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# Denying Genocide through Terminological Hairsplitting

Azmi Bishara

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## Denying Genocide through Terminological Hairsplitting

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# Table of Contents

I The Criminalization and Charge of Genocide in International Law . . . . .	1
II Identifying and Proving Intent . . . . .	8
III A Note on the Holocaust, Security and Self-Defence . . . . .	13
IV South Africa's Lawsuit Accusing Israel of Genocide . . . . .	17
V Evidence of Israeli Genocidal Intent in the War on Gaza . . . . .	25
VI Israel's Arguments before the ICJ . . . . .	28
VII The ICJ Order . . . . .	31
VIII On a closing note . . . . .	34
Sources . . . . .	36

## I The Criminalization and Charge of Genocide in International Law

International law, as we know it today, did not exist in the early modern period. Scholars disagree on its precise origins and scope, but they generally link it to the emergence of rules governing interaction between European states that recognized each other's sovereignty. This was long before the widespread recognition of an all-embracing concept of humanity that deems all human beings morally equal by virtue of being human, and before the international acceptance of the right of all peoples to self-determination.

It was the mid-nineteenth century that brought the first treaties and conventions establishing the rules of war and defining their violation as a war crime. Until the mid-twentieth century, however, there was no term – let alone legal definition – for the crime of genocide. The term originated during World War II and was officially adopted by the United Nations soon after its founding, amid the heavy pall cast by the Nazis' attempt to exterminate the Jews of Europe and the atrocities perpetrated towards this end (the attempted extermination of the Roma received less attention). On 9 December 1948, the UN adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG), often shortened to the Genocide Convention.<sup>1</sup>

The Nazi leaders who were brought before the International Military Tribunal (IMT), established by the Allies in Nuremberg (1945-1946), were charged with "waging wars of aggression against a number of other states". This crime was deemed distinct from other war crimes in that "it contains within itself the accumulated evil of the whole".<sup>2</sup> War of aggression was thus elevated to a "crime of crimes", a characterization that would subsequently be associated with genocide following the adoption of the convention to prevent and punish it.

The defendants in Nuremberg were tried for war crimes in violation of customary international law and the Hague Conventions on the rules of war (1899 and 1907), as well as for crimes against humanity. The latter included crimes committed in both wartime and peacetime and targeting both other states' populations and a state's own citizens. The hearings also addressed the deliberate targeting and mass murder of Jews. Although the term genocide was used – specifically during the trials of the third group of defendants – it was not treated as a crime in and of itself, but rather to denote an aspect of the crimes against humanity committed during wartime. The defendants at Nuremberg were not tried for genocide because a crime by that name did not exist in international law.

It was the Polish-Jewish lawyer Raphael Lemkin who coined the term genocide to designate a distinct crime, devoting a chapter to the subject in *Axis Rule in Occupied Europe* (1944). Lemkin had been concerned with what he would subsequently term the Armenian genocide (1914-1923) and the Assyrian massacre in Iraq (1933). He was struck by the absence of a legal term for these crimes,

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<sup>1</sup> United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9/12/1948, accessed on 20/1/2025, at: <https://acr.ps/1L9zR4h>

<sup>2</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14/11/1945–1/10/1946*, vol. XXII (Nuremberg, Germany: International Military Tribunal, 1948), p. 427, accessed on 20/1/2025, at: <https://acr.ps/1L9zRfh>

which were distinguished not only by the number of dead, wounded, and displaced, but also by the fact that the victims were a distinct human group and targeted because they were members of that group. He also observed that the purpose was to destroy that group, along with its culture, way of life, and identity, thereby depriving humankind of its contribution to the richness of human diversity. Ultimately, the Nazi Holocaust led him to coin the term, which fuses the Greek *genos* (tribe or race) with the Latin *cide* (killing) to signify the destruction of a distinct national group. He writes:

"Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group".<sup>3</sup>

As we will see below, the CPPCG did not limit its protection to just national groups. Lemkin goes on to observe:

"Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals. Denationalization was the word used in the past to describe the destruction of a national pattern".<sup>4</sup>

Lemkin adds that, in his opinion, the term "denationalization" is inadequate. This is because the aim is not only to deprive an indigenous population of their national character through peaceful or other means, but also to forcibly or otherwise impose another national pattern. This description applies to the settler colonialist processes that occurred in several countries. It perfectly fits the Nakba of the Palestinian people, as though it were formulated specifically with that catastrophe in mind.

It is clear from his discussion on genocide that Lemkin intends the term to apply not only to the crime committed against Jews but also to Germany's practices towards the occupied peoples in the territories that fell under its control. He wrote *Axis Rule* between 1942 and 1943. At the time, the magnitude of the genocide against the Jews was not yet known, and the term "Holocaust" had not

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<sup>3</sup> Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace, 1944), p. 79.

<sup>4</sup> *Ibid.*

yet come into use. He identified the techniques of genocide in the political, social, cultural, economic, religious, moral, biological, and physical fields, and he examined the role of racial discrimination in food rationing, endangering health, lowering birthrates, and provoking mass killings. He was particularly interested in the link between the Nazis' crimes and their intent, which was to annihilate the national existence of European peoples classed as non-Germanic in Nazi racial theory.<sup>5</sup> Over time, significant differences arose between the concepts encompassed in Lemkin's definition of genocide and later scholars' interpretations of the term, which included the perceived need for a political actor (such as Hitler) set on implementing a pre-existing vision and the requirement of intent to target of a group based on its ethnic or religious identity. These differences have become a source of confusion for researchers.<sup>6</sup>

On 11 December 1946, the UN General Assembly adopted resolution 96 (I), defining genocide as follows:

"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part".<sup>7</sup>

The subsequent CPPCG of 1948, which was drafted in implementation of the UNGA resolution, specified the types of groups that could become victims of genocide. As the resolution stated, the genocide entails the intent to destroy the group.

Nevertheless, consider that a group exists through its individuals and their interrelationships, its culture, institutions, and moral personality. The act of annihilating or attempting to annihilate a group entails multiple acts of killing and destruction of these components. At what point does the accumulation of such crimes coalesce into the single crime of genocide? Clearly, some relative quantitative threshold must be met. While difficult to quantify, it is self-evident that the term genocide implies large-scale acts of violence and destruction, including mass slaughter.

