amounted to war crimes" and risked genocidal acts by creating life-threatening conditions[217]. This apparent non-compliance set the stage for South Africa's subsequent requests and the Court's further interventions in March 2024.

2.6.3 Urgent Request for Additional Measures Under Article 75 of the Rules of the Court

Following the January order, the situation in Gaza remained dire and, in some respects, worsened. South Africa continued to monitor Israel's compliance and, on 12 February 2024, formally alerted the Court of new developments: Israel was reportedly planning a major ground offensive around Rafah (southern Gaza). On 9 February 2024, the Office of the Prime Minister announced that, in order to eliminate Hamas, Rafah needed to be evacuated, and the four Hamas battalions situated there destroyed[218]. However, more than half of Gaza's population lived there[219], mostly in tents, and evacuating would have been impossible since there was "nowhere else to go"[220]. Additionally, all the remaining hospitals, shelters and water systems were located in Rafah.

In the request, South Africa warned that an offensive in Rafah "has already led to and will result in further large-scale killing, harm and destruction" in breach of both the Genocide Convention and the 26 January Order[221]. Therefore, South Africa requested the Court, under

[217] Human Rights Watch, *Israel Not Complying with World Court Order in Genocide Case* (26 February 2024). And: Amnesty International, *Israel defying ICJ ruling to prevent genocide by failing to allow adequate humanitarian aid to reach Gaza* (26 February 2024).
[218] Israel Prime Minister's Office, A message from the Prime Minister's Office regarding an operation in Rafah (9 February 2024).
[219] The region was crowded with hundreds of thousands of Palestinians who had fled there following Israeli orders to evacuate the north.
[220] Republic of South Africa, *Urgent Request for Additional Provisional Measures under Article 75(1) of the Rules of Court* (12 February 2024) ICJ, *Application of the Genocide Convention (South Africa v Israel) 1.*
[221] Republic of South Africa, *Urgent Request for Additional Provisional Measures under Article 75(1) of the Rules of Court* (12 February 2024) ICJ, *Application of the Genocide Convention (South Africa v Israel)* 2.

Article 75(1) of the Rules of the Court[222], "to examine *proprio motu* whether the circumstances of the case requir[ed] the indication of provisional measures which ought to be taken or complied with by any or all of the parties"[223]. Article 75(1), previously exercised in the *LaGrand (Germany v. United States of America)* case (1999), would allow the Court, in cases of urgency and "imminent risk of harm", to exceptionally use its power to order provisional measures on its own initiative, without any hearing or submission by the parties[224].

In response to South Africa's urgent communication, the Court (now under its new President, Judge Nawaf Salam) took an unusual step on 16 February 2024: it issued a decision addressing South Africa's concerns. Although the full text of that decision was not published via the usual order format, the Court's press release indicated it had ruled upon South Africa's request for additional provisional measures and did not impose any new measures on Israel. The Court declined to modify the January order, concluding that the circumstances prevailing at that time "did not demand the indication of additional provisional measures pursuant to Article 75(1)"[225]. This implied that a majority of judges were not convinced that circumstances since the January order (barely three weeks earlier) warranted judicial escalation.

By early March 2024, however, the humanitarian situation in Gaza had further deteriorated. Reports from UN agencies and NGOs warned of impending famine as food, water and medical supplies ran critically low.

2.6.4 Urgent Request and Application for the Indication of Additional Provisional Measures and the Modification of the Court's Prior Provisional Measure Decision (March 2024)

On 6 March 2024, South Africa submitted a new urgent request to the ICJ, seeking additional provisional measures and a formal modification of the 26 January Order. In this second request, South Africa argued that Israel had failed to adequately comply with the Court's initial measures, accusing it of contempt. Specifically, South Africa highlighted "widespread deprivation" of essentials in Gaza (an imposed condition of life that risked

[222] "At any time after the filing of an application and before the final judgment, the Court may, if it considers that circumstances so require, indicate provisional measures which ought to be taken to preserve the respective rights of either party.": Rules of Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978, as amended on 29 September 2021) art 75(1).
[223] Republic of South Africa, *Urgent Request for Additional Provisional Measures under Article 75(1) of the Rules of Court* (12 February 2024) ICJ, *Application of the Genocide Convention (South Africa v Israel)2*.
[224] *LaGrand (Germany v. United States of America),* Provisional Measures, Order of 3 March 1999, I. C. I Reports 1999, p.9.
[225] International Court of Justice, *Decision of the Court on South Africa's Request for Additional Provisional Measures* (Press Release, 16 February 2024) para 1.

destroying the group in part)[226], the blocking of aid through restrictions, denials, closed crossings and the killing and targeting of humanitarian workers (including attempts to defund the United Nations Relief and Works Agency for Palestine Refugees(UNRWA)) and Palestinians seeking to obtain food or aid, like the "Flour Massacre" of 29 February 2024[227].

According to Article 76 of the Rules of the Court, to revoke or modify a decision concerning provisional measures, there must be substantial "changes in the situation" "such as to bring about a material change to the considerations upon which the Court based its original decision concerning provisional measures"[228]and such changes must justify the modification of those measures. Drawing on two precedents, *Bosnia and Herzegovina v. Yugoslavia* and *Temple of Preah Vihear* (*Cambodia v Thailand)* (2011)[229], South Africa asserts that both legal thresholds, the "new facts" standard (often referred to in the Court's practice) and the "change in circumstances" test under Article 76(1), are satisfied. Accordingly, it asked the Court to compel Israel to immediately permit and facilitate humanitarian aid.

Regarding the additional provisional measures, South Africa requested Israel to issue an open report (i.e. made public) within one month on all measures taken to comply with the Court's provisional measures and further clarified the humanitarian obligations previously requested. South Africa also renewed its plea for the Court to consider ordering a ceasefire or complete withdrawal of Israeli forces as an emergency measure, pointing to ongoing civilian deaths as evidence that the previous measures were insufficient.

The complete provisional measures requested in the document are the following:

> (1) All participants in the conflict must ensure that all fighting and hostilities come to an immediate halt, and that all hostages and detainees are released immediately.
> (2) All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must, forthwith, take all measures necessary to comply with all of their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.
> (3) All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must, forthwith, refrain from any action, and in particular any armed action or support thereof, which might prejudice the right of the Palestinians in Gaza to be protected from acts of genocide and related

[226] South Africa reported the statement of Medical Aid for Palestine according to which in Gaza it was recorded "the fastest decline in a population's nutrition status", meaning that "children are being starved at the fastest rate the world has ever seen": Republic of South Africa, *Urgent Request for Additional Provisional Measures under Article 75(1) of the Rules of Court* (12 February 2024) ICJ, *Application of the Genocide Convention (South Africa v Israel) 4.*
[227] *Application for the Indication of Additional Provisional Measures and the Modification of the Court's Prior Provisional Measures Decisions (South Africa v Israel)* (International Court of Justice, 6 March 2024) 2–6.
[228] *Observations of the State of Israel on South Africa's Request for Additional Measures under Article 75(1) of the Rules of Court* (12 February 2024), paras 6–7.
[229] Temple of Preah Vihear (Cambodia v Thailand) (Request for Interpretation of the Judgment of 15 June 1962) (Provisional Measures) [2011] ICJ Rep 537.

prohibited acts, or any other rights in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

(4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address famine and starvation and the adverse conditions of life faced by Palestinians in Gaza, by:

(a) immediately suspending its military operations in Gaza;

(b) lifting its blockade of Gaza;

(c) rescinding all other existing measures and practices that directly or indirectly have the effect of obstructing the access of Palestinians in Gaza to humanitarian assistance and basic services; and

(d) ensuring the provision of adequate and sufficient food, water, fuel, shelter, clothing, Hygiene and sanitation requirements, alongside medical assistance, including medical supplies and support.

(5) The State of Israel shall submit an *open report* to the Court on all measures taken to give effect to all provisional measures ordered by the Court to date, within one month as from the date of this Order.

Unlike the January request, the March 2024 request did not lead to oral hearings, likely due to the urgent circumstances. Instead, the Court established an expedited schedule for written submissions and Israel was given a short period to respond in writing to South Africa's allegations. In its written observations opposing South Africa's 6 March request for additional provisional measures, Israel countered both the factual allegations and the legal basis of the request.

2.6.4.1 Israel's Observations

First, Israel characterized South Africa's portrayal of the Gaza situation as distorted, noting that the request accused Israel of "massacring desperate Palestinians," "deliberately starving" the population, "deliberately killing" humanitarian workers and other acts evincing genocidal intent; claims which Israel denounced as "outrageous" and unfounded[230].

Factually, Israel argued that these allegations ignore the fact that it is engaged in a war against Hamas, a "genocidal terrorist organization", and that the humanitarian challenges in Gaza are largely a result of Hamas's strategies and the logistics of warfare, not an intent on Israel's part to inflict harm. Israel highlighted again its ongoing efforts to mitigate civilian

[230] State of Israel, *Observations on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated* (15 March 2024) *South Africa v Israel*, ICJ, 4-5.

suffering (such as facilitating aid convoys and infrastructure repairs[231], investigating incidents like the "Flour Massacre" and working with international actors such as UN entities) as evidence rebutting any allegation of deliberate cruelty.

Moreover, Israel challenged South Africa's claim that its attempt to defund the UNRWA violates the Genocide Convention. Israel stated instead that it has substantial evidence proving that "a number of UNRWA employees took an active part in the horrific attacks of October 7 and that over a thousand […] employees have direct links to Hamas or other terrorist groups in Gaza"[232][233]. Israel also argued that UNRWA's facilities have been used by Hamas' combatants for military purposes. Israel's argument for defunding the association was based on the claim that the humanitarian organization has been infiltrated and compromised by Hamas.

Legally, Israel argued that South Africa's repeated requests were procedurally abusive and unwarranted, noting that the claims and materials presented by South Africa in its 6 March request are not materially different from those reviewed by the Court in the 26 January Order. It claimed that South Africa's reliance on Article 75 of the ICJ's Rules (which permits *proprio motu* measures) implicitly acknowledged the absence of any "change in the situation" required under Article 76 to modify an existing order. The Court had just weeks earlier, on 16 February 2024, declined to indicate additional measures and reaffirmed that the original provisional measures remained in effect, a decision South Africa was improperly seeking to relitigate.

Israel further argued that the broad new measures it sought would go beyond the Court's jurisdiction and create an unfair imbalance ("a false impression of equality"[234]). The ICJ cannot impose obligations on entities or States that are not parties to the case, so an order addressed to all participants in the conflict or all States Parties to the Genocide Convention would effectively only bind Israel. Such one-sided actions (like a demand for Israel to unilaterally stop military operations) would, according to Israel, undermine its right to self-defense by forcing it to stand down while Hamas and others remain unchecked, causing irreparable harm to Israel's security.

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[231] Israel cited the United States-led agreement with Cyprus to establish a maritime corridor that would allow aid delivery to Gaza, known as the Joint Logistics Over-the-Shore modular system. However, the humanitarian impact of the project was very limited, due to issues and complications (such as bad weather, the complications of providing aid to the intended recipients and looting of trucks by hungry crowds), thus remaining operative for only 20 days. For such reasons, many newspapers and news outlets like Al Jazeera called the operation a mere "publicity stunt". See: Sultan Barakat and Androulla Kaminara, 'The Cyprus-Gaza Maritime Aid Corridor Was a Harmful Publicity Stunt' (*Al Jazeera*, 19 December 2024)

[232] On January 2024, news outlets reported of an Israeli intelligence dossier alleging that 12 UNRWA members have taken part in the October 7 attack and that 1,200 members had links with Palestinian militants' groups. See: Carrie Keller-Lynn and David Luhnow, 'At Least 12 U.N. Agency Employees Involved in Oct. 7 Attacks, Intelligence Reports Say' *Wall Street Journal* (29 January 2024).

[233] State of Israel, *Observations on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated* (15 March 2024) *South Africa v Israel*, ICJ, 10-11.

[234] State of Israel, *Observations on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated* (15 March 2024) *South Africa v Israel*, ICJ, 10-11.

For this reason, it accused South Africa of trying to use provisional measures as "a sword, not a shield," aiming to benefit one side in an ongoing conflict rather than to defend a legitimate legal right pending judgment[235].

Israel argued that the new provisional measures request effectively adds nothing to the measures already imposed by the Court on 26 January (which already require Israel to take all possible measures to prevent acts within the scope of Article II of the Convention). In particular, it opposed the third additional provisional measure demanding the issuance of an "open report", stating that such a measure would establish a different standard for Israel as it is not part of the Court's established practice (the ICJ has refused to apply it in all previous cases). Accordingly, Israel's observations urged the Court to reject South Africa's request for additional provisional measures as factually unfounded, legally improper and unnecessary given the existing order.

2.6.5 Order of March 2024: Request for Additional Provisional Measures of 6 March

On 28 March 2024, the ICJ issued an Order outlining additional provisional measures, marking the Court's second order in the case. The Court expressed serious concerns that Gaza's civilians were facing unprecedented levels of famine and starvation due to shortages of food, clean water and basic necessities. It cited a report on food insecurity published on 18 March 2024 by the Integrated Food Security Phase Classification (IPC Global Initiative) along with other organizations, including the World Food Programme (WFP), the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO). The report warned that "a risk [of] famine may occur by the end of May 2024 if an immediate cessation of hostilities and sustained access for the provision of essential supplies and services to the population did not take place"[236]. The report continues by denouncing that "the conditions necessary to prevent famine have not been met" as "famine is imminent in the northern governorates and projected to occur anytime between mid-March and May 2024"[237].

Taking these reports into account, in this nearly unanimous Order, the Court acknowledged that the humanitarian conditions in Gaza had "deteriorated further" since January (which constitutes a "change in the situation") and that its initial measures no longer

[235] State of Israel, *Observations on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated* (15 March 2024) *South Africa v Israel*, ICJ, 18.
[236] *Application of the Genocide Convention (South Africa v Israel)* (Order on Modification of 26 January 2024 Provisional Measures, 28 March 2024) para 21.
[237] Ibid.

fully address the unfolding crisis, justifying a modification of the provisional measures[238]. Accordingly, while not mandating a ceasefire, the Court reaffirmed the January provisional measures and added the following measures:

(i) Israel must urgently ensure that "unhindered provision" of essential humanitarian relief reaches Palestinians throughout Gaza. This includes orders to significantly increase the capacity of crossings and keep them open as needed to allow a continuous flow of food, water, medical supplies and electricity into Gaza;

(ii) prevent its military from obstructing aid delivery or committing acts that violate Palestinian rights; and

(iii) report back within one month on the measures taken.

Through public declarations, several judges noted that, although South Africa's broader request (a complete halt to hostilities) was not granted, they would have supported a temporary ceasefire given the extent of civilian suffering (specifically Judge Yusuf, Charlesworth, Xue, Brant, Gomez Robledo, Tladi and President Salam). Conversely, the Israeli-appointed Judge, Barak, warned that by addressing issues such as border crossings and aid delivery, the Court risked stepping into political and military realms, which could amount to judicial overreach. He also expressed concern about the Court's frequent reliance on NGO and UN reports, which he described as insufficiently verified.

In summary, scholars observe how the Order "moved closer to a ceasefire measure" but ultimately remain focused on the imminent outbreak of famine in Gaza[239]. Indeed, the focus of this second order was humanitarian: it underscored obligations paralleling international humanitarian law, framed, however, as measures to prevent genocidal acts.

