2024, Vol. 13, Issue 2

dr Tomasz Lachowski

University of Łódź (Poland)
ORCID 0000-0002-9026-0409

COMMENTS ON THE ICJ PROVISIONAL MEASURES ORDERS IN THE CASE OF SOUTH AFRICA V. ISRAEL ON 26 JANUARY 2024, 28 MARCH 2024 AND 24 MAY 2024

Abstract: On 29 December 2023, South Africa filed an application against Israel before the International Court of Justice (ICJ) concerning alleged violations of its obligations under the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 in relation to the protected group of Palestinians in the course of the large-scale military operation in Gaza Strip launched by the Israeli authorities as a response to an attack carried out by Hamas on Israel on 7 October 2023. The main aim of this case commentary is to analyze the provisional measure orders issued by the ICJ in the Genocide Convention case (*South Africa v. Israel*) on 26 January 2024, 28 March 2024 and 24 May 2024 in the light of South Africa's effort to make the Genocide Convention 'globally effective' by emphasizing the key role played by the obligation to prevent genocide in a process of securing the most fundamental rights of the protected groups under this treaty. Besides, it examines the interrelated issue of the ability of the ICJ to address the hard legal cases with strong political implications by the instrument of provisional measures.

Keywords: genocide, international law, ICJ provisional measures order, South Africa, Israel, Gaza Strip

1. Introduction

The large-scale military operation launched by the Israeli government as a response to the unprecedented attack of Hamas and other related paramilitary groups on Israel and its citizens on 7 October 2023, still ongoing at the time of writing, raised serious doubts among the vast majority of the international community over its compliance with the most fundamental norms of international law, including the main principles

of international humanitarian law and human rights. One of the most far-reaching pending allegations concerned the possible crime of genocide committed by the Israel Defence Forces (IDF) potentially supplemented by the public incitement to commit genocide articulated by the political and military leadership of the State of Israel which may be assessed as a manifestation of the genocidal intent to destroy Palestinians (at least in part), i.e. the protected group under the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the Genocide Convention).[1] The continuing bombardment and siege of Gaza, alongside killings of Palestinian residents and other grave violations of their basic human rights which may constitute the crime of genocide, was noticed by UN experts already in the first weeks of the IDF operation.[2] The great criticism on the conduct of Israel was driven by states, experts and the members of the academic world especially from the Global South,[3] among which notably the Republic of South Africa appeared to be one of the most active. In the aftermath of informing the United Nations General Assembly (UNGA) of the deteriorating situation in the Gaza Strip during the 10th Emergency Special Session held on 12 December 2023,[4] South Africa filed an application against Israel before the International Court of Justice (ICJ) regarding alleged violations of its obligations under the the Genocide Convention (Genocide Convention case) on 29 December 2023 in relation to the protected group of Palestinians as a result of military activities undertaken by Israel in Gaza.[5]

1 Read "Genocide in Gaza. Analysis of International Law and its Application to Israel's Military Actions since October 7, 2023", *University Network of Human Rights*, May 15, 2024, https://www.humanrightsnetwork.org/genocide-in-gaza (all websites cited in this paper were last accessed on 30 September 2024).

2 "Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide", October 19, 2023, https://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitalsand-schools-crimes-against-humanity; "Gaza: UN experts call on international community to prevent genocide against the Palestinian people", November 16, 2023, https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against.

3 Compare: "Public Statement: Scholars Warn of Potential Genocide in Gaza", *Third World Approaches to International Law Review*, October 17, 2023, https://web.archive.org/web/20231123124815/https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza.

4 "East Jerusalem & Palestinian Territories, Emergency UN General Assembly", December 12, 2023, YouTube, https://www.youtube.com/watch?v=rG6zSsWNPWE.

5 Prior to that, on 17 November 2023 – together with other four states also representing the Global South region – South Africa referred the situation in Palestine to the International Criminal Court (ICC) concerning the possible commission of international crimes covered by

The main aim of this case commentary is to analyze the provisional measure orders issued by the ICJ in the Genocide Convention case (*South Africa v. Israel*) on 26 January 2024, 28 March 2024 and 24 May 2024 in the light of South Africa's effort to make the Genocide Convention 'globally effective' by emphasizing the key role played by the obligation to prevent genocide in a process of securing the most fundamental rights of the protected groups under this treaty. As it was clearly underlined by the Applicant,

> [S]outh Africa is acutely aware of the particular weight of responsibility in initiating proceedings against Israel for violations of the Genocide Convention. South Africa is also acutely aware of its own obligation — as a State party to the Genocide Convention — to prevent genocide. (...) This application (...) and (...) request for the indication of provisional measures fall to be considered in that context.[6]

At the same time, South Africa attempted to put pressure on the ICJ by placing the alleged genocidal acts committed by Israel after 7 October 2023 '[i]n the broader context of Israel's conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza',[7] hence far beyond the actual scope of the Genocide Convention, in fact the only legal basis of the Applicant's claim. Therefore, the case commentary also examines the interrelated issue of the ability of the ICJ to address hard legal cases with strong political implications by the instrument of provisional measures. The study is based on the legal methodology: explanatory, the model of legal dogmatics, and an analytical methodology.

2. Factual Background

On 7 October 2023, Hamas and other paramilitary groups (namely Al-Qassam Brigades and Al Quds Brigades) directly linked to Hamas acting from the Gaza Strip commenced an unanticipated attack on Israel (named as 'Al-Aqsa

---

the ICC Rome Statute, including the crime of genocide, in the course of the military operation carried out by the IDF in Gaza Strip. See Section 5 of this paper.

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application of 29 December 2023 instituting proceedings and request for the indication of provisional measures, ICJ, para. 3.

7 Ibidem, para. 2.

Flood') killing more than 1,200 people and taking as hostages around 250 Israeli citizens (some of whom possessed dual citizenship) back to Gaza. However, the escalation of violence accelerated by Hamas on the territory of Israel continued beyond 7 October 2023 (through the launching of missile attacks at civilian objects, for instance).[8]

As a response on the same day, the Israeli government, led by Prime Minister Benjamin Netanyahu, began a military operation against Hamas ('Operation Swords of Iron'), firstly by air and sea, later a large-scale ground operation conducted in Gaza, in order to destroy 'the ability and desire (of Hamas – TL) to threaten and harm the citizens of Israel for many years'[9] and to free the hostages. On 9 October 2023, the Israeli Minister of Defence, Yoav Gallant, announced a 'complete siege of Gaza'[10] which soon resulted in a humanitarian catastrophe for the population living in Gaza who were deprived of electricity, food, water and basic medical supplies. As of 15 March 2024, nearly 677,000 inhabitants of Gaza (out of a 2.2 million population) was facing hunger as the outcome of the total blockade of Gaza Strip by Israel. This situation slightly improved in the following months, however, as of 25 June 2024, more than 495,000 people living in Gaza were on the edge of famine.[11] Moreover, throughout the long military operation, Israel kept all crossings into Gaza closed (temporarily opening just the crossing in Rafah on the border with Egypt) which prevented the supply of sufficient humanitarian aid for Gazans.[12] Furthermore, air and artillery strikes, along with other military activities undertaken by the IDF, resulted in around 34,800 documented deaths (including nearly 14,600 children and 9,600 women)[13]

8 "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice", Report of the United Nations High Commissioner for Human Rights, A/HRC/55/28, February 13, 2024, paras. 11-17.

9 "Security cabinet says Israel will destroy military, governmental abilities of Hamas, Islamic Jihad", *The Times of Israel*, October 7, 2023, https://www.timesofisrael.com/liveblog_entry/security-cabinet-says-israel-will-destroy-military-governmental-abilities-of-hamas-islamic-jihad/.

10 Emanuel Fabian, "Defense minister announces 'complete siege' of Gaza: No power, food or fuel", *The Times of Israe*l, October 9, 2023, https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/.

11 "Famine Review Committee: Gaza Strip", Integrated Food Security Phase Classification, June 25, 2024, https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Gaza_June2024.pdf.

12 A/HRC/55/28, para. 19 (note 8).

13 "UN Human Rights Chief deplores harrowing killings of children and women in Rafah", April 23, 2024, https://www.ohchr.org/en/press-releases/2024/04/un-human-rights-chief-deplores-harrowing-killings-children-and-women-rafah.

and around 78,000 injured by the end of May 2024, however, these numbers were likely much higher.[14] As a consequence of the IDF operation, at least 1.7 million Gazans were forcibly displaced (half of whom were children).[15] Last but not least, Israel, namely its security forces but also the IDF, started to also use lethal force against the Palestinian population in the West Bank,[16] as well as against Palestinians living in Israel through arbitrary detentions and mass arrests, inhumane or ill treatment and torture or by imposing restrictions on other fundamental human rights such as freedom of speech or association of Palestinian journalists and bloggers.[17]

The situation in Gaza in the aftermath of the Hamas attack of 7 October 2023 and the subsequent Israeli military response was addressed by different international organizations, including the United Nations and its agencies. In its report of 27 May 2024, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel[18] highlighted that representatives of both parties to the conflict shall be held accountable by means of international and domestic criminal justice.[19] Moreover, the UNGA[20] and UN Security Council (UNSC)[21] in their numerous resolutions noticed the catastrophic humanitarian situation of the civil population in Gaza, calling for an immediate ceasefire, ensuring sufficient humanitarian aid (also by creating humanitarian corridors), unconditional release of hostages and general compliance with international obligations namely in the field of international humanitarian law. Nevertheless, none of these resolutions possessed a binding character under international law. The language used by the UNSC, as well as the lack of a direct reference to Chapter VII of the UN Charter (UNC) in the resolution's content, rather suggest a full reliance on Chapter VI of UNC and reaffirmation of already existing

14 "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel", A/HRC/56/26, May 27, 2024, para. 39, https://www.ohchr.org/en/news/2024/06/commission-inquiry-occupied-palestinian-territory-concludes-israeli-authorities-and.

15 Ibidem, para. 43.

16 A/HRC/55/28, para. 53 (note 8).

17 Ibidem, paras. 67-68.

18 The Commission was established by the Human Rights Council on 27 May 2021 (A/HRC/RES/S-30/1, May 28, 2021).

19 Read A/HRC/56/26 (note 14).

20 Compare: G.A. res. A/RES/ES–10/21 of October 27, 2023; G.A. res. A/RES/ES-10/22 of December 19, 2023.

21 For instance, S.C. res. S/RES/2712 of November 15, 2023; S.C. res. S/RES/2720 of December 22, 2023.

obligations of the parties to the conflict in the field of international humanitarian law. Moreover, the legally binding nature of the long-awaited UNSC resolution no. 2728 of 25 March 2024 demanding the immediate ceasefire for the month of Ramadan adopted by 14 states voting in favor was contested by the USA which argued that this resolution did not impose on the parties any new obligations but should be respected.[22] USA was the only state which abstained in voting in the UNSC (although, did not use its veto power). Without a shadow of a doubt, it gave 'political fuel' to Israel not to abide by this resolution, which actually undermined the authority of the UNSC itself.[23] The US-sponsored UNSC resolution no. 2735 of 10 June 2024 urging both parties to the armed conflict to implement the three-phase ceasefire proposal announced by US President Joe Biden[24] was finally adopted by 14 votes in favor with just Russia abstaining, however, in spite of some positive but still not clear signals initially coming from Israel and Hamas to follow Biden's plan,[25] at the time of writing, neither Israel has fully stopped its military activities in Gaza Strip, nor has Hamas unreservedly released the hostages.