The Genocide Convention narrowed Lemkin's definition of genocide and added a psychological criterion, namely intent – i.e., the intent to destroy or kill a group through acts of murder and destruction. This is what distinguishes this crime from massacring large numbers of a group, bombing a building or several buildings, or levelling entire neighbourhoods or towns, as horrific as these atrocities are in themselves. The preamble and the first two articles of the CPPCG state:

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5 Ibid., pp. 79-80, 82 - 90.

6 Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York/ London: Harper & Perennial, 2002), p. 43.

7 UN, General Assembly, "96 (I). The Crime of Genocide", 11/12/1946, pp. 188-189, accessed on 21/11/2023, at: <https://acr.ps/1L9zQEn>

*The Contracting Parties,*

*Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,*

*Recognizing that at all periods of history genocide has inflicted great losses on humanity, and*

*Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,*

*Hereby agree as hereinafter provided :*

### **Article I**

*The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war,<sup>8</sup> is a crime under international law which they undertake to prevent and to punish.*

### **Article II**

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part,<sup>9</sup> a national, ethnical, racial or religious group, as such.<sup>10</sup>*

*(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.<sup>11</sup>*

The convention identified the following groups as meriting protection under its terms: national, racial, ethnic, and religious groups. Consequently, proving an allegation of genocide would entail establishing that the victims belonged to one of these groups. The convention – unjustly in the opinion of some – excludes cases of mass killings against political and social class groups. In Cambodia, the brutal genocidal acts committed by the Khmer Rouge targeted so-called class enemies. This

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<sup>8</sup> Emphasis mine. The phrasing is significant as it counters genocide apologists who hide behind wartime when there may be large numbers of civilian casualties.

<sup>9</sup> Emphasis mine to underscore the importance of intent in the acts mentioned in Article II (a) through (e). Parts of the final paragraphs also appear in: Azmi Bishara, *al-Tufan: al-Harb 'ala Filastin fi Ghaza (The Deluge: The War on Palestine in Gaza)* (Doha/Beirut: The Arab Center for Research and Policy Studies, 2024), pp. 140–142.

<sup>10</sup> Emphasis mine.

<sup>11</sup> Emphasis mine. See: United Nations.

illustrates how a political group perceived as an enemy could become a victim of genocide without necessarily falling under one of the four protected categories.<sup>12</sup>

Class-based, political and other groups not specified in the convention are protected under treaties that prohibit war crimes and crimes against humanity. However, since the adoption of the Genocide Convention, prosecutors and rights advocates have had a strong urge to classify the atrocities committed against them as genocide, which may indeed be the case if genocide is understood as the destruction of a group. However, the drafters of the convention consciously chose to limit its protection exclusively to major identity groups with a civilizational character clearly distinguishable from that of the oppressor group. This choice was based on the historical experiences of such identity groups falling victim to attempted genocide.

The qualifier "as such" has also sparked considerable debate among legal scholars.<sup>13</sup> The insertion of this problematic phrase into the convention is a source of ambiguity. It could theoretically be interpreted to mean that the crime is committed with the purpose of destroying the group "as such", and for no other reason, such as to win a war. If this interpretation were adopted, it could complicate the process of establishing intent. It narrows the definition of genocide to instances where the crime is committed for its own sake – i.e., to annihilate a group for the sole purpose of annihilating it (out of racist, ethnonationalist, or sectarian motives).

More significantly, the convention omitted a crucial element of Lemkin's definition of genocide: "the destruction of essential foundations of the life of national groups" (including the various cultural dimensions). The CPPCG definition confines genocide to the "physical destruction" of a group or the acts committed with the intent to physically destroy a group. It thus narrows the term with this limitation but broadens it in other ways. The CPPCG definition also omits forced displacement with the aim of destroying the national pattern of one group and supplanting it with that of another. Nor does it include what we now call ethnic cleansing, as some of the great powers that adopted the convention were engaged in or condoned such "projects" at the time.<sup>14</sup>

As soon as the crime was defined and distinguished, it gained notoriety in the aftermath of the Nazi experience. Moreover, as acknowledging the existence of an ongoing genocide requires states to take action to halt it and punish its perpetrators, states began to avoid using the term to describe war crimes and crimes against humanity and to prevent others from doing so, and their legal representatives engaged in endless sophistry to avoid using the term in public. Not only states, but also the UN began to downplay ongoing genocides, opting instead for terms such as "ethnic cleansing", "war crimes", and "crimes against humanity", even though these crimes are also horrific.<sup>15</sup>

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<sup>12</sup> Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals", *International and Comparative Law Quarterly*, vol. 49, no. 3 (2000), p. 581.

<sup>13</sup> Martin Shaw, *What is Genocide?* 2nd ed. (Cambridge: Polity Press, 2015), p. 40.

<sup>14</sup> *Ibid.*, p. 41.

<sup>15</sup> Ashley S. Kinseth, "The Trouble of Proving 'Genocidal Intent': The Modern Rohingya Crisis in Historical and Political Context", *Journal of International Law and Politics Online Forum*, vol. 51 (Spring 2019), p. 107.



In the case of Rwanda, the US under Bill Clinton eventually stated, after a prolonged silence, that acts of genocide "may have occurred". It understood that if it explicitly acknowledged the genocide, it could trigger public pressure to intervene. A frequently used method to avoid using the term genocide is to dwell on the element of intent and its varying definitions and methods of proof. In *A Problem from Hell*, Harvard scholar and later US ambassador to the UN (2013-2017) Samantha Power devoted a full chapter to the Clinton administration's efforts to skirt around referring to the massacres in Rwanda as genocide. She cited Susan Rice of the US National Security Council, who asked during an interagency teleconference: "If we use the word 'genocide' and are seen as doing nothing, what will be the effect on the November [congressional] election?"<sup>16</sup>

The fact is that even if the atrocities committed by a state are labelled genocide, other states' decisions to intervene in fulfilment of the responsibility to protect the victims remains a sovereign prerogative. Therefore, despite the commitment they undertook as signatories to the convention, states may choose not to implement international court rulings against other states and their officials found guilty of genocide. Often states with the means to intervene shirk their responsibility for political reasons (based on their current alliances), although they will mask their avoidance by disputing the presence of intent or attributing genocide to collateral damage. They might even go so far as to quibble with the International Court of Justice's definition of genocide even though the ICJ's rulings on questions of genocide are binding, not advisory.