2.6.6 Urgent Request for the Indication of Additional Provisional Measures and the Modification of the Court's Prior Provisional Measures (May 2024)

[238] *Application of the Genocide Convention (South Africa v Israel)* (Order on Modification of 26 January 2024 Provisional Measures, 28 March 2024), para 23.
[239] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in *South Africa v Israel*' (*EJIL: Talk!* 6 June 2024).

In May 2024, the conflict's epicenter shifted to southern Gaza when, on 7 May 2024, Israel launched a large-scale ground assault in Rafah, prompting South Africa to seek yet another round of emergency measures. This offensive prompted urgent warnings from UN officials that basic services in Rafah could collapse, potentially causing hundreds of thousands of additional deaths if fighting continued.

On 10 May 2024, South Africa submitted a new request for additional provisional measures and a modification of the March order. It argued that circumstances had materially changed: what had been feared in March was now happening as the humanitarian situation in Gaza, especially Rafah, had become "disastrous"[240].

The new conditions discussed by South Africa are the following. First, it accused Israel of controlling the Rafah and Kerem Shalom crossings, effectively blocking all humanitarian aid, medical supplies, goods and fuel from entering Gaza. Second, it argued that Israel's intensified assault in a densely populated refugee area and its treatment of evacuation zones as "extermination zones" amounted to an attempt to "bring about the physical destruction" of the Palestinian group in Gaza[241]. Third, South Africa reported a statement by UN Office for the Coordination of Humanitarian Affairs (OCHA) affirming that the evacuation orders in Rafah are "impossible to carry out safely" (many were given less than 15 hours to evacuate) and condemned Israel's practice of separating Palestinian men from women and children as they evacuate through designated "safe routes", describing it as "reminiscent of the genocidal practices at Srebrenica"[242]. Lastly, Israel was accused of preventing international observers, factfinders and journalists from entering Gaza, explicitly contravening previous Court Orders regarding the effective collection and preservation of evidence.

In legal terms, South Africa reaffirmed that the criteria for provisional measures were once again satisfied: there was ongoing irreparable harm and extreme urgency, considering that the very survival of a large number of civilians was at risk within days or weeks, not years. It warned that, with the destruction of Rafah, the destruction of Gaza will be complete[243].

In this third request, South Africa explicitly asked the Court to indicate the following additional measures regarding Israel's unchanged conduct[244]:

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[240] *Request by South Africa for Additional Provisional Measures and Modification of 28 March 2024 Order* (10 May 2024) ICJ, para 28.
[241] Id. para 23-24.
[242] Id. para 25.
[243] *Request by South Africa for Additional Provisional Measures and Modification of 28 March 2024 Order* (10 May 2024) ICJ, para 28.
[244] As evidence, South Africa reported other, more recent, claims made by Israeli officials that amount to genocidal rhetoric (refuting Israel's defense in the first oral hearing). It cited Minister of Defense Yoav Gallant's claim that Israel will take apart "neighborhood after neighborhood" and Minister of Finance Bezalel Smotrich's statement that there will be no "half measures" but "total annihilation" to" blot out the

(i) Israel must halt its military offensive in Rafah and withdraw from the Governorate of Rafah;

(ii) "immediately take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies or officials, investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence, and shall ensure that its military does not act to prevent such access, provision, preservation or retention"[245]; and

(iii) submit an open report on all the measures taken to give effect to these provisional measures (within one week) and all previous provisional measures (within one month).

Public hearings on this request were convened on 16 and 17 May 2024 at The Hague. These proceedings closely mirrored the January hearings in format, with South Africa presenting arguments on the first day and Israel responding the next.

2.6.7 Oral Hearing of May 2024: Requests for Additional Measures and Rafah Offensive

The Applicant (Republic of South Africa)

On 16 May 2024, South Africa argued that Israel's actions in Rafah represented a continuation of genocidal conduct and needed to be stopped immediately. South Africa's Ambassador Vusi Madonsela, speaking before the Court, urged the judges to order Israel to "immediately, totally and unconditionally, withdraw [its] army from the entirety of the Gaza Strip", or at least to halt the Rafah operation[246].

Counsel Tembeka Ngcukaitobi described the assault on Rafah as "the final stand" in what he characterized as Israel's plan to "wipe [Palestinians] off the face of the earth". He

remembrance of Amalek from under the heavens". As a counterargument to Israel's claim that such statements do not reflect general state policies, South Africa notes that Gallant is a member of the War cabinet and the Security Cabinet while Smotrich is a member of the Security Cabinet, both of which directly determine state policy: Id. para 31.

[245] Id. para 25.

[246] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 16 May 2024) CR 2024/27, 3.

argued that "from the onset, Israel's intent was always to destroy Palestinian life", with the current offensive aiming to eliminate the last refuge for Gaza's population[247]. South Africa noted that by mid-May, over 35,000 Palestinians had been killed in seven months of war and that in Rafah, more than 800,000 people had been displaced into increasingly small enclaves.

Advocate Max du Plessis stated that evacuating 1.5 million Palestinians into Rafah and then bombarding the area while closing entry and exit points to that same area ultimately shows genocidal intent. He argued that the destruction of Rafah, the last Palestinian refuge, served as a "potent example to all Palestinians of their vulnerability and their defenselessness in the face of Israeli military forces, […] emblematic of the fate of all Palestinians in Gaza"[248]. Du Plessis also condemned Israel's declaration of "humanitarian zones" in southern Gaza as a cruel performative stunt. On 6 May 2024, Israel forced 100,000 Palestinians in Rafah to evacuate to the eastern portion of the region, but many civilians were too malnourished to move to these zones and those who did were often attacked by Israeli forces even after relocating[249]. "There is nothing humanitarian about these so-called humanitarian zones," he observed, arguing that Israel was perpetrating "genocide […] through military attacks and man-made starvation".[250]

Adila Hassim, after re-presenting the main alleged genocidal acts, highlighted the uncovering by a UN inspection team of mass graves near Al Nasser Hospital (in Khan Younis) containing 324 bodies of men, women, children, elderly and medical staff members. The bodies showed "signs of torture and summary executions"[251]. Hassim insisted that Israel must be stopped, urging the Court to use its authority to save lives in real time.

South Africa also condemned Israel's military operations and tactics, denouncing the use of "Lavender", an AI database that targets Palestinians (a system that generates so-called "kill lists" of Palestinians selected for execution[252]) and the surveillance and tracking system "Where's Daddy?" which targets "targeted" Palestinians specifically when they are at home with their families[253].

Legally, South Africa claimed that Israel was in blatant violation of the January and March orders: not only had Israel failed to prevent genocidal acts but it was also actively

[247] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 16 May 2024) CR 2024/27, 25.
[248] Id. 24.
[249] On 7 May 2024, 15 hours after the evacuation order, Israeli forces attacked Rafah, destroying Palestinians' tents and the remaining infrastructure (including hospitals like the Al-Najjar Hospital, Gaza's largest remaining medical facility at the time). Du Plessis stated: "Israel deliberately attacked the very shelters to which it directed Palestinians to flee". See: Id. 27.
[250] Id. 38.
[251] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 16 May 2024) CR 2024/27, 21.
[252] The criteria for execution include being in a WhatsApp group with another selected target.
[253] UN Office of the High Commissioner for Human Rights (OHCHR), 'Gaza: UN Experts Deplore Use of Purported AI to Commit Domicide in Gaza, Call for Reparative Approach to Rebuilding' (15 April 2024).

inflicting conditions (such as siege and bombardment of shelters) intended to gradually destroy the protected group. The Applicant also asked the Court to require Israel's cooperation with international investigations ("immediately take all effective measures to ensure the access of persons able to investigate ongoing atrocities"[254]): for example, allowing UN fact-finding missions and special rapporteurs unhindered access to Gaza to document evidence of possible genocide.

South Africa also pointed out that the ICJ has the authority to order a ceasefire, rebutting Israel's previous claim that such an order would only target Israel alone, thus being unfair. A "one-sided cessation order" would be legal under the Convention because Article 41 does not require reciprocity, meaning that an order does not have to be directed at both parties[255]. Second, the Convention, which is based on an inalienable right (protection from genocide) that does not depend on circumstances or supposed justifications, applies in both non-international and international armed conflicts. It must be enforced regardless of the right to self-defense or whether both belligerents are State parties to the Convention. The court also described the convention as being "adopted for [a] purely humanitarian and civilizing purpose"[256]. Third, the UN Security Council's power to order a ceasefire does not prejudice or overstate the Court's own authority to do so. The Court's role is distinct from the Security Council, focusing specifically on preventing genocide.

The Respondent (State of Israel)

On 17 May 2024, Israel presented its rebuttal. Gilad Noam, an official from Israel's Ministry of Justice, argued that South Africa's application was "completely divorced from facts and circumstances" and amounted to an abuse of the legal term genocide[257]. He urged the judges to dismiss the request, accusing South Africa of trivializing the Genocide Convention: "[This case] makes a mockery of the heinous charge of genocide […] an obscene exploitation of the most sacred convention,"[258] Noam stated, invoking the legacy of the Holocaust to suggest that the allegations against Israel were unfounded and offensive.

[254] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 16 May 2024) CR 2024/27, 24.
[255] Ibid.
[256] Id. 25.
[257] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 17 May 2024) CR 2024/28, 8.
[258] Ibid.

Legally, he challenged the basis of South Africa's request for provisional measures because they would only limit Israeli military actions, not protect Palestinians' rights. This would turn the Court into a "strategic actor" in the conflict by allowing it to "micromanage" Israeli operations, dangerously blurring the lines between legal oversight and political intervention[259].

Noam emphasized that the military operations were aimed at Hamas terrorists using Rafah as a stronghold, not at the civilian population. He described Hamas's extensive tunnel networks in Rafah and suggested that militants could use them to escape or smuggle hostages out of Gaza. He implied that the Rafah offensive (described as a "rather specific, limited and localized operation"[260]) was crucial to prevent further harm to Israel and to rescue hostages. Any Palestinian deaths or suffering, Israel argued, were tragic but incidental to its legitimate campaign against a genocidal "ruthless jihadist terrorist organization"[261]; they were not evidence of an intent to destroy the Palestinian people as such. Hamas' use of civilians as human shields was also denounced and used as one of the reasons for the Rafah attack, alongside the presence there of battalions, rockets and Israeli hostages[262]. To that end, Noam contended that the individual incidents and statements highlighted by South Africa (e.g., Israeli strikes hitting civilian areas or inflammatory remarks by Israeli politicians[263]) were not proof of a "policy" of genocide or even illegal conduct. Israel insisted that its army does not target civilians and that any violations were isolated excesses, not state policy.

Once again, Noam criticized South Africa's cited materials as often related to Hamas or "subject to Hamas' intimidation"[264]. Specifically, more than 10,000 declared victims are unnamed, making them unverifiable (lists that, according to Noam, also include concealed Hamas militants and victims unrelated to IDF operations). Additionally, Noam argued that the claim that 70% of the victims are women and children is based on false UN data and highlighted the unprecedented damage caused to Israeli civilian homes and infrastructure, with approximately 600,000 residents of southern Israel displaced.

Ordering an immediate withdrawal of troops, as South Africa requested, would be dangerous and beyond the Court's authority: Noam warned that a judicial demand for

[259] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 17 May 2024) CR 2024/28, 13.
[260] Id. 10-12.
[261] Id. 13.
[262] Noam stressed the tragedy of the Israeli hostages, more than 130 women, men and children, held in Gaza for 224 days incommunicado and in inhumane conditions.
[263] Israel ensured that 55 criminal investigations have been opened by the Military Advocate General regarding such incidents. Plus, Israel's High Court of Justice has been reviewing Israel's compliance with international humanitarian law since the start of the hostilities.
[264] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 17 May 2024) CR 2024/28, 18-19.

withdrawal "would sentence the remaining hostages in Gaza to death," asserting that Hamas would execute Israeli captives if Israel's military pressure were removed[265]. This argument aimed to "turn the tables" by suggesting that stopping Israel's offensive, rather than continuing it, would cause a humanitarian disaster for Israeli civilians held by Hamas.

In summary, Israel's legal position focused on intent and proportionality. It argued there was no evidence of a specific intent to destroy Palestinians. Israel claimed it was complying with international humanitarian law, citing its issuance of evacuation warnings, designation of humanitarian corridors and facilitation of some aid deliveries. In a notable rhetorical move, Israel accused South Africa of acting in bad faith at the request of Hamas ("The terrorists of Hamas are using South Africa in their attempt to exploit the ICJ," stated the Israeli Foreign Ministry[266]). This reflects Israel's strategy to frame the case as a propaganda stunt rather than addressing it on the merits. Furthermore, Israel argued that the relief South Africa sought (a ceasefire and withdrawal) was well beyond the Court's scope under the Genocide Convention. Its lawyers suggested that South Africa was essentially asking the Court to impose an unsolicited armistice in an ongoing conflict.

Throughout, Israel's delegation combined legal arguments with a specific narrative, reminding the Court of the Israeli civilians killed on October 7 and asserting that preventing genocide justified Israel's war against Hamas (implying Israel was the party preventing the genocide of Jews).

2.6.8 Order of May 2024: Urgent Requests for the Indication of Additional Measures of 10 May 2024

After deliberating for a week, the ICJ issued its ruling on the third request for additional measures on 24 May 2024. By a 13–2 majority (with Judge Sebutinde and Judge ad hoc Barak dissenting from all paragraphs of the dispositif), the Court revised and broadened its previous provisional measures.

First, the Court reaffirmed the previously indicated measures (from 26 January and 28 March) and stressed that Israel must immediately and effectively implement all the obligations. Then, the Court went further, indicating three new measures tailored to the Rafah situation.

[265] South Africa v Israel (Provisional Measures) [2024] ICJ Rep (Oral Proceedings, 17 May 2024) CR 2024/28, 20.
[266] Id. 15.

The Court ordered Israel to:

> *a)* "Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part".
> *b)* "Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance".
> c) "Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide".[267]

In public statements, Israel's government maintained that it abides by international law and that the Court's decision was misinformed and one-sided. In fact, within days of the order, Israeli forces pressed on with their campaign in Rafah, indicating *de facto* non-compliance.

2.7 Recent Developments and State Interventions (Post-May 2024)

The Court's earlier provisional measures remain in effect, with the ICJ requiring Israel to report on compliance with the interim rulings. The report was filed on 26 February 2024, but it was not released to the press or the public. However, human rights organizations (such as Human Rights Watch, Amnesty International, Doctors without Borders, Oxfam and the UN Special Rapporteur on the Right to Food, Michael Fakhri) reported that Israel continued to obstruct aid and thus failed to fully follow the protective measures[268].

Meanwhile, the proceedings have seen unprecedented third-party involvement. Over a dozen countries (including Turkey, Egypt, the Maldives, Mexico, Chile, the State of Palestine, Spain, Cuba, Bolivia, Ireland and Belize) filed declarations to intervene in support of South

[267] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 24 May 2024) 15.
[268] In particular, the organizations reported that fewer humanitarian aid entered Gaza after the Court's 24 May Order and that the risk of genocide is increasing since Israel continues to not provide necessities and humanitarian assistance to the population. The reports also cited Israel's frequent attacks on medical facilities and humanitarian workers. See: Human Rights Watch, 'Israel Not Complying with World Court Order in Genocide Case' (26 February 2024), Oxfam, 'Golden Time for Seasonal Farming Production Destroyed and Lost in Northern Gaza Amid Relentless Attacks' (11 April 2024), Médecins Sans Frontières, 'Gaza Attacks on Humanitarian Staff Make Vital Assistance Near Impossible' (18 March 2024).

