UNIVERSIDADE CATÓLICA PORTUGUESA

Time of War and Time in War

Examining the South Africa vs. Israel Case

Rita Maria Carreiro Mariz Esteves

International Studies Programme: Master in International and European Law

Faculty of Law | Porto's School
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To my parents, my unconditional safe haven.

To my grandmother, my guardian angel.

É mais fácil mobilizar os homens para a guerra que para a paz. Ao longo da história, a Humanidade sempre foi levada a considerar a guerra como o meio mais eficaz de resolução de conflitos, e sempre os que governaram se serviram dos breves intervalos de paz para a preparação das guerras futuras. Mas foi sempre em nome da paz que todas as guerras foram declaradas.

José Saramago, 2009

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As is only fitting, first of all, I express my deepest gratitude to my parents; their unwavering support and guidance have been the cornerstone of my journey. To my beloved mother, whose strength and resilience have shown me the true meaning of perseverance, I am forever indebted for instilling in me the courage to explore, confident that I would always find my way back. To my cherished father, whose wisdom and encouragement have been enduring sources of inspiration, I am profoundly proud of the values and morals you have engraved in me, for they are the guiding light through which I view and navigate the world.

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To all those who, in some way, brightened this journey.

TIME OF WAR AND TIME IN WAR
EXAMINING THE SOUTH AFRICA VS. ISRAEL CASE

Abstract: In the complex arena of international conflicts, the Palestinian-Israeli dispute emerges as a compelling narrative marked by a historical accusation filled with legal maneuvers and geopolitical tensions. From territorial claims to South Africa's advocacy for Palestinian rights before the ICJ, each aspect reveals layers of complexity in the ongoing conflict. Notably, the ICJ's first and recent provisional measures indicate a nuanced understanding of the conflict's evolving dynamics, reflecting the Court's pivotal role in navigating global tensions. While refraining from a definitive ruling on genocide, the Court's acknowledgment of the plausibility of South Africa's claims underscores the magnitude of the situation. Simultaneously, the ICC emerges as a crucial arbiter of justice, transcending political pressures to uphold accountability. However, the challenge of demonstrating intent in cases involving states poses a significant obstacle, prompting critical reflections on the application of international law in such sensible scenarios. This dispute, reminiscent of a global broadcast of atrocity, compels us to confront the darkest chapters of history and reaffirms the imperative of seeking justice and protecting civilian populations.

Keywords: South Africa; Israel; International Court of Justice; Jurisdiction; Provisional Measures; International Criminal Court; Genocide; Intent.

TIME OF WAR AND TIME IN WAR
EXAMINING THE SOUTH AFRICA VS. ISRAEL CASE

Resumo: Na complexa arena dos conflitos internacionais, a disputa Israelo-Palestiniana emerge como uma envolvente narrativa marcada por uma acusação histórica repleta de manobras jurídicas e tensões geopolíticas. Das reivindicações territoriais à defesa dos direitos dos palestinianos pela África do Sul perante o TIJ, cada aspeto revela camadas de complexidade no conflito em curso. Nomeadamente, as primeiras e recentes medidas provisórias do TIJ indicam uma matizada compreensão da dinâmica evolutiva do conflito, refletindo o papel fundamental do Tribunal na resolução das tensões globais. Embora se tenha abstido de tomar uma decisão definitiva sobre o genocídio, o facto de o Tribunal reconhecer a plausibilidade das alegações da África do Sul sublinha a magnitude da situação. Simultaneamente, o TPI surge como um árbitro crucial de justiça, transcendendo as pressões políticas para garantir responsabilização. No entanto, o desafio de demonstrar a intenção em casos que envolvem Estados constitui um obstáculo significativo, suscitando reflexões críticas sobre a aplicação do direito internacional em cenários tão sensíveis. Esta disputa, que faz lembrar uma transmissão global de atrocidade, obriga-nos a confrontar os capítulos mais negros da história e reafirma o imperativo de procurar justiça e proteger as populações civis.

Palavras-Chave: África do Sul; Israel; Tribunal Internacional de Justiça; Jurisdição; Medidas Provisórias; Tribunal Penal Internacional; Genocídio; Intenção.

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PREVIOUS NOTE

Prior to delving into the discussion, it's crucial to acknowledge that this analysis concerns an ongoing conflict, characterized by its dynamic nature and frequent developments. It's imperative for readers to understand that the data provided herein was gathered up to April 2024.

LIST OF ACRONYMS AND ABBREVIATIONS

Art.	Article
CERD	Committee on the Elimination of Racial Discrimination
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ECHR	European Court of Human Rights
EU	European Union
HR	Human Rights
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IVGC	Fourth Geneva Convention
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
p.	Page/Pages
par.	Paragraph/Paragraphs
Res.	Resolution
RS	Rome Statute
SCIIP	Special Committee to Investigate Israeli Practices
UN	United Nations
UNC	United Nations Charter
UNCE	United Nations Commission of Experts
UNGA	United Nations General Assembly
UNRWA	United Nations Relief and Works Agency for Palestine Refugees
UNSC	United Nations Security Council
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

INTRODUCTION

In the ongoing legal dispute between South Africa and Israel, two distinct narratives emerge, each presenting a compelling yet contrasting perspective. On one side, we have the plight of the Palestinian people, who have endured displacement and the denial of their right to self-determination since the conception of the State of Israel in 1948, being their narrative one of oppression and occupation that has persisted for decades. Conversely, the Jewish perspective reflects a long history of persecution and fragmentation, culminating in the establishment of Israel as a homeland for people who faced extermination during the Holocaust. These narratives, though seemingly conflicting, both hold truths that deserve recognition[1].

In an extensive 84-page submission, South Africa makes severe accusations against Israel, alleging that its actions, and inactions, possess genocidal characteristics. The application contends that these are carried out with the deliberate intent to eradicate Palestinians in Gaza, thereby targeting them as a subset of the broader Palestinian national, racial, and ethnic community[2].

Undoubtedly, Gaza faces a deeply distressing humanitarian crisis at present. Recent data from UNRWA as of April 4, 2024, reveals a grim reality: at least 33,899 Palestinians, including 13,800 children, have tragically lost their lives. These figures underscore the devastating cost of the conflict, with more children perishing in just four months in Gaza than in the entirety of conflicts worldwide over four years[3]. Additionally, over 12,009 children have been injured, and more than 8,000 individuals are reported missing. Furthermore, at least 1.7 million people are displaced within Gaza, highlighting the widespread displacement and instability faced by civilians in the region[4]. Moreover, a large portion of the population is struggling with the dual challenges of disease and starvation, compounded by the persistent threat of military strikes[5].

Witnessing a genocidal exhibition, on December 29 South Africa has assumed the role as guardian of the rights of Palestinians in Gaza through its pursuit of provisional measures at the ICJ[6]. Due to the urgency of the situation and the risk of irreparable harm,

[1] Keitner, 2024.
[2] Amnesty, 2024.
[3] Lusa, 2024.
[4] UNRWA, 2024.
[5] WHO, 2023.
[6] Keitner, 2024.

the Court issued provisional measures "as a matter of extreme urgency", until a final decision is made (*§144 South Africa v. Israel*)[7].

In this dissertation, we shall look into the origins of the conflict, seeking to uncover the factors that have shaped its development over time. We navigate the jurisdictional terrain of the ICJ, delving into the complexities of its realm and the legal frameworks that underpin its decisions. We analyze the contrasting narratives presented by opposing parties in the ICJ's deliberations, shedding light on the divergent perspectives and their implications for the case's outcome. Furthermore, we delve into the ICJ's use of provisional measures as a tool to address conflict, exploring the legal leverage carried by the Court. Transitioning to the ICC' sphere, we examine the intersection of justice and conflict resolution, seeking the intricacies of genocide allegations and the question of intent. Lastly, we explore the potential pathways forged by the ICC in the context of the conflict, assessing its role in advancing accountability and fostering conciliation.

[7] Keitner, 2024.

CHAPTER I – Origins Unveiled: Tracing the Roots of Conflict

In 1967, Egypt administered the Gaza Strip, while the West Bank was integrated with Jordan after the adoption of the Act of Unity in 1950. However, with the eruption of hostilities between Israel and the Arab States, the Israeli army occupied both territories. Despite numerous UNGA resolutions demanding the "withdrawal from all territories occupied", Israel continues to defy them, maintaining its occupation of these lands several years later[8].

The legal status of the West Bank and Gaza is a topic of heated debate, marked by contrasting interpretations stemming from historical, religious, and international legal contexts. Israel claims sovereignty over these regions, however, the prevailing view among the international community, consistent with UN resolutions[9], regards them as occupied territories.

While Israel maintains that its governance of the territories is not comparable to occupation but rather an administrative arrangement, citing legislation enacted after 1967 that extended Israeli law to these areas, international legal frameworks, including the IVGC[10] and the 1907 Hague Convention, offer specific criteria for assessing the status of occupied territories, thus contributing to the ongoing debate regarding the legal status of the West Bank and Gaza[11]. In fact, Art. 42 of the Hague Regulations[12] delineates the criteria for occupation, while Israel's endorsement of the IVGC underscores its legal commitments, which appear to be consistent with the concept[13].

[8] UN, 1982.

[9] The UN has consistently reaffirmed the inalienable rights of the Palestinian people through various resolutions. Res. 2535 (XXIV) reiterated these rights, while Res. 2628 (XXV) underscored the importance of respecting Palestinian rights for establishing peace in the Middle East. Similarly, Res. 2672 (XXV) recognized the entitlement of the Palestinian people to equal rights and self-determination. This sentiment was echoed in Res. 2949 (XXVII), Res. 3089 (XXVIII), and Res. 3210 (XXIX). UNGA, in Res. 3236 (XXIX), reaffirmed the inalienable rights of the Palestinian people, including the right to self-determination and national sovereignty. Additionally, Res. 3375 (XXX) urged the UNSC to enable the Palestinian people to exercise their national rights. UNGA further expressed concern about the continued illegal occupation of Arab territories in Res. 32/20 and emphasized the need for a comprehensive solution to the Middle East problem in Res. 33/29. Moreover, Res. ES-7/2 reaffirmed the inalienable rights of the Palestinians, including the right of return, self-determination, and the establishment of an independent sovereign state. UNGA Res. 35/169 reiterated these rights and demanded Israel's complete withdrawal from all occupied territories, while UNSC Res. 465 condemned Israel's actions in occupied territories as violations of the IVGC and demanded to revoke illegal measures. See: UN, 1982.

[10] See Art. 47 of the IVGV.

[11] UN, 1982.

[12] See Art. 42 and 43 of The Hague Regulations.

[13] Israel signed IVGC on December 8, 1949, and subsequently ratified it on July 6, 1951.