3. Legal Background of South Africa v. Israel Case

This part of the case commentary touches solely upon the substantial aspect of South Africa's complaint against Israel, also by invoking the main arguments of the Respondent. The procedural dimension of the application is addressed in Section 4 which serves as a disclosure of the Court's reasoning leading to its Order of 26 January 2024 (and subsequent ones) indicating provisional measures in the *South Africa v. Israel* case. Furthermore, up to date, pursuant to Article 63 of the ICJ Statute ten states (Spain, Palestine, Mexico, Libya, Colombia, Nicaragua, Türkiye, Chile, Maldives and Bolivia) notified the submission of declarations to intervene in the case of *South Africa vs. Israel*.

22 "Department Press Briefing – Matthew Miller, Department Spokesperson", March 26, 2024, https://www.state.gov/briefings/department-press-briefing-march-26-2024/.

23 Compare: Hansen, "The Ceasefire Resolution at the UN Security Council: Why the U.S. Position is both Wrong and Harmful".

24 "Remarks by President Biden on the Middle East", May 31, 2024, https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/05/31/remarks-by-president-biden-on-the-middle-east-2/.

25 Cordall, "Is Israel going to back the Biden-announced Gaza peace plan?".

3.1. South Africa's Claim against Israel

South Africa's main argument was that Israel failed to fulfill its obligations under the Genocide Convention towards the Palestinian group[26] in the course of its large-scale military operation in the Gaza Strip (considering it as unlawful), namely by failing to: prevent the crime of genocide; prosecute the direct and public incitement to genocide; enact the necessary legislation to give sufficient effect to the provisions of the Genocide Convention in its domestic legal system; and cooperate with the relevant international fact-finding or judicial bodies investigating the situation in Gaza in the context of genocide, by engaging in, committing or attempting/conspiring to commit genocidal acts against the protected group of Palestinians.[27] Therefore, the Applicant claimed that the Respondent violated its numerous obligations found in the Genocide Convention,[28] i.e. Articles I, III, IV, V and VI, read in conjunction with Article II which stipulates the definition of the crime of genocide.[29] In its argumentation, South Africa referred to the *ius cogens* character of a norm to prevent and not to commit genocide, as well as *erga omnes* and *erga omnes partes* obligations[30] that can be derived from the Genocide Convention.[31] Interestingly, regarding the *erga omnes* character

26 Although, South Africa did not define *expressis verbis* which of the protected groups under Genocide Convention – national, ethnical, racial or religious – does the Palestinian group form.

27 *South Africa v. Israel*, para. 4 (case note 6).

28 Ibidem, para. 110.

29 Article II of the Genocide Convention: 'In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group'.

30 *South Africa v. Israel*, paras. 5; 13; 16 (case note 6). The nature of obligations *erga omnes* was defined by the ICJ in the *Barcelona Traction* case. See '[I]n view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations *erga omnes*. (...) Such obligations derive, for example, in contemporary international law, from the outlawing of (...) genocide'. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase: Preliminary objections, ICJ Judgment of 5 February 1970, I.C.J. Reports 1970, paras. 33-34.

31 *South Africa v. Israel*, paras. 5; 13 (case note 6). Compare: "[I]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention". *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

of the abovementioned obligations, the Applicant highlighted most of all its own obligations to prevent genocide and affect the conduct of people likely to commit genocide,[32] even if it is happening thousands of kilometers from its territory.[33] It should be emphasized that the application itself was preceded by South Africa's concern over the situation in the Gaza Strip expressed at least since 30 October 2023 publicly but also directly to the Ambassador of the State of Israel to South Africa by its diplomacy and main state organs.[34]

Taking into consideration the *actus reus* element of the crime under Article II of the Genocide Convention (in points (a), (b), (c) and (d)), South Africa provided extensive evidence of the activities of Israel leading to the possible physical destruction of the Palestinian group at least in part by: killings and causing serious bodily and mental harm to Gazans; mass expulsion from homes and displacement; deprivation of access to adequate food and water; deprivation of access to adequate shelter, clothes, hygiene and sanitation; deprivation of adequate medical assistance; destruction of Palestinian life in Gaza (through, for instance by targeting local courts, libraries, educational facilities or centers of Palestinian culture); and imposing measures intended to prevent Palestinian births.[35]

In relation to the mandatory *mens rea* element of the crime of genocide, i.e. genocidal intent ('the specific intent', *dolus specialis*), the Applicant highlighted:

> [t]hat intent is (...) properly to be inferred from the nature and conduct of Israel's military operation in Gaza, having regard inter alia to Israel's failure to provide or ensure essential food, water, medicine, fuel, shelter and other humanitarian assistance for the besieged and blockaded Palestinian people, which has pushed them to the brink of famine,[36]

as well as from public statements of the Israeli state authorities. South Africa invoked those of Prime Minister Netanyahu ('[w]e're facing monsters, monsters who murdered children in front of their parents (...). This is a battle not only of Israel against these barbarians, it's a battle of civilization against

32 *South Africa v. Israel*, paras. 16; 127 (case note 6).
33 Ibidem, paras. 3; 13. Compare: Pezzano, "The Obligation to Prevent Genocide in South Africa v. Israel: Finally a Duty with Global Scope?".
34 *South Africa v. Israel*, para. 13 (case note 6).
35 Ibidem, paras. 43-100.
36 Ibidem, para. 4.

barbarism'), President Herzog ('[I]t's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware not involved. (...) we will fight until we break their backbone'), Minister of Defence Gallant ('[W]e are fighting human animals and we are acting accordingly') and other high-ranked officials such as Israeli Minister of Finance Smotrich: '[w]e need to deal a blow that hasn't been seen in 50 years and take down Gaza'.[37]

It is important to stress that concerning the two elements of the crime of genocide – *actus reus* and *mens rea* – South Africa relied significantly on reports and evidence gathered by different fact-finding bodies working in the field and other treaty bodies (such as United Nations Relief and Works Agency for Palestine Refugees in the Near East, UNRWA; or the UN Committee on the Elimination of Racial Discrimination).

As a consequence, South Africa requested the ICJ to determine the state responsibility of Israel for its acts and omissions towards the Palestinian group and its obligation to cease any acts leading to the crime of genocide of the Palestinians, as well as to prosecute and punish all people involved in committing genocide, directly and publicly inciting genocide, conspiring or attempting to commit genocide and complicit in genocide. Furthermore, the Applicant asked the Court to adjudicate that Israel must provide reparations for the victims of its genocidal practices and ensure non-repetition of such activities.[38] Having in mind the ongoing nature of hostilities, pursuant to Articles 41 of the ICJ Statute and Articles 73, 74 and 75 of the Rules of Court, South Africa requested the ICJ to indicate provisional measures that, according to the Applicant's reasoning were '[n]ecessary (...) to protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention',[39] and which seemed to have 'at least' a plausible character.[40] Therefore, South Africa asked the Court to indicate nine provisional measures, among which the request to adjudicate that Israel must immediately stop its military operation in Gaza appeared to be the far-reaching. Others concerned the Israeli obligation to prevent genocide, or to prosecute and punish the perpetrators of different forms of criminal acts stipulated in Article III of the Genocide Convention, and to cooperate with international fact-finding bodies working in the field of documentation and preservation of evidences of alleged genocidal acts. On 6 March 2024 and on

37 Ibidem, para. 101.
38 Ibidem, para. 111.
39 Ibidem, para. 115.
40 Ibidem, para. 129.

10 May 2024, the Applicant asked the ICJ to indicate additional provisional measures out of which especially the request to halt the military operation and to stop the blockade of Gaza in order to effectively address the problem of starvation and famine among Gazans and the horrific situation in the city of Rafah, needs to be highlighted (since its initial request in this respect was not approved by the Court).

3.2. Response of Israel

From the very beginning, the senior leadership of Israel denied South Africa's claim of the crime of genocide committed, *inter alia*, by the IDF on the Palestinian group in Gaza naming it as a 'baseless 'blood libel'',[41] an example of 'hypocrisy' in the field of human rights of Pretoria,[42] and a symbol of 'antisemitic bias which was later directed also at the ICJ itself,[43] especially after the first order indicating provisional measures was issued on 26 January 2024. Having in mind the purely legal aspect of the argumentation of Israel, in a document of the Ministry of Foreign Affairs dated 6 December 2024 it was emphasized that '[I]srael's military operations in Gaza are solely directed at Hamas, Islamic Jihad and other armed groups. The IDF does not intentionally target civilians or seek to harm the civilian population'.[44] Israel highlighted that '[t]he appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention',[45] since the genocidal intent cannot be attributed neither to the state authorities nor to the IDF. Israel has been constantly recalling its 'rights and obligations to defend' the Israeli state and its population against the attacks of Hamas from Gaza (relying on Article 51 of the UNC), as well as missile and rocket attacks fired, for instance, by Hezbollah and other terrorist organizations

41 "Israel Rejects South Africa's 'Baseless' Pursuit of Genocide Order From Top UN Court for Conduct in Gaza", *Haaretz*, December 29, 2023, https://www.haaretz.com/israel-news/2023-12-29/ty-article/israel-rejects-south-africas-pursuit-of-genocide-order-from-top-un-court/0000018c-b6cd-db94-afbd-b6fdc7410000.

42 "Netanyahu rejects South Africa's case against Israel as UN court's hearing progress", *AfricaNews*, January 12, 2024, https://www.africanews.com/2024/01/12/netanyahu-rejects-south-africas-case-against-israel-as-un-courts-hearing-progress/.

43 McKernan, "Israeli officials accuse international court of justice of antisemitic bias".

44 "Hamas-Israel Conflict 2023: Frequently Asked Questions", Ministry of Foreign Affairs of the State of Israel, December 6, 2023, p. 5, https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English_Documents_Israel-Hamas%20Conflict%202023%20-%20FAQs%20(Israel%20MFA,%206.12.23).pdf.

45 *South Africa v. Israel*, Provisional measures, ICJ Order of 26 January 2024, para. 40.