Africa's case, reflecting international engagement under Article 63 of the ICJ Statute[269]. By contrast, several Western states (including Germany, France, Italy, the UK and the US) aligned with Israel's position. These states have either formally opposed the proceedings or indicated their intention to intervene on Israel's behalf, dismissing the genocide claim as "meritless"[270].

Outside the courtroom, multilateral efforts have come together to support and enforce the ICJ's decisions. In early 2025, a group of Global South nations launched "The Hague Group," promising coordinated legal and diplomatic action to hold Israel accountable. In their inaugural statement, the member states agreed to follow the ICJ's provisional orders (alongside ICC measures[271]) and to reduce military aid that could enable further violations. The United Nations has also strengthened these judicial efforts. For instance, the General Assembly's Emergency Special Session in September 2024 broadly endorsed an ICJ advisory opinion condemning Israel's occupation and called on all nations to follow international law obligations emphasized by the Court[272].

Taken together, these procedural developments and international responses highlight a growing global commitment to uphold the Court's interim measures and to establish a foundation for the eventual enforcement of any judgment in *South Africa v. Israel*.

2.8 Conclusion

In conclusion, the provisional measures phase of *South Africa v. Israel* underscored several fundamental legal issues, including the Court's jurisdiction, South Africa's standing to bring the case, the *jus cogens* character of the prohibition of genocide, and the scope of the Court's authority under Article 41 of the ICJ Statute to indicate binding *interim* measures. Despite Israel's emphatic objections, contesting the ICJ's jurisdiction and portraying South Africa's case as baseless and politicized, the Court found *prima facie* jurisdiction and *plausible* rights at risk, allowing the case to proceed.

[269] "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it": Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) art 63.
[270] Foundation for Defense of Democracies, 'U.S. Rejects "Meritless" South Africa ICJ Case Against Israel' (FDD, 5 January 2024).
[271] On 21 November 2024 Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant, under allegations including starvation as a method of warfare, murder, persecution, and other crimes against humanity during the Gaza conflict. States Parties to the ICC are obliged to arrest these individuals if present in their territory. Israel, which is not an ICC party, rejects the court's jurisdiction and called the allegations politically motivated.
[272] UNGA Res ES-10/24 (18 September 2024) UN Doc A/RES/ES-10/24.

Throughout a series of orders in January, March and May 2024, the Court's provisional measures demonstrated an evolution in both scope and rigor. Significantly, the language employed by the Court became progressively more assertive with each order, reflecting an increased willingness to extend the application of Article 41 in order to uphold humanitarian principles.

The proceedings not only clarified the parties' legal positions but also served as a forum for international political messaging. South Africa consistently described Israel's actions as an ongoing genocide, using legal arguments based on the Genocide Convention, supported by emotional descriptions of human suffering, and by highlighting provocative statements from Israeli leaders to demonstrate intent. Conversely, Israel denied genocidal intent or policy, framing the case as a politically motivated attack and asserting that its military operations are lawful counter-terrorism measures, grounded in the right of self-defense and not aimed at the destruction of the Palestinian people.

The following chapter turns to the merits of the case, examining how the Court will address the substantive allegations of genocide and the legal arguments advanced by the parties during the provisional measures proceedings.

Chapter III

The Merits Phase: Assessing the Allegations of Genocide

3.1 Introduction

The merits phase is the main stage of the ICJ's proceedings, where the Court carefully reviews the actual claims and defenses and issues a final judgment. The Court's authority to decide cases on the merits comes from the parties' consent to its jurisdiction (often through treaties or special agreements, per Article 36 of the ICJ Statute[273]) and the mandate to apply international law (Article 38 of the Statute[274]). The goal of the merits phase is to settle the legal dispute between the parties once and for all. The ICJ must determine whether a violation of international law has taken place, assess the responsibility of the respondent state and choose appropriate remedies or relief. The merits phase concludes with a written Judgment, which is final and binding on the parties (ICJ Statute Articles 59–60[275]).

Unlike the provisional phase, during the merits the Court addresses the substance of the case, which is about preserving rights. A full merits proceeding is very lengthy, it can last several years, and involves detailed pleadings: the parties submit written memorials and counter-memorials (with both evidence and legal arguments) and the Court conducts oral hearings and examines documents, expert reports and other evidence in depth. Judges may even ask for clarifications or pose questions to the parties.

During the merits phase, the evidentiary and legal threshold is significantly higher than at the provisional stage. The Court reviews the evidence and decides whether the claim is convincingly proven. In general, for ordinary violations of international law, the Court needs

[273] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 36.
[274] Id. art 38.
[275] Id. art 59-60.

evidence demonstrating the breach. However, for allegations of exceptional seriousness and gravity, such as genocide or severe human rights violations, the ICJ applies a strict standard of proof, as shown by the Court's reasoning in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) and *Croatia v. Serbia* (2015)[276]. This phase also allows for fact-finding measures like appointing experts or conducting site visits (though these are rare in ICJ practice) to ensure the Court has enough evidence.

Ultimately, the Court's judgment on the merits will include detailed reasoning, findings on each legal question and often a list of any reparations owed. The Court's judgment is binding on the parties and has *res judicata* effect (i.e. it definitively resolves the dispute) and any provisional measures previously in place end as the judgment will either confirm, modify or deny the issues those interim measures aimed to protect.

This chapter explores the merits of *South Africa v. Israel*. It will begin by presenting the factual and legal arguments made by both parties. Then, it will conduct a critical legal analysis of these arguments, assessing their plausibility and evidentiary strength in light of the strict legal threshold for genocide, in particular the requirement of specific intent. The chapter also reviews the ICJ's provisional measures orders issued between January and May 2024, highlighting what the Court has stated or deliberately avoided stating at the preliminary stage, and evaluating the importance of those interim measures for the case's merits.

3.2 Initiation of the Merits Phase: South Africa's Memorial

Following the 24 May Court Order, which indicates additional provisional measures, the case has entered a stage of written proceedings. On 28 October 2024, South Africa submitted a detailed Memorial (its first pleading on the merits of the case) after Israel's ground invasion of Lebanon on 1 October 2024 and its failure to comply with most of the ICJ's provisional measures.

The document contains over 750 pages of text, supplemented by exhibits and annexes, totaling more than 4,000 pages. However, under the Rules of the Court, it is not available to

[276] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, paras 209–210; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, para 178.

the public[277]. The Department of International Relations and Cooperation (DIRCO) of the Republic of South Africa described the Memorial as "a comprehensive presentation of the overwhelming evidence of genocide in Gaza", including using starvation as a weapon of war and Israel's plans to depopulate and resettle Gaza[278]. In summary, South Africa's latest filing serves as a "reminder to the global community to remember the people of Palestine, to stand in solidarity with them and to stop the catastrophe."[279]

The Court initially set 28 July 2025 as the deadline for Israel's Counter-Memorial but an order issued on 14 April 2025 extended the deadline by six months (to 12 January 2026) at Israel's request, after it cited "evidentiary difficulties" in addressing South Africa's Memorial.[280] The extension was requested for three main reasons:

(i) Practical and substantive problems relating to South Africa's evidence, with evidence allegedly submitted late and many issues still open for the court to decide.

(ii) The parallel new ICJ proceeding Israel will need to contend with to respond to claims of starvation and cutting off humanitarian aid.

(iii) The number of additional claims by other states, like Ireland, against Israel, which Israel must also respond to[281].

By filing this Memorial, South Africa launched the full trial on the core issue of its claim: Israel has committed (or failed to prevent and punish) genocide. By the end of the Merits Phase, the Court will ultimately decide on Israel's responsibility.

3.3 Factual and Legal Arguments in the Provisional Measures Proceedings

This paragraph will summarize the factual and legal arguments presented by both parties during the provisional measures proceedings.

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[277] "The pleadings, annexed documents and translations submitted to the Court in a case shall not be made accessible to the public until the opening of the oral proceedings, unless the Court decides otherwise, or the parties agree otherwise." See: Rules of Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978, as amended 29 September 2005) art 53(2).

[278] Department of International Relations and Cooperation (DIRCO), 'South Africa Delivers Evidence of Israel Genocide to ICJ' (28 October 2024).

[279] Ibid.

[280] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Order of 14 April 2025) [2025] ICJ Rep 1

[281] Under Article 63 of the ICJ Statute third states can intervene in an ongoing case presenting their interpretation of the specific treaty (here the Genocide Convention). Each state intervention requires Israel to submit written observations and, in some cases, oral hearings. In its request for a time extension, it noted that some of these interventions added new factual allegations that often overlap with South Africa's claims. See: *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 63.

3.3.1 South Africa's Allegations of Genocide

As discussed in Chapter II, South Africa, as the Applicant, accused the State of Israel of committing acts of genocide against the Palestinian people in the Gaza Strip, in violation of its obligations under the Genocide Convention. The main factual claim is that, since October 2023, Israeli forces have systematically killed Palestinian civilians in Gaza and inflicted conditions of life calculated to destroy a significant part of the group.

South Africa highlights the death toll and destruction caused by the conflict: entire neighborhoods in Gaza have been destroyed and nearly all of the 2.3 million residents have been displaced at least once. South Africa argues that these acts align with the acts of genocide listed in Article II of the Genocide Convention (killing members of the group, causing serious bodily and mental harm and deliberately inflicting conditions of life calculated to bring about the group's destruction).

Beyond the military offensive, South Africa describes Israel's "complete siege" of Gaza as an instrument of genocide. Since 9 October 2023, Israeli authorities have imposed a siege on the Gaza Strip, cutting off electricity, fuel, food, water and other necessities. South Africa alleges that this blockade has created life-threatening humanitarian conditions intended to destroy the Palestinian population. The Application details how Gazans have been deprived of adequate food, clean water, medicine and electricity, leading to malnutrition and disease. In addition, hospitals and clinics have been rendered non-functional, exacerbating mortality and preventing births by denying pregnant women necessary care. South Africa notes that these conditions are not incidental byproducts of warfare, but rather deliberate measures imposed by Israel.

Legally, South Africa bases its case on the Genocide Convention, to which both South Africa and Israel are parties without reservations. South Africa claims it has the right and duty to bring this claim as part of the obligations *erga omnes* to prevent and punish genocide. The Genocide Convention's compromissory clause (Article IX) grants the ICJ jurisdiction over disputes between State Parties "relating to the interpretation, application, or fulfillment of the Convention," and South Africa has invoked this provision to bring the case before the Court[282].

[282] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 9.

Importantly, South Africa is not acting based on a direct injury to itself but rather to uphold the international norm against genocide.

In the application, South Africa asks the Court to declare that Israel has violated the Genocide Convention, specifically Article I (the duty to prevent and punish genocide) read together with Article II (the definition of genocide) and relevant parts of Article III (punishable acts such as conspiracy, incitement, attempt and complicity), and to order Israel to stop these violations immediately. South Africa argues that the pattern of conduct, along with certain statements by Israeli leaders, demonstrates the specific intent (*dolus specialis*) to destroy the Palestinian group in Gaza, at least in part. To meet the high standard of proving genocidal intent, South Africa provides both evidence of the outcomes and evidence of the mindset. Supporting this, the application cites inflammatory statements by Israeli officials as direct evidence of genocidal intent.

South Africa also emphasizes that Israel's conduct fits the other *actus reus* of genocide listed in Article II. In addition to killing and causing serious bodily harm, Israel is accused of "imposing measures intended to prevent births" among Palestinians in Gaza[283]. The destruction of hospitals and the blockade on medical supplies have led to pregnant women being unable to give birth safely, with increased miscarriages and infant deaths, which South Africa argues is a way of suppressing the next generation of the group.

In sum, South Africa contends that Israel's ongoing military operation in Gaza is not a legitimate act of self-defense but rather a campaign aimed at destroying Palestinians as an ethnic or national group. The combination of destructive actions (*actus reus*) and the apparent intent behind them (*dolus specialis*), South Africa argues, satisfies the definition of genocide. By bringing the case, South Africa aims not only for a formal legal ruling that Israel has violated the Genocide Convention but also for urgent judicial intervention to halt the alleged genocide.

3.3.2 Israel's Defense

Israel, as the Respondent, firmly denies South Africa's accusations of genocide, calling them baseless and politically motivated, and even suggesting that the proceedings serve Hamas's interests. In the preliminary oral hearings, Israel emphasized that it is a victim of

[283] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2(d).

genocidal aggression (from Hamas), not a perpetrator, and argued that the case is a misuse of international law.

Israel's factual argument is that its military operation in Gaza is simply a response to Hamas's armed attack on October 7. Israel maintains that it is fighting a war of self-defense against a terrorist group that has committed genocidal acts and incitement against Jews, citing Hamas's charter and actions as evidence, which demonstrate an intent to kill Israelis because of who they are. By emphasizing the Hamas threat throughout the oral hearings, Israel aimed to reframe the situation: the Gaza conflict is not a one-sided attack on an ethnic group, but a two-sided war initiated by a genocidal terrorist organization.

Israel insists that its targets are exclusively military, specifically Hamas fighters and infrastructure, not the Palestinian civilian population. To support this, Israel highlights various precautions it claims to have taken to minimize civilian harm, such as warning Gazan civilians to evacuate areas of upcoming combat, establishing humanitarian zones and corridors, and allowing pauses in fighting for humanitarian reasons. Additionally, Israel stresses that it has made efforts to facilitate the delivery of food, water, and medicine into Gaza (through the Rafah crossing) as much as possible, arguing that any shortages are mainly due to Hamas's actions. Essentially, Israel asserts that it recognizes its obligations under international humanitarian law, arguing that the deaths in Gaza are not intentional but are a consequence of warfare and Hamas's tactics.

Legally, Israel challenged both the jurisdiction of the Court and the substantive basis of South Africa's claim. Early in the proceedings, Israel's lawyers urged the ICJ to dismiss the case as inadmissible or unfounded, arguing that there was no dispute between South Africa and Israel over the Genocide Convention before the lawsuit (a prerequisite for ICJ jurisdiction under Article IX of the Convention). Israel points out that it responded to South African diplomatic communications in late 2023 about Gaza, even proposing meetings, showing that it engaged in dialogue rather than rejected South Africa's concerns. Israel contends that South Africa initiated the proceedings without exhausting bilateral discussions, meaning the legal dispute did not exist. However, this jurisdiction issue was only preliminarily addressed at the provisional measures stage, where the Court found *prima facie* jurisdiction to proceed. Israel is likely to raise jurisdiction and admissibility objections again at the merits stage (the counterargument, as discussed in Chapter II, is that under the Genocide Convention, any party can act to prevent genocide).

Israel's main defense is the lack of *dolus specialis* in its actions.[284] Israel claims that South Africa has not provided any credible evidence that its military campaign targets Palestinians "as such". It states that its war aims focus on neutralizing Hamas and freeing Israeli hostages. Any inference of genocidal intent based on inflammatory public statements is taken out of context: the comments by politicians and officials cited by South Africa do not amount to a state plan or policy. South Africa has not demonstrated the fundamental element of intent behind the alleged acts and without proof of intent to destroy the group, the conduct does not legally qualify as genocide.