However, debates persist regarding the interpretation and enforcement of these conventions. International entities such as the ICRC and the UN affirm the relevance of these conventions to the occupied territories. UNSC Res. 465, passed unanimously, explicitly reaffirms the applicability of the IVGC to the territories occupied by Israel since 1967. Additionally, the SCIIP highlights the importance of upholding the Geneva Conventions and advocates for the application of Jordanian law in the West Bank, warning against legislative and institutional alterations that violate IHL[14].

Hence, despite Israel's claim of sovereignty over the West Bank and Gaza, the legal status of these areas remains disputed, with international legal standards and resolutions reaffirming their classification as occupied territories and emphasizing the importance of adhering to humanitarian principles[15].

As the legal dispute over the status continues, it intersects with broader geopolitical dynamics and historical struggles for justice, setting the stage for this case brought by South Africa against Israel on behalf of Palestinian rights. The historical trajectory suggests a scenario wherein South Africa's decision to initiate legal proceedings against Israel at the ICJ may have been influenced by multifaceted factors. Among these, the controversial visit of South Africa's Prime Minister, Balthazar Johannes Vorster, to Israel in 1976. Despite Vorster's controversial past as a Nazi sympathizer, his diplomatic engagement aimed to solidify arms deals between the two nations, subsequently fostering a significant military partnership during South Africa's *apartheid* era. Over time, however, the relationship between the two nations soured, catalyzed by historical resentments over Israel's perceived support for *apartheid* and South Africa's alignment with anti-*apartheid* movements sympathetic to the Palestinian cause[16]. Thus, South Africa's decision to initiate a legal dispute in the ICJ reflects not only its own historical experience with *apartheid* but also its alignment with the Palestinian liberation movement and perhaps the reflection of a desire to reclaim its moral standing on the global stage[17].

Moreover, numerous HR Organizations, legal experts, and international bodies have accused Israel of practicing *apartheid* in its treatment of Palestinians in the occupied West Bank[18]. Among these are HRW, Amnesty International, and the UN which have

[14] UN, 1982.
[15] UN, 1982.
[16] Polakow-Suransky, 2024.
[17] Polakow-Suransky, 2024.
[18] Keitner, 2024.

highlighted Israel's policies regarding land access, movement restrictions, voting rights, and legal systems as indicative of institutionalized racism designed to uphold Israeli Jewish supremacy over Palestinians. This comparison to *apartheid* is noteworthy, as it draws parallels between Israel's treatment of Palestinians and the systematic oppression experienced by Black residents during *apartheid* in South Africa[19].

Nevertheless, it is pertinent to acknowledge that South Africa has hindered prosecutions for international crimes, including genocide. This is exemplified by its failure to adhere to an arrest warrant issued by the ICC against Sudanese President Omar al-Bashir[20,21]. Additionally, South Africa abstained from the UNGA's March 2022 condemnation of Russia's invasion of Ukraine. The South African president voiced criticism against the Res. ES/11-1, citing its failure to prioritize meaningful engagement between Ukraine and Russia[22]. However, this abstention does not diminish Israel's legal obligations or the imperative to firmly engage with South Africa's argument[23].

As a third party to the conflict not to forget, Hamas unequivocally opposes a two-state solution, a stance that many Jews interpret as a call for the destruction of Israel and the expulsion of its Jewish population from the area between the Jordan River and the Mediterranean Sea. However, some Palestinian activists argue that they advocate for peace and equality with the slogan "from the river to the sea" aiming to channel Palestinian anger at the ongoing Israeli occupation and present itself as the authentic voice of resistance, particularly in the face of Israel's hard-right government's actions in the West Bank and Gaza. Additionally, geopolitical factors such as Israel's negotiations to normalize relations with Saudi Arabia may have influenced Hamas's decision to launch the attack[24].

Meanwhile, Prime Minister Benjamin Netanyahu's Israeli government has actively restricted the establishment of a sovereign Palestinian State. Extremist factions within Israel's right-wing seek to forcibly remove Palestinians from the West Bank and Gaza and reject non-Jewish immigrants, despite the significant Arab minority within

[19] Zhou, 2023.
[20] Keitner, 2024.
[21] The ICC ruled that South Africa's failure to arrest Bashir was a violation of its obligations under the RS. While South Africa argued that there was no duty under international law to arrest him and that he enjoyed diplomatic immunity, the ICC prosecutor contended that South Africa had the ability to arrest him but chose not to do so. See: Aljazeera, 2017.
[22] South Africa's abstention drew criticism, particularly from social media users who questioned African countries' stance on the issue. The abstention was part of a larger pattern, with 17 African countries choosing not to vote, representing nearly half of the countries that remained neutral. See: Mureithi, 2022.
[23] Keitner, 2024.
[24] Beauchamp, 2023.

Israel, comprising mostly Muslims but also Christians and Druze. This persistent conflict fuels a cycle of dehumanization, eroding the chances of reaching a shared understanding[25].

The truth is, South Africa's bold move to take Israel to the ICJ on behalf of Palestinian rights is not merely a legal maneuver, it's a strategic assertion of power with deep historical roots. Behind the scenes of this legal battle lies a complex web of geopolitical dynamics and historical struggles. From South Africa's own experience with *apartheid* to its alignment with the Palestinian liberation movement, every step in this journey reflects a calculated effort to challenge the *status quo* and shift the balance of power in the region. As the case unfolds, it becomes increasingly clear that this is more than just a legal dispute, it's a high-stakes game of power, where the future of Palestine hangs in the balance. Yet, amid the complexities and uncertainties, one thing remains certain: South Africa's stance resonates as a powerful statement on behalf of Palestinian rights, echoing the aspirations of oppressed peoples everywhere for justice and liberation.

[25] Keitner, 2024.

CHAPTER II – The International Arena: Navigating the World Court's Terrain

A. Jurisdictional Maze: Understanding the ICJ's Realm

In the records of international law, where principles cross with geopolitical reality, the ICJ stands out as an institution of justice tasked with settling international disputes. Its ancient halls endure with the weight of history, where legal debates rage and the delicate balance between sovereignty and global order is at stake. As an esteemed institution within the realm of international law, the ICJ assumes the vital role of settling disputes between nations, navigating the intricate balance between sovereignty and global order within its historic chambers. While its focus lies on adjudicating legal conflicts among states rather than prosecuting individual criminal liability, the Court's purview extends to matters encompassing the interpretation, application, or fulfillment of treaties such as the Genocide Convention – as outlined in Art. 38(1)(a) of its Statute – as well as determining state's responsibility for acts of genocide[26].

However, before the Court can exercise its jurisdiction during the preliminary measures phase, it must establish three key points: firstly, whether Israel's claimed actions could potentially fall within the scope of the Genocide Convention. Secondly, it must assess whether provisional measures are necessary to safeguard the rights of the involved parties as outlined in the treaty. Lastly, the Court must determine whether there exists a connection between the rights being sought for protection and the provisional measures being requested[27]. These initial considerations form the foundation of the Court's decision-making process. However, two additional criteria factor into the consideration of provisional measures: the risk of irreparable[28] harm and the urgency of the situation. These aspects are closely intertwined with the Court's assessment of the initial three criteria[29].

Undoubtedly, the urgency of the circumstances is evident, with both physical and psychological harm inflicted upon civilians deemed unrecoverable. However, it's crucial to note that the Court's jurisdiction extends solely to safeguarding rights delineated within

[26] Amnesty, 2024.
[27] Keitner, 2024.
[28] See §74 *Gambia v. Myanmar*.
[29] Keitner, 2024.

the Genocide Convention[30]. With its dual focus on prevention and punishment, the Genocide Convention empowers the ICJ to address disputes between contracting parties concerning the interpretation, application, or fulfillment of the provisions, as evidenced by Art. VIII. The Court's determination revealed that it possesses *prima facie* jurisdiction over this dispute as outlined in the Convention[31], establishing a foundational basis for its involvement. Additionally, it acknowledged that "at least some" of South Africa's assertions regarding Israel's infringement of the Convention hold plausibility (§*30 South Africa v. Israel*), requiring further examination and legal scrutiny[32]. It is important to remember that establishing a *prima facie* case of failure to prevent and punish incitement is not contingent on the occurrence of genocide.

The ICJ, while pivotal in matters of international law, typically doesn't serve as the initial venue for addressing concerns related to global peace, security, or humanitarian emergencies. According to the UNC, the UNSC, comprised of 15[33] members, holds the primary responsibility for upholding international peace and security[34,35]. However, in accordance with Article IV of the Genocide Convention, the ICJ assumes responsibility regarding disputes between consenting states in instances where the provisions of the Convention come into play.

These articles enable the ICJ to act when nations may be failing to uphold their obligations to prevent and punish acts of genocide, thus stepping in as a protector to ensure that the Convention's obligations are enforced, and justice is upheld[36]. States that are parties to the treaty consent to the ICJ's jurisdiction over disputes between states parties concerning genocide. This includes matters related to conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in genocide[37], according with Art. III.

South Africa, much like other states parties, recognizing the collective responsibility enshrined in the Genocide Convention, affirms its right to address violations of the treaty through the ICJ thus setting the stage for invoking the *erga omnes*

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[30] Keitner, 2024.
[31] The Genocide Convention currently has 153 parties, including Israel (since 1991) and South Africa (since 1998).
[32] Keitner, 2024.
[33] See Art. 23 of Chapter V of the UNC.
[34] Despite Art. 92 of Chapter XIV of the UNC, which designates the ICJ as the principal judicial organ of the UN and outlines its functions, Art. 24(1) asserts that the UNSC holds primary responsibility for maintaining international peace and security.
[35] Keitner, 2024.
[36] Keitner, 2024.
[37] Keitner, 2024.

partes doctrine, also known as the doctrine of "common interest". Considering that all states party to the Genocide Convention share a collective interest in preventing acts of genocide and ensuring that perpetrators do not evade accountability, the provisions in question give rise to *erga omnes partes* obligations. In other words, each state party has a vested interest in ensuring compliance with these obligations in any given scenario[38]. This doctrine allows a state, which is a signatory to a treaty safeguarding collective legal rights, to enforce those rights, even if the state itself is not directly affected by the violation. Under this principle, any nation can call upon another nation to be held accountable for its unlawful conduct if the breached obligation is owed to the global community collectively, as stipulated in Art. 48(6) of the DARSIWA[39]. In fact, also through the application of this doctrine, Nicaragua affirms its vested interest in upholding the obligations outlined in the Convention when submitted an application to intervene in the proceedings of *South Africa v. Israel* case, invoking Art. 62 of the ICJ's Statute[40].