(according to Israeli domestic legislation) collaborating with Hamas, coming from different locations such as Lebanon, Syria or Iran.[46] In other words, Israel pointed to the main responsibility of Hamas for the humanitarian crisis witnessed in the Gaza Strip. Moreover, it accused several UNRWA employees of participating in the Hamas attack of 7 October 2024,[47] thus undermining the independence and credibility of the UNRWA and other UN agencies reports on the situation in Gaza. Nonetheless, in subsequent written proceedings, the Respondent emphasized its commitment to providing humanitarian aid for Gazans and the IDF efforts of evacuating civilians, as well as its readiness to cooperate with different international bodies (either the UN agencies, or NGOs) in this regard.[48]

4. ICJ Provisional Measure Orders in the Case of South Africa v. Israel

The ICJ delivered three orders indicating provisional measures in the *South Africa v. Israel* case – on 26 January 2024, 28 March 2024 and 24 May 2024, to date.

4.1. Order of 26 January 2024

The Court first had to consider whether the Applicant has a standing to appear before the ICJ and initiate its complaint against the Respondent. South Africa sought the jurisdiction of the ICJ on the grounds of Article 36 (1) of its Statute[49] and Article IX of the Genocide Convention,[50] since both

46 "Hamas-Israel Conflict 2023: Key Legal Aspects. An overview of key legal aspects of the hostilities triggered by the horrific attacks perpetrated against Israel on October 7, 2023", Ministry of Foreign Affairs of the State of Israel, November 2, 2023, https://www.gov.il/en/pages/hamas-israel-conflict2023-key-legal-aspects.

47 Interestingly, the US intelligence evaluated Israel's claim of the UNRWA staff members taking part in the Hamas activities on 7 October 2023 as 'credible', although almost impossible to verify. Youssef, Malsin and Strobel, "U.S. Finds Some Israeli Claims on U.N. Staff Likely, Others Not".

48 Compare: *South Africa v. Israel – Response of the State of Israel to the question posed by Judge Nolte at the oral hearing of 17 May 2024 on South Africa's fourth request for provisional measures*, May 18, 2024.

49 Article 36 (1) of the ICJ Statute: 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.

50 Article IX of the Genocide Convention: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article

South Africa and Israel are parties to this treaty that did not make any reservations to the Genocide Convention in this regard.[51] To make it clear, irrespective of different categories of international core crimes allegedly committed during the hostilities in Gaza Strip, the Applicant could base its claims solely on the Genocide Convention – it was because neither South Africa, nor Israel recognized the compulsory jurisdiction of the ICJ pursuant to Article 36 (2) of its Statute. As stated before, the Applicant referred to the *ius cogens* character of the norms, as well as *erga omnes* and *erga omnes partes* obligations coming from the treaty under consideration. As a result, in the eyes of South Africa, the Applicant had *prima facie* standing before the ICJ on the basis of alleged violations of the Genocide Convention by Israel to which the Respondent denied that its conduct infringed international obligations coming from this treaty, even if it was done indirectly. Thus, in a legal sense the dispute between the two states was formed.[52] The Court reached similar conclusions by invoking the exchange of public statements of both states clearly opposing its views on the matter.[53] Furthermore, by recalling the ICJ order of 16 March 2022 indicating provisional measures in the case of *Ukraine v. Russian Federation* on the basis of Genocide Convention,[54] the Court reiterated that at this stage of the proceedings it was not obliged to determine whether the Respondent violated its obligations under the Genocide Convention, but only to '[t]o establish whether the acts and omissions complained of by the applicant appear to be capable of falling within the provisions of the Genocide Convention'.[55] It has to be emphasized that the ICJ power to indicate provisional measures is driven directly from Article 41 of the ICJ Statute, not the Genocide Convention

III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'.

51 Read more: Alexander, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) at the International Court of Justice".

52 Compare: *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Permanent Court of International Justice (PCIJ) Judgment of 30 August 1924, PCIJ, Series A, p. 11; *South West Africa (Ethiopia v. South Africa*; *Liberia v. South Africa)*, Preliminary Objections, ICJ Judgment of 21 December 1962, I.C.J. Reports 1962, p. 328.

53 *South Africa v. Israel*, para. 28 (case note 45). For a broader account see Schreuer, "What is a Legal Dispute?".

54 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional measures, ICJ Order of 16 March 2022, I.C.J. Reports 2022 (I), para. 43.

55 *South Africa v. Israel*, para. 30 (case note 45).

itself, therefore it can order them even if in the main proceedings the Court finds that it ultimately lacks jurisdiction in the particular case. Eventually, the ICJ confirmed its *prima facie* jurisdiction by stating that South Africa as each State Party to the Genocide Convention has a common interest '[t]o ensure the prevention, suppression and punishment of genocide' approving the standing of the Applicant in the present case.[56] What needs to be highlighted in this regard is the concurring opinion with the majority of the bench of Judge Xue. In *The Gambia v. Myanmar* case – to some extent similar to the analyzed one – she was reluctant to follow the argumentation that the construction of *actio popularis* can be found within the framework of the Genocide Convention.[57] In *South Africa v. Israel*, on the contrary, Judge Xue seemed to emphasize the 'extra-ordinary' character of the situation regarding the necessary protection of the Palestinian group that justified South Africa's standing in the case.[58]

This position of the Court was contested by Judge Sebutinde in her dissenting opinion, as well as by a judge appointed *ad hoc* by Israel, Judge Barak, in his separate opinion. Judge Sebutinde pointed out that the dispute between South Africa and Israel is of a political, not legal nature – also taking into account the political and diplomatic endeavors of different international organizations, including the UN, and other states to solve the long-lasting conflict between Israel (Jewish population) and Palestine (the Arab population).[59] Thus, according to her, the ICJ was not a proper forum to follow this case. Whereas, according to Judge Barak, the Genocide Convention was not an appropriate legal instrument in the analyzed case, and which the international humanitarian law regime appeared to be the relevant one. What is more, Judge Barak accused South Africa of lodging its application in bad faith, since, in his eyes, the Applicant presented its claim at the same time by refusing to provide a political and diplomatic dialogue offered by Israel.[60] For these reasons, in the light of the argumentation presented by

56 Ibidem, para. 33.

57 *The Gambia v. Myanmar – Separate opinion of Vice-President Xue to the ICJ Order of 23 January 2020*, para. 6.

58 *South Africa v. Israel – Declaration of Judge Xue to the ICJ Order of 26 January 2024*, para. 4.

59 *South Africa v. Israel – Dissenting opinion of Judge Sebutinde to the ICJ Order of 26 January 2024*, para. 4.

60 *South Africa v. Israel – Separate opinion of Judge Barak to the ICJ Order of 26 January 2024*, para. 15.

Judges Sebutinde and Barak, the ICJ would lack even *prima facie* jurisdiction in the analyzed case.

Furthermore, for the purpose of indicating provisional measures, the Court was obliged to check whether the applicable test for ordering them was met, i.e. to state whether the rights of Palestinians for which South Africa sought protection under Genocide Convention were at least plausible[61] and the prerequisites of the existence of urgency[62] and irreparable harm[63] did occur (that undoubtedly are interrelated).[64] In other words, the Applicant should be able to demonstrate a link between its application for provisional measures and the subject-matter of the legal dispute addressed later on in the main proceedings.[65]

According to the ICJ, Palestinians constituted a distinct group protected pursuant to Article II of the Genocide Convention ('national, ethnical, racial or religious group'),[66] however, it did not define which of these groups the Palestinians in fact represented. What is more, the ICJ relied on reports issued by different international fact-finding bodies or agencies (UNRWA, UN Office for the Coordination of Humanitarian Affairs; OCHA; and the World Health Organization) on the catastrophic humanitarian situation in Gaza being '[a]t serious risk of deteriorating further'[67] (notably in the context of growing number of deaths, starvation and displacement). Besides, the ICJ took into account the public statements of high-ranking Israeli officials recalled by the Applicant from which the genocidal intent could be inferred to conclude '[t]hat at least some of the rights claimed by South Africa and for which it is

61 Compare: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional measures, ICJ Order of 28 May 2009, I.C.J. Reports 2009, para. 57; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional measures, ICJ Order of 23 January 2020, I.C.J. Reports 2020, para. 56.

62 See *LaGrand (Germany v. United States of America)*, Provisional measures, ICJ Order of 3 March 1999, para. 26.

63 Compare: *Legal Status of the South-Eastern Territory of Greenland*, Provisional measures, PCIJ Order of 3 August 1932, Series, A/B, p. 284; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional measures, ICJ Order of 15 December 1979, I.C.J. Reports 1979, para. 42.

64 "[T]he power of the Court to indicate an interim measure will only be exercised if there is urgency, in the sense that there is a real and imminent risk of irreparable harm before the Court issues a final decision". See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional measures, ICJ Order of 8 March 2011, I.C.J. Reports 2011, para. 64.

65 Sałkiewicz-Munnerlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection*, 71.

66 *South Africa v. Israel*, para. 45 (case note 45).

67 Ibidem, para. 72.

seeking protection are plausible'.[68] Thus, the ICJ confirmed that the plausible rights of Palestinians to be protected from the crime of genocide and other related acts stipulated by Article III of Genocide Convention, '[a]re of such a nature that prejudice to them is capable of causing irreparable harm'.[69] It is also worth noting that the ICJ determined the right of the Applicant to seek the Respondent's compliance with its obligations under the Genocide Convention. Interestingly, in this regard Judge Nolte highlighted his uncertainty whether the Israeli military campaign in Gaza was pursued with genocidal intent in connection with the lack of sufficient evidence provided by different fact-finding bodies in the context of thw mental element of the crime of genocide especially in comparison with the adequate evidence gathered by similar bodies in *The Gambia v. Myanmar* case in which the rights of the affected Rohingya group were undoubtedly plausible.[70] Judge Barak was even more radical in his separate opinion by highlighting not only the fact that reports of fact-finding bodies did not refer at all to the term of genocide, but also that '[t]he Court is unaware of the underlying information or methodology used by the (...)' Israeli senior leadership in the cited statements from which the genocidal intent could have been inferred, since the proper message of the state authorities of Israel was the intent to destroy Hamas, not the Palestinians living in the Gaza Strip.[71]

Nonetheless, as a result of the abovementioned deliberations, pursuant to Article 75 (2) of the Rules of Court, the ICJ used the power to indicate six provisional measures (out of nine sought by the Applicant) in the *South Africa v. Israel* case among which there was no obligation imposed on Israel to immediately cease its military activities in Gaza Strip. The Court stated that Israel is obliged:

I. to take all measures within its power to prevent the commission of crime of genocide and other related acts under the Genocide Convention (by fifteen votes to two; Judge Sebutinde and Judge Barak voted against);

68 Ibidem, para. 54.
69 Ibidem, para. 66.
70 *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 26 January 2024*, para. 13.
71 *South Africa v. Israel – Separate opinion of Judge Barak to the ICJ Order of 26 January 2024*, para. 36.