Israel also presented arguments based on international humanitarian law to justify its military operation.[285] Under the laws of war, civilian harm is not inherently illegal if it results from collateral damage proportional to a legitimate military target. Therefore, what South Africa calls "genocide" might more appropriately be assessed under *jus in bello* principles of distinction and proportionality, but these are not considered by the ICJ in this case, which is focused solely on genocide.

Finally, Israel has invoked its sovereign rights and security obligations. It cautioned the Court that granting South Africa's requests (especially the request to order a ceasefire) would effectively strip Israel of its sovereign right to defend its citizens from an ongoing terrorist attack. In the January 2024 hearings, Israel's lawyers warned that an ICJ order suspending Israel's military campaign would reward Hamas.

In summary, Israel's stance is that its operation in Gaza does not have the "intent to destroy" needed for genocide and is justified as an act of self-defense. Therefore, the Court should conclude there is no violation of the Genocide Convention. Instead, this case should be seen as a misapplication of international law and considered within the framework of armed conflict and counter-terrorism.

[284] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep, para 47, 54; Marko Milanovic, 'South Africa v. Israel: The ICJ Indicates Provisional Measures in the Gaza Genocide Case' (Opinio Juris, 26 January 2024).

[285] Id. para 48; Francesca Albanese, Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (UN Human Rights Council, Advance Unedited Version, A/HRC/55/73, 25 March 2024).

3.4 The Legal Threshold for Genocide: *Dolus Specialis* and State and Individual Responsibility

The crime of genocide is defined as any of a set of enumerated acts, including "killing members of [a protected] group," "causing serious bodily or mental harm to [the] group," and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[286]. Most importantly, the act is committed even if the intended destruction of the group is not achieved; what matters is the objective of the perpetrator, not its accomplishment.

The definition of the crime contains two key elements: (1) a physical element (*actus reus*) consisting of the commission of one or more specific acts against members of a protected group and (2) a mental element (*mens rea*), the intent behind the commission of the acts that must be established. Intent includes two intertwined elements: a general intent to carry out the criminal acts (*dolus generalis*) and a specific intent to destroy the targeted group (*dolus specialis*).

Therefore, the threshold for proving genocidal intent is extraordinarily high. It is not sufficient to show that a state or its agents committed heinous crimes; one must also demonstrate that the perpetrator intended to destroy the protected group. This means that the perpetrators must target individuals not (or not only) for what they did, but because of who they are.

3.4.1 Legal Standard for Genocidal Intent (*Dolus Specialis*)

Most legal scholars see genocide as a crime with two mental elements or a "double intent"[287]: a "general intent" (or *dolus*) and an additional "intent to destroy" the group. The latter is defined as "special intent" or *dolus specialis* and is what makes genocide a "goal-

[286] The term does not include conducts such as the extermination of a group on political grounds, cultural genocide (the destruction of the language and culture of a group) and ethnic cleansing ("Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment": UN Doc. A/C6/234). See Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 2.
[287] Kai Ambos, 'The Crime of Genocide and the Situation in Gaza (2023–24)' (2024) 106 *International Review of the Red Cross* 7.

oriented crime" or a "crime of ulterior intent", distinguishing it from other international crimes and contributing to its particular seriousness[288].

In international law, the term "intent" includes an action taken with the purpose of achieving a specific goal but also an action taken with awareness that a given result might follow. The *dolus specialis* is therefore a "state of mind", it relates to "what is anticipated to result from the underlying act"[289]. In the *Akayesu* case (1988), the International Criminal Tribunal of Rwanda (ICTR) described the "intent to destroy" as a key element of the offense, "characterized by a psychological relationship between the physical result and the mental state of the perpetrator,"[290] which "demands that the perpetrator clearly seeks to produce the act charged"[291]. Jean-Paul Akayesu was the mayor of the Taba commune in Rwanda during the 1994 genocide and was charged with multiple counts of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The Court found that Akayesu, even if he did not know that destruction would follow from his actions, "should have known" nevertheless by inferring the destructive consequences from the general context[292]. Moreover, in the *Prosecutor v Goran Jelišić* case (1999), the International Criminal Tribunal of Yugoslavia (ICTY) added that a personal motive does not exclude the specific intent nor does a disturbed personality or "randomness" in the killings[293]. The perpetrator must consciously desire the destruction of a group or know that his criminal acts are destroying in nature.

However, some scholars challenge the traditional view of genocidal intent as a special additional intent. For example, Alicia Gil Gil, Professor of Criminal Law at the Universidad Complutense de Madrid and an expert in international criminal law, introduced the concept of *dolus eventualis* or "conditional intent", a state of mind that falls between knowledge and negligence. Hans Vest, Professor of Criminal Law and Criminal Procedure at the University of Cologne, distinguishes between a "general intent" referred to individual acts and an "intent to destroy" related to the overall genocidal conduct. In evaluating genocidal intent, Kai Ambos,

[288] Kai Ambos, 'The Crime of Genocide and the Situation in Gaza (2023–24)' (2024) 106 *International Review of the Red Cross* 7.
[289] Id. 6.
[290] Prosecutor v. Jean-Paul Akayesu, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para 518.
[291] Id. para 498.
[292] The *Akayesu* case is particularly significant in international law not only for its authoritative interpretation of *dolus specialis* but also as the first instance in which an international court interpreted the Genocide Convention and recognized rape and sexual violence as constitutive acts of genocide.
[293] "The Chamber considers that the existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. Similarly, the fact that the accused may suffer from a mental disturbance or that his acts may have been committed in a haphazard manner does not in itself exclude the possibility that he had the intent to destroy, in whole or in part, a group as such. The perpetrator must consciously seek to achieve this result or must know that the destruction of the group will be the necessary consequence of his acts: *Prosecutor v Goran Jelisić* (Judgment) ICTY-95-10-T (14 December 1999) para 101.

Professor of Criminal Law, Criminal Procedure, Comparative Law, and International Criminal Law at the University of Göttingen and Judge at the Special Tribunal for Kosovo, differentiated between low-level and mid/high-level perpetrators, based on their status and role. Indeed, the perpetrators are a key element contributing to the severity of genocide, which involves multiple participants and is often described as "the archetypal crime of a state", requiring "organization and planning"[294]. Ambos argues that for low-level perpetrators (such as soldiers, individuals who cannot meaningfully contribute to the destruction of the group), the knowledge of the genocidal context should be enough for genocidal liability. However, for mid/high-level perpetrators (bureaucrats like Adolf Eichmann and leaders of genocidal campaigns), the additional specific intent is necessary.

Regarding complicity in the crime, in *Akayesu*, the Court held that an accomplice to genocide does not necessarily need to possess *dolus specialis* but he must understand the perpetrator's specific intent since "accomplice liability is accessorial to principal liability"[295]; it is a "borrowed criminality"[296][297]. In the same case, the Court also defined incitement to genocide as "a desire on the part of the perpetrator to create by his actions a particular state of mind" in the minds of the persons he is engaging with, necessary to commit the crime and in which the perpetrator must necessarily have *dolus specialis* to be liable[298].

For a conduct to be considered genocide, both general intent and *dolus specialis* must be established[299]. In general, specific intent may be established from direct evidence (since it is an organized crime, it usually implies a state plan, official documents or orders) or indirect intent. The latter can be inferred from facts and circumstances, including the overall context. Indeed, because establishing *dolus specialis* is often very complicated since direct evidence is usually lacking, the case law of international tribunals like the ICTR and ICTY has established that specific genocidal intent can be inferred from patterns of behavior, like the scale of atrocities, the systematic targeting of protected group members, the use of dehumanizing language or the existence of a particular policy or genocidal plan. In *Croatia v. Serbia* (2015), the Court noted that "in the absence of direct proofs, there must be evidence of acts on a scale that establishes intent […] to destroy the group"[300]. However, intent must be the "only

[294] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 243–44.
[295] Kai Ambos, 'The Crime of Genocide and the Situation in Gaza (2023–24)' (2024) 106 *International Review of the Red Cross* 851.
[296] *Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para 528.
[297] Nonetheless, complicity in genocide is prohibited and might give rise to obligations for third states (section 3.4.2).
[298] *Prosecutor v. Jean-Paul Akayesu*, Trial Judgement, Case No. ICTR-96-4-T, 2 September 1998, para 560.
[299] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 187-188.
[300] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, para 148.

reasonable inference"[301], meaning that the acts must be committed with knowledge that destruction would follow and that no intervening act would prevent it.

In the *Bosnia and Herzegovina v Serbia and Montenegro* judgment (2007), concerning Bosnia and Herzegovina's claim that Serbia (then Serbia and Montenegro) was responsible for committing, conspiring to commit and failing to prevent genocide during the Bosnian war (1992-1995), the Court held that a pattern of atrocities can support an inference of genocidal intent only if that is "the only conclusion that could reasonably be drawn from the facts"[302]. In other words, if the mass violence can be plausibly explained by some motive or a combination of motives other than an intent to destroy the group (for example, an intent to expel the group from a territory or to terrorize rather than exterminate), the *dolus specialis* of genocide is not proven. Indeed, the Court's final judgment explicitly rejected the argument that the pattern of ethnic cleansing proved an intent to destroy, viewing the mass killings as a tool toward an end rather than as an end in themselves.

This evidentiary standard makes genocide the most complex international crime to establish. The high threshold reflects the severity of the accusation, especially because such a crime has the potential to trigger international intervention. The prevailing approach indicates that, unless the destructive motive is dominant or decisive, genocide cannot be established. Generally, recklessness or knowledge of likely group destruction is insufficient; intent (in the sense of purpose) is required.

On this basis, the ICTY and the ICJ did not classify the crimes targeting Bosnian Muslims committed in the former Yugoslavia during the Bosnian war (cited several times by South Africa in its requests for provisional measures) as genocide but rather as war crimes or crimes against humanity. The ICJ found that genocide had only occurred at Srebrenica in July 1995, where Bosnian Serb forces systematically executed more than 8,000 Bosnian Muslim men and boys, as Bosnia presented evidence of direct orders given by Serbian political and military leaders. This finding rested on prior judgments of the ICTY, which had established "beyond a reasonable doubt" the genocidal intent of the Bosnian Serb commanders in Srebrenica. By contrast, the ICJ did not find that Serbia (the respondent state) was directly responsible for committing genocide elsewhere in Bosnia because it was not convinced that those crimes were perpetrated with the intent to destroy the Bosnian Muslim group in whole or

[301] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, para 148.
[302] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 373.

part. The Court noted that in Bosnia, the pattern of violence generally appeared aimed at driving Muslims out of certain areas to create ethnically homogeneous territories, rather than at their destruction. Moreover, as the Court emphasized, ethnic cleansing and mass killings do not automatically equate to genocide without proof of the requisite intent. This distinction led the Court to conclude that, apart from Srebrenica, the overall offensive did not meet the genocide threshold. Serbia was found responsible only for failing to prevent genocide at Srebrenica and failing to punish those responsible.

The later *Croatia v. Serbia* case (2015) reinforced the previous judgment. The ICJ examined crimes committed during the 1991–1995 conflict in Croatia and ultimately found that neither side had proven genocidal intent by the other. Even though serious crimes were committed against groups (Serbs in Croatia and Croats in Serbia's sphere of control), the Court was not convinced that those crimes were perpetrated with the intent to destroy the respective groups. The judgment again highlighted the existence of other plausible motives (such as displacement or retribution). However, several judges dissented, arguing that the majority's insistence on an extremely strict standard made proving genocide almost impossible despite evidence of deliberate targeted violence. Judge Trindade, in a dissenting opinion, criticized the approach of requiring evidence to exclude all other motives, suggesting it constitutes an unrealistic criterion and neglects the possibility of mixed motives: as the Court already stated in *Jelisic*, having personal or other motives does not exclude having also genocidal intent[303].

Similarly, in a Joint Declaration of Intervention in *The Gambia v. Myanmar* case, several states expressed the necessity to recognize the gravity of the crime "without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings on genocide near-impossible" and by taking into account the "overall factual picture" of the offensive[304].

Finally, in *A-G Israel v. Eichmann* (1968), the Court clarified that, to establish the commission of three of the specified criminal acts (namely, killing, inflicting harm, and transferring children), evidence of the conduct's result is required. For the remaining two (inflicting conditions of life and preventing births) the evidentiary standard is less stringent, necessitating only proof of intent to achieve the outcome rather than its actual achievement[305].

[303] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, paras 148–149, 440 (Trindade J, Dissenting Opinion).
[304] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Joint Declaration of Intervention by Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, para 51.
[305] *Attorney-General of the Government of Israel v Adolf Eichmann* 36 ILR 5 (Supreme Court of Israel, 29 May 1962).

Having these precedents in mind, proving *dolus specialis* in Gaza would require South Africa to show that Israel's offensive was aimed not at defeating and neutralizing Hamas (so, for security reasons) but at physically destroying a substantial part of the Palestinian population as an end in itself. South Africa has already presented this kind of evidence in the Application and the Memorial, especially regarding inflammatory rhetoric by Israeli officials. However, Israel's defensive narrative offers an alternative point of view: that the intention behind its actions is to destroy Hamas (a non-state actor) and that Palestinian civilian victims are "collateral damage" rather than targets.

However, it is important to remember that the situation in Gaza differs from that in Bosnia. In Bosnia, the crimes targeted a limited number of people in specific towns, whereas in Gaza, they are being inflicted on the entire population. If the Court were to adopt a more flexible approach, especially after some critiques of its previous reluctance to infer intent, it might consider whether the scale and nature of Israeli actions are more consistent with an intent to destroy rather than any other intent. For example, destroying neighborhoods and killing civilians in such large numbers could be seen as exceeding the goal of neutralizing Hamas, revealing a punitive strategy aimed at the population. However, Israel would argue that Hamas's deep entrenchment makes these outcomes a necessary means for IDF commanders to achieve their military objectives, rather than an end in itself. If Israel's actions can be reasonably explained by any other intent (for instance, to eradicate Hamas and its military capacity or remove Gaza as a threat by dispersing its population), a genocide finding would not be the "only reasonable inference." This does not mean that Israel's actions are lawful but that they might fall outside the narrow legal definition of genocide, potentially constituting other international crimes (e.g. war crimes or crimes against humanity such as persecution or extermination) which do not require the same intent.

Thus, the question of intent in this case is a matter of contention. International legal experts are divided on whether the Gaza situation meets the genocide threshold. Some independent experts and human rights organizations have indeed warned that there are indicators of (or the risk of) genocide in Gaza. For example, by late 2023, a group of United Nations special rapporteurs and the UN Special Adviser on the Prevention of Genocide voiced alarm that the rhetoric and actions in Gaza could signal genocidal intent[306]. Francesca Albanese,

[306] Alice Wairimu Nderitu, "Statement by the UN Special Adviser on the Prevention of Genocide on the situation in the Middle East …" (9 February 2024) UN.

the UN Special Rapporteur on the occupied Palestinian territories since May 2022, in her March 2024 UN report *Anatomy of a Genocide*, asserted that genocidal intent can be inferred from "the totality of conduct targeting the totality of Palestinians, in the totality of the occupied Palestinian territory"[307]. Israeli-American historian Omar Bartov interpreted Israel's rhetoric, in particular Netanyahu's statements, as showing genocidal intent[308]. Bartov stated that, as of May 2024, it was "no longer possible to deny that Israel was engaged in systematic war crimes, crimes against humanity and genocidal actions"[309], noting that very few in Israel held this view. The Israeli historian Raz Segal and legal scholar Luigi Daniele drew parallels between such rhetoric and scholarship that points to the Russian media's rhetoric of the Russian invasion of Ukraine as genocidal[310].