Additionally, in an interesting note, Nicaragua proceedings against Germany at the ICJ on 1st of March mirrors the approach taken by South Africa against Israel. By submitting an official application, it accuses Germany of complicity in the alleged genocide of Palestinians by Israel in Gaza, citing violations of the Geneva Conventions, and underlining that Germany had discontinued financial assistance to UNRWA, which provides critical aid to Palestinian residents. In fact, Berlin has long been one of Israel's most vocal supporters, owing to the "moral debt" incurred as a result of the Holocaust's legacy. This may be interpreted as political support for Israel's perpetration of atrocities and violations of international law[41]. On the other hand, Germany's swift decision to intervene in the case initiated by South Africa suggests being a response to this political instigation. Given its post-Holocaust legacy, Germany may feel a strong moral obligation to uphold international law and prevent genocide. As a key ally of Israel, Germany might be driven by strategic interests to support and defend its ally in the face of allegations of genocide. This move could reflect Germany's support for Israel and its wider geopolitical goals in the Middle East. However, while Germany's intervention may demonstrate solidarity with Western allies, it also raises questions about its stance on human rights and international justice, potentially straining diplomatic relations[42].

[38] Hachem & Hathaway, 2024.
[39] Jadhav, Ravey, Henderson, & Patel, 2024.
[40] See §10 of the *Nicaragua's Application for the Permission to Intervene*.
[41] Kılavuz, 2024.
[42] Talmon, 2024.

Regarding South Africa appeal, the Court refrained from exploring the other legal frameworks pertinent to Israel's actions, as they fall outside the purview of the Genocide Convention. Nevertheless, it underscored that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law" (§85 *South Africa v. Israel*)[43]. It's crucial to understand that the Court's ruling doesn't make a definitive judgment on whether Israel's actions in Gaza amount to genocide. Rather, at these provisional measures stage, the Court is assessing the credibility of the rights asserted by South Africa for possible safeguarding[44].

Additionally, the Court also has the authority to provide advisory opinions on matters brought before it by entities such as the UNGA. This includes ongoing requests like the one outlined in Res. 77/247 from December 30, 2022[45], urging the Court to offer a legal perspective on Israel's violations of Palestinian rights. While advisory opinions lack binding legal force, they carry substantial weight, as evidenced by previous rulings on contentious issues like Israel's security wall construction in the Occupied Palestinian Territory[46,47].

While the absence of an international police force poses a challenge in enforcing the Court's rulings, the authoritative nature of these judgments is undeniable. Ever since the 2001 *LeGrand* case (*Germany v. United States of America*), the Court has upheld the binding nature of its orders pertaining to provisional measures[48]. With judgments delivered being binding upon the concerned parties, Art. 94 of the UNC emphasizes the obligation of each member state to adhere to the Court's decisions. These judgments are not subject to appeal, ensuring their finality. In cases where there may be ambiguity, parties can seek clarification through a request for interpretation. Additionally, if new evidence arises, either party can petition for the revision of the judgment, as stipulated by Art. 61 of the ICJ's Statute[49]. This provision serves as a vital pathway to justice, recognizing the dynamic nature of historical narratives and emphasizing the critical need for ongoing scrutiny and adaptability in the pursuit of truth and accountability.

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[43] Keitner, 2024.
[44] Goodman & Watt , 2024.
[45] The UNGA involvement in settling the conflict began with the issuance of Res. 181/1947, followed by Res. A/RES/ES-10/21, Res. A/RES/77/208 and others. Additionally, more recently, it also has called for an immediate humanitarian cease-fire through the Res. A/ES-10/L.27, on the immediate and unconditional release of all hostages and ensuring humanitarian access.
[46] See Res. ES-10/14.
[47] Keitner, 2024.
[48] Goodman & Watt , 2024.
[49] ICJ, s.d.

Furthermore, there are channels of appeal available within the UN system in situations when the ruling of the ICJ is believed to have been broken. Firstly, should these rulings not be executed, the matter is referred to the UNSC, which holds the authority to propose recommendations or determine actions necessary to enforce the judgment[50]. However, the adoption of UNSC Res. 2728, demanding an immediate ceasefire during the month of Ramadan as well as the unconditional release of all hostages, raises questions about the effectiveness of the UNSC in addressing grave international crises such as the conflict between Israel and Palestine. Despite receiving overwhelming support from the international community, the resolution's non-binding nature, as asserted by American officials, casts doubt on its enforceability. This apparent departure from the traditionally firm support of Israel by the US underscores a shifting dynamic within UNSC and its role in promoting international peace and security. As the Resolution has questionable authority despite Art. 25 of the UNC, its implementation remains uncertain, particularly given Israel's historical reluctance to comply with such resolutions. Thus, while it serves as a symbolic gesture of international concern, its impact on the ground may ultimately be limited, highlighting the need for more robust mechanisms to ensure compliance with international law and promote lasting peace in the region[51]. Additionally, parties are also authorized to bring such cases before the UNGA by Res. 377, often known as the Uniting for Peace Resolution, and Articles 10, 11, 14, 22, and 35 of the UNC. As mandated by UNC Art. 98 and 99, the Secretary-General is responsible for guaranteeing ICJ rulings are followed. However, even with these safeguards in place, there is still a significant gap in the effective application of ICJ decisions, as more governments decide to ignore them[52].

It is crucial to stress that disobeying ICJ decisions can have serious consequences, such as diplomatic isolation and losing support from other countries, especially when it comes to cases of genocide, which is regarded as the "Crime of All Crimes"[53]. In this *momentous* and widely followed case, the ICJ's jurisdiction underscores its crucial role as a safekeeper of global justice and accountability.

[50] Amnesty, 2024.
[51] Ramos, 2024.
[52] Jadhav, Ravey, Henderson, & Patel, 2024.
[53] Jadhav, Ravey, Henderson, & Patel, 2024.

B. Dueling Narratives: ICJ's Decision and the Provisional Measures

I. Clashing Perspectives: Prosecution *vs*. Defense

In light of the devastating situation unfolding in Gaza, South Africa seeks to halt Israel's military operations in Gaza citing plausible allegations of the crime and emphasizing the urgency of the situation to prevent irreparable harm.

The Court conducted public hearings on South Africa's provisional measures request on 11th and 12th of January. In the clash of perspectives between South Africa and Israel, the narratives presented to the Court diverge starkly. South Africa's victim-oriented approach underscores the urgency and irreparable harm to Palestinian civilians, emphasizing the need for immediate intervention to prevent further devastation (*Jan. 11 verbatim record, at p. 72*). Conversely, Israel's narrative centers on the implausibility of South Africa's claim of special genocidal intent, portraying its military actions in Gaza as self-defense against Hamas's aggression (*Jan. 12 verbatim record, at p. 12*)[54].

South Africa's narrative began with its legal team, led by John Dugard, presenting a firm condemnation of the October 7 attack, contending that Israel's response, characterized by widespread destruction and severe impact on Gaza's civilian population, was disproportionate and suggested potentially genocidal motivations behind the use of force (*Jan. 11 verbatim record, at p. 77*), as emphasized by the continuous Israeli airstrikes and ground invasion. Subsequently, Adila Hassim, representing South Africa, presented five main "genocidal acts" perpetrated by Israel during the war in Gaza, including mass killings, bodily and mental harm, forced displacement and food blockade, destruction of the healthcare system, and averting of Palestinian births. Hassim argued that Israel's actions resulted in significant civilian casualties, with thousands killed and tens of thousands wounded or displaced. She also highlighted the deliberate destruction of Gaza's healthcare system and the obstruction of humanitarian aid, leading to widespread suffering and loss of life[55]. Backed by substantial evidence, encompassing UN reports and provocative statements from Israeli officials, South Africa contended that Israel's conduct satisfied the *actus reus* criteria outlined in Art. II for genocide[56], urging the ICJ to implement urgent measures to cease the ongoing violence and devastation in

[54] Shany & Cohen, 2024.
[55] Lawal, 2024.
[56] Shany & Cohen, 2024.

Gaza and stressing that a final verdict on the genocide allegations was not requisite for the Court to intervene[57].

On the opposite hand, Israel legal team, led by Malcolm Shaw, asserts its legal and moral duty to safeguard its citizens. It presented a contrasting narrative, acknowledging Palestinian suffering while emphasizing the broader context of urban warfare against Hamas and portraying its military actions as necessary defensive measures undertaken to protect Israeli civilians from relentless attacks by Hamas militants (*Jan. 12 verbatim record, at p. 12*). Israel raised procedural objections regarding the Court's jurisdiction, claiming that South Africa failed to engage in dialogue before bringing the case to the ICJ. Furthermore, it defended its actions during the war in Gaza, arguing that it acted in self-defense[58] against attacks by Hamas and invoked Professor Vaughan Lowe, counsel for South Africa, statement from 2005 that says "no-one, and no state, is obliged by law passively to suffer the delivery of an attack"[59], regardless of whether the attacker is a state or a non-state entity. Israel highlighted Hamas's tactics of using civilians as human shields, launching rockets from civilian areas, and impeding humanitarian aid delivery and argued that its actions were consistent with IHL law, aiming at countering Hamas's aggression rather than perpetrating genocide[60], refuting the genocidal intent arguments by arguing that they were based on misinterpretations and taken out of context. Thus, despite South Africa's allegations, Israel maintained that it had not intentionally targeted civilians or prevented humanitarian aid from reaching Gaza[61].

Thus, in presenting their cases, both sides selectively highlighted certain facts while downplaying others to support their respective narratives. South Africa focused on the extensive loss of Palestinian lives and the dire humanitarian situation in Gaza, while neglecting Hamas's role in exacerbating the conflict and endangering civilians (*Jan. 11*

[57] Lawal, 2024.
[58] The argument follows Israel's interpretation of Art. 51 of the UNC, which recognizes the inherent right of states to defend themselves against external threats. According to Israel, its military actions in Gaza were necessary measures taken to safeguard its territorial integrity and ensure its survival amid attacks by Hamas. This assertion aligns with the classical view of international law, which grants states the broad right of self-preservation, including the use of force to protect their interests. However, it also reflects a modern perspective that emphasizes the interests of the international community as a whole, particularly in maintaining a credible prohibition on the use of force. Israel's invocation of self-defense underscores the complex interplay between state sovereignty and the collective responsibility to uphold peace and security within the international system. See: Weller, 2024.
[59] Wilmshurst, 2005, p. 22.
[60] Shany & Cohen, 2024.
[61] Lawal, 2024.

verbatim record, at p. 72). In contrast, Israel emphasized its security challenges and efforts to minimize harm to Palestinian civilians, while omitting controversial measures such as the blockade of Gaza and the destruction of civilian infrastructure and emphasizing the attempt to reduce the escalation of the conflict (*Jan. 12 verbatim record, at p. 53*)[62].