Herein lies the fatal flaw of international law: it is not sovereign law. Its authority remains purely theoretical in the absence of states able and willing to enforce it. It can, however, be leveraged in political conflicts when political powers have the wherewithal to capitalize on it. Moreover, the US has effectively claimed the exclusive authority to determine whether the crimes in a given country are genocide. It will characterize Russian forces' actions in Ukraine<sup>17</sup> and the massacres perpetrated by the Rapid Support Forces (RSF) in Sudan as genocide,<sup>18</sup> and take actions accordingly.<sup>19</sup> Meanwhile, it refuses to accuse Israel of committing genocide in Gaza since October 2023, even though the ICJ found sufficient grounds to investigate it on this charge. Washington has consistently echoed Israel's claims that it is fighting a war of self-defence, that the civilian casualties in Gaza are "unintended", and that Hamas is to blame for the suffering of Palestinians in the Strip. Since Trump's return to the White House, the trend to denounce anyone who accuses Israel of genocide as anti-Semitic has been gaining momentum. Employees and university staff members already risk summary dismissal for "committing" this act.

International judicial bodies are very slow to issue rulings. The officials accused of committing genocide were in power for three years in the case of Cambodia and just four months in the case of

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<sup>16</sup> Power, pp. 359 - 360. ((This URL is just for my reference: [https://archive.org/details/problemfromhella00pove\\_0/page/358/mode/2up?q=Rice](https://archive.org/details/problemfromhella00pove_0/page/358/mode/2up?q=Rice)))

<sup>17</sup> The White House, "Remarks by President Biden on Lowering Energy Costs for Working Families", 12/4/2022, accessed on 19/1/2025, at: <https://acr.ps/1L9zQml>; The White House, "Remarks by President Biden Before Air Force One Departure", 12/4/2022, accessed on 19/1/2025, at: <https://acr.ps/1L9zRjU>

<sup>18</sup> Antony J. Blinken, "Genocide Determination in Sudan and Imposing Accountability Measures", US Department of State, 7/1/2025, accessed on 19/1/2025, at: <https://acr.ps/1L9zQjc>

<sup>19</sup> The ICJ is still deliberating the charges against Russia, as well as the case of the Rohingya (Gambia v. Myanmar) while no case has been brought against the RSF despite its crimes against the Sudanese people.

Rwanda. The proceedings and deliberations of the international tribunals established by the UN for these cases took much, much longer. The Extraordinary Chambers in the Courts of Cambodia (ECCC), formed to try the Khmer Rouge, sat from 1997 to 2022, while the International Criminal Tribunal for Rwanda (ICTR) sat from 1994 to 2015.

ICJ hearings and deliberations regarding violations of the Genocide Convention have been equally lengthy. The case that Bosnia and Herzegovina initiated against the Federal Republic of Yugoslavia (later Serbia and Montenegro) was submitted to the court on 20 March 1993, and the court issued its final verdict fourteen years later, on 26 February 2007. Similarly, Croatia filed its case against Serbia on 2 July 1999, and the court issued its final verdict sixteen years later, on 3 February 2015.

Because of the long deliberation process, the ICJ can call for provisional measures to prevent or minimize irreparable harm in the interim. However, experience has shown that states actively perpetrating a genocide are unlikely to implement such measures voluntarily. Therefore, it is difficult to separate this problem from the question of humanitarian intervention to protect the vulnerable through the deployment of peacekeeping or other forces capable of enforcing the provisional measures. This would entail invoking Chapter VII of the UN Charter which addresses "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".<sup>20</sup> But here, too, action is impeded by politically motivated differences on the definition and application of the term of genocide, as occurred when the US, followed by most other Western countries, refused so much as to consider the possibility that Israel's actions in Gaza constituted genocide. The veto power often wielded by certain permanent members of the Security Council has also been a major obstacle to action.

Experts agree that demonstrating intent is one of the most challenging aspects of proving charges of genocide, though they differ on what constitutes intent. This is a main reason why the deliberations of the ICJ and special tribunals take so long. However, their provisional orders to prevent irreparable harm to the victims in the interim can only be enforced if there is a collective will among major powers to compel the perpetrator of genocide to comply. This prerequisite is not available when it comes to Israel. Moreover, if the applicant fails to make its case or if the court determines that it does not have sufficient grounds to classify a respondent's war crimes and crimes against humanity as genocide, the respondent might appear cleared of all wrongdoing, even though not calling its atrocities genocide would make them no less monstrous. So why take them to court?

Going to court will not yield tangible benefits unless it sets into motion the responsibility to protect. As the likelihood of this is remote for the Palestinians, the benefits can only be moral and political. Nevertheless, these should not be understated. A conviction against Israel for genocide would erode its international standing and undermine its chief propaganda weapon, which combines the claim of self-defence with the advantages of a monopoly on victimhood based on linking the establishment of that state with the Nazi Holocaust against European Jews. A guilty verdict for genocide will strip

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<sup>20</sup> United Nations, "Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51)", accessed on 16/1/2025 at: <https://www.un.org/en/about-us/un-charter/chapter-7>

Israel of that monopoly and offer its Palestinian victims the international recognition their suffering merits, even if this recognition falls short of delivering justice.

## II Identifying and Proving Intent

Article II of the CCPCG links the killing of the members of a national, ethnical, racial or religious group (paragraph a) with the "intent to destroy, in whole or in part", the group.<sup>21</sup> As Vest observes, genocide is thus framed as an *intentional result crime* which includes an *extended mental element*: destroying a protected group. Establishing the existence of the crime can only be fulfilled by proving that this goal was the direct intent of the perpetrator's criminal conduct. Furthermore, genocide is unlike ordinary murder in that it cannot be carried out by a single perpetrator acting on his own intent. The act must be collective and so must the intent, and the collective intentionality must be proven. Genocide "normally depends on a concerted action often perpetrated, controlled or tolerated by a state or organization".<sup>22</sup>

But what is "intent"? What is "purpose"? How are they defined? These questions arise over and over whenever the subject of genocide is raised.