Conversely, numerous legal scholars are cautious and expressed the view that the available evidence may not meet the specific intent requirement. Scholars such as Marko Milanovic and Roy Schondorf have highlighted that Israel has not explicitly articulated genocidal goals (indeed, it consistently disavows them) and that its aims could reasonably be interpreted as security oriented[311]. Historians Norman J. W. Goda and Jeffrey Herf reject claims that Israel is committing genocide and characterize these accusations as attempts to delegitimize the State of Israel[312]. Goda even asserts that the genocide allegations against Israel are imbued with antisemitic tropes, referring to it as "The Genocide Libel"[313].

3.4.2 State and Individual Responsibility

The Genocide Convention states that the crime of genocide gives rise to both individual and state responsibility[314]. Specifically, the ICJ affirmed that "state responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims"[315].

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[307] Francesca Albanese, 'Anatomy of a Genocide' (Report of the UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory, March 2024) UN Doc A/HRC/52/43.
[308] Omer Bartov, 'Opinion: What I Believe as a Historian of Genocide' *The New York Times* (10 November 2023).
[309] Ibid.
[310] Raz Segal and Luigi Daniele, 'Gaza as Twilight of Israel Exceptionalism: Holocaust and Genocide Studies from Unprecedented Crisis to Unprecedented Change' (2024) *Journal of Genocide Research* (Forum: Israel–Palestine: Atrocity Crimes and the Crisis of Holocaust and Genocide Studies) 1.
[311] Roy Schöndorf, *Implausible Confusion: The Meaning of "Plausibility" in the ICJ's Provisional Measures* (EJIL: Talk!, 19 May 2020) And Marko Milanovic, *ICJ Indicates Provisional Measures in South Africa v Israel* (EJIL: Talk!, 26 January 2024).
[312] Isaac Chotiner, 'The Holocaust Historian Defending Israel Against Charges of Genocide' (2025) *The New Yorker.*
[313] Norman JW Goda, 'The Genocide Libel: How the World Has Charged Israel with Genocide' (Research Paper Series, Institute for the Study of Contemporary Antisemitism, February 2025) 2025(3).
[314] As reaffirmed by the ICJ in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para. 161-167.
[315] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, para 129.

Individual responsibility in genocide can arise from direct involvement in acts such as committing, attempting, conspiring, publicly inciting, planning, instigating, ordering and complicity in genocidal acts with the required specific intent to destroy the targeted group[316]. Establishing individual responsibility is necessary both in front of domestic and international courts, regardless of the role of the perpetrator.

The law of state responsibility is a principle of international law that assigns legal responsibility to States for breaching international obligations[317]. It was codified for the first time in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted in 2001[318]. Article 2 of the ARSIWA states that for an internationally wrongful act to exist there must be: (1) conduct consisting of an action or omission "attributable to the State under international law" (this includes State organs, persons or entities exercising elements of governmental authority and persons acting under the State's direction or control) and (2) such conduct must violate a binding international rule in force for that State[319]. According to Articles 4-11, three main types of conduct of persons or entities can be attributed to a state:

(i) Conduct of any state organs: regardless of their position, function, or character. Municipal law states that any persons or entities under the law of a state can be considered a state organ for the rule of attribution. However, in *Bosnia v. Serbia*, the Court introduced a stricter test, requiring that persons and entities be completely dependent on the state[320].

(ii) Conduct of persons or entities exercising elements of governmental authority: Their conduct might be attributable to the state if they act in that capacity, exceed their authority (acts *ultra vires*) or contravene instructions.

(iii) Conduct of private persons or a group of persons: A State can be held responsible for a violation of international law committed by a person or group of persons in two cases. First, if it failed to take all necessary measures to prevent or punish the wrongful act (conduct by omission). Second, if the person

[316] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, art 3.
[317] To clarify, the conduct of a State violates an international obligation when is contrary to an obligation stemming for that state from a rule or principle of international law. This could be a customary rule, a treaty provision or a binding decision of an international organization: International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UNGA Res 56/83, art 12.
[318] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UNGA Res 56/83
[319] Id. art 2.
[320] This criterion, the so-called "complete dependence test", was criticized since it would require evidence that a State exerts full control in all fields of activity of the person/entity.

or group of persons commits the act on behalf of the State without meeting the requirements to be considered State organs. In this case, the person or group of persons must carry out the conduct "on the instruction of, or under the direction or control of, that State"[321]. This requirement reflects the high standard of the "effective control test" established by the ICJ in *Nicaragua v. United States of America*. Conversely, the ICTY applies a less strict test, the "overall control test", noting that it is sufficient to prove that a state exercises overall control over private individuals, without the state necessarily issuing instructions regarding the actions.

(iv) Conduct of insurrectionist or other movements.

Several circumstances can preclude wrongfulness and exclude legal state responsibility, such as the explicit consent of the injured state (following the principle of *volenti non fit injuria*), self-defense or proportionate countermeasures in response to a prior armed attack, and in cases of *force majeure*, distress or necessity[322]. Usually, when a state is found responsible for an international wrongful act, it is under several obligations owed to the injured state:

(i) Cease the wrongful act, if it is continuing.

(ii) Offer assurances and guarantees of non-repetition.

(iii) Make full reparation to the injured State, which may take the form of restitution in kind, compensation or satisfaction (e.g., apology, acknowledgment). If it refuses, it must agree in *bona fide* to any attempt made by the injured state to peacefully settle the dispute.

However, if a state is found to violate rules that protect the fundamental values of the international community (owed to all the other member states), such as gross and systematic human rights violations like genocide, it results in an aggravated state responsibility. This responsibility enables collective or public responses from the international community, as opposed to bilateral or private reactions for ordinary responsibility. For "serious breaches of obligations under peremptory norms of general international law"[323], all States other than the

[321] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UNGA Res 56/83, art 8.
[322] Article 26 of the ILC Articles clarifies that such circumstances precluding wrongfulness cannot be applied in the case of a breach of obligations deriving from peremptory norms: International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) Yearbook of the International Law Commission, vol II, Part Two, art 26.
[323] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UNGA Res 56/83, art 40.

responsible one has a duty to cooperate in ending such violations via lawful means and to refuse to recognize any situation created by them as lawful. As for the legal consequences of breaches of rules setting *erga omnes* and *erga omnes partes* obligations, all states other than the injured one "may invoke the responsibility of the delinquent state" and may claim the cessation of the wrongful act, guarantees of non-repetition and "the performance of the obligation of reparation […] in the interest of the injured State"[324].

In cases of state responsibility for genocide, the ICJ requires not only that genocide has been committed by individuals accountable to the state, but also that those individuals acted with the necessary intent. In practice, this often means that establishing state responsibility for genocide depends on parallel findings of individual responsibility and genocidal intent by competent courts. In fact, the standards of proof for establishing individual criminal responsibility for genocide were developed by the ICTY and the ICTR. Another significant contribution came from the Extraordinary Chambers in the Courts of Cambodia (ECCC), an UN-backed judicial body that found the Khmer Rouge leader guilty of genocide against the Cambodian Muslim Cham minority and the Vietnamese minority in the *Nuon Chea* case (2018)[325]. Therefore, since genocide is a "state crime" that requires planning, holding a state accountable for committing genocide (including conspiring to commit genocide, inciting genocide, attempting genocide, or being complicit in genocide) requires showing that a state organ or private individual committed the acts with genocidal intent. The ICJ's task is complicated by the fact that a state, as an abstract entity, has no mind of its own; a state's intent is the aggregate intent of individuals whose actions are attributable to the state.

Few ICJ cases involve state responsibility for genocide, such as the ongoing cases *The Gambia v. Myanmar*, *Ukraine v. Russia* and *South Africa v. Israel*[326]. The only concluded case that confirmed state responsibility for genocide is *Bosnia v. Serbia*.

In *Bosnia*, the Court primarily examined whether the intent of relevant actors (like the Bosnian Serb Army leadership or Serbian officials) could be attributed to Serbia under the law of state responsibility. It concluded that the direct perpetrators at Srebrenica (Bosnian Serb forces) were not *de jure* organs of Serbia nor entirely under its control, so Serbia wasn't directly responsible for their genocide. The Court also decided for the first time that the appropriate standard of proof for establishing state responsibility is "the balance of evidence or the balance

[324] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UNGA Res 56/83, art. 48.
[325] *Nuon Chea (Prosecutor v Nuon Chea)* (Extraordinary Chambers in the Courts of Cambodia, Case 002/02, Judgment) 16 November 2018.
[326] As discussed, in *Croatia v. Serbia*, the Court eventually excluded state responsibility for both parties.

of probabilities, inasmuch as what is alleged is a breach of treaty obligations"[327]. This means that the Court will find state responsibility for genocide if it is more likely than not to be true. This is a lower standard than "beyond a reasonable doubt", but still higher than the plausibility test for provisional measures.

In *South Africa v. Israel*, South Africa has accused Israel as a state of breaching the Genocide Convention by committing acts of genocide against the Palestinian people in Gaza, invoking the obligation of states to prevent and punish genocide. This means the ICJ proceeding focuses on state responsibility (not individual criminal responsibility) for genocide. To hold Israel responsible, South Africa must show that acts attributable to the Israeli State (for instance, military operations by the IDF, which is a state organ) were carried out with the specific intent to destroy a substantial part of the Palestinians in Gaza. This parallels the challenge in *Bosnia v. Serbia*, where the Court examined whether genocidal acts and intent by individuals could be attributed to the state. In *South Africa v. Israel*, however, attribution is more straightforward since the alleged atrocities are committed by Israel's official forces (satisfying ARSIWA's test for state organs), leaving the core issue of the case to prove genocidal intent. Notably, because state responsibility is a civil matter between states, the ICJ can apply a lower standard of proof than a criminal court, while still requiring convincing evidence of intent. In its 26 January order, the Court already found that it is plausible for Israel to have had such genocidal intent. Ultimately, *dolus specialis* could be attributed to Israel as an entity or even to specific military units.

If the ICJ eventually finds that Israel has committed or failed to prevent genocide, Israel would incur aggravated state responsibility for violating a peremptory norm. This would trigger obligations such as ceasing the wrongful conduct and providing full reparation to the victims' state, as well as broader obligations for all states to cooperate in ending the genocide and non-recognition of the unlawful situation.

3.5 Analysis of the Evidence

In this paragraph, an evaluation of the evidence presented during the provisional measures phase is conducted, applying the standards of proof discussed above to South Africa's allegations of genocide and Israel's defense.

[327] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 208.

3.5.1 Evidence of *Actus Reus*

Regarding *actus reus*, South Africa can establish a *prima facie* case that Israel's conduct appears to resemble genocide, at least in effect. The evidence presented in the Application shows many of the acts listed in Article II of the Convention, including:

a) large-scale killings (including women and children)
b) systematic destruction of residential areas
c) use of dehumanizing language
d) actions suggesting an aim to physically destroy the group
e) failure to distinguish between combatants and civilians

Multiple independent international organizations and reports confirmed that the acts listed have occurred in Gaza. Francesca Albanese stated that there are "reasonable grounds to believe" that Israel has committed several acts of genocide in Gaza, in particular at least three of the acts mentioned by Article II of the Convention: "killing members of the group", "causing serious bodily or mental harm to members of the group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"[328].

First, the killing of Palestinians is evident. More than 60,000 have died as of August 2025[329], many of whom are civilians, women and children, therefore unlawful military targets (to be lawfully targeted they must be combatants). Even Israel did not dispute the numbers, claiming instead that a substantial part of the victims were military targets.

Second, "causing serious bodily or mental harm" is likewise evident, as tens of thousands have been wounded. According to the ICJ, the act must involve "a grave and long disadvantage to a person's ability to lead a normal and constructive life"[330]. The harm inflicted must not necessarily be permanent or irremediable and can be caused by several acts aimed at the victim's degradation and deprivation of rights (e.g. torture, inhumane treatment, persecution, deportation and sexual violence). To prove this, Albanese cited the severe deprivation, physical

[328] Francesca Albanese, *Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967* (Report, UN Human Rights Council, March 2024) paras 93, 14 (Since Israel prohibits her visits, the report is based "on data from organizations on the ground, international jurisprudence, investigative reports and consultations with affected individuals, authorities, civil society and experts").
[329] Wafaa Shurafa and Samy Magdy, 'Palestinian Death Toll in Israel-Hamas War Passes 60,000, Gaza Health Ministry Says' (AP News, 29 July 2025).
[330] *Prosecutor v Radislav Krstić* (Judgment) ICTY-98-33-T (2 August 2001), para 862.

and psychological trauma, and the "hazardous health procedures" (e.g. amputations without anesthesia) suffered by the Gazans[331].

Third, imposing conditions of life calculated to destroy the group is a key allegation, as Israel's siege and bombardment have created conditions approaching famine and medical collapse. This act involves criminal conduct that, even if it does not directly kill members of the protected group, is capable of leading to their destruction. This might include starving and forcibly displacing the population and depriving them of medical services and necessities like clothing, hygiene items, housing and education. The ICJ's order of 28 March 2024 explicitly noted that "Palestinians in Gaza are no longer facing only a risk of famine […] but that famine is setting in", before ordering Israel to ensure basic humanitarian aid[332]. In addition, preventing births within the group was supported by highlighting how many pregnant women and infants have died due to the lack of medical care.

Even without relying on this last point, the pattern of conduct appears to satisfy multiple criteria for genocidal acts. Most importantly, Israel's defense is not that these events did not occur but that they were acts of war aimed at Hamas combatants and military targets, with civilian casualties being incidental. Therefore, if intent is established, the *actus reus* is strongly supported.

3.5.2 Evidence of *Dolus Specialis*

South Africa's strongest evidence of genocidal intent comes from the spoken and written words of Israeli officials and political figures, such as Netanyahu's reference to Amalek and the dehumanization of Palestinians as "human animals". Such rhetoric, when used by those in power, can suggest a genocidal "state of mind" or at least incitement. The question is whether this can be connected to official state policy.

Israel has argued that these specific statements do not represent formal policy and that the "real" decision-makers (meaning the War Cabinet and top generals) did not issue any genocidal orders.[333] However, the complete siege of the Strip that Yoav Gallant called for was effectively

[331] Francesca Albanese, *Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967* (Report, UN Human Rights Council, March 2024) paras 93, 9.
[332] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Provisional Measures, Order of 28 March 2024) para 19.
[333] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep, para 49.

implemented. The fact that Israel turned the siege into a formal policy shows that these words are not just threats but, sometimes, reflect state policies. The legal issue is whether a policy like a complete siege amount to "intent to destroy" but South Africa contends that deliberately starving 2 million people leaves no other interpretation.

By presenting these statements as evidence, South Africa aims to demonstrate that there is an atmosphere of acceptance of violence toward Palestinians in Israel, which can help establish a genocidal context or a "context of intent" (such as a racial or ultranationalist ideology). Providing a broader context can strengthen the argument that Israel's actions are driven by genocidal intent rather than military necessity.