Regarding the contrasting perspectives on the necessity and implications of implementing provisional measures, South Africa's affirmed that demonstrating acts that potentially constitute genocide is sufficient to establish a "plausible" claim justifying the implementation of provisional measures[63]. Conversely, according to Israel, unless the Court requires a sufficient demonstration of particular intent, any terrorist group may embed itself within a civilian society resulting in the type of humanitarian catastrophe that would prompt the Court's action under South Africa's premise. Additionally, during the hearings, Israel contended that provisional measures should function defensively, not offensively, stressing that any directive to cease rescue operations for Israeli hostages and counter Hamas's attacks might compromise Israel's primary obligation to safeguard its citizens. Therefore, Israel's legal representatives opposed the granting of provisional measures[64].

After considering the arguments presented by both sides, the ICJ ultimately issued provisional measures to address the situation, claiming that "at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza" (§*30 South Africa v. Israel*) and that "at least some of the rights claimed by South Africa met the test of plausibility" (§*54 South Africa v. Israel*).

[62] Shany & Cohen, 2024.
[63] Keitner, 2024.
[64] Keitner, 2024.

II. Legal Leverage: ICJ's Use of Provisional Measures to Address Conflict

The term "provisional measure of protection" is used by the ICJ to describe a process that is similar to temporary restraining orders or directive orders that are present in national legal systems. Executing this procedure is referred to as indicating the provisional measure of protection[65]. Therefore, the objective of provisional measures must be the urgent preservation of the respective rights claimed by the parties, pursuant Art. 41 from the ICJ Statute and Art. 74 of the Rules of Court[66].

For the issue of the provisional measures, the Court must assess the plausibility[67] of the rights claimed by South Africa and determine if there is a significant connection between those rights and the provisional measures requested[68]. In *Timor-Leste v. Australia*, Judge Greenwood clarified that plausibility means that there is "a realistic prospect that [the rights in question] will be adjudged to exist and to be applicable when the Court rules on the merits of the case" (*§4 Timor-Leste v. Australia*)[69].

Indeed, the plausibility section of the order acknowledges the assertions of both parties before delving into an examination of numerous UN sources[70]. The Court's jurisprudence was noted by Judge Nolte as "not entirely clear as to what "plausibility" entails". He clarified that his vote in favor of the provisional order was justified by the fact that, even though he did not think the military operations in Gaza were carried out with the intention of committing genocide, remarks made by Israeli military and political figures "give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention" (*§10* and *§15 Judge Nolte Declaration*)[71]. Therefore, the Court lacked a detailed fact-finding report establishing possible genocidal intent, but, instead, it considered circumstantial evidence submitted by South Africa, such

[65] Rosenne & D. Gill, 1989, p. 95.
[66] See also Art. 75 of the Rules of Court.
[67] The exact parameters of plausibility remain somewhat nebulous. However, in previous instances, the Court hinted that a determination of plausibility hinges on "a thorough examination of the evidence and arguments presented" (*§*58 *Costa Rica v. Nicaragua*), which Judge Koroma objected by stated that the application of "plausibility" in the case was "ambiguity and uncertainty" and that it is still unclear if the test applies to facts, legal rights, or both (*§*1 *Separate Opinion of Judge Koroma*). Additionally, the Court suggested that the severity of the allegations does not impact the plausibility threshold (*§*56 *Gambia v. Myanmar*). Moreover, the Court indicated that the plausibility test should scrutinize key elements of the right in question (*§*75 *Ukraine v. Russia*), emphasizing the need to assess whether essential components such as intention, knowledge, and purpose, are present. See: Galand & Muller, 2024.
[68] Keitner, 2024.
[69] Galand & Muller, 2024.
[70] Cohen & Shany, 2024.
[71] Galand & Muller, 2024.

as the dire humanitarian situation in Gaza and statements by Israeli officials, like Defense Minister Yoav Gallant, President Isaac Herzog, and former Energy Minister Israel Katz. Additionally, the Court considered statements from various UN bodies, high-ranking UN officials, and UN experts, including OCHA, WHO, CERD, the Under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, and the Commissioner-General of UNRWA. This underscores the flexible nature of the plausibility standard, which depends on the specific rights, claims, and factual circumstances presented in court[72].

Although the evidence was weak and contested, the Court found that at least some of the rights claimed by South Africa were plausible, particularly regarding the protection of Palestinians in Gaza from acts of genocide and related prohibited acts[73]. In fact, the Court determined that the actions of Israel in the Gaza Strip fulfilled the criteria outlined in *§66* and *§74* (*South Africa v. Israel*), concluding that Israel's measures to mitigate harm to civilians and counter incitement were inadequate in addressing the potential for irreversible harm, as indicated in *§73* (*South Africa v. Israel*) [74]. However, due to the legal weaknesses of the case and the inability to clearly define the plausible rights, the Court favored issuing general rather than specific provisional measures. As a result, the impact of these measures is limited[75].

Regarding the structure of judges that constituted the ICJ and resulted in the remarkable consensus concerning the provisional measures, it is important to understand that the Court consists of 15 judges, each serving nine-year terms. These judges are elected by the UNSC and the UNGA, with the requirement that each judge must come from a different country[76]. As none of the current 15 judges represented either South Africa or Israel, both countries had the opportunity to appoint *ad hoc* judges, bringing the total number of judges to 17[77,78]. South Africa's appointee was Judge Dikgang Ernest Moseneke[79], known for his opposition to *apartheid*, for which he was imprisoned, and

[72] Galand & Muller, 2024.
[73] Cohen & Shany, 2024.
[74] Goodman & Watt , 2024.
[75] Cohen & Shany, 2024.
[76] See Art. 4 of the ICJ's Statute.
[77] See Art. 31 of the ICJ's Statute.
[78] Keitner, 2024.
[79] Moseneke's serious sense of injustice led him to actively resist the oppressive *apartheid* regime, resulting in his detention. Emerging from his confinement, he embarked on a remarkable journey that saw him rise as a leading figure in South Africa's legal landscape. His legacy as a defender of democracy and human rights is highlighted by his crucial involvement in writing the country's new constitution and supervising its first democratic elections. See: Levi & Dikgang, 2020.

Israel's appointee was Judge Aharon Barak[80], a Holocaust survivor[81]. However, it is important to note that ICJ judges do not serve as representatives of their respective countries, a point emphasized by Uganda[82] following Judge Sebutinde's dissent[83].

Moreover, changes in the composition of the Court have occurred since January[84], with South Africa securing a permanent judge and the Lebanese Judge Nawaf Salam being elected as President of the ICJ, which holds particular significance for the ongoing case. Salam's background and his previous involvement in advocating for Palestinian rights suggest a potential shift in the dynamics of the ICJ proceedings. Given Salam's history of defending the rights of Palestinians and his alignment with South Africa's position, his presidency introduces a new dimension to the case since his leadership may influence the Court's deliberations and rulings, potentially bolstering South Africa's arguments. Nevertheless, Salam's presidency underscores the importance of impartiality and fairness in the ICJ's, while also highlighting the potential impact of personal backgrounds and beliefs on judicial decisions in contentious international disputes. Thus, his election adds an intriguing layer of complexity to the already contentious legal battle[85]. As the case progresses under Salam's leadership, it will be intriguing to see how his perspectives and advocacy for Palestinian rights may influence the Court's decisions and shape the outcome of this significant international dispute. It should also be noted that it was this new Court that examined South Africa's Urgent Request and issued the second set of provisional measures ordered on March 28.

Regarding the first issue of provisional measures, the striking characteristic of the Court's opinion is its remarkable alignment among the judges[86]. The provisional measures were voted upon as follows: the first one indicated by a vote of 15-2, with Judge *ad hoc* Aharon Barak and Judge Julia Sebutinde voting against; the second by a vote of 15-2, with Barak and Sebutinde voting against; the third by a vote of 16-1, with

[80] Critics from the Israeli right have targeted Barak for his perceived judicial activism within the Israeli Supreme Court. Additionally, some have voiced disapproval, accusing him of justifying Israeli settlements and other controversial policies. See: Staff, 2024 and Masri, 2024.
[81] Keitner, 2024.
[82] Uganda's government said in a statement issued on 27th January that "the position taken by Judge Sebutinde is her own individual and independent opinion and does not in any way reflect the position of the government of the republic of Uganda". See: Reuters, 2024.
[83] O'Dell, 2024.
[84] Judges Donoghue, of the USA; Gevorgian, of Russia; Bennouna, of Morocco; and Robinson, of Jamaica, were replaced by Judges Brant, of Brazil; Gómez Robledo, of Mexico; Aurescu, of Romania; and Tladi, of South Africa.
[85] Riachi, 2024.
[86] Keitner, 2024.

Sebutinde voting against; the fourth by a vote of 16-1, with Sebutinde voting against; the fifth by a vote of 15-2, with Barak and Sebutinde voting against; and the last one by a vote of 15-2, with Barak and Sebutinde voting against. Despite the existence of political divisions, the majority of the Court reached consensus by underlining the necessity for all involved parties to abide by IHL. This display of solidarity amid worldwide disagreement highlights the broader importance of the ruling[87].

The previous Court's president, Joan Donoghue, delivered a composed summary of the reasons and announced the order[88]. It is significant to highlight that Donaghue was part of the majority on every aspect of the order which was an unexpected alignment from an American judge and suggests additional criticism of Israel's ongoing military operations in Gaza, coming from its key ally, the US[89].

As Judge Xue Hanqin, from China, accompanied by Judge Dalveer Bhandari, from India, and Judge Georg Nolte, from Germany, attached opinions, it is worth noting the contrast in viewpoints within the Court.

In a dynamic exchange of perspectives, Judge Hanqin underscored South Africa's authority to bring claims against Israel, particularly regarding the Palestinian people, highlighting the enduring presence of the Palestinian issue on the UN agenda. Simultaneously, Judge Bhandari drew attention to the nuanced approach required in evaluating claims under international law, emphasizing the differing standards for granting provisional measures[90]. Expressing an ambiguous posture on the ceasefire, he called for an immediate halt and the unconditional release of remaining hostages stating that "all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt and that remaining hostages captured on 7 October 2023 are unconditionally released forthwith"[91]. Moreover, Judge Nolte acknowledged Israel's special status as a homeland for the Jewish people and underscored the complexity of applying legal standards in cases involving allegations of genocide[92]. While expressing skepticism about the existence of genocidal intent behind Israel's military operations, Nolte acknowledges the plausibility of other claims made by South Africa, specifically noting that certain statements by Israeli state officials may contribute to a real and

[87] Krisch, 2024.
[88] Keitner, 2024.
[89] Sterio, 2024.
[90] Keitner, 2024.
[91] Gurmendi, 2024.
[92] Keitner, 2024.

imminent risk of harm to Palestinians. His opinion suggests a cautious approach, recognizing that while some claims may be plausible, others may require further examination[93]. While there may be some divergence in these judges' opinions, they converge in the Court's decision, setting the stage for further discourse, which includes the dissenting opinion of Judge Sabutinde and the separate opinion of Judge Barak.