II. to ensure with immediate effect that its military does not commit any of the prohibited acts (by fifteen votes to two; Judge Sebutinde and Judge Barak voted against);
III. to 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 (by sixteen votes to one; only Judge Sebutinde voted against);
IV. to 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 (by sixteen votes to one; only Judge Sebutinde voted against);
V. to 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 Genocide Convention in relation to Gazans (by fifteen votes to two; Judge Sebutinde and Judge Barak voted against);
VI. to submit a report to the Court on all measures taken to give effect to this Order within one month (by fifteen votes to two; Judge Sebutinde and Judge Barak voted against).[72]

To conclude, the ICJ made it clear that none of the provisional measures indicated within the framework of its Order of 26 January 2024 did not prejudge the future decisions of the Court on jurisdiction, admissibility and merits of the analyzed case.

4.2. Order of 28 March 2024

Following South Africa's request of 6 March 2024 to indicate additional provisional measures and to modify two provisional measures ordered previously in *South Africa v. Israel* case with reference to Article 41 of the Statute of the Court, as well as Articles 75 (1) and (3), and Article 76 of the Rules of Court, the ICJ had to determine whether the conditions stipulated by Article 76 (1) were met[73] – i.e. a change in the situation

72 *South Africa v. Israel*, para. 86 (case note 45). The obligation to provide the ICJ with a report on the actions undertaken by Israel was later repeated in the ICJ's Orders of 28 March and 24 May 2024.

73 Article 76 (1) of the Rules of Court provides that 'At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision

that justified modification of its Order of 26 January 2024. The Court observed that since its previous Order '[t]he catastrophic living conditions of the Palestinians in the Gaza Strip have deteriorated further'[74] especially concerning the increasing food insecurity of Gazans ('[P]alestinians in Gaza are no longer facing only a risk of famine, as noted in the Order of 26 January 2024, but that famine is setting in').[75] The ICJ took a position that a significant change in the situation observed in the Gaza Strip entailed '[a] further risk of irreparable prejudice to the plausible rights claimed by South Africa',[76] since the developments of the situation in Gaza were 'exceptionally grave'.[77] What needs to be highlighted is the fact that this position was shared also by Judge Nolte who was previously hesitating on whether the Israeli military operation was pursued with genocidal intent affecting the plausible rights of Palestinians under Genocide Convention.[78] As a result, the ICJ decided to reaffirm the provisional measures rendered by the Order of 26 January 2024 and indicate additional provisional measures.

It should be emphasized that the provisional measures issued by the ICJ eventually differed from those sought by the Applicant. First of all, the Court rejected those which were addressed to all State Parties of the Genocide Convention, since the legally binding effect of the provisional measures concerns solely parties to the dispute before the ICJ.[79] Secondly, irrespective of South Africa's request to oblige Israel to halt its military operation in the Gaza Strip, the ICJ did not follow this path. It stated that Israel – in full cooperation with the UN agencies working in the field, such as UNRWA, constantly being obstructed by the Israeli government which was an outcome of the aforementioned accusations of participation of the UNRWA staff in the Hamas attack – shall take all necessary and effective measures to ensure basic services and humanitarian assistance for Gazans, including food, water, shelter and medical care, by 'increasing the capacity and number of land crossing points and maintaining them open for as long as necessary'.[80]

---

concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification'.

74 *South Africa v. Israel*, Provisional measures, ICJ Order of 28 March 2024, para. 18.

75 Ibidem, para. 21.

76 Ibidem, para. 40.

77 Ibidem, para. 22.

78 *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 28 March 2024*, para. 6.

79 *South Africa v. Israel*, para. 44 (case note 74).

80 Ibidem, para. 51.

Although, in their joint declaration Judges Xue, Brant, Gómez Robledo and Tladi suggested that a proper implementation of the provisional measures by Israel required at least suspension of its military activities in Gaza Strip,[81] while President Salam referred to UNSC resolution no. 2728 of 25 March 2024 calling for an immediate ceasefire for the month of Ramadan that only then the measures indicated by the Court could have taken an effect.[82] The necessity of the suspension of Israeli's military operation was mentioned also by Judges Yusuf[83] and Judge Charlesworth[84] in their declarations which clearly showed the changing attitude among the ICJ judges concerning the possibility of fulfilling its obligations under Genocide Convention by Israel – especially on the level of the prevention of genocide – if the military operation was still taking place. Thirdly, the ICJ obliged Israel to ensure that its military forces did not commit any acts against the protected group of Palestinians under the Genocide Convention. This measure differed from a similar one indicated by the Order of 26 January 2024 since – according to the ICJ – the prevention of the delivery of needed humanitarian assistance by the IDF may have fallen within the ambit of the prohibited acts under the Genocide Convention.

Unsurprisingly, the Order of 28 March 2024 was hugely criticized by Judge Barak. He blamed the ICJ for going far beyond its jurisdiction and the factual scope of the Genocide Convention. What is more, Judge Barak invoked a 'structural imbalance' of the Court's intervention in the sense of affecting the conduct of hostilities since it bounded only Israel but not Hamas, the second party to the armed conflict taking place in Gaza Strip. According to him, the analyzed Order: '[s]hields Hamas while imposing interim obligations on Israel'.[85]

81 *South Africa v. Israel – Joint declaration of Judges Xue, Brant, Gómez Robledo and Tladi to the ICJ Order of 28 March 2024*, para. 7.

82 *South Africa v. Israel – Declaration of President Salam to the ICJ Order of 28 March 2024*, para. 11.

83 *South Africa v. Israel – Declaration of Judge Yusuf to the ICJ Order of 28 March 2024*, para. 10.

84 *South Africa v. Israel – Declaration of Judge Charlesworth to the ICJ Order of 28 March 2024*, para. 7.

85 *South Africa v. Israel – Separate opinion of Judge Barak to the ICJ Order of 28 March 2024*, para. 7.

4.3 Order of 24 May 2024

On 10 May 2024 South Africa submitted a subsequent 'urgent' request for modification and indication of additional provisional measures which was directly linked to the situation on the ground, a military offensive carried out by the IDF in Rafah Governorate. The Court was again confronted with the question whether the Israeli military operation created a change in the situation that would have justified the modification or adoption of additional provisional measures on the basis of Article 76 (1) of the Rules of Court. The majority of the Court's bench decided that the intensification of bombardments of Rafah leading to the evacuation of 1 million Gazans and the 'disastrous' humanitarian situation met the requirements set by Article 76 (1) enabling the ICJ to indicate new provisional measures or modify the previous ones in conjunction with general terms of provisional measures stipulated by Article 41 of the ICJ Statute. Although, in the eyes of Vice-President Judge Sebutinde[86] and Judge Barak,[87] the military offensive conducted by the IDF in Rafah was part of the larger Israeli campaign in Gaza initiated as a response towards the attack of Hamas of 7 October 2023, therefore it should have not been assessed as a change in the situation justifying the need of new measures ordered by the Court. Interestingly, some serious doubts in this regard were also raised by Judge Nolte who highlighted that the horrific situation in which Gazans were living for the last few months was exactly the same when the ICJ was confronted with South Africa's requests in January and March 2024, thus a justification of the necessity of indication of new provisional measures in May 2024 was poorly established.[88]

Relying on information provided by the UN, WHP, OCHA and UNICEF, the ICJ stated that evacuation efforts undertaken by the IDF in Rafah Governate did not guarantee the fulfillment of plausible rights of the Palestinian group to be protected against the crime of genocide (and other related acts) under the Genocide Convention. As a result of reasoning that an ongoing military operation in Rafah entailed '[a] further risk

86 *South Africa v. Israel – Dissenting opinion of Vice-President Sebutinde to the ICJ Order of 24 May 2024*, para. 1.

87 *South Africa v. Israel – Dissenting opinion of Judge Barak to the ICJ Order of 24 May 2024*, para. 13.

88 *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 24 May 2024*, para. 6.

of irreparable prejudice to the plausible rights claimed by South Africa',[89] the Court obliged Israel to '[i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part'.[90]

This particular phrase raised some significant doubts also among the ICJ judges. In her dissenting opinion, Vice-President Judge Sebutinde – voting against all additional measures adopted by the Court – highlighted that the ICJ could not have obliged Israel to fully stop its military offensive in Rafah as soon as these actions were in compliance with obligations of Israel under Genocide Convention.[91] The right of Israel to defend itself and its nationals was emphasized by Judge Tladi, who was voting in favor of adopting the provisional measure obliging Israel to halt its military activities in Rafah Governate only if they may have violated Israel's obligation under Genocide Convention. On the contrary, according to Judge Tladi, the legitimate defensive actions would have been assessed as consistent with the Order of the Court.[92]

5. Comments on the ICJ Orders in the Case of South Africa v. Israel

It should be noted that the situation observed in the Gaza Strip since October 2023 is highly complex due to the ongoing active military activities of both parties to the conflict, as well as the complicated (geo)political context directly or indirectly involving the interest not only of Israel, Palestine or other Middle East countries, but also of the world's superpowers such as USA, China or Russia.[93] Moreover, the history of Israeli (Jewish) – Palestinian (Arab) conflict over their entitlement to the land of Israel/Palestine unquestionably remains a long-lasting issue.[94] Therefore, even though this study deals merely with the provisional measures issued by the ICJ in the *South Africa v. Israel* case and, thus also the Genocide Convention, it

89 *South Africa v. Israel*, Provisional measures, ICJ Order of 24 May 2024, para. 47.
90 Ibidem, para. 50.
91 *South Africa v. Israel – Dissenting opinion of Vice-President Sebutinde to the ICJ Order of 24 May 2024*, para. 21.
92 *South Africa v. Israel – Declaration of Judge Tladi to the ICJ Order of 24 May 2024*, para. 17.
93 Read more: Banco and Ward, "US officials don't see clear path to ending war in Gaza as cease-fire talks stall"; Leonard, "China's Game in Gaza. How Beijing Is Exploiting Israel's War to Win Over the Global South"; Notte, "Where Does Russia Stand on the Israel-Hamas War?".
94 For a broader account see Milton-Edwards, *The Israeli-Palestinian Conflict. A People's War.*

cannot be completely isolated from the endeavors undertaken by different states (on the diplomatic, or judicial level), international organizations (such as the UN) and other international tribunals (i.e. the International Criminal Court, ICC) dealing with the outcomes of war between Israel and Hamas in Gaza, or, in more general terms, the legal consequences of the presence of Israel in the occupied Palestinian territory since 1967 (to which, South Africa referred in rhetoric form in its application against Israel).