Another element in South Africa's defense supporting its claims is framing Israel's current actions as the result of years of systemic oppression (the Application cites 75 years of apartheid). This approach aims to suggest that a state (Israel) that has mistreated the Palestinian people for years, treating them as inferior, may plausibly seek their destruction after experiencing a violent terrorist attack.

Furthermore, even after the ICJ's provisional orders, Israel did not significantly change its behavior. Civilian casualties continued to increase due to indiscriminate bombings, and humanitarian aid remained limited. Independent observers like Human Rights Watch and Amnesty International also argued that such actions demonstrated a defiance of court orders. From this conduct, one could infer, if not *dolus specialis*, at least a disregard for the Palestinian people and a willingness to accept civilian casualties.

In general, the nature and scale of atrocities are strong evidence of intent. Official statements made by state officials, assuming they constitute direct and public incitement to genocide, combined with *actus reus*, also provide a circumstantial basis from which intent may be inferred. Ultimately, South Africa's claim depends on whether the ICJ believes that the evidence of intent outweighs Israel's alternative explanations, meaning if any reasonable alternative inference exists besides genocidal intent. Israel's claims of self-defense, its efforts (even if contested) to save civilians and the context of the conflict could suggest other inferences. One factor the Court might consider is whether the pattern of violence continued even when Hamas's military neutralization could have been achieved without causing high civilian casualties. South Africa needs to demonstrate that Israel consistently chose tactics that increased civilian harm despite safer options that could meet military objectives.

3.6 Plausibility Requirement

In its 26 January 2024 Court Order, the ICJ determined that "the facts and circumstances mentioned [in the Order] are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible" (a conclusion also reaffirmed in the 28 March 2024 Order).[334] Nevertheless, as the Court reiterated in the order, its determination regarding plausibility does not prejudice subsequent findings or judgments.

Overall, little has been written about plausibility in international law. The requirement of plausibility was first introduced in *Belgium v. Senegal* (2009) where the court stated that provisional measures should be indicated "only if the Court is satisfied that the rights asserted by a party are at least plausible"[335]. After its introduction, the plausibility standard was soon criticized by Judge Koroma in *Costa Rica v. Nicaragua* (2010) for creating ambiguity and uncertainty. He noted that the definition remained unclear on whether it should be applied to facts, legal rights or both[336]. Indeed, in *Belgium v. Senegal*, the plausibility requirement was applied to legal rights, while in *Costa Rica v. Nicaragua*, it was applied to the facts. Even in *South Africa v. Israel*, Judge Nolte acknowledged that the Court's jurisprudence is not entirely clear on what plausibility entails[337].

The ICJ's case law indicates that, during the provisional measures stage, the threshold for plausibility is very low. This differs from the type of examination required in civil and common law legal systems to issue provisional measures, which demands at least some possibility of victory if the matter proceeds to final judgment. The ICJ, however, does not assess the truth or strength of the claims or their likelihood of success. Instead, it considers whether there is a plausible link between the claimed rights and the relevant treaty, and whether the alleged facts have been presented to the court.

The court's determination of plausibility in *South Africa v. Israel* is legally significant as it diverged from traditional interpretations, causing "significant confusion" among

[334] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Order on Request for the Indication of Provisional Measures) [2024] ICJ Rep, para 54; reaffirmed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Order) [2024] ICJ Rep, para 19.
[335] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2009] ICJ Rep 139, para 59.
[336] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures, Separate Opinion of Judge Koroma) [2011] ICJ Rep 18, 110–11.
[337] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)* (Declaration of Judge Nolte) [2024] ICJ Rep, para 4.

scholars[338]. According to Nico Krisch, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, the Court's orders implied that the Court found that "South Africa's claim of a violation of rights under the Genocide Convention is 'plausible'"[339]. Marko Milanovic, Professor of Public International Law, contended that the Court's assessment of plausibility implied that "it was plausible that genocide was being committed in Gaza"[340]. Contrary, Roy Schondorf, former Israel's Deputy Attorney General, noted that the Court found that the rights claimed by South Africa plausibly existed under the Genocide Convention and that it presented factual arguments aimed at supporting its claim that those rights have been violated.

In light of this legal confusion, Joan Donoghue, at the time President of the Court, clarified in an interview that through its orders the Court simply addressed the "plausibility of rights"[341]; it did not decide on the plausibility of the claim of genocide. In other words, the order stated that Palestinians had a plausible right to be protected from genocide and that South Africa had the right to present that claim in court. Other judges, in their separate declarations (notably Judge Bhandari and Judge Yusuf), confirmed that at the provisional measures stage, the Court does not need to determine the existence of genocidal intent but only whether rights under the Genocide Convention are plausible[342]. Indeed, as discussed, to pass the plausibility test, a state must demonstrate that a link exists between the alleged acts and the rights under the Convention.

The Court's approach in *South Africa v. Israel* follows its decisions in *Gambia v. Myanmar*, where intent was not particularly significant to the case. Myanmar had argued that plausible genocide claims must include evidence of intent but the Court rejected that as a merits-level inquiry and proceeded on a lower threshold. Therefore, in cases based on the Genocide Convention, it appears that a pattern exists: the evidentiary thresholds are not requisite for indicating provisional measures. This demonstrates that a plausibility finding does not prejudice the ultimate determination of genocide intent at the merits stage.

Regarding the merits phase, both Milanovic and Schondorf observe that there is a misuse of the provisional measures procedure in contemporary practice, as a State can easily

[338] Roy Schöndorf, 'Implausible Confusion: The Meaning of "Plausibility" in the ICJ's Provisional Measures' (EJIL: Talk! 19 May 2020).
[339] Nico Krisch, 'Speaking the Law, Plausibly: The International Court of Justice on Gaza' (EJIL: Talk!, 29 January 2024).
[340] Marko Milanovic, 'ICJ Indicates Provisional Measures in *South Africa v Israel*' (EJIL: Talk!, 26 January 2024).
[341] BBC News, 'Joan Donoghue on ICJ Provisional Measures in Gaza' (interview, BBC News, 26 April 2025).
[342] South Africa v Israel (Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip) (International Court of Justice, Case No 192, 29 December 2023).

prevail in a request for provisional measures but fail to establish its case on the merits[343]. Consequently, an applicant State may easily meet the low plausibility standard to obtain interim measures, yet ultimately be unable to demonstrate genocide at trial when the strict merits-phase threshold is applied. In other words, provisional measures serve as an unreliable predictor of the final outcome concerning genocide allegations, as evidenced by previous cases where states succeeded in requesting provisional measures but subsequently failed to meet the *dolus specialis* standard during the merits.

This discrepancy arises because, at the merits stage, the evidentiary threshold for establishing genocide is more stringent than the minimal plausibility threshold used for provisional measures. In its judgments in *Bosnia v. Serbia* and *Croatia v. Serbia*, the ICJ emphasized that genocidal intent must be established as "the only reasonable inference" from the pattern of conduct[344]. Indeed, the "only reasonable inference" test demands near certainty that genocide is attributable to a state, akin to a "beyond reasonable doubt" standard.

3.7 Analysis of Israel's Counter-Arguments

As previously discussed, Israel's defense strategy is founded on two principal components: the right to self-defense against Hamas and the unequivocal denial of any genocidal intent.

3.7.1 The Right of Self-Defense

During the provisional measures stage, South Africa repeatedly asked the Court to require Israel to immediately cease its military operations in Gaza, effectively advocating for a ceasefire. This request is neither unprecedented nor disproportionate as it aligns with the recent precedent set in *Ukraine v. Russia*, wherein the ICJ ordered a suspension of hostilities[345]. Israel argued that a ceasefire order would violate its right to self-defense against a dangerous terrorist organization, Hamas, and, in particular, would hinder efforts to save Israeli hostages.

[343] Roy Schöndorf, 'Implausible Confusion: The Meaning of "Plausibility" in the ICJ's Provisional Measures' (EJIL: Talk! 19 May 2020). And: Marko Milanovic, 'ICJ Indicates Provisional Measures in *South Africa v Israel*' (EJIL: Talk!, 26 January 2024).
[344] *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) [2007] ICJ Rep 43; *Croatia v Serbia* (Merits) [2015] ICJ Rep 3.
[345] In this case the order was issued not to prevent Russia from committing genocide but rather to prevent it from using the Genocide Convention as a pretext for its invasion of Ukraine.

Article 2(4) of the UN Charter states that "all Members shall refrain […] from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations"[346]. The Charter then clarifies that Member States can only resort to violence if authorized by the Security Council or in self-defense. Both the prohibition of aggression and self-defense are also customary rules of international law, with the former being part of *jus cogens*[347].

Self-defense is recognized by Article 51 of the Charter, which states:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security"[348].

Self-defense is defined as the lawful response to an armed attack, an aggression against the territorial integrity or political independence of a state that threatens its government or its life. Moreover, the aggression must be of such scale that the victim state cannot repeal it by any means other than using force. In international law, self-defense is generally understood to also apply to actions committed by a terrorist organization or insurgents, not just a state.

However, the act of self-defense must adhere to strict criteria of necessity and proportionality: its purpose should only be to repeal an armed attack with measures "proportional to the armed attack and necessary to respond to it"[349]. Other requirements include:

a) The victim of the aggression should only attack *legitimate military targets* and it must take precautions to minimize civilian casualties.

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[346] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2(4).
[347] In *Nicaragua v. United States of America* (1986), the ICJ noted that the International Law Commission (ILC) expressed the view that "the law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*". See: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 190.
[348] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.
[349] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 176.

b) It must not occupy the aggressor state's territory, unless necessary to prevent the aggression from continuing.

c) Self-defense must cease as soon as the Security Council takes effective actions rendering such offensive unnecessary.

d) It must cease as soon as the purpose has been achieved.

In light of this, Israel's claim of self-defense raises several legal questions. First and foremost, the ICJ's authority to indicate provisional measures (Article 41 of the Statute) is constrained by the right of self-defense, even though Article 41 leaves many questions unanswered regarding the basis of interim measures and the scope and exercise of the power. However, the ICJ Statute is part of the UN Charter as Article 92 of the Charter provides: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which […] forms an integral part of the present Charter".[350] Considering both Article 92 and Article 51, it is clear that the ICJ's authority to indicate provisional measures cannot hinder a state's right to self-defense. Moreover, even if the Genocide Convention constitutes the juridical basis for *South Africa v. Israel*, the court's authority under Article 92 does not arise from the Convention but from the ICJ Statute, which is an integral part of the UN Charter (indeed the Court will usually indicate provisional measures without definitively establishing jurisdiction, it need only appear *prima facie* that jurisdiction could be founded[351]). At the same time, Article 51 qualifies the right of self-defense as temporary and ultimately subordinate to the Security Council's actions ("[…] until the Security Council has taken measures necessary to maintain international peace and security."[352]).

Second, several scholars, such as Marko Milanovic and Tom Ruys, doubt whether Israel's offensive could be considered self-defense.[353] They do not believe that Article 51 can be applied to non-state actors or that a state occupier could invoke it in the occupied territory. Indeed, in its 2004 Advisory Opinion, the ICJ noted that Article 51 could not be applied to Israel's construction of a wall in the West Bank to defend itself from terrorist attacks.[354] The Court reasoned that the terrorist attacks were not imputable to a foreign state and that Israel

[350] Statute of the International Court of Justice (Annex to the Charter of the United Nations) (1945) and *Charter of the United Nations*, art 92.
[351] Jesse Lempel, 'Why the ICJ Cannot Order Israel to Stop the War in Gaza as a Provisional Measure' (EJIL: Talk!, 8 January 2024).
[352] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.
[353] Marko Milanovic, 'South Africa v. Israel: The ICJ Indicates Provisional Measures in the Gaza Genocide Case' (Opinio Juris, 26 January 2024); Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010), chs 2 and 5.
[354] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.

effectively exercised control over the Palestinian territories, rendering Article 51 unusable in that case. However, in *South Africa v. Israel*, the Court might decide that Article 51 can be invoked also against a non-state actor or even recognize the State of Palestine and attribute the October 7 attacks to a state. In this case, Israel's claim of self-defense would be valid. Similarly, in *Ukraine v. Russia*, Judge Robinson argued that such a right "cannot be overridden by any pronouncement the Court may make as to the consistency [of a State's actions] with the Genocide Convention"[355].

Third, the right to self-defense is still limited by the prohibition of genocide (*jus cogens*) and, more broadly, by International Humanitarian Law (IHL). The Genocide Convention explicitly stipulates that genocide is prohibited both in times of peace and war and can never be justified on the grounds of self-defense: it is expressly forbidden regardless of whether by an aggressor or the defender. The notion of self-defense (a justification under *jus ad bellum* for the use of force) does not exempt violations of *jus cogens* norms such as the prohibition of genocide, even when a state is responding to an armed attack (as Israel was). Consequently, should Israel's actions constitute genocide, the fact that it was fighting against Hamas would not constitute a legal exoneration. Furthermore, it is evident that South Africa's requests for provisional measures and the Court's subsequent orders pressuring Israel to fulfill its obligations under the Genocide Convention and cease the Rafah offensive do not contravene Article 51.

The Court appeared to distance itself from Israel's claim of self-defense by refraining from employing the term in its orders concerning provisional measures. In a separate opinion, Judge Nolte noted that this omission was due to jurisdictional considerations, given that the case was brought under the Genocide Convention, rendering the issue of self-defense unnecessary for the decision-making process[356]. Consequently, the Court sought to prevent any normative conflict between Israel's right to self-defense and its obligations under the Convention.

Some might interpret the Court's decision to refrain from issuing a ceasefire as an acknowledgment that there exists a plausible claim of genocide but there is also a plausible claim of self-defense that the Court could not impair. Conversely, an argument may be made that the Court ought to have ordered a suspension of hostilities, even if the genocidal intent was

[355] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Separate Opinion of Judge Robinson (16 March 2022) para 32.
[356] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Declaration of Judge Nolte (24 May 2024).

only plausible and not beyond doubt, and despite the possibility that the provisional measure might impair Israel's right to self-defense. This is because the prohibition of genocide constitutes a non-derogable obligation, whereas self-defense is not classified as such, notwithstanding some support.

3.7.2 Evidence of Lack of Genocidal Intent

Israel asserts that the objective of its military operation has consistently been the eradication of Hamas. The latter is classified as a militant organization, rather than a protected group under the Convention, which signifies that the intention to destroy a non-state armed group does not constitute genocide (the Genocide Convention safeguards national, ethnic, racial or religious groups, not political or militant groups). So, a key Israeli argument revolves around the characterization of its alleged target.

Moreover, during the provisional measures stage, Israel criticized South Africa's reliance on inflammatory statements made by Israeli officials as evidence of genocidal intent. Such assertions, Israel contends, are taken out of context, contradict Israel's actions, have been condemned by Israel and conflict with other statements made by the same individuals. Consequently, they do not constitute sufficient proof of genocidal intent. To prove this point, the Israeli legal team highlighted other previously unmentioned statements by state officials such as Netanyahu's "we have no desire to harm the population" (2 December 2023), President Isaac Herzog's "the people of Gaza are not our enemy. The enemy is only Hamas." (19 December 2023) and Yoav Gallant's statement "our war against Hamas […] is not a war against the people of Gaza" (18 December 2023)[357]. Overall, they speak of "eliminating Hamas" or "fighting terrorists" and do not officially speak in terms of "eliminating Palestinians*"*. The statements presented by South Africa (e.g. "bloodthirsty monsters", "human animals", "children of darkness"), Israel argues, were only directed at Hamas and the Palestinian Islamic Jihad (PIJ). For example, Yoav Gallant's description of Palestinians as "human animals" came from his 9 October 2023 tweet in which he stated: "You saw what we are fighting against. We are fighting against human animals. This is the ISIS of Gaza. This is what we are fighting against. Gaza won't return to what it was before. We will eliminate everything. […] They will

[357] Olivia Flasch, 'Rebutting Allegations of Genocide Against Israel' (EJIL: Talk!, 10 January 2024).

regret it"[358]. Despite the clear violent and eliminationist language, it can be argued that he was referring to Hamas's militants ("the ISIS of Gaza") and, as a consequence, called for the elimination of Hamas and its infrastructure.