Judge Julia Sebutinde, from Uganda, the sole dissenting voice on all six provisional measures, penned an opinion outlining her objections. Although she was the only dissent on two measures[94], which urged Israel to prevent and punish any incitement to commit genocide against the Palestinian people in Gaza and to facilitate the entry of humanitarian aid into Gaza, Sebutinde's attitude was uncompromising since she clearly rejected the possibility of a ceasefire, calling it "unrealistic"[95]. Notably, she has presided over three other genocide cases during her term on the Court, where in two of these cases she supported the issuance of provisional measures. This includes her favorable vote in the 2022 case between Ukraine and Russia, where she backed all three provisional measures[96], including demands for an immediate cessation of Russia's military operations in Ukraine[97]. In her dissent, Sebutinde underscored that the core of the dispute between Israel and Palestinians is fundamentally political and has deep historical roots. She advocated for a resolution through diplomatic channels or negotiations, emphasizing the importance of implementing the UNSC's resolutions in good faith[98,99]. Sebutinde stated that she does not think the conflict between Israel and the Palestinian people, or more generally, the Israel-Hamas war, is a matter that should be brought before the ICJ for judicial resolution[100,101]. The Judge further expressed her skepticism about the plausibility of South Africa's requested provisional measures under the UN genocide law, contending

[93] Cohen & Shany, 2024.
[94] See third and fourth provisional measure.
[95] Gurmendi, 2024.
[96] Additionally, Sebutinde backed a measure focused on the protection of civilians trapped in the conflict zone, emphasizing the importance of ensuring their safety and well-being amidst armed hostilities. Lastly, she voted in favor of preserving evidence and documentation related to the conflict, recognizing its significance in facilitating investigations and potential legal proceedings.
[97] O'Dell, 2024.
[98] In Oct. 1973, the UNSC issue the Res. 388/1973. Then, Res. 1276, Res. 1402 and Res. 2334 were passed and followed by others. Additionally, later, the UNSC passed Res. 2712. On Dec. 22, Res. 2720 was adopted and, most recently, Res. 2728 was approved with 14 votes in favor and one abstention (US). Despite Judge Sabutinde's opinion, the various resolutions underscore how diplomatic endeavors have frequently collapsed due to political maneuvering and entrenched interests. The truth is one, the disregard of Art. 25 of the UNC is troubling, as it explicitly mandates acceptance and implementation of UNSC decisions.
[99] O'Dell, 2024.
[100] O'Dell, 2024.
[101] See §4 of *Judge Sebutinde's Dissenting Opinion*.

that the acts attributed to Israel lacked genocidal intent, a crucial element necessary for invoking the provisions[102,103].

Lastly, *Ad Hoc* Judge Aharon Barak underscored that the core dispute revolves around the interpretation and application of IHL. However, he concurred with the majority in ordering Israel to take measures to prevent and punish incitement to genocide and to provide humanitarian aid to Gaza. Barak discusses the role of Israel's Supreme Court in restraining military actions in the name of human rights and international law. While acknowledging the different legal thresholds at different stages of the case, the Judge criticizes the Court's methodology in assessing plausibility concerning specific intent, particularly highlighting the absence of evidence comparable to previous cases. He emphasizes the need for a thorough investigation into inappropriate statements by Israeli officials but finds it implausible to infer genocidal intent from these statements. In the end, despite his reservations about the plausibility, Barak voted in favor of provisional measures regarding incitement and humanitarian aid, hoping to minimize tensions and mitigate the consequences of the conflict, emphasizing his commitment to morality, truth, and justice[104].

As it is possible to see, the interplay of the Judges' opinions became evident in the voting on the Court's order. Despite different perspectives, the Court instructed Israel to address its conduct, which shows its willingness to intervene quickly and decisively in urgent matters of international concern[105].

[102] With respect to her dissenting opinion, several experts contend that Sebutinde did not carry out a comprehensive analysis of the circumstances. They stress that both South Africa and Israel are signatories to the Genocide Convention and that genocide is a legal issue rather than merely a political disagreement. See: Knight, s.d.

[103] O'Dell, 2024.

[104] Keitner, 2024.

[105] Agnès Callamard, Secretary General of Amnesty International, stated that the "decision is an authoritative reminder of the crucial role of international law in preventing genocide and protecting all victims of atrocity crimes. It sends a clear message that the world will not stand by in silence as Israel pursues a ruthless military campaign to decimate the population of the Gaza Strip and unleash death, horror and suffering against Palestinians on an unprecedented scale". See: Amnesty, 2024.

Under the terms of the Court's order:

Summary	Court Judgment (26 Jan. 2024)
Prevent genocide and desist from killing, injuring, destroying life and preventing births.	(1) The State of Israel must, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, 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 this Convention, in particular: (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) and imposing measures intended to prevent births within the group; (2) The State of Israel must ensure with immediate effect that its military does not commit any acts described in the above-described acts;
Desist from incitement, and punish acts of and encouragement to genocide.	(3) The State of Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;
Enable the provision of basic services and humanitarian assistance.	(4) The State of Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;
Prevent the destruction of and ensure the preservation of evidence.	(5) 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 and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;
Submit ongoing reports to the Court on measures taken.	(6) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.

Table 1 - Provisional Measures ordered by the Court

Indeed, the rigorous standard needed to demonstrate genocide during the material phase, contrasted with the lower threshold of plausibility necessary for granting provisional measures, establishes inherent incentives for states to initiate proceedings and request them.

Upon reviewing the provisional measures that were ordered, one could argue that if the aim of such measures is to safeguard rights, particularly in cases involving the right to be free from genocidal acts, then it becomes pertinent to question whether the Court was obligated to issue a suspension of hostilities[106]. Therefore, an important part of the

[106] Considering Conclusion 23 of the Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), which explicitly includes the prohibition of genocide in its non-exhaustive list, the question arises: should the Court treat the prohibition of genocide as a non-derogable obligation, thus taking precedence over the right of self-defense, especially when both are recognized as norms of general international law with the same character under Art. 53 of VCLT? In fact, the Court earlier classified genocide as a *jus cogens* norm in *Armed Activities on the Territory of the Congo* (§64 *Democratic Republic of Congo v. Rwanda*). The right of self-defense, as recognized under Art. 21 of DARSIWA, can serve as a circumstance precluding wrongfulness. However, it is important to note that even a legitimate claim of self-defense does not absolve a state of wrongdoing if its actions violate peremptory norms of international law. According to Art. 26 of DARSIWA, self-defense cannot justify actions that violates obligations arising from peremptory norms, such as those outlined in *jus cogens* principles. This underscores the principle that even in cases of self-defense, states are still bound by the fundamental principles of international law, and actions that violate these principles cannot be justified solely on the grounds of self-defense. See: Keitner, 2024. Furthermore, the debate over the legal status of the prohibition of the use of force also gains significance particularly regarding Israel's military actions. While the Court has yet to explicitly classify the prohibition of force as a *jus cogens* norm, there is ongoing debate on whether such classification should be extended beyond the prohibition of aggression. Notably, the Court has indicated some endorsement for the idea that unlawful force may fall within the ambit of *jus cogens* (§*190 Nicaragua v. United States of America*). See: Henderson, 2024.

petition is the underscoring of the fundamental nature of the prohibition against genocide as *jus cogens*[107], highlighting the universal and reciprocal obligations states have under the Genocide Convention, both towards the international community as a whole (*erga omnes*) and towards each other (*erga omnes partes*)[108]. This is especially relevant, even if there was only a plausible rather than unquestionable indication of genocidal intent from Israel, and even if the provisional measure results in impairing the right of self-defense[109] and is unilaterally imposed upon only one of the belligerent parties[110].

However, on the other hand, this doubt gains further meaning when arguing that directing a state to cease military actions while it asserts its inherent right to self-defense may exceed the jurisdiction of the ICJ since the UNC explicitly states that "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". Nevertheless, the relevance of the legal framework of self-defense outlined in Art. 51 of the UNC in this scenario is questionable. According to Professor Marc Weller, "Israel cannot avoid scrutiny of its use of force and associated practices, as well as possible interim measures of protection, simply by invoking self-defense"[111]. Therefore, the crux of the matter remains unequivocal: regardless of the circumstances or the severity of the provocation, genocide can never be justified as a response. Every application of force, whether in self-defense, enforcing occupation, law enforcement, or any other scenario, must adhere to the parameters set by international law. This encompasses the explicit obligation delineated in Art. I of the Convention to prevent genocide (*p. 80 of the Jan. 11 verbatim record*)[112].

Of greater significance, the Court's decisions resulted in various predictable outcomes that should be reinforced. Firstly, it identified a genuine dispute under Art. IX of the Genocide Convention (§*28 South Africa v. Israel*). Secondly, it upheld South

[107] Genocide carries the weight of *jus cogens* due to its fundamental nature as an offense against the global community's core values. The existence of peremptory norms is aimed at safeguarding these values, demanding special consequences for their breach. However, without such enforcement, doesn't the hierarchy of *jus cogens* risk losing its significance? See: Henderson, 2024.
[108] Hachem & Hathaway, 2024.
[109] In his separate opinion, Judge Nolte suggested that since the case was solely under the Genocide Convention, delving into issues of self-defense wasn't imperative for the Court to reach its decision (§5 *Judge Nolte Separate Opinion*). In essence, any potential conflict between Israel's asserted right of self-defense and its obligations under the genocide prohibition could and, according to Judge Nolte, should be sidestepped. See: Henderson, 2024.
[110] Henderson, 2024.
[111] Weller, 2024.
[112] Shany & Cohen, 2024.

Africa's right to initiate the case, echoing its position in *Gambia v. Myanmar* and stressing the collective responsibility of Genocide Convention signatories (§*33 South Africa v. Israel*). Thirdly, the Court determined that the conditions for ordering provisional measures were satisfied, citing the plausible risk of genocidal acts in Gaza and the urgent nature of the circumstances, being unsurprising as South Africa only needed to establish the plausibility of the rights it sought to protect, namely the Palestinians' right in Gaza to be shielded from genocidal acts (§*54, §72 and §74 South Africa v. Israel*)[113].

Thus, the Court's decision not to compel Israel to halt all military activities, despite South Africa's plea (§*144 South Africa Application*), redirected attention to proposing other specific measures. This choice aligns with Israel's obligation to protect its population from Hamas within international law boundaries, contrasting with past directives like the complete cessation in Russia's invasion of Ukraine[114]. However, concluding that the situation was urgent, the Court confirmed that the circumstances on the ground in Gaza are catastrophic (§*46* and §*70 South Africa v. Israel*)[115], hence necessitating the ordering of distinct specific provisional measures.