It is no coincidence that the drafters of the Genocide Convention opted for "intent" instead of "purpose" in one of the drafting committee's sessions.<sup>23</sup> The drafters were clearly thinking in terms of the lexicon of domestic criminal law, despite the complexity arising from shifting the charge from murder of an individual to murder of a group. This is why they differentiated between "purpose" and "intent". They also hesitated considerably before enforcing the convention on states, rather than just individuals. They were evidently conscious that the criminal law terms and concepts they used normally applied to individual actors and victims. The legal committee of the Sixth General Assembly, which finalized the draft, upheld the initial ad hoc committee's decision to reject the term "purpose" and keep the formula "with intent to" destroy. It was a deliberate choice.<sup>24</sup>

The legal expert John Quigley did not explain the difference between "purpose" and "intent" in legal terminology. Perhaps he assumed his readers were already familiar with it. In domestic criminal law, "intent" merely refers to an action taken with the awareness of the result that will follow from it.<sup>25</sup>

Black's Law Dictionary helps clarify the difference between "purpose" and "intent". The former denotes an aim, determination or motive; it gives the actor meaning to his action. Intent, by contrast, denotes

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21 United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*.

22 Hans Vest, "A Structure-Based Concept of Genocidal Intent", *Journal of International Criminal Justice*, vol. 5, no. 4 (September 2007), pp. 783 - 784.

23 In the first draft (Secretariat Draft), the phrase "with the purpose of" was used in Article 2 to define genocide. In the second draft (Ad Hoc Committee Draft) and final draft, "purpose" was replaced by "intent". See: "Appendix: The Three Principal Drafts of the Convention", in: William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), pp. 655, 662, 667.

24 John B. Quigley, "Legal Standard for Genocide Intent: An Uphill Climb for Israel in Gaza Suit", *EJIL: Talk!* 14/3/2024, accessed on 13/1/2025, at: <https://acr.ps/1L9zQGX>

25 Ibid.

the conscious, self-aware will that mentally links an action with its result. Purpose is a "design" and "a resolve to do or forbear a particular act". Intent is the embodiment of the will in the act itself. "Intent shows the presence of will in the act" whereby "the mind [is] fully aware of the nature and consequences of the act which is about to be done".<sup>26</sup> Bear in mind that the foregoing jurisprudential definitions are for use for legal purposes and are informed by cognitive psychology. But they are not cognitive psychology definitions or, for that matter, philosophical definitions.

Knowledge that a criminal act may lead not only to the concrete result that was the perpetrator's immediate purpose, but also and inevitably to other results, such as the annihilation of a group (or considerable part of it) protected according to the Genocide agreement, constitutes a form of genocidal intent. If a perpetrator understands that a certain consequence is a foregone conclusion of his conduct, it can only be assumed that he desired that consequence.<sup>27</sup> In the case of Israel's war on Gaza, there was an explicitly expressed desire to destroy Palestinian society in Gaza. It was so prevalent that it pervaded mass culture. It was also understood, in advance, that a full-scale assault on Gaza would result in the genocide of this part of the Palestinian people. This was the foregone conclusion of the Israeli conduct, regardless of whether it was driven by revenge for the Palestinians' acts of resistance or by a security doctrine that reasoned that eliminating the resistance required widescale carpet-bombing to level residential neighbourhoods and decimate urban civilian infrastructures from schools and hospitals to water and electricity grids. The conduct could also have been motivated by the implicit or explicit suspicion that all Gazan civilians support the resistance and "breed" fighters. The perpetrator does not necessarily have to have the goal of eliminating the Palestinians as a group in mind; what matters is that his genocidal intent exists by virtue of the awareness of the nature and consequences of his actions.

Genocide scholars hold that the term holds if the intent to commit it is clearly and explicitly expressed, as was the case with the Nazis' intent to exterminate Jews. This view on intent is shaped by the Holocaust, in which the crime is preceded by an ideological identification of the aim, namely the annihilation of a group based on its identity – in this case, the Jews for being Jews. However, this reasoning has lost its validity since the Holocaust, as no one expresses intent in this way anymore. Indeed, contemporary genocide scholars have begun to question whether the pre-identification of the aim existed even in the Nazi model. Some argue that, despite the Nazis' anti-Semitic ideology, the aim of annihilating the Jews did not arise all at once. Rather, it evolved gradually during World War II through a prolonged, incremental transition from the aim to expel Jews to the "Final Solution" articulated in 1942.<sup>28</sup>

Were we to accept the condition that genocide requires ideological targeting, the annihilation of indigenous peoples in the Americas and Australia would not be considered genocide. There the annihilation occurred in the context of settler colonialism, rather than as the execution of a pre-existing ideological project aimed at exterminating the indigenous population. Therefore,

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<sup>26</sup> "Intent", *Black's Law Dictionary*, 2nd ed., accessed on 13/1/2025, at: <https://acr.ps/1L9zQP>i

<sup>27</sup> Vest, pp. 791 - 792.

<sup>28</sup> Amos Goldberg, "The Problematic Return of Intent", *Journal of Genocide Research* (October 2024), pp. 2 - 3.

regardless of the difference between "intent" and "purpose", the presence of intent, in general, does not necessarily mean that the target of genocide is determined by group identity. There exist other ideological motives for mass killing. One might be rooted in "ideologically radicalized security politics", which becomes more extreme in wartime.<sup>29</sup> This is accompanied by the dissemination of extremely negative prejudices against the targeted group, who are cast as an imminent threat to those being mobilized to participate in the act of extermination or psychologically conditioned to accept it. The motive, at least in part, could also be rooted in revenge or even political considerations.

Intent, as noted above, refers to the conscious will to commit genocide, irrespective of motive. What is crucial here is the presence of the genocidal intent, not what gave rise to it. The Nazis had a specific motive that would not necessarily recur elsewhere. It did not recur in the cases of Rwanda and Bosnia, both of which had special tribunals. Nor did it occur in the case of Cambodia, which was not classified as genocide due to the absence of a protected group, or in the case of the Rohingya, which is still being deliberated by the ICJ. My point is that motive should not be confused with the formation of intent – that mental element of genocide which consists of the conscious will to commit it. If we conflate the two, the term will only apply to the Holocaust, the perpetrators of which were not even tried on the charge of genocide.