The latter issue was addressed by the ICJ on 19 July 2024 in the Advisory Opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* which followed the UNGA resolution 77/247 of 30 December 2022 co-sponsored by 20 states belonging to the Global South. Even though the evaluation of Israel's military response to the attack of Hamas of 7 October 2023 was excluded from the ICJ's findings,[95] the Advisory Opinion of 19 July 2024 is one of the strictest legal assessments of Israel's policy towards the Palestinians. The Court found the ongoing presence of Israel in the occupied Palestinian territory since 1967[96] as unlawful under international law, including the violation of the right to the self-determination of the Palestinian people.[97] Thus, Israel should bring an end to its presence in the occupied Palestinian territories.[98] From a strictly formal point of view, this Advisory Opinion cannot affect the Court's work in the *South Africa v. Israel* case, nonetheless the ability of extra-judicial factors – such as institutional, political or sociological ones (to which the 'atmosphere' created by the Advisory Opinion of 19 July 2024 unquestionably belongs) – to influence the reasoning of particular judges cannot be fully excluded.[99]

The aforementioned Advisory Opinion did not refer specifically to the main issue of this case comment, i.e. the scope of the Genocide Convention and its application to the situation witnessed in Gaza. However,

95 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, ICJ Advisory Opinion of 19 July 2024, para. 81.

96 The ICJ determined that 'occupied Palestinian territory since 1967' 'encompasses the West Bank, East Jerusalem and the Gaza Strip'. Ibidem, para. 78.

97 *Inter alia*, by acquisition of territory by force (through 'annexation') and other policies and practices infringing basic human rights of Palestinians, as well as violating Israel's obligations under international humanitarian law. Ibidem, para. 267.

98 Moreover, Israel is bound to cease any illegal acts coming from those policies and practices and provide full reparation to all victims of these abuses – by compensation, satisfaction and restitution.

99 Read more: Alter, Helfer and Madsen, "How Context Shapes the Authority of International Courts".

the crime of genocide remains one of the core elements of the proceedings held before the other international court based in the Hague, the ICC.[100] On 17 November 2023, the Office of the Prosecutor (OTP) of the ICC received a referral of the situation in Palestine lodged by five states: South Africa, Bangladesh, Bolivia, Comoros, and Djibouti, pursuant to Articles 13 (a) and 14 of the ICC Rome Statute.[101] All of them argued that the ongoing large-scale military invasion launched in October 2023 leading to 'escalation of the violence, including against civilians' amounted to the commission of new crimes covered by the ICC jurisdiction – namely the crime of genocide against the protected group of Palestinians, alongside other war crimes and crimes against humanity, by the Israeli authorities and forces on the ground.[102] Undoubtedly, the findings of the OTP may be used by both parties to strengthen their position in the course of the analyzed dispute before the ICJ in main proceedings.

These two examples, alongside the *The Gambia v. Myanmar* cases (initiated in 2019) concerning the alleged genocide on the people of Rohingya and

100 Following the ICC Pre-Trial I Chamber decision of 5 February 2021 on the jurisdiction of the ICC regarding the situation in the State of Palestine, on 3 March 2021 the ICC Prosecutor opened an investigation on crimes that are alleged to have been committed in Palestine since 13 June 2014 (i.e. the beginning of "Operation Protective Edge" launched by Israeli authorities in Gaza). Since 1 April 2015 the State of Palestine is the State-Party to the Rome Statute, however, prior to that fact, on 1 January 2015 Palestine lodged an declaration on the ground of Article 12(3) of the Rome Statute recognizing the Hague-based Court jurisdiction over alleged crimes committed in Palestine since the abovementioned 13 June 2014. Israel is not the State Party to the ICC Rome Statute.

101 Furthermore, on 18 January 2024 two other parties to the Rome Statute, Chile and Mexico, referred the situation in Palestine to the OTP, by underlining that the hostilities between both parties to the conflict may amount to the crimes within the ICC jurisdiction.

102 On 20 May 2024 the ICC Prosecutor, Karim A.A. Khan, filed applications before Pre-Trial Chamber I for warrants of arrest with regard to the leaders of Hamas (Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (Deif), and Ismail Haniyeh) and Prime Minister of Israel (Benjamin Netanyahu), as well as the Israeli Minister of Defence (Yoav Gallant) for war crimes and crimes against humanity allegedly committed, respectively, since 7 October 2023 in the territory of Israel and Palestine, and since 8 October 2023 in the territory of State of Palestine. On 21 November 2024 the ICC rejected the Israel's challenges to its jurisdiction and issued warrants of arrest for Netanyahu and Gallant (who – in the meantime – ceased to be Minister of Defence of Israel). Moreover, the ICC issued warrant of arrest for Al-Masri (Deif). Sinwar and Haniyeh were killed by the Israeli forces, therefore the ICC terminated proceedings against them. It is important to emphasize that none of allegations invoked by the OTP of the Hague-based Court concerned the crime of genocide (at least up to date, since the current charges may be extended to genocide in the course of the investigation). "Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant,", November 21, 2024, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

the *South Africa v. Israel* case, demonstrate a growing trend in international relations, i.e. turning to international courts and other legal institutions – observed mainly among representatives of the Global South.[103] It seems the top international courts ceased to be understood solely as an instrument of the 'neo-colonial' oppression of the West against the Global South (which mainly concerned the ICC, but this approach used to be seen also with reference to the ICJ).[104] On the contrary, they are becoming one of the forums in which international law with a strong human rights paradigm is used for the benefit of a post-colonial world.[105] It may be argued that as a result of such a tendency, international law is currently going through a stage of 'real universalization'. Just to remind the reader, six out of eight states that decided to intervene in the *South Africa v. Israel* case come from the Global South. Whereas, when Germany announced its willingness to use the path of Article 63 of the Statute and intervene in this case 'on the side of Israel', it was immediately publicly criticized by Namibia and State of Palestine,[106] while on 1 March 2024, Nicaragua initiated proceedings against Germany before the ICJ claiming that by providing military aid and equipment to Israel, as well as by suspending funding to the UNRWA, the German state was in breach of its obligations under the Genocide Convention to prevent the genocide of the Palestinian population in Gaza.[107] It eventually led to the abandonment of these initial plans by Berlin.[108] This exlains why, in this context, post-apartheid South Africa presented itself to be a right state[109] and draw the world's attention to the existential problems suffered by the Palestinian

103 This tendency is being supported by the increasing number of academic writings of the representatives of the Third World Approaches to International Law (TWAIL) theory. See Gathii, "The Promise of International Law: A Third World View".

104 Read more in Bianchi, *International Law Theories. An Inquiry into Different Ways of Thinking*, 205-226.

105 One of the visible signs of this process was the ICJ Advisory Opinion of 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

106 Talmon, "Germany Rushes to Declare Intention to Intervene in the Genocide Case brought by South Africa Against Israel Before the International Court of Justice".

107 *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application of 1 March 2024 instituting proceedings and request for the indication of provisional measures, ICJ, para. 3.

108 The ICJ did not agree with Nicaragua to order provisional measures against Germany, though. See *Nicaragua v. Germany*, Provisional measures, ICJ Order of 30 April 2024, para. 20.

109 As South Africa's President Cyril Ramaphosa clearly highlighted: '[S]ome have told us we should mind our own business and not get involved in the affairs of other countries, and yet it is very much our place as the people who know too well the pain of dispossession, discrimination, state-sponsored violence. See "Gaza genocide ruling: 'It was our place to get

people, not only after 7 October 2023.[110] In other words, South Africa put an effort into demonstrating the alleged genocide experienced by Gazans through the lens of a system of apartheid allegedly organized by Israel on the occupied territories (far beyond the temporal limitation of the application). Although, basing its claim on the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) of 1973 remained unfeasible, since during the time of submitting the application to the ICJ neither South Africa, nor Israel were parties to the Apartheid Convention.[111] Therefore, irrespectively of its legal constrains, the reference to the Genocide Convention by South Africa – a very specific and symbolic first human rights treaty in the history of humankind – it shall not be assessed as accidental in this regard. What is more, it might be seen as a first dimension of making the Genocide Convention 'globally effective' by the Applicant (although more in a political and moral sense).

Moving towards an analysis of the purely legal aspect of South Africa's claim against Israel, we should remember that the application was built upon the crucial role of the obligation to prevent genocide under the Genocide Convention. To be precise, not only with reference to the Respondent as such (which might be understood as the most 'natural' if South Africa sought Israel's responsibility under international law for acts and omissions of a potentially genocidal character against the protected group of Palestinians in Gaza Strip), but also and foremost to the Applicant, as well as to the whole international community. The key factor used for this purpose was an appeal to the *erga omnes* and *erga omnes partes* obligations that can be derived from the Genocide Convention guaranteeing South Africa legal standing in this case. Responding affirmatively to this argumentation in its Order of 26 January 2024, the ICJ followed the path that began in the *Belgium v. Senegal* case (determined under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; CAT), repeated

involved' – South African president", *CNR*, January 26, 2024, https://citinewsroom.com/2024/01/gaza-genocide-ruling-it-was-our-place-to-get-involved-south-african-president/.

110 D'orsi, "When Nelson Mandela was (Considered) a Terrorist and the "Natural Alliance" between South Africa and Palestine". However, voices coming mainly from the Jewish circles around the globe and pointing to the political links between South Africa and Hamas need also to be invoked. See "South Africa, Hamas, and the ICJ "genocide" case against Israel," *AIJAC – Australia/Israel & Jewish Affairs Council*, February 6, 2024, https://aijac.org.au/fact-sheets/factsheet-south-africa-hamas-and-the-icj-genocide-case-against-israel/.

111 On 13 June 2024 the Apartheid Convention entered into force for South Africa after deposition of its accession to the treaty on 14 May 2024.

later in *Canada and the Netherlands v. Syria* (examined also under CAT) and *The Gambia v. Myanmar* (under the Genocide Convention) cases.[112] As in the latter, the ICJ did not require South Africa to prove it was specifcally affected by the conduct of Israel to successfully commence proceedings before the Court.[113] This increasingly universally accepted procedural trend by the ICJ is one of the crucial factors of making the Genocide Convention 'globally effective',[114] and, at the same time, remains one of the preconditions of the proper fulfilment of a substantial obligation to prevent genocide of each State Party to this treaty. Moreover, bearing in mind the plausibility test applied for the indication of provisional measures, the ICJ plausibly determined the right of the Applicant to seek the Respondent's compliance with its obligations under the Genocide Convention. Importantly, these are not the only links between the jurisdictional and substantial aspects of the matter that can be driven from the recent case-law of the Hague-based Court, including the analyzed case of *South Africa v. Israel*.