These provisional measures ordered draw a closer parallel to the Court's previous ruling in the case of *Gambia v. Myanmar* (§79 *et seq Gambia v. Myanmar*) rather than its decision in the case of *Ukraine v. Russia* (§102 *et seq Ukraine v. Russia*) [116]. To begin with, Israel received a clear directive to take all necessary actions to prevent and punish direct incitement to genocide, a more explicit requirement than seen in the *Gambia v. Myanmar*. It is intriguing to observe that the first provisional measure does not explicitly reference intent, nevertheless, the Court effectively underscores Israel's obligation to take these actions "in accordance with its obligations under the Genocide Convention", as previously stated in its order, wherein "the Court recalls that these acts fall within the scope of Art. II of the Convention when they are committed with the intent to destroy in whole or in part a group as such" (§*78 South Africa v. Israel*)[117]. Additionally, Israel was specifically tasked with promptly implementing effective humanitarian aid measures, similar to those outlined in *Armenia v. Azerbaijan* (§15(5) *Armenia v. Azerbaijan*). Moreover, akin to *Gambia v. Myanmar*, the Court demanded a compliance report from Israel, albeit with a shorter timeframe of just one month (§*82 South Africa v. Israel*).

[113] Sterio, 2024.
[114] UN News, 2022.
[115] Sterio, 2024.
[116] Goodman & Watt , 2024.
[117] Goodman & Watt , 2024.

Lastly, the Court emphasized the necessity for all parties involved in the conflict, including Hamas, to abide by international humanitarian laws, while also advocating for the release of hostages detained in Gaza (§*85 South Africa v. Israel*)[118].

As mentioned before, in fact, the ICJ issued broad provisional measures, offering limited direction and leaving considerable room for interpretation regarding Israel's policy adjustments. While certain measures, such as those aimed at preventing and punish incitement to genocide and facilitating humanitarian aid, offer potential for tangible impact, others, like preventing genocidal actions by the military and preserving evidence, may not effectively bring significant changes on the field[119]. Therefore, the broad scope of the provisional measures, influenced by the Court's use of vague language regarding the plausibility test and its interpretation of the case's facts, mirrors Israel's legal justifications for its actions, making it improbable that these measures will significantly impact the situation on the ground as we are witnessing[120]. Hence, it can be argued that although the Court's decision appears to promote unity, the actual measures it prescribed are rather unclear. Apart from urging humanitarian aid, these measures mainly serve as reminders to Israel of its current obligations without detailing specific actions it should take. The lack of specificity in the instruction to Israel leaves it without explicit guidance on actions to cease, such as displacing civilians or damaging infrastructure. Therefore, providing more detailed directives could have established clearer standards for compliance and potentially prompted action from international political bodies like the UNSC. Regrettably, the Court chose a cautious stance in this matter[121], a decision that, given the gravity of the genocide case at hand, may have profound implications. This cautious approach could potentially delay the urgent intervention needed to address the ongoing devastation, raising questions about the Court's role in responding effectively to such atrocities.

Nevertheless, the recent ruling by the ICJ on March 28, acknowledging the deteriorating humanitarian crisis in Gaza as justification for additional measures, reflects the alignment of the Court's actions with the prevailing international sentiment[122].

Remarkably, despite Judge Sebutinde's dissent in the prior provisional measures, the Court unanimously upheld the earlier ruling and extended its application to Rafah. It

[118] Milanovic, 2024.
[119] Cohen & Shany, 2024.
[120] Cohen & Shany, 2024.
[121] Krisch, 2024.
[122] Keitner, 2024.

renewed the request for the immediate release of hostages, called for immediate and unhindered provision of humanitarian aid, including essential services and supplies, to Palestinians in Gaza, with an emphasis on increasing capacity at land crossing points for aid delivery, and demanded that Israel's military to cease actions that violate the rights of Palestinians in Gaza as protected under the Genocide Convention, particularly by ensuring the unrestricted delivery of humanitarian assistance.

Judge Xue, Brant, Gómez Robledo and Tladi, offered additional perspectives regarding these new provisional measures, underlining the critical necessity for comprehensive steps to reduce civilian suffering and expressing displeasure because the Court's judgment "does not directly and explicitly order Israel to suspend its military operations for the purpose of addressing the current catastrophic humanitarian situation in Gaza" (§1 *Joint Declaration Of Judges Xue, Brant, Gómez Robledo and Tladi*). Judge Yusuf emphasized that the measures represent "an obligation of result", requiring immediate action, which necessitates the suspension or cessation of aerial bombardments, ground assaults on urban centers and refugee camps by the Israeli army, and the removal of obstacles to the delivery of humanitarian aid (§11 *Judge Yusuf Opinion*). Likewise, Judge Hilary Charlesworth stressed the importance of ending military operations to avert more harm and sustained the necessity of a humanitarian ceasefire stating that in her view "the Court should have made it explicit that Israel is required to suspend its military operations in the Gaza Strip, precisely because this is the only way to ensure that basic services and humanitarian assistance reach the Palestinian population" (§7 *Judge Charlesworth Opinion*). Lastly, Judge Salam remarked that the Court's additional measures can only be completely implemented if all parties obey the UNSC's demand for an immediate ceasefire throughout Ramadan (§11 *Judge Salam Opinion*).[123]

Interestingly, Judge Nolte may once again be the strongest indicator of the Court's overall attitude. He provided a separate statement clarifying the application of Art. 76(1) of the Rules of Court, addressing the concept that any expansion should only occur if there had been a notable "change in the situation" (§2 *Judge Nolte Opinion*). His hesitance stemmed from concerns about avoiding the perception of the Court issuing a second order due to non-compliance with the first which could suggest a low threshold for modifying or adding measures, and his belief that full adherence to the January order could have mitigated the dire situation in Gaza. It is intriguing to note that while Judge Nolte initially

[123] Gurmendi, 2024.

did not regard Israel's actions in Gaza as potentially genocidal, his current stance suggests a consideration of Israel's strategy of starving Gaza as possibly meeting the criteria for genocide[124]. Differently was Judge Barak's opinion which expressed his support for the initial additional measure based on moral grounds, despite disagreeing with the Court's rationale (§30 *Judge Barak Separate Opinion*)[125].

After analyzing all these recent provisional measures, a bright side can be seen. Now, two months later, following the unfolding of the second set of measures and the Judges' response to Israel's conduct, there seems to be a shift in the international community's outlook, offering a glimmer of hope for South Africa's prospects.

[124] Gurmendi, 2024.
[125] Keitner, 2024.

CHAPTER III – Bridging Justice: The ICC's and Its Synergy with the ICJ

A. The Crime of Genocide and the Question of Intent

A fundamental problem in South Africa's case is the necessary intent to eliminate a group, in whole or in part. Surprisingly, the ICJ has already deemed it plausible that Israel may have had such intent in its first order[126].

This crucial element, highlighted in the initial ICJ order, underscores the gravity of the accusations. Transitioning from this foundational concern, a closer examination of the legal parameters set by the Genocide Convention sheds light on the specific acts necessary for charging genocide. According to Art. II of the Genocide Convention, a spectrum of heinous acts, from killings to inflicting dire living conditions, forms the basis for such charges. Additionally, it cannot be forgotten that genocide involves two key elements: a mental component, known as *mens rea*, which entails the intent to destroy a particular group based on national, ethnic, racial, or religious identity, and a physical component, known as *actus reus*, which encompasses specific actions.

At the heart of South Africa's submission lies the fundamental assertion of Palestinians' entitlement to safeguard their identity without facing targeted persecution, ultimately aimed at the group's destruction. This argument hinges on the enumerated acts faced by Palestinians as outlined in Art. II, alleging instances of killings (*"a"*), harm infliction (*"b"*), and imposition of dire conditions of life in Gaza (*"c"*), all meticulously detailed within the South Africa Application's *actus reus* analysis, thus laying the groundwork for its legal battle[127]. Moreover, in the examination of *mens rea*, South Africa draws upon numerous statements made by Israeli officials to substantiate claims of genocidal intent. These include explicit declarations from high-ranking Israeli figures such as the Prime Minister and the President[128].

In the legal discourse surrounding the concerning allegations of genocide, the examination of two essential elements, special intent and double intent, emerges as crucial. In fact, one of the primary challenges in this case revolves around determining the nature of evidence required to establish this first concept. The ICJ mandates that a

[126] Quigley, 2024.
[127] Quigley, 2024.
[128] Quigley, 2024.

state must demonstrate *dolus specialis*, also known as special intent, to establish genocide. Meeting this criterion requires evidence that is "fully conclusive" of the special intent to commit genocide (§209 *Bosnia v. Serbia* and §178 *Croatia v. Serbia*). The term "fully conclusive" establishes an extremely high bar of proof[129].

Additionally, to establish special intent in cases of genocide, two key requirements are considered: the pattern of conduct and official statements, which are intertwined. For pattern of conduct, since there are no standards or guidelines stating that a specific piece of evidence, if presented, will be "totally conclusive" of the special intent to commit genocide, it will involve examining the actions and behaviors of the accused party over time to discern any systematic or deliberate efforts aimed at the destruction of a particular group. Therefore, this examination will encompass various factors, including official statements and reports from official bodies, as well as the broader context in which these actions took place (§373 *Bosnia v. Serbia*). If Israel demonstrates at the merits stage that its pattern of conduct was not to harm Palestinians but to destroy Hamas, as Israel will undoubtedly argue, then Israel's pattern of conduct since October 7 would not be "fully conclusive" to show that Israel committed genocide. Nevertheless, the evidence, including the scale of casualties and the harsh conditions of life endured by the population, suggests otherwise. Israel asserts that it has made efforts to distinguish between the estimated 15,000 to 40,000 Hamas militants and the rest of Gaza's population, which totals roughly 2 million[130]. However, with the staggering numbers of casualties and the dark reality on the ground, such assertions seem increasingly improbable. Additionally, remembering *Croatia v. Serbia*, the widespread destruction and humanitarian crisis in Gaza, where around 70% of the population is displaced and facing food insecurity, further cast doubt on Israel's claims of minimizing harm to civilians[131]. Therefore, the ICJ may conclude that Israel intended to force the Palestinians to leave, or that this constituted an attempt to eliminate the Palestinian people (§435 *Croatia v. Serbia*)[132]. Regarding the official statement's requirement, in conflicts like the one in Gaza, gathering evidence of significant value is uncertain, especially given the widespread use of social media for documentation. Even if witness statements are obtained and verified, the credibility of these statements may be challenged by the

[129] Gehani, 2024.
[130] Keitner, 2024.
[131] Frankel, 2024.
[132] Gehani, 2024.

respondent state[133]. However, Israel faces a significant challenge as certain Israeli officials, including prominent figures within the present governing coalition, have voiced desires to remove Palestinians from Gaza. Despite Netanyahu's attempts to distance himself from such statements, he has refrained from taking punitive measures or replacing the most outspoken advocates, such as Israel's Finance Minister and Minister of National Security. The political swing held by far-right extremists, coupled with the absence of reprimand, encourages the credibility of South Africa's allegations, especially concerning incitement. Moreover, while Defense Minister description of "human animals" immediately following the October 7 attack seemingly targeted Palestinian combatants rather than the entire population, his directive for a "complete siege" in the same statement raises concerns about forbidden collective punishment[134]. Nevertheless, the Court's acknowledgment of statements by Israeli officials (§52 *South Africa v. Israel*) lacks the comprehensive analysis usually present in judgments on the merits, failing to thoroughly scrutinize certain statements that might indicate genocidal intent, notably Prime Minister Netanyahu's speech, which the Court viewed as more ambiguous than believed[135].