Genocide is carried out by many participants whose individual actions converge into a collective crime. It is sufficient for an individual who commits murder or other acts prohibited under the Genocide Convention to be aware that these actions are part of a genocidal plan in order to be held responsible. It is unreasonable to assume that every participant was personally involved in planning the genocide.<sup>30</sup> In any case, the problem of individual responsibility within a collective action with collective goals does not arise in South Africa's case against Israel, in my opinion. This is because the accused, in this case, is not a group of individuals but the state itself represented by the government.

Vest proposes adopting the standard of "practical certainty", which is established through circumstantial evidence, as is the practice in normal criminal courts. Such evidence – for example the concrete consequences of a deliberate act – is regarded as proof of intent. He maintains that the means to present circumstantial evidence to establish intent in ordinary courts can also be applied in genocide cases. Opinions on the presence of criminal evidence in genocide range from a narrow understanding of direct purpose to broader legal definitions of intent, such as *dolus eventualis*, whereby a person proceeds with a criminal act despite knowing its likely harmful consequences. Vest holds that neither concept of intent offers a satisfactory solution for how to define intent in genocide and that a special concept should be developed from the perspective of international criminal law.<sup>31</sup>

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<sup>29</sup> Jonathan Leader Maynard, *Ideology and Mass Killing: The Radicalized Security Politics of Genocides and Deadly Atrocities* [online], (Oxford: Oxford University Press, 2022), p.18 of 492.

<sup>30</sup> Vest, p. 786.

<sup>31</sup> *Ibid.*, p.782.

In his discussion of purpose, Vest explains that it stresses the volitional element of desiring the consequence of an act. He cites Paragraph 2.02 (2)(a) of the Model Penal Code, which differentiates between "conduct", "attendant circumstances" and "result".<sup>32</sup> To illustrate the difference between purpose and intent, he relates the example of a bomb expert who wants to kill his wife to cash in on her life insurance policy. So, he plants a bomb on a plane she is going to board, hoping that only she will die when the bomb explodes. This is his purpose. However, he is fully aware that the hundred passengers on board are likely to die with her. Even if he does not want this to happen, he knows it will. This knowledge is sufficient to close the gap between purpose and intent. The husband must be held responsible for killing a hundred passengers, and not just his wife, since he was virtually certain that this would be the consequence of his act, yet he proceeded with that act anyway. In this case, there is no difference between knowledge and purpose in terms of consequence.<sup>33</sup> If the result of an act is inevitable, and the perpetrator is aware of that inevitability, even if this was not his motive, he is as responsible as if he desired it. Almost all participants in the academic discussion on the question of intent in genocide have underscored that in the absence of a confession, genocidal intent can be inferred through indirect or circumstantial evidence. In this case, Vest writes, "there is *no difference* as a matter of principle between a purpose-based and a knowledge-based reading of the intent clause" in the CPPCG.<sup>34</sup>

Noting that intent is a mental factor that is difficult, if not impossible, to determine, the *ad hoc* tribunal for Rwanda (ICTR) found that in the absence of a confession, intent can only be inferred from a number of causally related facts. Relying on Rule 61 of the decisions of the International Criminal Tribunal for Yugoslavia (ICTY) on Radovan Karadžić and Ratko Mladić, the ICTR trial chamber considered the following circumstances as indicative of genocidal intent:

- The scale and the general nature of the crimes;
- The fact of deliberate or systematic targeting victims of a group, while excluding the members of other groups;
- The general political doctrine of the perpetrators of the crime;
- The repetition of discriminatory and destructive acts;
- Speeches or projects preparing the ground for the massacres.

The ICTR was able to infer the genocidal intent of the accused from such circumstances.<sup>35</sup> It should be relatively easy to infer genocidal intent in the Israeli atrocities in Gaza.

Despite the logical solution reached by the international courts, the charges brought against Israel in The Hague reignited the debate over genocidal intent. The difficulty of proving it would be Israel's

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<sup>32</sup> Ibid., pp. 782 - 783.

<sup>33</sup> Ibid., p. 787.

<sup>34</sup> Ibid., p. 795.

<sup>35</sup> Verdirame, pp. 584-585

main line of defence in the hearings, and because Israel was the accused, it had no shortage of experts ready to champion this line.

Kai Ambos agrees on the need to move beyond the traditional methods for interpreting intent and purpose and urges the application of a combined structure- and knowledge-based approach. He argues that the *dolus specialis* (special intent), or the purpose-based intent – in this case the "intent to destroy in whole or in part" – can only be upheld with high-level perpetrators. As this goal or purpose may not be consciously present in the mind of all perpetrators, knowledge of the general genocidal context in which they are participating should suffice to establish intent.<sup>36</sup> Similarly, Alicia Gil Gil and subsequent scholars such as Otto Triffterer find that the presence of intent in the form of *dolus eventualis* – knowledge of the genocidal consequences of one's actions – is sufficient evidence of genocidal intent.<sup>37</sup>

A significant contradiction arises by limiting the requirement to prove specific intent to senior decision-makers. This makes it difficult to prosecute them because they rarely state their genocidal intent explicitly. Meanwhile, allowing mere knowledge of consequences to suffice for lower-level perpetrators facilitates their prosecution. In other words, it becomes easier to prosecute the executioners than the political decision-makers who ordered the execution. A more correct approach would be to apply the knowledge-based criterion of intent to all offenders; otherwise, only the lower-ranking foot soldiers of genocide will be held to account while the decision-makers will escape accountability merely because they did not publicly declare their intention.<sup>38</sup> In the Israeli case, on the other hand, multiple declarations by senior officials make it possible to prosecute them on the basis of both forms of intent: knowledge of the consequences of their actions and the specific intent to destroy a group in whole or in part – namely genocide.