Explicit disavowals of genocidal intent cannot override substantive evidence to the contrary; however, the absence of an explicit genocidal plan must also be considered. In historical genocides, perpetrators often explicitly articulated their intent, as evidenced by the openly eliminationist rhetoric of Nazi propaganda and the explicit call for the extermination of Tutsis in Rwanda. In the case of Israel, no policy document or public statement demonstrates a clear, specific intent. Therefore, establishing intent relies solely on inference. Israel's defense strategy fundamentally depends on this, asserting that any inference can be challenged by their officially stated objectives (to destroy Hamas, not the Palestinians) and by actions aimed at minimizing Palestinian suffering.

Indeed, another indication of lack of a specific intent is Israel's actual conduct, such as issuing warnings to civilians to evacuate combat zones[359], establishing humanitarian corridors and implementing occasional temporary ceasefires. Israel also underscores that it permitted (under international pressure) some fuel and aid trucks to enter Gaza, conducted daily humanitarian pauses and collaborated with mediators like Egypt and the United Nations to mitigate civilian suffering. These actions, although sometimes inadequate and conducted with reluctance, appear inconsistent with an intent to exterminate the population; rather, they demonstrate that, when feasible, Israel tries to spare civilians. Consequently, Israel contends that it has taken measures incompatible with a plan to destroy the group. For instance, some Gazans holding dual nationality or possessing special permissions were allowed to exit to Egypt during limited evacuations, which contrasts with the conduct expected of a genocidal perpetrator. Additionally, Israel engaged in hostage negotiations, resulting in a ceasefire and exchange. These facts may support Israel's position that its intent is not to destroy Gaza or maximize civilian casualties.

However, several international organizations and experts denounced Israel's reliance on IHL as a way to legitimize its genocidal conduct against the Palestinians. In December 2023, the report *Anatomy of a Genocide* conducted by the Palestine Genocide Initiative (PGI), a

[358] Olivia Flasch, 'Rebutting Allegations of Genocide Against Israel' (EJIL: Talk!, 10 January 2024).
[359] The Genocide Convention allows evacuations as long as they do not displace the population outside the occupied territory, except when for material reasons it is impossible to avoid such displacement. The evacuated persons must be "transferred back to their homes as soon as hostilities in the area in question have ceased". See: Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 49.

network of academics, lawyers, and activists, argued that Israel's conduct in Gaza is genocidal and that references to IHL (e.g. human shields, collateral damage and evacuations) by Israel serve as "humanitarian camouflage"[360]. Similarly, Francesca Albanese, in her report with the same title, accused the Israeli executive and military of "humanitarian camouflage", stating that they are "intentionally distorting *jus in bello* principles, subverting their protective functions"[361]. In Albanese's view, Israel's conduct profoundly contradicts civilian protection by blurring the distinction between "civilian casualties and military necessity" as well as the customary rules of "distinction, proportionality and precaution"[362]. For instance, Hamas' embedment in the population is used by Israel to justify indiscriminate attacks[363] (often against civilians, journalists and paramedics). Such attacks, however, do not, by nature, distinguish between lawful military targets and protected persons (civilians) or objects, being therefore disproportionate and unlawful under international law. It follows that, by accusing Hamas of using the population of Gaza as human shields, the entire population is transformed into a legitimate military target. This argument justifies the destruction of whole neighborhoods and civilian objects as Israel considers any object that might be or might have been used by Hamas as a military object and a lawful target. Any harm caused to civilians becomes thus incidental, collateral.

Another element of Israel's defense pertains to the arguments concerning the absence of prior disputes or negotiations and the lack of standing for South Africa. While the ICJ already found it possesses *prima facie* jurisdiction, Israel retains the option to contest this at the merits stage. However, this jurisdictional defense may have limited efficacy in light of the Court's contemporary approach, as demonstrated in *The Gambia v. Myanmar,* where the ICJ rejected Myanmar's argument that there was no dispute or that Gambia lacked standing, thereby affirming obligations *erga omnes partes*. Should the ICJ adopt this reasoning, South Africa's right to initiate the case remains solid and Israel's position may ultimately depend on the substantive defense previously discussed.

Lastly, the Court's inference regarding Israel's intent may be complicated by the claim that some civilian casualties are partly due to Hamas's actions. In the January hearings, Israel

[360] The report argues that the evacuation orders Israel issued, effectively an IHL measure to protect civilians, in Gaza facilitate the commission of crimes by concentrating civilians in certain areas for easier targeting.

[361] Francesca Albanese, *Anatomy of a Genocide: Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967* (Report, UN Human Rights Council, March 2024) paras 93, 1.

[362] Id. 15.

[363] Indiscriminate attacks refer to attacks not directed at a specific military objective, which employ a method or means of combat which cannot be directed at a specific military objective or which strike multiple lawful targets at once in areas with high concentration of civilians or civilian objects. See: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 51.

argued that Hamas intentionally endangered Palestinian civilians by embedding military assets in civilian objects (a violation of IHL), by preventing civilians from evacuating or by using civilians as human shields. Israel has an obligation to choose lawful means of aggression, but it can contend that Hamas caused the tragic outcome and is therefore partially responsible for the crisis in Gaza. Although the ICJ cannot directly judge Hamas's conduct since it is not a state party, this narrative could influence whether Israel's intent is seen as genocidal or as self-defense. During the hearings, Israel's representatives also argued that the atrocities on October 7 demonstrated Hamas's own genocidal intent. By shifting the genocide label onto Hamas, Israel positioned itself as responding to a terrorist organization that openly advocates the destruction of Israel.

In conclusion, Israel's defense introduces doubt: it has a legitimate rationale (self-defense against Hamas) and can point to actions inconsistent with a desire to destroy the Palestinian people. As discussed, if there remains doubt or ambiguity about specific intent, the Court should decide to not find genocide. Therefore, the distinction between Hamas and Palestinians is vital in Israel's defense and, if accepted, could negate genocidal intent, reinterpreting mass civilian casualties as collateral damage (which is not indicative of specific intent if the objective is military) or as unlawful and indiscriminate under IHL. In the latter case, that would fall outside the scope of the Genocide Convention and the Court's jurisdiction which is limited to genocide. This result is also plausible considering the legal precedent set by *Bosnia v. Serbia*, where the Court was hesitant to classify most atrocities as genocide. Gaza's situation is similar: a large-scale use of force against a population, arguably aimed at territorial or security objectives rather than direct destruction. If the ICJ follows this precedent, Israel's defense could succeed on the merits regarding the charge of genocidal intent.

3.7.3 Non-Compliance with Provisional Measures

Despite Israel's crafted defense, its arguments might be compromised by its disregard for the Court's provisional measures. While non-compliance does not determine the merits, it could nonetheless influence the judges' decisions. Israel did not directly defy the ICJ's orders, employing instead legalistic interpretations to justify its non-compliance. For example, it argued that it was not obligated to cease Rafah operations because the order was ambivalent. It contended that the 24 March order only prohibited actions that may inflict destructive

conditions and, in its view, the Rafah offensive did not possess such characteristics. Other instances of non-compliance include:

a) Enabling humanitarian aid: Several independent international organizations (Human Rights Watch[364], Amnesty International[365], OCHA[366] and a group of twelve Israeli human rights organizations[367]) reported Israel's failure to allow adequate humanitarian aid into Gaza. They accused Israel of blocking and delaying life-saving supplies and reducing the number of trucks entering Gaza from 500 (pre-October 7) to 105 a day.

b) Preventing and punishing incitement to genocide: No evidence of punitive or preventive action has been reported against Israeli officials for making dehumanizing statements.

c) Preserving evidence of alleged genocidal acts: Reports point to Israel's destruction of Gaza's civilian infrastructure and cultural heritage sites (e.g. schools, religious institutions, media facilities and health facilities, agricultural land, and government buildings)[368][369]. Moreover, the Committee to Protect Journalists (CPJ) counted 178 journalists killed in the war (176 of them were Palestinians), marking the deadliest conflict for journalists in the 21st century[370][371].

d) Submit reports on the measures taken: Israel submitted its first report on 26 February 2024. Still, several NGOs criticized it by claiming it was incomplete and not publicly disclosed.

e) Refraining from aggravating or extending the dispute.

Nevertheless, the enforcement of compliance appears improbable due to the paralysis within the Security Council (the United States is expected to veto any measure attempting to enforce the ICJ order against Israel) and the ICJ lack of such mechanisms.

[364] Human Rights Watch, *Israel Again Blocks Gaza Aid, Further Risking Lives* (5 March 2025).
[365] Amnesty International, 'Israel Defying ICJ Ruling to Prevent Genocide by Failing to Allow Adequate Humanitarian Aid to Reach Gaza' (Amnesty International, 26 February 2024).
[366] OCHA, *Humanitarian Situation Update No. 306 – Gaza Strip* (16 July 2025).
[367] 12 Israeli Human Rights Organizations, *Statement on Humanitarian Aid in Gaza* (13 August 2025).
[368] Forensic Architecture, A Cartography of Genocide (Forensic Architecture, 2024).
[369] Amnesty International, 'Satellite Imagery Reveals Total Razing of Khuzaa in May 2025 in Further Evidence of Israel's Wanton Destruction and Genocide in Gaza' (Amnesty International, 25 June 2025).
[370] Recently, on August 10, 2025, an Israeli strike killed four Al Jazeera journalists while working in a press tent near the Al-Shifa Hospital. The IDF stated that the attack was targeted against Anas Al-Sharif, a prominent Palestinian journalist who covered the war since the start, accusing him of operating a Hamas cell. Al-Sharif previously denied the accusation and, as of today, no other media outlets could verify the documents released by the IDF regarding the accusations. See: Abeer Salman, Dana Karni and Mohammed Tawfeeq, 'Israel Kills Multiple Journalists in Gaza, Including Prominent Al Jazeera Reporters' (CNN, 10 August 2025).
[371] Committee to Protect Journalists, 'Journalist Casualties in the Israel-Gaza Conflict' (CPJ, 27 October 2023, updated regularly).

3.8 The ICJ's Provisional Measures Orders: Indications and Avoidances

The ICJ's provisional measures orders from January, March and May 2024, although not determinations on the merits, offer valuable insight into the Court's interpretation of the situation and the framing of the legal dispute at the interim stage. This paragraph will analyze the Court's statements and omissions, as well as the potential influence of these orders on the final judgment on the merits.

3.8.1 Order of 26 January 2024

Indications

This was the Court's response to South Africa's urgent request for provisional measures filed in late 2023. The Order (made by 15 votes to 2 on most points) imposed several binding measures on Israel. First, it ordered that "[Israel] shall, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of [the] Convention".[372] This first measure was an instruction to Israel to cease any and all conduct that could constitute genocide. Additionally, the Court directed (also 15–2) that Israel ensures its military does not commit any such acts. It further (16–1) ordered Israel to "prevent and punish" acts of direct and public incitement to genocide against Palestinians[373]. The Order also included a requirement (16–1) that Israel "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance" to Palestinians in Gaza by measures such as opening border crossings and allowing supplies in[374]. This was aimed at alleviating the life-threatening conditions in Gaza caused by the siege. Moreover, the Court (15–2) mandated that Israel "prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and III" of the Genocide Convention[375]. Finally, the Court (15–2) ordered Israel to submit a report within one month on its compliance with these measures.

[372] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 26 January 2024) [2024] ICJ Rep, paras 78–86.
[373] Ibid.
[374] Ibid.
[375] Ibid.

Avoidances

The Court essentially granted a large part of South Africa's requests. The one major thing the Court did not order, however, was the immediate suspension of military operations. Indeed, South Africa had explicitly requested an order that Israel immediately suspend its military operations in and against Gaza, essentially a ceasefire. The Court also refrained from using the words "cease" or "halt" regarding Israel's offensive, framing the obligations in terms of outcomes and leaving it to Israel to determine how to comply. The ICJ presumably avoided a direct ceasefire order for several reasons: to avoid judging the lawfulness of the entire military campaign (which pertains to *jus ad bellum*/IHL, not strictly genocide law), to secure broad consensus among the judges and to avoid a normative clash with the right of self-defense (section 3.6.1).

By refraining from ordering a halt to the military offensive, the Court avoided explicitly labeling Israel's action as unlawful per se (which would effectively prejudge that it's genocidal or at least beyond lawful self-defense). Instead, the Court reminded Israel of its obligations under the Genocide Convention and emphasized the need for humanitarian relief, incorporating principles of IHL.

Second, the Court did not explicitly state that Israel had committed or was committing genocide. It also did not declare Hamas's actions or the Palestinians' actions. However, in a rather unusual addition, it expressed concern for Israeli hostages, mentioning that "Palestinian armed groups should release hostages"[376]. This is unusual because such a measure falls outside the scope of the Genocide Convention but was likely included for humanitarian reasons and to avoid appearing one-sided. The order focused on Israel regarding legal obligations (since only Israel is the state party before it) but also acknowledged the broader context, including Hamas's actions.

Most importantly, the Court did not use the word "genocide" when describing Israel's actions, opting for more cautious language and instead referring to "acts under the Convention" and "plausible rights." The ICJ avoided stating that genocide was plausible or that Israel was violating the Convention, even as it imposed measures; it also refrained from ordering Israel to compensate or implementing any punitive measure at that stage.

[376] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 26 January 2024) [2024] ICJ Rep, paras 78–86.

3.8.2 Order of 28 March 2024 (Additional Provisional Measures)

Indications

South Africa returned to the Court requesting additional urgent measures. On 28 March, the ICJ unanimously (15–0) issued another Order expanding on the measures. The Court reaffirmed the January measures and added a new requirement: that Israel "take all necessary and effective action to ensure basic food supplies arrive without delay to the Palestinian population in Gaza."[377] The Order directly recognized that the situation had deteriorated and that "famine [was] setting in" in Gaza[378]. Specifically, the Court ordered the unhindered passage of humanitarian aid in Gaza "by increasing the capacity and number of land crossing points and maintaining them open as long as necessary".[379] The Order again required Israel to report within one month on the measures taken. Essentially, the March Order highlighted the humanitarian obligations which, while included in January's Order, had not been deemed sufficient.

Avoidances

Once again, the Court avoided any references to military operations or a ceasefire. Instead, it focused on starvation as a potentially genocidal act that required urgent action. Importantly, unanimity was achieved as even Judge ad hoc Barak and others agreed on humanitarian relief (whereas they dissented on some points in January). It is important to clarify that the Court didn't explicitly state that Israel is causing famine intentionally, but by ordering Israel to take action to alleviate famine, it implied that maintaining a siege leading to starvation is unacceptable under the Genocide Convention. This is significant because it clarifies that starvation can be a means of genocide, falling under "conditions of life" (Article II(c)). In summary, scholars note how the Order "moved closer to a ceasefire measure" but ultimately remains focused on the imminent risk of famine in Gaza[380]. Indeed, the main focus of this

[377] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 28 March 2024) [2024] ICJ Rep, paras 54–61.
[378] Ibid.
[379] Ibid.
[380] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).

second order was humanitarian: it highlighted obligations aligned with international humanitarian law but framed as measures to prevent genocidal acts.