We should bear in mind that for the first time the ICJ interpreted the obligation to prevent genocide embodied in Article I of the Genocide Convention in its landmark 2007 judgment in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* by stating that this legal duty is '[o]ne of conduct and not one of result',[115] being not limited solely by territory of a given State Party acting 'in ways appropriate to meeting the obligations in question'.[116] In the eyes of the Court, in order to determine whether a State Party breached an obligation to prevent genocide, the ICJ needs to assess:

> [t]he capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all

112 Compare: Urs, "Obligations Erga Omnes and the Question of Standing Before the International Court of Justice".

113 Compare: *The Gambia v. Myanmar*, Preliminary objections, ICJ Judgment of 22 July 2022, I.C.J. Reports 2022, paras. 111-112.

114 Interestingly, the issues of South Africa's standing, alongside the *erga omnes* and *erga omnes partes* obligations, were not even questioned by Israel that focused its argumentation on the lack of legal dispute between the Applicant and the Respondent in this particular case.

115 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, ICJ Judgment of 26 February 2007, I.C.J. Reports 2007, para. 430.

116 Ibidem, para. 183.

other kinds, between the authorities of that State and the main actors in the events'.[117]

Furthermore, in the Order on provisional measures in *Ukraine v. Russian Federation* issued on 16 March 2022, the ICJ noticed that each State Party to the Genocide Convention for the purpose of fulfilling its obligation to prevent genocide may invoke Article VIII (reference to the competent UN organ to prevent genocide) or Article IX (the dispute resolution clause) of the treaty.[118] The recognition of a genuine dispute existing between the Gambia and Myanmar plus between South Africa and Israel under Article IX, as well as the confirmation of its *prima facie* jurisdiction granted on the construction of *erga omnes* and *erga omnes partes* in those two cases by the ICJ, suggests the growing readiness of the Court to accept that while the factual capacity of the Gambia or South Africa – being located thousands of kilometers from the place where the risk of genocide is being observed – to influence the actions of concrete individuals remains extremely limited, their legal capacity to initiate proceedings before the ICJ appears crucial on the way to make the Genocide Convention 'globally effective' on the level of prevention ('[a]ll States parties to the Convention have a common interest to ensure the prevention, suppression and punishment of genocide')[119]. Some authors even claim that this approach may be understood as one of the methods of fulfillment of the Responsibility to Protect (R2P) doctrine ('judicial R2P'), a concept that emerged at the beginning of 21st century to address the cases of mass atrocities by means of prevention, reaction and rebuilding.[120] What may raise some doubts in this regard, however, is the fact that the possibility of initiating proceedings under Article IX of the Genocide Convention was traditionally construed as a right – but not as an obligation – of each State Party. In the interpretation presented by the ICJ in its recent case-law, the question remains open whether the failure to invoke the compromissory clause under Article IX by a given State Party may be assessed as a violation of its obligation to prevent genocide when the risk of genocide in a certain area is relatively high and, at the same time, a State Party possesses knowledge of this fact – even if is located far away from the area under consideration.

117 Ibidem, para. 430.
118 *Ukraine v. Russian Federation*, para. 56 (case note 54).
119 *South Africa v. Israel*, para. 33 (case note 45).
120 Read more Pezzano, "Towards a Judicial R2P: The International Court of Justice and the Obligation to Prevent Genocide in The Gambia v. Myanmar Case".

The next successful example of South Africa's endeavor of making the Genocide Convention 'globally effective' – with which the Court seems to agree – was the relatively low threshold set for the Applicant by the ICJ to meet the requirements of the indication of provisional measures sought by South Africa. With reference to the plausibility test, by taking into account numerous reports published by different intergovernmental (including UN agencies) and non-governmental organizations on the catastrophic humanitarian situation noticed on the ground in the Gaza Strip (these reports did not advocate the naming of crimes allegedly committed by the IDF in Gaza as a crime of genocide), and the statements of the possibly genocidal character issued by the senior leadership of Israel, the Court found that at least some rights of the Palestinians not to be victims of genocide were plausible. Leaving aside still the less controversial subject of *actus reus*, the genocidal intent seemed to be crucial to determine whether the rights of the Palestinians to be protected from genocide were plausible. However, the ICJ did not examine this issue in detail, rather accepting *a priori* that the intent to destroy the protected group of Palestinians at least in part may have existed in the invoked statements of Israel's officials.[121] The question automatically arises – how to reconcile the abovementioned finding with the declaration of the state authorities of Israel that the only intent was to destroy Hamas, not the Gazans if it was not exhaustively investigated by the Court? As stated above, this matter was also raised by Judge Nolte who drew attention to the absence of reference to genocidal intent in reports of different organizations upon which the ICJ based its reasoning. Undoubtedly, the intent of a state to commit genocide is different from the intent of an individual in the sense of (international) criminal law, nevertheless basing its presence on such factors as a 'state policy' or 'plan'[122] – completely ignored by the Court in its deliberations[123] – gives the impression of being more appropriate.

The approach presented by the ICJ seems justified – although entirely on the level of prevention of genocide. The initial stage of proceedings before the Court is in fact the only moment, when the ICJ can truly impact a state's conduct by its order, especially in a such fragile context of a serious risk

121 Compare: Milanovic, "ICJ Indicates Provisional Measures in South Africa v. Israel".

122 Schabas, *Genocide in International Law. The Crime of Crimes*, 518.

123 Compare: Mazzeschi and Carli, "Proof of Specific Intent in the Crime of Genocide: The Case of South Africa v. Israel Before the International Court of Justice".

of genocide taking place.[124] It should be emphasized that this influence is purely legal in nature because since the 2001 judgment of the Court delivered in the *LaGrand* case, it is clear that provisional measures ordered pursuant to Article 41 of the ICJ Statute are '[c]onsequently binding in character and create(...) a legal obligation'.[125] Choice of the provisional measures in its Order of 26 January 2024, underlining the obligations of Israel to prevent genocide, to ensure that its military forces does not commit genocidal acts, as well as to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip, confirmed this attitude of the Court (strongly underlined by Judge Bhandari in his Declaration to the ICJ Order of 26 January 2024).[126] Needless to say, the vast majority of provisional measures of the Order of 26 January 2024 were approved almost unanimously (at least fifteen out of seventeen judges voted in favor), whereas Judge Barak – appointed by Israel – voted in favor of obliging the Israeli state to prevent and punish the direct and public incitement to commit genocide in relation to Gazans, as well as to 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. This explains why it cannot be understood as surprising that the ICJ belived Gazans to be facing irreparable harm during the ongoing large-scale military operation carried out by the IDF. The ICJ also confirmed that the deteriorating humanitarian catastrophe of the civilian population in the Gaza Strip in the aftermath of the Order of 26 January 2024 constituted a change in the situation that justified the modification of provisional measures, irrespectively of some hesitation by Judges Sebutinde, Barak and Nolte.

Without a shadow of a doubt, the issue that stirred up the most controversies was whether the ICJ could use provisional measures to influence the modalities of operation led by the IDF notably by ordering Israel to unconditionally halt its military activities in Gaza, a measure sought foremost by

124 Compare: '[T]his (...) does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. A State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'. *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 431 (case note 115).

125 *LaGrand*, Merits, ICJ Judgment of 27 June 2001, I.C.J. Reports 2001, para. 110.

126 *South Africa v. Israel – Declaration of Judge Bhandari to the ICJ Order of 26 January 2024*, paras. 8-9.

South Africa in its application. It should be emphasized that the Respondent constantly underlined that by carrying out the 'Operation Swords of Iron', Israel exercised the right to self-defence enshrined in Article 51 of the UNC. *Ius ad bellum* matters fall beyond the scope of this particular paper, however, it should be recalled that it is legally debatable whether Israel is entitled to base its actions on Article 51 of UNC.[127] What is more, the legal evaluation of the use of force by the Israeli state in Gaza Strip remains an issue with huge potential to be politicized with which the ICJ was confronted. These circumstances may explain the general reluctance of the ICJ judges to oblige Israel to halt its military activities in the first two orders which could have been construed as an attempt to restrict the inherent right to self-defence embodied in UNC by the Court's order (however, as aforementioned, several judges opted on imposing on Israel the obligation to 'at least' suspend its military operation). Therefore, the provisional measures determined by the ICJ in its Orders of 26 January 2024 and 28 March 2024 – upon which the obligation not to commit genocide by Israeli military forces with reference to the protected group of Palestinians appeared to be the strongest one – were tailored in order to somehow affect the modalities of the IDF operation in Gaza (which cannot lead to the destruction of Gazans in whole or in part), but still remain coherent with Article 51 of UNC. Moreover, the essence of the Order of 24 May 2024, i.e. the obligation of Israel to '[i]mmediately halt its military offensive, (...) which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part'[128] is not just territorially restricted (to the Rafah Governorate), but also substantially limited. The Court noticed the disastrous humanitarian situation in Gaza which dramatically worsened in the course of the military offensive of the IDF in the Rafah Governorate, however, the obligation to halt military operation applied only to these activities that could lead to the genocide of the Gazans, not a military response to the attack of Hamas as such. This disposition corresponds with the understanding of the obligation to prevent genocide presented earlier by the ICJ in *Bosnia Herzegovina v. Serbia and Montenegro* case:

> [t]he obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation,

127 Compare recent discussions on the matter: Gill, "The ICJ Wall Advisory Opinion and Israel's Right of Self-Defence in Relation to the Current Armed Conflict in Gaza"; Milanovic, "Does Israel Have the Right to Defend Itself?".

128 See note 90.

> has it in its power to contribute to restraining in any degree the commission of genocide.[129]

Israel possesses the capacity to alter the modalities of its military operation in the Rafah Governorate in order not to commit the crime of genocide against the protected group of Palestinians, at the same time being entitled to continue its efforts to suppress the Hamas what may eventually lead to the release of hostages.

Nevertheless, Judge Nolte highlighted that '[t]he Court can play only a limited role in the present proceedings'.[130] It can neither replace the UNSC in fulfilling its primary responsibility for the maintenance of international peace and security, nor the states directly involved in the situation on the ground – i.e. Israel and Palestine – in reaching the settlement to the dispute lasting far beyond the substantial and procedural (temporal) scope of South Africa's application in the present case. Moreover, the ICJ is strictly limited in its jurisdiction by Article IX of the Genocide Convention, thus it cannot take into account any acts falling beyond the scope of this treaty, even if they constitute other examples of international core crimes, such as war crimes or crimes against humanity, or other serious violations of international humanitarian law. Eventually, during the merits stage, it may be impossible to determine the genocidal intent of the Respondent. Therefore, it may be argued that the Court decided to widely open a legal path for states willing to bring the claims in the name of alleged victims of genocide and, as a result, successfully prevent the forthcoming tragedy of a protected group pursuant to Genocide Convention – even if they are not specially affected by the conduct of a given state under consideration. The choice of the indicated provisional measures in the cases of *South Africa v. Israel* and *The Gambia v. Myanmar* underlining the importance of preventive endeavors seem to confirm this way of reasoning. However, the negative consequence of such an approach in the analyzed particular case is a certain 'systemic asymmetry'. As Judge Barak accurately indicated, the Court's orders put the limitations on just one party to the conflict (Israel), whereas the second (Hamas) – being a non-state actor – is in fact unreachable by the ICJ. What is more, Israel is deprived from instituting proceedings by a counter-claim pursuant to Article 80 of the ICJ Statute since the subject of international law to which

129 *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 461 (case note 115).