In the editor's introduction to *Genocidal Nightmares*, Abdelwahab El-Affendi observes that not all mass killings occur with the objective of extermination,<sup>39</sup> but this does not refute the charge of genocide, which may be driven by an illusory notion of self-defence. The contributors to this book agree on three main propositions: First, the distinction between mass killings – committed by individuals, dictators or ethnic groups against other groups – and genocide causes confusion. Genocide consists of a series of mass killings; there is no need to make a qualitative distinction between the two. Focusing exclusively on genocide diminishes the gravity of other instances of mass killing. Second, the distinction between mass killing and genocide depends on the dominant narratives. These are what determine how a mass killing is framed, whether as a crime against humanity or a genocide. Third, the spread of fear and sense of threat is a key factor in genocide, as these sentiments make members of a group more likely to accept – and perhaps participate in – the extermination of another group.

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<sup>36</sup> Kai Ambos, "What Does 'Intent to Destroy' in Genocide Mean?" *International Review of the Red Cross*, vol. 91, no. 876 (December 2009), p. 833.

<sup>37</sup> *Ibid.*, p. 840.

<sup>38</sup> *Ibid.*, p. 858.

<sup>39</sup> Abdelwahab El-Affendi, "Introduction", in: *Genocidal Nightmares: Narratives of Insecurity and the Logic of Mass Atrocities*, Abdelwahab El-Affendi (ed.) (London: Bloomsbury, 2015), p. 5.

### III A Note on the Holocaust, Security and Self-Defence

Miri Cohen relates that the Israeli psychologist and founder of the International Association of Genocide Scholars, Israel Charny, told her that he went to the Knesset to invite Gideon Hausner to an international conference on the study of the Holocaust and genocide. The Israeli politician, Hausner, had served as Israel's Attorney General and chief prosecutor in the trial of Adolf Eichmann, and later became a Knesset member for the Independent Liberals Party. Hausner threatened to call the Knesset police to have Charny expelled for daring to speak of other genocides along with the Holocaust.<sup>40</sup> To Hausner there could be only one genocide: the Holocaust.

For Hausner and his contemporaries, the monopolization of the role of genocide victim might have sprung from sincere emotions, as they were Holocaust survivors. However, it soon became into a cynical political ploy coupled with accusing anyone who criticizes Israel of anti-Semitism, as has been so apparent in the Israeli official propaganda and that of its Western backers, especially the US, Germany, and France. In the latter two countries, the cynicism was compounded by their instrumentalization of these tactics as a form of penitence for their past crimes at the expense of new victims of racism.

This approach was evident at the academic level as well. In the wake of the 7 October attack, institutions specializing in Holocaust and genocide studies, research, archiving and commemoration were quick to issue statements condemning the attack and likening it to the Holocaust. This was especially cheap hyperbole, coming as it did from academics. These same institutions fell mute as Israel carried out its atrocities in Gaza.

The Center for Holocaust and Genocide Studies at the University of Minnesota released a statement condemning the "heinous attacks" at the hands of Hamas on 7 October 2023,<sup>41</sup> while the statement by the United States Holocaust Memorial Museum expressed solidarity with the Holocaust survivors who helped build the State of Israel.<sup>42</sup> The hyperbole was more flagrant in the statement released in November 2023 by a group of scholars at the Lessons & Legacies Europe conference on Holocaust studies, saying that "the indiscriminate killings of children, women, and men whose only crime was being Jewish unavoidably bring to mind the mindset and the methods of the perpetrators of the pogroms that paved the way to the Final Solution".<sup>43</sup>

Marking the first anniversary of the 7 October attack, the Holocaust Memorial Museum issued another condemnation of that incident without a single reference to the devastation that had been unfolding in Gaza for a year.<sup>44</sup> Despite the fact that Amnesty International released a report on 5

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40 Mari Cohen, "Can Genocide Studies Survive a Genocide in Gaza?" *Jewish Currents*, 19/12/2024, accessed on 7/1/2025, at: <https://acr.ps/1L9zR3r>

41 Center for Holocaust and Genocide Studies, "A Statement from CHGS Regarding the Violence in Israel", University of Minnesota, 13/10/2023, accessed on 12/1/2025, at: <https://acr.ps/1L9zRcn>

42 "Museum Statement on the Attack on Israel", United States Holocaust Memorial Museum, 8/10/2023, accessed on 12/1/2025, at: <https://acr.ps/1L9zQFM>

43 Cohen.

44 "Museum Statement on the Anniversary of Hamas's October 7 Attack on Israel", United States Holocaust Memorial Museum, 6/10/2024, accessed on 12/1/2025, at: <https://acr.ps/1L9zR3Z>



December 2024 accusing Israel of genocide,<sup>45</sup> Holocaust studies centres continued to remain silent. Even the oldest academic group dedicated to genocide research, the International Association of Genocide Scholars, which had previously condemned Russia's invasion of Ukraine and the attacks on the Rohingya people in Myanmar, citing the moral responsibility that comes with engaging in genocide research,<sup>46</sup> remained silent about Gaza.

In contrast, as early as December 2023, Raz Segal, director of the Holocaust and Genocide Studies programme at Stockton University in New Jersey, published a letter, signed by 60 Holocaust and genocide scholars, warning of the "danger of genocide" unfolding in Gaza. Some months later, Omer Bartov resigned from the editorial board of *Yad Vashem Studies* because the Holocaust journal acted as if "the extraordinary carnage" taking place in Gaza was normal.<sup>47</sup>

The purpose of the frequently repeated Israeli claim that 7 October saw the largest number of Jews killed since the Holocaust was not merely to gain international sympathy and recast the occupier as victim and the oppressed as perpetrator. It also aimed to feed terror among Israelis on the pretext of an existential threat to their security. Hamas's operation did not target Jews as Jews; it targeted Israel as the occupying power and its citizens, whether soldiers or civilians (which should be condemned). But the Holocaust comparison was needed to supplant one history with another, to immediately invert the narrative. So, the history of Jews in Europe, with its long current of anti-Semitism, which Zionist ideology sees as an eternally incurable disease, was summoned to overwrite the history of Israel with the Palestinians, the history of occupation and settlement, the history of uprooting and attempted annihilation of a people. This supplantation, which exploits the suffering of Israeli citizens, is a deliberate act of deception, one that Israel's Western allies and their mainstream media embrace. Its purpose is to turn attention away from the genocidal war Israel is waging in Gaza and the hell endured by its residents and Palestinian prisoners in Israeli jails, next to which the plight of Israeli hostages, many of whom are soldiers, pales.