3.8.3 Order of 24 May 2024

Indications

This was the most controversial and, in many ways, consequential order. While the previous one mainly addressed the imminent risk of famine in Gaza, this order, according to scholars, signifies a "more decisive action"[381]. By May, Israeli forces had moved their offensive in the southern Gaza Strip, particularly around the city of Rafah, where hundreds of thousands of displaced people had amassed. Initially, the Court declined to indicate additional measures on the Rafah situation, while acknowledging its gravity. Then, on 24 May, by 13 votes to 2, the ICJ indicated three additional provisional measures. First:

> "Israel should immediately halt its military offensive, and any other action in the Rafah governorate, *which may inflict* on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part."[382]

The first measure was the most anticipated as the Court abandoned the constructive ambiguity of its previous orders, explicitly ordering Israel to halt the Rafah offensive to prevent genocidal consequences. Importantly, this was the first time the ICJ had explicitly ordered a halt (even a localized one) to ongoing military operations in this case. Observers described the order as "ambiguous in form but clear in substance"[383]: although the judges did not explicitly use the word "ceasefire," telling Israel to stop any offensive that threatens the group's survival was tantamount to ordering a temporary localized ceasefire in Rafah.

However, the inclusion of the phrase "which may inflict" in the order immediately sparked a legal debate. The placement of the comma ("halt its military offensive, and any other action in Rafah, which may inflict") created ambiguity in how the order could be interpreted.

[381] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).
[382] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures, Order of 24 May 2024) 15.
[383] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).

Scholars observed that the sentence is a relative clause (e.g. a type of dependent clause that serves as an adjective) that was arguably unnecessarily convoluted. The ICJ had already determined that the Rafah offensive posed a "real and imminent risk" of irreparable harm to the protected group's rights, effectively concluding that the offensive met the threshold of plausible genocidal harm. Given that finding, adding a conditional phrase about actions "which may inflict" such harm seemed redundant.

The core issue of the ambiguity was whether the ICJ's instruction was conditional (only halting actions if they may inflict genocidal conditions) or an absolute order to halt the Rafah offensive because it poses such a threat. Following the first interpretation, Israel must immediately stop its military offensive in Rafah and any other actions there that may inflict conditions of life destructive to the group. This view sees the phrase "which may inflict" as applying only to "any other action". Instead, according to the second interpretation, which Israeli officials supported, Israel must cease any military offensive or other action that may inflict life-threatening conditions on the group. In this view, "which may inflict" applies to both the Rafah offensive and other actions, meaning only operations that meet the threshold of creating genocidal conditions need to be halted. Israel's government immediately rejected the idea that the ICJ had ordered it to stop the offensive, insisting that the ruling did not apply to Israel's broader operations against Hamas but only to actions that, in their judgment, would create genocidal conditions. Therefore, their Rafah campaign could continue as long as it did not create such conditions.

However, leaving a provisional measure open to the respondent's subjective interpretation risks undermining the very purpose of provisional measures.[384] According to Article 41 of the ICJ Statute, provisional measures are intended to be binding and unambiguous safeguards to prevent imminent harm. If Israel can dismiss the risk and proceed with its offensive, it undermines the effectiveness of the Court's order. Such a situation effectively defeats the purpose of issuing a provisional measure, which is meant to provide clear protection for the affected party while the case is pending.

The split vote (13–2) and careful wording suggest the ICJ's judges had to compromise on the language to secure a strong majority. In a separate declaration, Judge Nolte clarified that the measure "does not concern other actions of Israel which do not give rise to such risk",

[384] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).

adding that the phrasing of the measure was simply a consensus-binding exercise[385]. Therefore, the measure's vagueness reflects a political compromise within the Court to secure a majority vote: some judges were cautious about overreaching which led to a vague formulation that all the judges could agree on.

In essence, the measure was ambiguous in form but clear in substance: the judges did not explicitly say "ceasefire" but, by telling Israel not to continue any offensive that creates life-threatening conditions for the group, the outcome was tantamount to a temporary ceasefire instruction. The phrase "which may inflict [...] conditions of life that could bring about physical destruction" directly references the Genocide Convention's definition of genocidal acts. By using that language, the Court indicated that the way Israel was conducting the Rafah campaign risked creating genocidal conditions for Palestinians in Rafah. Several international voices interpreted the order this way[386].

Second, Israel was instructed to:

> "Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance"[387].

This measure is not new but a refinement of the previous one (28 March Order), addressing both prior non-compliance and the new emergency caused by Israel's closure of Rafah. It clarifies that the previous obligation must also include keeping the Rafah crossing open.

Third, the Court ordered Israel to:

> "Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide".[388]

This provisional measure is unprecedented in the Court's history as previous measures typically only called for general evidence preservation (e.g., *The Gambia v. Myanmar*, *Canada*

[385] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Provisional Measures) [2024] ICJ Rep (Declaration of Judge Nolte, 24 May 2024) 689, para 25.
[386] Peter Beaumont, 'ICJ ruling underlines risks for Israel as its isolation grows' The Guardian (24 May 2024).
[387] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep (Order of 24 May 2024) 15.
[388] Ibid.

and the Netherlands v. Syria and the first order in *South Africa v. Israel*). The measure also serves as an "indictment of the inefficacy of Israeli domestic investigations of isolated events"[389].

The investigation bodies most covered by the order are the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory (which has the mandate to establish facts and circumstances that may amount to crimes, including genocide) and Israel. The investigation of the crime of genocide also falls, less explicitly, under the mandate of the UN Special Rapporteur on the Occupied Palestinian Territories, Francesca Albanese. Yet, the International Criminal Court (ICC), the only international investigation capable of resulting in a criminal prosecution for the crime of genocide, is not explicitly included. Additionally, the order required Israel to report to the Court within one month on its compliance efforts.

Avoidances

Although the order only addressed the military offensive in Rafah, many judges expressed in separate statements that they believe the order already implicitly required Israel to fully suspend its offensive in Gaza to comply with the provisional measures. This is important because it makes the 24 May Order the strongest statement to date from the Court in this case so far and makes a future total ceasefire "quite probable."[390] Therefore, in substance, the order was the closest the ICJ has likely ever come to ordering a state to suspend a specific ongoing military campaign. The fact that it was widely understood, including by media outlets, experts, and presumably most of the international community, as requiring the cessation of the offensive, indicates that the Court, in effect, executed what it avoided in January: it intervened to attempt to halt hostilities, at least in Rafah.

[389] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).
[390] Mischa Gureghian Hall, 'Assessing the Contents of the ICJ's Latest Provisional Measures Order in South Africa v Israel' *EJIL: Talk!* (6 June 2024).

3.8.4 Significance of Provisional Measures for the Merits

Legally, provisional measures orders are binding; however, they do not prejudge the merits, as the ICJ has frequently reaffirmed in case law. Nevertheless, such orders may serve as indicators of the Court's reasoning and final decision. In this case, the orders demonstrate that:

a) The Court affirmed it has *prima facie* jurisdiction, so it will likely conclude it does have jurisdiction on the merits.

b) It determined that the rights asserted by South Africa, specifically the protection of Palestinians from genocide, are plausible and that there exists a risk of irreparable harm. Additionally, the Court's repeated intervention with measures suggests it perceives at least a serious possibility that violations of the Convention may occur or are currently taking place.

c) It acknowledged that the situation in Gaza falls within the scope of the Genocide Convention's concerns (otherwise, no measures could be indicated).

d) The progression of orders from general to specific, from caution to near-ceasefire, also indicates that as the conflict developed, the Court's concern intensified. This could mean that, should the conflict escalate in a similar manner, the Court might even identify genocidal acts in a final judgment if warranted.

3.8.5 Implications for the Merits Stage

The orders have several implications. First, they apply moral and political pressure on Israel. Even if Israel does not fully comply, the ICJ's orders still hold international validity and authority. In fact, human rights organizations explicitly used the ICJ's orders as a benchmark to criticize Israel, ultimately shaping public opinion and legal discourse on the case. Over time, such pressure can limit a state's freedom to act or, at the very least, damage its reputation. Additionally, Israel's failure to comply with the provisional measures could further isolate it diplomatically.

Second, the ICJ's orders reinforce the absolute nature of Genocide Convention obligations even during active conflict. In particular, the ICJ clarified that even if Hamas attacked Israel,

Israel does not have the right under the Genocide Convention to respond to the attack in ways that threaten an entire group. This sets a precedent: self-defense is not a justification for genocide. It reaffirms that *jus in bello* and *jus contra* genocide must be respected simultaneously with any self-defense claim.

Third, as previously mentioned, scholars agree that for South Africa and supporters of the Palestinian cause, the provisional measures were a significant victory.[391] It is uncommon for the ICJ to intervene so swiftly and multiple times in an ongoing conflict, demonstrating the Court's receptiveness to South Africa's arguments about the risk of genocide. Additionally, the orders might encourage other states to support or join the case. In fact, by July 2025, Brazil announced it would join the case alongside South Africa.

The measures also highlight the limits of international law enforcement. Israel's partial non-compliance poses a potential issue. The provisional phase suggests Israel might ignore or reinterpret unfavorable judgments. However, non-compliance with provisional measures can be seen as bad faith and could influence the judges' attitudes. Non-compliance could also impact any remedies the Court might order: a judgment might include ongoing monitoring or reporting requirements, as it did for Myanmar. Indeed, in the *The Gambia v. Myanmar* case, the ICJ ordered Myanmar to report periodically on compliance with provisional measures. Israel was also instructed to report, although it's unclear if it did so meaningfully. Nonetheless, the need for repeated orders over three consecutive months in 2024 clearly indicates that Israel was not responsive until pressured.

Overall, the Court's phrasing demonstrates a balance of caution and assertiveness, showing caution about prejudgment and assertiveness concerning the Rafah offensive. Regarding the merits, this indicates the Court will likely avoid using the word "genocide" unless it is truly convinced of *dolus specialis*.

In summary, the provisional measures orders from January to May 2024 show the ICJ working to prevent irreparable harm to the Palestinian population in Gaza and hint at the legal arguments that will be important on the merits, particularly the issues of civilian starvation, indiscriminate killing and dehumanizing rhetoric.

[391] Milena Sterio, 'The ICJ's Provisional Measures Order in the *South Africa v Israel* Case: Unsurprising, Politically and Legally Significant' (Opinio Juris, 27 January 2024); Marko Milanovic, 'ICJ Indicates Provisional Measures in *South Africa v Israel*' (EJIL: Talk!, 26 January 2024); Yussef Al Tamimi, 'Implications of the ICJ Order (*South Africa v Israel*) for Third States' (EJIL: Talk!, 31 January 2024).

3.9 Conclusion

The chapter analyzed the opposing positions of South Africa and Israel in light of international law and the evidence provided. South Africa accused Israel of breaching the Genocide Convention through a military offensive aimed at destroying a substantial part of the Palestinian people in Gaza. Israel, on the other hand, denies any genocidal intent, arguing that it is exercising its legitimate right of self-defense against Hamas and that any civilian casualties are an unfortunate consequence of warfare and Hamas's tactics. It argues that context and intent are what differentiate the war it is conducting from an actual genocide. The legal analysis reveals that the heart of the case is the specific intent required for genocide (*dolus specialis*). South Africa must prove that Israel's military operations in Gaza were conducted with the intent to physically destroy the Palestinian group in whole or in part. This standard is very high since the ICJ's jurisprudence demands that genocide be the only reasonable inference from the pattern of conduct. Nevertheless, Israel's narrative of alternative motives (counter-terrorism and security reasons) provides an alternative inference to genocidal intent, which the Court may not discount.

Conclusion

In conclusion, the key findings of this thesis emphasize both the legal issues and the broader significance of the *South Africa v. Israel* case. Historically and politically, the case arises from an environment of protracted conflict and humanitarian crises, culminating in the 2023 Israel-Hamas war.

Legally, the Genocide Convention provides the structure for addressing the current conflict. The ICJ's jurisdiction was properly invoked through Article IX of the Genocide Convention and the Court stepped into an active conflict to emphasize genocide prevention by indicating provisional measures to protect fundamental rights. As the case moves to the merits, the core issue will be the Court's assessment of *mens rea* and evidence: if South Africa can satisfy the stringent standard of proof for genocidal intent, the judgment would mark the first time a state is held legally responsible for committing genocide against an external population. Such an outcome would also trigger obligations of reparation and fuel international pressure on Israel to change its conduct and to punish the perpetrators. If, on the other hand, the Court finds the evidence insufficient, it would still clarify the limits of the law, reaffirming that not all violence, even if extremely violent and criminal under IHL, meets the narrow legal definition of genocide. Such a judgment might point to alternative definitions (e.g. war crimes or crimes against humanity) as more appropriate for the situation, falling outside the scope of this case. Nonetheless, the case has already demonstrated that states will invoke legal mechanisms to address alleged *jus cogens* violations in real time, not just *post facto*. It has also shown the limits of the ICJ: the Court can assert principles and issue orders but enforcement ultimately hinges on the collective will of states.

Moreover, *South Africa v. Israel* may set a lasting precedent for the enforcement of peremptory norms. It tests the effectiveness of legal remedies for one of the most serious crimes, often referred to as the "crime of crimes". The case will have broader implications on the evolution of international humanitarian law and human rights protection: a severe judgment could strengthen the deterrence of extremely serious crimes such as genocide and by extension other gross violations of international law. It also reinforces the concept of obligations *erga omnes*, reminding all states of their duty not to remain passive in the face of genocide. The

outcome of this case might also contribute to the jurisprudence on the Genocide Convention, clarifying contentious issues such as the standard of proof for intent and the interplay between lawful military conduct and international crimes. In sum, the dispute between South Africa and Israel before the ICJ is more than a litigation over the events in Gaza; it outlines the tension between realpolitik and the rule of law, and it will influence how the world sees the capacity of legal institutions to address and prevent genocide. Whatever judgment the Court issues, the proceedings have already underscored a critical lesson: the prevention and punishment of genocide is a responsibility shared by all nations and the international legal order provides instruments to pursue justice even during an unfolding conflict.

Therefore, the judgement of *South Africa v. Israel* will not only resolve the dispute, but it will shape the legacy of the Genocide Convention and the strength of the international legal system. In a world plagued by conflicts and wars, this case reinforces the imperative that the international community must legally and politically unite to ensure humanitarian assistance to victims and that the gravest crimes must be met with accountability rather than impunity. *Jus cogens* norms are not just ideals written on paper; they are commitments that bind the conscience and conduct of all states.

The enduring impact of this judgment will ultimately be measured by how it influences state behavior and international responses in future crises. However, this thesis finds that *South Africa v. Israel* has already advanced international law in the protection of vulnerable populations by bringing issues of genocide, humanitarian law and international justice to the forefront during an active conflict. The case exemplifies the evolving role of the ICJ in upholding *erga omnes* obligations and may serve as a reference point in the ongoing quest to reconcile state sovereignty with the imperative of preventing genocide and safeguarding fundamental human rights.

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