130 *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 26 January 2024*, para. 2.

acts or omissions of Hamas can be attributed (Palestine) is not and cannot be the party to the proceedings before the Court (State of Palestine neither ratified the Genocide Convention, nor accepted the ICJ jurisdiction in this regard). Israel may decide to challenge the standing of South Africa during the stage of preliminary objections, although no one would be surprised if these arguments are going to be dismissed by the Court. ICJ is constantly moving towards the fortification of emerging doctrine of the prevention of genocide (or broadly speaking – prevention of mass atrocities), potentially being the most effective at the initial stage of proceedings.

Undoubtedly, it is still too early to assess the impact of the ICJ orders issued in the case of *South Africa v. Israel* on the State of Israel but also the conduct of third states, nevertheless it is worth pointing out a few examples related to the significance of the obligation to prevent genocide under the Genocide Convention. After several states (such as the USA, the United Kingdom, Canada, the Netherlands, Finland, Germany, Italy and Switzerland) initially withdrew their funding to UNRWA – the main agency responsible for providing humanitarian assistance for Gazans – following allegations that UNRWA staff had participated in the Hamas attack of 7 October 2023, some of these states have since reversed their decision. The ICJ Order of 26 January 2024 (and subsequent ones) emphasizing the leading role played by the obligation to prevent genocide might have at least indirectly impacted such a position, especially in the aftermath of the aforementioned application submitted by Nicaragua against Germany to the ICJ claiming that by providing military aid and equipment to Israel, as well as suspending its funding for UNRWA, the German state was in breach of its obligations under the Genocide Convention to prevent genocide of Palestinians in Gaza Strip. It should be emphasized that by directly invoking the binding character of provisional measures streaming from the ICJ Order of 26 January 2024, on 14 February 2024 Spain sent a letter to Ursula von der Leyen, President of the European Commission, formally requesting a review of whether Israel's conduct in Gaza was in compliance with its obligations under the Genocide Convention in light of the European Union–Israel Association Agreement.[131] Furthermore, on 12 February 2024, the Court of Appeal in the Hague blocked the Dutch government from the transfer of F-35 fighter jets to Israel in connection with the risk of further violations of international humanitarian law norms by

131 "Letter to European Commission President", February 14, 2024, https://www.lamoncloa.gob.es/presidente/actividades/Documents/2024/Letter-to-Commission-President-Ursula-Von-der-Leyen.pdf.

the recipient during the armed conflict in Gaza.[132] Following the Netherlands, some other states, including Japan, Belgium and Spain also decided to suspend or halt their military supplies to Israel.[133] The growing number of members of the international community are unwilling to be blamed for failing to fulfill their obligations to prevent genocide or even for being complicit in committing the crime of genocide under the rules of state responsibility or 'at least' for actions undermining their international reputation. This may indicate that the Genocide Convention, despite its many legal constrains, is becoming an 'effectively global' instrument of international law, especially at the level of the obligation to prevent genocide, to which the ICJ orders on provisional measures in the *South Africa v. Israel* case significantly contributed.

6. Conclusion

In recent months the visible inflation of the use of international courts and other institutions of international law regarding the development of Israeli–Palestinian relations can be observed. The case brought by South Africa before the ICJ regarding the alleged crime of genocide committed by Israel (its military forces strengthened by the possible public incitement to genocide articulated by the senior leadership of the State of Israel) against a protected group of Palestinians during the military operation in Gaza Strip remains high-profile. This is because it represents a hard legal case – with reference to the alleged genocide committed during the ongoing military campaign of declared defensive character – with strong political implications. The latter regards the highly complicated (geo)political situation surrounding the long-lasting Israeli (Jewish) – Palestinian (Arab) dispute (occasionally transformed into an armed conflict) falling far beyond the substantial and temporal scope of South Africa's application calling for the investigation of Israel's conduct witnessed in Gaza after 7 October 2023 on the basis of Genocide Convention.

The aforementioned analysis highlighted several significant issues. First of all, taking into account a broader context of deliberations, the submission of South Africa to the ICJ proved that international law is becoming a popular tool in hands of states belonging to Global South. This growing tendency can redefine the international legal order in the near future. Secondly, having in mind not only the *South Africa v. Israel* case, but also, *The Gambia v.*

132 Nonetheless, the Dutch court did refer neither to the obligations of the Netherlands under the Genocide Convention, nor the obligations of Israel coming from this treaty.

133 Saba, "The legal obligation to prevent genocide in Gaza".

Myanmar, as well as *Ukraine v. Russian Federation*, the Genocide Convention enhances the 'living legal instrument', while international legal discussions over the crime of genocide cease to be purely 'rhetorical' or 'theoretical' in nature. Furthermore, the Hague-based Court consequently affirms the legal ability of each State Party to the Genocide Convention to bring the case to the ICJ on the construction of the *erga omnes* and *erga omnes partes* obligation giving the standing before the Court and granting *prima facie* jurisdiction even if a given state is not directly affected by the alleged genocidal conduct. Fourthly, in a situation observed throughout the last couple of months of the '[t]he catastrophic living conditions of the Palestinians in the Gaza Strip' that have 'deteriorated further',[134] the ICJ seems to understand that indication of provisional measures becomes necessary. This is why the Court decided to craft a relatively low threshold for the Applicant to meet the requirements of the plausibility test, urgency and irreparable harm prerequisites to order the legally binding provisional measures. Although none of these findings can prejudge the ICJ's future judgments on the preliminary objection and merits, at the same time, provisional measures establish a legal path for the most effective securing of the rights of a protected group under the Genocide Convention. The initial stage of proceedings – when the Court acts in a peculiar 'state of emergency' – remains crucial for the successful avoidance of the commission of a crime of genocide. Therefore, the Hague-based Court is consequently tailoring the doctrine of prevention what contributes to the attempt of making the Genocide Convention 'globally effective'. Nonetheless, it should not be forgotten that being bound by its jurisdiction coming strictly from international law, the ICJ cannot be treated as a 'magic wand' capable of solving any international crisis.

Bibliography

1. Alexander, Atul. "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) at the International Court of Justice." *Chinese Journal of International Law* 23, issue 1 (2024): 185-190. https://doi.org/10.1093/chinesejil/jmae004.
2. Alter, Karen J., Laurence R. Helfer and Mikael Rask Madsen. "How Context Shapes the Authority of International Courts." *Law and Contemporary Problems* 79, no. 1 (2016): 1-36.

134 See note 74.

3. *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*. Application of 1 March 2024 instituting proceedings and request for the indication of provisional measures, ICJ.
4. *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*. Provisional measures. ICJ Order of 30 April 2024.
5. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. Provisional measures. ICJ Order of 16 March 2022. I.C.J. Reports 2022 (I).
6. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Merits. ICJ Judgment of 26 February 2007. I.C.J. Reports 2007.
7. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. Preliminary objections. ICJ Judgment of 22 July 2022. I.C.J. Reports 2022.
8. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. Provisional measures. ICJ Order of 23 January 2020. I.C.J. Reports 2020.
9. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Application of 29 December 2023 instituting proceedings and request for the indication of provisional measures, ICJ.
10. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Provisional measures. ICJ Order of 26 January 2024.
11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Provisional measures. ICJ Order of 28 March 2024.
12. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. Provisional measures. ICJ Order of 24 May 2024.
13. Banco, Erin and Alexander Ward. "US officials don't see clear path to ending war in Gaza as cease-fire talks stall." *Politico*, June 19, 2024. https://www.politico.com/news/2024/06/19/gaza-israel-cease-fire-talks-00164098;
14. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. Second Phase: Preliminary objections. ICJ Judgment of 5 February 1970. I.C.J. Reports 1970.
15. Bianchi, Andrea. *International Law Theories. An Inquiry into Different Ways of Thinking*. Oxford University Press, 2016.
16. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. Provisional measures. ICJ Order of 8 March 2011. I.C.J. Reports 2011.
17. Cordall, Simon S. "Is Israel going to back the Biden-announced Gaza peace plan?." *Al Jazeera*, June 4, 2024. https://www.aljazeera.com/news/2024/6/4/is-israel-going-to-back-the-biden-announced-gaza-peace-plan.

18. "Department Press Briefing – Matthew Miller, Department Spokesperson." March 26, 2024. https://www.state.gov/briefings/department-press-briefing-march-26-2024/.
19. D'orsi, Cristiano. "When Nelson Mandela was (Considered) a Terrorist and the "Natural Alliance" between South Africa and Palestine." *Opinio Iuris*, August 9, 2024. https://opiniojuris.org/2024/08/09/symposium-on-unbroken-bond-tracing-the-ties-between-african-and-palestinian-anti-colonial-struggles-when-nelson-mandela-was-considered-a-terrorist-and-the-natural-alliance-between-south-afric/.
20. "East Jerusalem & Palestinian Territories, Emergency UN General Assembly." December 12, 2023. YouTube. https://www.youtube.com/watch?v=rG6zSsWNPWE.
21. Fabian, Emanuel. "Defense minister announces 'complete siege' of Gaza: No power, food or fuel." *The Times of Israel*, October 9, 2023. https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/.
22. "Famine Review Committee: Gaza Strip." Integrated Food Security Phase Classification, June 25, 2024. https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Gaza_June2024.pdf.
23. G.A. res. A/RES/ES–10/21 of October 27, 2023.
24. G.A. res. A/RES/ES-10/22 of December 19, 2023.
25. "Gaza genocide ruling: 'It was our place to get involved' – South African president." *CNR*, January 26, 2024. https://citinewsroom.com/2024/01/gaza-genocide-ruling-it-was-our-place-to-get-involved-south-african-president/.
26. "Gaza: UN experts call on international community to prevent genocide against the Palestinian people." November 16, 2023. https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against.
27. "Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide." October 19, 2023. https://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitalsand-schools-crimes-against-humanity.
28. "Genocide in Gaza. Analysis of International Law and its Application to Israel's Military Actions since October 7, 2023." *University Network of Human Rights*, May 15, 2024. https://www.humanrightsnetwork.org/genocide-in-gaza.
29. Gill, Terry. "The ICJ Wall Advisory Opinion and Israel's Right of Self-Defence in Relation to the Current Armed Conflict in Gaza." *Armed Groups and International Law*, November 13, 2023. https://www.armedgroups-internationallaw.org/2023/11/13/the-icj-wall-advisory-opinion-and-israels-right-of-self-defence-in-relation-to-the-current-armed-conflict-in-gaza/;
30. "Hamas-Israel Conflict 2023: Frequently Asked Questions." Ministry of Foreign Affairs of the State of Israel, December 6, 2023. https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English_Documents_Israel-Hamas%20Conflict%202023%20-%20FAQs%20(Israel%20MFA,%206.12.23).pdf.
31. "Hamas-Israel Conflict 2023: Key Legal Aspects. An overview of key legal aspects of the hostilities triggered by the horrific attacks perpetrated against Israel on