The settler colonization of Palestine has fostered a culture that approves the expulsion of Palestinians from their towns and villages, justifies replacing one people with another, denies the existence of the indigenous people, and condones mass killing. As in other instances of settler colonialism, the occupying power has repeatedly carried out large-scale retaliatory operations against the population centres from which fighters emerge to carry out resistance operations. With repetition, mass killing to "teach the natives a lesson" became normal in the culture of settler-colonial countries.

Determining genocidal intent in the actions of an occupying power against an indigenous people cannot remain confined to legal reasoning that ignores history and culture. Three main elements contribute to shaping genocidal intent in the Israeli case. They must not be overlooked, and they

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<sup>45</sup> "Israel/Occupied Palestinian Territory: 'You Feel Like You Are Subhuman': Israel's Genocide against Palestinians in Gaza", Amnesty International, 5/12/2024, accessed on 7/1/2025, at: <https://acr.ps/1L9zQkd>

<sup>46</sup> Cohen.

<sup>47</sup> Ibid. See; "Statement of Scholars in Holocaust and Genocide Studies on Mass Violence in Israel and Palestine since 7 October" in *Contending Modernities*, 9/12/2023, accessed on 16/1/2024 at: <https://acr.ps/1L9zQtv>

can easily be detected in the genocidal statements by Israeli officials and the war crimes and crimes against humanity in Gaza:

1. The pervasive racism and sense of superiority over the indigenous people – including the contempt for their culture, denial of their existence as a people and as individuals – makes it possible to not to feel pangs of guilt about seizing their land and property after expelling them and concentrating them in isolated enclaves like Gaza.
2. The justification of collective punishment against the indigenous people who are perceived not as individuals, organizations or even a people, but rather as a backward group (or groups) that deserves be punished collectively.
3. The persistent conscious and unconscious sense of insecurity. This stems, on the one hand, from the certainty that the indigenous population will never accept the settlers and their political entity and, on the other, from the ingrained prejudices towards them. It is difficult to get people to commit or justify large-scale crimes against humanity without demonizing and dehumanizing the target group.

When a government sounds the war drums in response to an event such as 7 October and orders its forces to attack a small, blockaded, densely populated enclave while its officials issue statements that the war will not distinguish between fighters and civilians, the presence of the three aforementioned elements in the prevailing culture is sufficient indication that such statements are not mere angry outbursts. Rather, they will be widely understood within that society as genocidal intent.

Genocidal crimes may stem from a distorted notion of self-defence driven by a paranoid fear of a real or imaginary threat. This perspective may shed light on the murky tangle of motives, virulent racism and fear of the other in the dark recesses of a perpetrator's mind. Alternatively, the crimes might originate in the cold calculations of individuals devoid of human emotions, or they may be driven by uncontrollable bloodlust that sweeps perpetrators into a murderous frenzy severing them from their sense of self, conscience and moral constraints. However, these are exceptions. The soldiers who take part in genocide are, for the most part, "normal people".<sup>48</sup> They follow orders, not because violence is inherent in human nature,<sup>49</sup> or out of fear of punishment for insubordination – these are exceptions – but because they belong to a society that instils in them certain ideo-cultural attitudes and, also, because they are subject to social pressures. Their compliance is informed by the dominant ideological and cultural climate steeped in racism, hatred, fear of the other, and even a reverence for discipline (whether military or bureaucratic) as the supreme value.

A neurotic fixation on security pervades popular political culture in Israel. This explains the public's readiness to accept the idea of an existential threat disseminated by the ruling authorities. This obsession has its roots in the history of settler colonialism, the denial of criminal wrongdoing and

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<sup>48</sup> We are reminded, here, of Hannah Arendt's discussion of the "banality of evil" in *Eichmann in Jerusalem: A Report on the Banality of Evil*, Viking Press, 1963.

<sup>49</sup> The historian Christopher Browning refers to mass killings as "atrocities by policy", and Jonathan Maynard agrees that they are not uncontrolled eruptions of human nature. See: Maynard, p. 13.

the criminalization of the victim, and in the fear – bordering on physical aversion – of the other, fuelled by ubiquitous anti-Arab and anti-Muslim stereotypes. All these factors prime the public to condone and participate in the killing of Arabs. A pervasive Israeli delusion that manifests in the worship of security, led by politicians, military officials, analysts, media commentators and other self-appointed priests and prophets who have elevated security to the ultimate value. Obviously, security and stability are indispensable for normal civilian life and economic prosperity. However, in the Israeli case, the illusion lies in the presumption that it is possible to ensure a permanent and absolute security in the framework of a settler colonial project that assumes an immanent existential threat forever lurking in the surrounding environment. Both assumptions are false.

That moment of transition from fear and revenge to fear-banishing bravado and jubilation during acts of destruction, the euphoria of power, the exultation in the reclaimed masculinity, which, according to the Zionist ethos, was absent among Jews in the diaspora, is not always visible. This, too, accounts for the focus on the Holocaust, not just to exploit global sympathy and turn the perpetrator into a victim, but also to instil fear of succumbing to fear and the will to conquer it by crushing the other. Western scholars have concluded that the term genocide does not include such behaviours as the Israeli soldiers' swagger and triumphalist poses before their cameras, and their perverse thrill at killing and destruction.