To explore whether the charges of genocide meet the threshold necessary for prosecution, it is imperative to delve into the concept of double intent within the context of genocide, specifically contended in Art. II. This intent, which involves the specific intention to destroy a national, ethnical, racial, or religious group, serves to complement the general intent associated with the committed acts, thereby constituting a crucial dual mental element in defining genocide. This criterion must be reliably established, the most reasonable conclusion to draw (§148 *Croatia v. Serbia*)[136]. In cases involving acts such as killing or causing harm, the centrality of this additional intent becomes crucial, as these actions may have motives other than group destruction. South Africa argues that Israel, through its actions such as the killing of Palestinian children, widespread displacement, destruction of homes, deprivation of basic needs, and measures impeding childbirth (§45 *et seq South Africa Application*), has violated Art. II by failing to prevent genocide, particularly under *par. a, b, and c*, thereby bearing responsibility for these acts[137].

[133] Gehani, 2024.
[134] Keitner, 2024.
[135] Milanovic, 2024.
[136] Quigley, 2024.
[137] Jadhav, Ravey, Henderson, & Patel, 2024.

In past cases, the Court clarified the criteria for proving additional intent, particularly regarding deliberate killings as outlined in *par. (a)*. It stressed that mere evidence of unlawful killings isn't enough, there must be clear proof of additional intent, the *dolus specialis* (§187 *Bosnia v. Serbia*). The Court emphasized that when direct proof of intent is lacking, the scale of the killings can serve as evidence, just being necessary that the acts indicate intent not only to target specific individuals but also to destroy the group, either wholly or partially (§139 *Croatia v. Serbia*)[138].

Par. (b) addresses intentional acts or omissions resulting in "serious bodily or mental harm" to members of the targeted group. Similar to *(a)*, it necessitates proof of a specific outcome. While the concept lacks explicit definition, it encompasses actions like torture, inhumane treatment, sexual violence, threats of death, and others causing significant injury or trauma to group members (§717 *Prosecutor v. Zdravko Tolimir*). Statements from international organizations such as Amnesty[139] and UNRWA[140] suggesting potential violations may provide concrete evidence that Israel's actions constitute torture or inhumane treatment, likely influencing the Court's interpretation and finding that the paragraph is being violated.

Concerning *par. (c)*, which specifically addresses the deliberate imposition of "conditions of life" calculated to result in physical destruction, there is an implicit recognition of the potential lethality of such circumstances to the targeted group. In previous cases like *Bosnia v. Serbia*, the ICJ examined similar situations, such as the siege of towns and the operation of detention camps. Despite the consequent deaths in these instances, which might suggest an expectation of destruction, the Court did not find the requisite intent to destroy the targeted group present, thus precluding that in any event the additional intent was not proved (§328 and §354 *Bosnia v. Serbia*). Regarding South Africa case, the ICJ has not found violations of *par. (c)*, hence has not had to resolve the additional intent required[141].

Unfortunately, the language disparities between the Court's ruling (§54 *South Africa v. Israel*) and the corresponding language used in the *Myanmar*[142] might also suggest the presence of weak and contested evidence regarding genocidal intent[143].

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[138] Quigley, 2024.
[139] Amnesty, 2023.
[140] UN News, 2024.
[141] Quigley, 2024.
[142] Par. §56 asserts "In the Court's perspective, all the facts and circumstances outlined above ... are adequate to establish that the rights asserted by The Gambia and for which it is seeking protection ...".
[143] Cohen & Shany, 2024.

Subsequent to the aforementioned, the most evident South Africa's challenges is the ICJ's extremely strict standard for proving genocide claims, which necessitates demonstrating specific genocidal intent based on unequivocal evidence (§209 *Bosnia v. Serbia* and §178 *Croatia v. Serbia*)[144]. In Gaza, where warnings were of imminent death, the entire population was subjected to conditions of life designed to inflict harm, with Israel controlling both entry and exit from the territory. This situation underscores the pressing need for a broad interpretation of "intent" in line with the humanitarian purpose of the Genocide Convention[145].

Lastly, despite the traditional focus on individual intent in cases of genocide, it is essential to consider how state actions may also contribute to the commission of such heinous crimes, challenging the notion that only individuals can be held accountable for genocide. States are not only bound by international conventions to prevent genocide but also to refrain from committing such acts themselves. Although this obligation is not explicitly outlined in the Convention, the Court in *Bosnia v. Serbia* elucidated that it can be derived from the convention's overarching purpose and the obligations set forth within it. Art. I requires states to prevent genocide, categorizing it as a "crime under international law". By agreeing to this categorization, states inherently undertake not to commit such acts. Therefore, the obligation to prevent genocide logically implies a prohibition on committing genocide themselves. This prohibition extends to situations where states have influence over individuals or groups committing such acts. Thus, states are not only obliged to prevent genocide but are also prohibited from perpetrating it (§166 and §167 *Bosnia v. Serbia*). In *Bosnia v. Serbia* the Court clarifies that "state responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (§182 *Bosnia v. Serbia*). Therefore, it could be argued that Israel could be charged for genocide based on its actions and obligations outlined within international law. Consequently, the world awaits with anticipation the Court's ruling on this matter, eager to find out the implications of its decision.

[144] Cohen & Shany, 2024.
[145] Milanovic, 2024.

B. Forging Pathways: The ICC's Role in the Conflict

The unfolding situation in Gaza resembles what has been termed an "atrocity cascade", where the scenario presents the possibility of a genocide unfolding.

The ICC plays a critical role in addressing individual responsibility for international crimes, complementing the focus of the ICJ on delineating the legal responsibility of states. This synergy between the two institutions is particularly evident in the context of the Israel-Palestine conflict, where the ICC's investigations encompass alleged crimes committed by individuals, filling a gap left by the ICJ's jurisdictional constraints[146].

Nevertheless, the ICC is at a crossroad, with its route entangled in the weight of political discord. The architecture of the Court's referral procedure, which allows nations to initiate investigations, frequently combines legal proceedings with geopolitical interests, making the ICC vulnerable to external influences. Against this setting, the Palestine case exemplifies the ICC's politization[147]. The truth is, while the Prosecutor moved fast to examine alleged war crimes in Ukraine, he has done nothing to advance an inquiry in Palestine, which was initiated by his predecessor but is fiercely opposed by US and Israel, none of which are ICC members.

Palestine's efforts to join the ICC commenced in 2009, initially met with hesitance from the Court's first Prosecutor due to Palestine's ambiguous statehood status. However, with the adoption of Res. 67/19 in 2012, granting Palestine non-member observer state status at the UNGA, Palestine proceeded to place a declaration accepting the ICC's jurisdiction[148,149]. Unlike 124 other states, Israel has not ratified the Rome Statute and disputes the ICC's jurisdiction, a position that is shared by the Prime Minister Netanyahu which has persistently endeavored to erode the credibility of the ICC, characterizing the Palestine pursuit as "pure anti-Semitism"[150]. In contrast, Palestine ratified the Rome Statute in 2015 and brought the matter to the ICC's attention[151], in an attempt to obtain more political influence by threatening to prosecute Israeli officials for war crimes they

[146] Keitner, 2024.
[147] McBrien, 2023.
[148] Even though all EU nations are ICC state parties, five of them – Austria, Czechia, Germany, Hungary, and Lithuania – have rejected the Court's authority over Palestine, citing the lack of a Palestinian State and concerns about the Court being too politicized. See: Jones, 2023.
[149] Sadat, 2024.
[150] Jones, 2023.
[151] UN, 2023.

had committed in the Occupied Territories[152], which made Prosecutor Fatou Bensouda initiate a Preliminary Examination in January 2015, prompted by a referral from Palestine in 2018, urging an investigation into past, ongoing, and future crimes within the jurisdictional boundaries of Palestine. According to a statement released in 2019, the Prosecutor came to the following conclusions: "(i) war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip ("Gaza"); (ii) potential cases arising from the situation would be admissible; and (iii) there are no substantial reasons to believe that an investigation would not serve the interests of justice"[153]. Pre-Trial Chamber I later determined, in 2021, that Palestine, as a state party to the Rome Statute, had legitimately conferred jurisdiction upon the ICC, extending to the territories occupied by Israel since 1967, encompassing Gaza, the West Bank, and East Jerusalem[154].

Currently, the ICC is investigating alleged crimes committed by individuals implicated in the conflict, within the constraints of its contested jurisdictional scope. In February 2021, the ICC declared that the Court possessed jurisdiction over certain regions[155] and an investigation started in March 2021, preceding the latest eruption of hostilities, where the ICC asserts authority over international transgressions occurring from 2014 onwards[156,157] and investigates into the crimes committed within what it terms the "situation in Palestine", encompassing the Gaza War, operation "Protective Edge"[158]. This provided Prosecutor Karim A.A. the authority to look into war crimes carried out in Palestine, including the lethal October 7 invasion into Israel by Hamas, as well as Israel's military reaction in Gaza[159].

However, prior to October 29, 2023, the Prosecutor's handling of the Palestine situation sparked concerns regarding potential double standards. Despite the severity of the situation, there was little progress in advancing the investigation, with limited allocation of resources and minimal engagement with Palestinian victims and human rights organizations. This stands in stark contrast to the Prosecutor's proactive approach

[152] Middle East Policy Council, s.d.
[153] McBrien, 2023.
[154] Sadat, 2024.
[155] McBrien, 2023.
[156] While the Biden administration started providing the ICC with evidence of claimed Russian war crimes in Ukraine in July, the US and Israel have continued to oppose the investigation in Palestine. See: McBrien, 2023.
[157] Keitner, 2024.
[158] UN, 2023.
[159] Jones, 2023.

in other cases, such as Ukraine, where significant efforts were made to collect evidence and involve stakeholders[160]. Such double standards not only compromise the pursuit of justice for victims but also erode trust in the ICC's ability to uphold the principles of impartiality and equality before the law, as enshrined in international legal instruments such as the Rome Statute and the Geneva Conventions[161].