October 7, 2023." Ministry of Foreign Affairs of the State of Israel, November 2, 2023. https://www.gov.il/en/pages/hamas-israel-conflict2023-key-legal-aspects.
32. Hansen, Thomas O. "The Ceasefire Resolution at the UN Security Council: Why the U.S. Position is both Wrong and Harmful." *Justice in Conflict*, April 3, 2024. https://justiceinconflict.org/2024/04/03/the-ceasefire-resolution-at-the-un-security-council-why-the-u-s-position-is-both-wrong-and-harmful/.
33. "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice." Report of the United Nations High Commissioner for Human Rights, A/HRC/55/28, February 13, 2024.
34. "Israel Rejects South Africa's 'Baseless' Pursuit of Genocide Order From Top UN Court for Conduct in Gaza." *Haaretz*, December 29, 2023. https://www.haaretz.com/israel-news/2023-12-29/ty-article/israel-rejects-south-africas-pursuit-of-genocide-order-from-top-un-court/0000018c-b6cd-db94-afbd-b6fdc7410000.
35. *LaGrand (Germany v. United States of America)*. Merits. ICJ Judgment of 27 June 2001. I.C.J. Reports 2001.
36. *LaGrand (Germany v. United States of America)*. Provisional measures. ICJ Order of 3 March 1999.
37. *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*. ICJ Advisory Opinion of 19 July 2024.
38. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. ICJ Advisory Opinion of 25 February 2019.
39. *Legal Status of the South-Eastern Territory of Greenland*. Provisional measures. PCIJ Order of 3 August 1932. Series, A/B.
40. "Letter to European Commission President." February 14, 2024. https://www.lamoncloa.gob.es/presidente/actividades/Documents/2024/Letter-to-Commission-President-Ursula-Von-der-Leyen.pdf.
41. Leonard, Mark. "China's Game in Gaza. How Beijing Is Exploiting Israel's War to Win Over the Global South." *Foreign Affairs*, January 8, 2024. https://www.foreignaffairs.com/china/chinas-game-gaza.
42. *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*. PCIJ Judgment of 30 August 1924. PCIJ, Series A. McKernan, Bethan. "Israeli officials accuse international court of justice of antisemitic bias." *The Guardian*, January 26, 2024. https://www.theguardian.com/world/2024/jan/26/israeli-officials-accuse-international-court-of-justice-of-antisemitic-bias.
43. Milanovic, Marko. "Does Israel Have the Right to Defend Itself?." *EJIL: Talk!*, November 14, 2023. https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself/.
44. Milanovic, Marko. "ICJ Indicates Provisional Measures in South Africa v. Israel." *EJIL: Talk!*, January 26, 2024, https://www.ejiltalk.org/icj-indicates-provisional-measures-in-south-africa-v-israel/.
45. Milton-Edwards, Beverley. *The Israeli-Palestinian Conflict. A People's War*. Routledge, 2009.
46. "Netanyahu rejects South Africa's case against Israel as UN court's hearing progress." *AfricaNews*, January 12, 2024. https://www.africanews.

com/2024/01/12/netanyahu-rejects-south-africas-case-against-israel-as-un-courts-hearing-progress/.
47. Notte, Hanna. "Where Does Russia Stand on the Israel-Hamas War?." *Foreign Policy*, October 19, 2023. https://foreignpolicy.com/2023/10/19/israel-palestine-hamas-gaza-war-russia-iran-putin/.
48. Pezzano, Luciano. "The Obligation to Prevent Genocide in South Africa v. Israel: Finally a Duty with Global Scope?." *EJIL Talk!*, January 4, 2024. https://www.ejiltalk.org/the-obligation-to-prevent-genocide-in-south-africa-v-israel-finally-a-duty-with-global-scope/.
49. Pezzano, Luciano. "Towards a Judicial R2P: The International Court of Justice and the Obligation to Prevent Genocide in The Gambia v. Myanmar Case." *Global Responsibility to Protect* 15, issue 4 (2022): 305-334.
50. Pisillo Mazzeschi, Riccardo and Eugenio Carli. "Proof of Specific Intent in the Crime of Genocide: The Case of South Africa v. Israel Before the International Court of Justice." *Journal of International Criminal Justice*, 2024, https://doi.org/10.1093/jicj/mqae025.
51. "Public Statement: Scholars Warn of Potential Genocide in Gaza." *Third World Approaches to International Law Review*, October 17, 2023. https://web.archive.org/web/20231123124815/https://twailr.com/public-statement-scholars-warn-of-potential-genocide-in-gaza/.
52. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Provisional measures. ICJ Order of 28 May 2009. I.C.J. Reports 2009.
53. "Remarks by President Biden on the Middle East." May 31, 2024. https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/05/31/remarks-by-president-biden-on-the-middle-east-2/.
54. "Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel." A/HRC/56/26. May 27, 2024. https://www.ohchr.org/en/news/2024/06/commission-inquiry-occupied-palestinian-territory-concludes-israeli-authorities-and.
55. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Advisory Opinion of 28 May 1951, I.C.J. Reports 1951.
56. Saba, Claudia. "The legal obligation to prevent genocide in Gaza." *CIDOB – Barcelona Centre for International Affairs*, April 2024. https://www.cidob.org/en/publication/legal-obligation-prevent-genocide-gaza.
57. Sałkiewicz-Munnerlyn, Ewa. *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection*. T.M.C. Asser Press, 2022.
58. S.C. res. S/RES/2712 of November 15, 2023.
59. S.C. res. S/RES/2720 of December 22, 2023.
60. Schabas, William. *Genocide in International Law. The Crime of Crimes*. Cambridge University Press, 2009.
61. Schreuer, Christoph. "What is a Legal Dispute?." In *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, edited by Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich. Koninklijke Brill NV, 2008: 959-980.
62. "Security cabinet says Israel will destroy military, governmental abilities of Hamas, Islamic Jihad." *The Times of Israel*, October 7, 2023. https://www.

timesofisrael.com/liveblog_entry/security-cabinet-says-israel-will-destroy-military-governmental-abilities-of-hamas-islamic-jihad/.
63. "Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant,", November 21, 2024. https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.
64. "South Africa, Hamas, and the ICJ "genocide" case against Israel." *AIJAC – Australia/Israel & Jewish Affairs Council*, February 6, 2024. https://aijac.org.au/fact-sheets/factsheet-south-africa-hamas-and-the-icj-genocide-case-against-israel/.
65. *South Africa v. Israel – Declaration of Judge Bhandari to the ICJ Order of 26 January 2024*.
66. *South Africa v. Israel – Declaration of Judge Charlesworth to the ICJ Order of 28 March 2024*.
67. *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 26 January 2024*.
68. *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 28 March 2024*.
69. *South Africa v. Israel – Declaration of Judge Nolte to the ICJ Order of 24 May 2024*.
70. *South Africa v. Israel – Declaration of Judge Yusuf to the ICJ Order of 28 March 2024*.
71. *South Africa v. Israel – Declaration of President Salam to the ICJ Order of 28 March 2024*.
72. *South Africa v. Israel – Declaration of Judge Tladi to the ICJ Order of 24 May 2024*.
73. *South Africa v. Israel – Declaration of Judge Xue to the ICJ Order of 26 January 2024*.
74. *South Africa v. Israel – Dissenting opinion of Judge Barak to the ICJ Order of 24 May 2024*.
75. *South Africa v. Israel – Dissenting opinion of Judge Sebutinde to the ICJ Order of 26 January 2024*.
76. *South Africa v. Israel – Dissenting opinion of Vice-President Sebutinde to the ICJ Order of 24 May 2024*.
77. *South Africa v. Israel – Dissenting opinion of Vice-President Sebutinde to the ICJ Order of 24 May 2024*.
78. *South Africa v. Israel – Joint declaration of Judges Xue, Brant, Gómez Robledo and Tladi to the ICJ Order of 28 March 2024*.
79. *South Africa v. Israel – Separate opinion of Judge Barak to the ICJ Order of 26 January 2024*.
80. *South Africa v. Israel – Separate opinion of Judge Barak to the ICJ Order of 28 March 2024*.
81. *South Africa v. Israel – Response of the State of Israel to the question posed by Judge Nolte at the oral hearing of 17 May 2024 on South Africa's fourth request for provisional measures*, May 18, 2024.
82. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, ICJ Judgment of 21 December 1962, I.C.J. Reports 1962.
83. Talmon, Stefan. "Germany Rushes to Declare Intention to Intervene in the Genocide Case brought by South Africa Against Israel Before the International Court of Justice." *GPIL – German Practice in International Law*, January 15, 2024. https://gpil.jura.uni-bonn.de/2024/01/

germany-rushes-to-declare-intention-to-intervene-in-the-genocide-case-brought-by-south-africa-against-israel-before-the-international-court-of-justice/.

84. *The Gambia v. Myanmar – Separate opinion of Vice-President Xue to the ICJ Order of 23 January 2020*.
85. Thuo Gathii, James. "The Promise of International Law: A Third World View." *American University International Law Review* 36, issue 3 (2021): 378-477.
86. "UN Human Rights Chief deplores harrowing killings of children and women in Rafah." April 23, 2024. https://www.ohchr.org/en/press-releases/2024/04/un-human-rights-chief-deplores harrowing-killings-children-and-women-rafah.
87. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*. Provisional measures. ICJ Order of 15 December 1979. I.C.J. Reports 1979.
88. Urs, Priya. "Obligations Erga Omnes and the Question of Standing Before the International Court of Justice." *Leiden Journal of International Law* 34, issue 2 (2021): 505-525.
89. Youssef, Nancy A., Jared Malsin and Warren P. Strobel. "U.S. Finds Some Israeli Claims on U.N. Staff Likely, Others Not." *The Wall Street Journal*, February 21, 2024. https://www.wsj.com/world/middle-east/u-s-finds-claims-that-u-n-aid-agency-staff-took-part-in-hamas-attack-credible-957b747e.