Nevertheless, the Prosecutor's visit to Israel and Palestine in December 2023 points out the Court's dedication to confronting fatal international crimes. The unexpected journey to Israel, despite Israel previous denials of ICC jurisdiction, highlights the Court's commitment to fairness. The meetings with survivors, victims' relatives, and officials from both sides demonstrate this commitment to pursue justice without bias based on nationality or ethnicity[162]. The adjustment in the Prosecutor's strategy after his visit to the region underscores the necessity for continuous scrutiny and accountability. Nevertheless, the uncertainty regarding the criteria for the standard of proof[163] and the selective emphasis on certain aspects of the conflict may jeopardize the integrity of the ICC's mission[164].

In fact, Karim Khan made it clear that these atrocities fall under the jurisdiction of the ICC[165]. The ICC has jurisdiction over crimes committed on Palestinian territory if Israeli officials directed, carried out, or participated in those crimes, given that the Oslo Accords, rejected by President Abbas, current president of the Palestinian National Authority since 2005, removed the Palestinian Authority's criminal jurisdiction over Israeli citizens. As a result, the only forum available for the investigation and prosecution of Israeli citizens charged with crimes covered by the ICC is the ICC itself[166].

While ongoing debate persists regarding the classification of the conflict as either non-international (considering that Hamas is a non-state actor) or international (considering that Israel is an occupying power), the ICC's jurisdiction encompasses both scenarios[167].

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[160] Mariniello, 2024.
[161] Euro-Med Human Rights Monitor, 2024.
[162] ICC, 2023.
[163] The Prosecutor has emphasized that he will not hesitate to fulfill his mandate once the evidence meets the standard of a "realistic prospect of conviction". However, by establishing this threshold, Karim Khan seems to be introducing a new standard of proof when applying for arrest warrants or summons to appear, which lacks legal foundation in both the Rome Statute and the Rules of Procedure and Evidence. See: The Guardian, 2023.
[164] Mariniello, 2024.
[165] Justice in Conflict, 2023.
[166] Sadat, 2024.
[167] Sadat, 2024.

Firstly, based on available data, the October 7 strike by Hamas terrorists constitute egregious violations of human dignity and are likely to be classified as war crimes, crimes against humanity, and possibly genocide under international criminal law. The killings and kidnappings perpetrated by Hamas members violate Art. 8 of the Rome Statute and customary international law, which prohibit targeting innocent civilians and taking hostages (Art. 8(2)(a)(viii) RS). The coordinated nature of the attacks, involving extensive planning and simultaneous actions across multiple locations, suggests a systematic and widespread campaign against the civilian population, meeting the criteria for crimes against humanity (Art. 7 RS)[168]. Nevertheless, Israel is the one with the authority to bring charges of terrorism[169]. This implies that while the ICJ lacks jurisdiction over the actions of Hamas during that period, those actions may fall under the ICC's purview[170]. Karim Khan stated on December 3, 2023, that the "attacks against innocent Israeli civilians on October 7 represent some of the most serious international crimes that shock the conscience of humanity, crimes which the ICC was established to address"[171]. In order to prove crimes against humanity, the Prosecutor needs show that the attack was a component of a larger, deliberate campaign against civilians that was carried out in accordance with organizational policy. This calls for demonstrating a consistent pattern of behavior, which could be difficult to do, especially when linking senior Hamas figures to particular acts, especially since the co-perpetration theory, which the ICC uses, requires a close connection between commanders and crimes carried out on the ground. As has been noted, demonstrating intent in charges of genocide is challenging[172], therefore, while some of the October 7 attacks may come to fit the definition of genocide, proving specific intent and a clear pattern of such behavior may be difficult to prove[173].

Regarding *South Africa v. Israel*, the Israeli officials' declarations supporting policies like the "voluntary migration" of Palestinians and a "complete siege" of Gaza, along with the way the conflict is being fought, raise questions about possible intent in genocide or ethnic cleansing. In the context of genocide, ethnic cleansing often involves implementing a policy aimed at rendering an area ethnically homogeneous through force

[168] Ohlin, 2023.
[169] Sadat, 2024.
[170] Sagoo, 2024.
[171] Freidson, 2023.
[172] Ohlin, 2023.
[173] Justice in Conflict, 2023.

or intimidation, as indicated by the UNCE (§190 *Bosnia v. Serbia*). Despite not being explicitly defined in the Genocide Convention, it can potentially constitute genocide if it aligns with the acts prohibited by Art. II of the Convention and is carried out with the specific intent to destroy the targeted group (§190 *Bosnia v. Serbia*). While ethnic cleansing typically falls under the category of crimes against humanity, it can escalate to genocide if it leads to the commission of objective elements outlined in Art. 6 of the Statute and the Elements of Crimes, coupled with the specific intent to destroy the targeted group (§145 *Prosecutor v. Omar Al Bashir*). Hence, it is conceivable that upon evaluation, the ICJ may assert that Israel, falling into either category, will ultimately be held accountable for the crime of genocide. As the ICC Prosecutor's jurisdiction extends beyond the Genocide Convention, the statements made by Israeli leaders may also indicate failures to prevent or punish a broader range of international crimes committed by forces under their control leading to various war crimes and crimes against humanity[174]. Nevertheless, the attacks on minority communities and the disproportionate impact on Gaza's most vulnerable inhabitants highlight how serious the situation is, drawing parallels to previous genocides like the *Srebrenica* tragedy[175]. Therefore, if the perpetrators acted with genocidal intent, seeking to destroy the Palestinian population in Gaza, the attacks could also amount to genocide under the Genocide Convention and Art. 6 of the Rome Statute. Additionally, modes of liability such as command responsibility, indirect perpetration, and accomplice liability may also apply to individuals involved in planning, facilitating, or carrying out the attacks (Art. 25, RS)[176].

In conclusion, the deteriorating humanitarian situation in Gaza, along with South Africa's subsequent requests for additional measures from the ICJ and the Court's more extensive modified ruling, might potentially put greater pressure on the ICC[177]. Although the ICJ's assessment of likely Genocide Convention violations might not be legally relevant, it might have an impact on how the ICC decides whether to issue arrest warrants. According Rome Statute's Art. 58, the ICC is only authorized to issue an arrest warrant in the event that there exist "reasonable grounds to believe" that a person has committed a crime within its jurisdiction[178], which aligns with the "reasonable suspicion" benchmark used by the ECHR, emphasizing the need for verifiable and objective evidence to justify

[174] Galand & Muller, 2024.
[175] Sadat, 2024.
[176] Ohlin, 2023.
[177] Galand & Muller, 2024.
[178] Galand & Muller, 2024.

suspicion and reflecting the requirements of Art. 5(1)(c) of the ECHR. Karim Khan could consider the weight given to the statements by the ICJ when deciding whether to request arrest warrants against the individuals under Art. 25(3)(e) of the Rome Statute, depending on the perceived directness of the incitement[179].

The world's eyes are observing the Court's contrasting stances, as an arrest warrant is issued for President Putin of Russia by the ICC, while uncertainty covers the potential for one to be issued for Prime Minister Netanyahu, casting shadows of critiques upon the ICC's passive posture. It is imperative that the Prosecutor explicitly states that it has closely monitored the ICJ's proceedings and its determination regarding the likelihood of genocidal actions occurring or about to occur. Karim Khan needs to assert that the Court should handle the Palestine situation with the same determination it applies to other investigations, even if faced with objections from influential third parties like the US and other states parties to the Rome Statute. Prioritizing a "cordial relationship" with the US over fulfilling its duty could damage the ICC's reputation as an impartial and independent body[180]. In a recent statement, Judge Tomoko Akane, the recently appointed head of the ICC, said that "no matter the circumstances or political background, we must issue (the arrest warrant) as long as there is evidence and a need"[181].

[179] Galand & Muller, 2024.
[180] Mariniello, 2024.
[181] Galand & Muller, 2024.

CONCLUSION

The case of Palestine and Israel unfolds as a historical accusation. From the disputed sovereignty over occupied territories to South Africa's bold move to protect Palestinian rights in the ICJ, each chapter reveals layers of complexity. It is notable how the ICJ, as the arbiter of international disputes, navigates through the labyrinth of legal arguments and political sensitivities. Particularly intriguing is the evolution of judicial opinions within the Court, evidenced by shifting perspectives in recent provisional measures which reflects the rising intensity of the conflict and underscores the Court's role as a barometer of global tensions. Notably, while refraining from deciding on the question of genocide, the ICJ acknowledged the plausibility of South Africa's claims, a statement of profound significance in the context of the conflict. Moreover, the ICC stands as a fundamental pillar in the pursuit of justice and responsibility. Despite politicization and external pressures, the ICC must uphold its mandate to prosecute responsibles for egregious crimes, transcending geopolitical divisions for the sake of global justice. In the realm of genocide, the concept of intent presents a robust challenge, particularly when applied to state actors rather than individuals. The difficulty lies in demonstrating intent within the context of state policies and actions, as the parameters were originally conceived for individual culpability. Thus, as the conflict unfolds and legal proceedings continue, the question remains as to how intent can be effectively demonstrated in cases involving states and what implications does this hold for the threshold of accountability in international law.

The truth is, this legal dispute reveals itself as a disturbing reality being broadcasted, in which the atrocities of genocide unfold before our eyes, challenging humanity's moral conscience in the twenty-first century. Beyond statutes and jurisprudence, it exposes the fundamental dilemma inherent in our collective duty for the suffering of others and forces us to address the recurring dilemma of how we, as individuals and societies, deal with the echoes of history's darkest chapters while navigating the muddy waters of geopolitical loyalty.

To conclude, warfare is far from a trivial game. In the grand theater of international conflicts, each move is similar to a delicate step in a ballet or a calculated maneuver in a game of chess. Just as every graceful leap or strategic pawn placement carries profound significance in shaping the outcome, so too do the actions judicial bodies

and nations in the arena of global affairs. Each legal decision and each policy is imbued with the potential to alter the course of history, to tip the scales of justice one way or another. Yet, amidst this intricate interplay, it is crucial to remember the human cost and the lives at stake. Behind the diplomatic maneuvers and geopolitical strategies lie real people, real communities, whose fates are intertwined with the outcome of these high-stakes games. As discussions surrounding this verdict unfold and various perspectives emerge, it is imperative for individuals to delve into the insightful analyses provided by the ICJ and the Judges, particularly in a case as emotionally and politically charged as this one.

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