Rob Howse views the war on Gaza as an example of the psychological costs sustained by soldiers engaged in prolonged and brutal conflicts, which can lead to severe mental disorders. He notes the testimonies by Israeli soldiers, documented by the South African legal team, in which they stated that they were ordered to kill Palestinians with no restraints whatsoever, as there were no innocents in Gaza. He was particularly struck by the soldiers' boastful photos and social media posts, revelling in the destruction they wrought and their inhumane treatment of Palestinian victims. This led him to conclude that another crime was being perpetrated in Gaza in addition to genocide. He termed it "legicide", or "destroying the whole notion of legal limits in war". Israel has been charged with genocide, but no corresponding legal term exists for the charge that could be brought against those soldiers who exulted in the atrocities they committed.<sup>50</sup>

One risk when filing a genocide charge against Israel for its crimes in Gaza is that the court's focus might shift from the examination of Israel's atrocities to debates on whether they meet the definition of genocide. The discussion then inevitably turns to the element of intent, which is what sets genocide apart from war crimes and crimes against humanity. Genocide may be no different from the other crimes in terms of the scale of atrocities or the number of victims, but unlike them, it also entails a premeditated intent to destroy an ethnic, national or religious group in whole or in part. Dirk Moses, in *The Problems of Genocide*, argues that the concept of genocide as it is framed and discussed could detract from other major crimes. Countless civilians can be killed by missiles and

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<sup>50</sup> Rob Howse, "No Legal Term – Even Genocide – Can Fathom Israel's Atrocities in Gaza. A Moral Abyss", *Novara Media*, 2/1/2025, accessed on 16/1/2025, at: <https://acr.ps/1L9zQWw>

other modern military technologies and dismissed as collateral damage for the sake of achieving permanent security, which is an illusory goal especially in the case of a foreign occupation. Quibbling over whether these atrocities constitute genocide could blind us to the horrors of mass murder of civilians in war in the pursuit of absolute permanent security. In Moses's view, this pursuit is a major crime and should replace genocide in international law.<sup>51</sup> Most cases of mass killing in the twentieth and twenty-first centuries fall into this category. The longer wars continue, the greater the risk they descend into such atrocities. If the ICJ finds that Israel committed war crimes, but not genocide, this may be perceived as an exoneration. Yet, the crimes it committed would be no less horrific if they were not classed as genocide because the lawyers were unable to establish intent.

## IV South Africa's Lawsuit Accusing Israel of Genocide

On 29 December 2023, South Africa filed an application to institute proceedings against Israel before the ICJ, accusing Israel of violating its obligations under the Genocide Convention in relation to Palestinians in Gaza. The CPPCG entered into force on 12 January 1951. Israel signed it on 17 August 1949 and South Africa signed it on 10 December 1998, after its liberation from decades of apartheid.

In its application, South Africa accused Israel of acts of a genocidal character because they are "intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group", namely the "Palestinians in Gaza". The acts it listed were three of the crimes listed in the Genocide Convention: killing members of the group, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. These would be considered acts of genocide if they were committed with the intent to destroy the group in whole or in part, which is the applicant attempted to prove in the application and in the subsequent oral pleadings.

South Africa filed the following claims against Israel:

- a) *failing to prevent genocide in violation of Article I;*
- b) *committing genocide in violation of Article III (a);*
- c) *conspiring to commit genocide in violation of Article III (b);*
- d) *direct and public incitement to commit genocide in violation of Article II);*
- e) *attempting to commit genocide in violation of Article III (d);*
- f) *complicity in genocide in violation of Article III (e);*
- g) *failing to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, in violation of Articles I, III, IV and VI;*

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<sup>51</sup> A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge/ New York: Cambridge University Press, 2021).

- h) *failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide, conspiracy to commit genocide, incitement to genocide, attempted genocide, and complicity in genocide, in violation of Article V; and*
- i) *failing to allow and/or directly or indirectly impeding the investigation by competent international bodies or fact-finding missions of genocidal acts committed against Palestinians in Gaza, including those Palestinians removed by Israeli State agents or forces to Israel, as a necessary and corollary obligation pursuant to Articles I, III, IV, V and VI.*<sup>52</sup>

Not only did South Africa attempt to establish that Israel's acts fall under the provisions of the convention, particularly Article II (a), (b), (c) and (d), and that there exists evidence of incitement to genocide, it also sought to convince the court to acknowledge immediately that the alleged violations are plausible. In its application, South Africa also requested the court to impose provisional measures to prevent further harm and safeguard the rights South Africa seeks to protect. It therefore attempted to underscore the urgency of the situation in Gaza and convince the court that the measures it requested were reasonable, pending a final determination on the merits of the evidence with respect to the charge of genocide.

South Africa asked the court to indicate four measures, the first being the immediate suspension of the Israeli military operations in and against Gaza. Other measures called on Israel to desist from committing acts that fall within the scope of the Genocide Convention. In addition to the three mentioned above, it explicitly called on Israel to desist from: actions intended to prevent births within the group, the expulsion and forced displacement of the members of the group, and depriving the group of adequate food and water, depriving them of humanitarian assistance and medical supplies and assistance, and destroying Palestinian life in Gaza.<sup>53</sup>

As is clear from the application, South Africa recognizes the difference between acts of genocide and other violations of international law, including war crimes involving mass killings. It also acknowledged that the crimes committed formed a continuum, the cumulative parts of which constituted genocide, as understood by Lemkin, who coined the term.<sup>54</sup>

South Africa took pains to contextualize Israel's crimes in Gaza within their historical continuum, starting from the Nakba. It divided this continuum into three historical phases in Israeli behaviour: 1) 75 years of practicing apartheid, 2) 56 years of belligerent occupation of Palestinian territories, and 3) the 16-year-long ongoing blockade of Gaza. The purpose here was to pre-empt the anticipated Israeli justification of its conduct of the war in Gaza as acts of self-defence following the 7 October attack and the Israeli claim that its target was Hamas, not Palestinian civilians. Addressing these

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<sup>52</sup> South Africa v. Israel, "Application Instituting Proceedings containing a Request for the Indication of Provisional Measures," International Court of Justice, 29/12/2023, para. 110, accessed on 16/1/2025 at: <https://acr.ps/1L9zPnR>

<sup>53</sup> *Ibid.*, para. 144.

<sup>54</sup> Lemkin, chap. IX.

matters, South Africa's representatives presented reams of evidence showing otherwise: months of continuous bombing, levelling entire residential neighbourhoods, preventing the entry of food, severing water and electricity lines, cutting off communications to an entire population. All this "cannot credibly be argued to be a manhunt for members of Hamas", they stated. Instead, it is "an indiscriminate attack, killing, maiming and terrorizing the entire population of Gaza with no regard to questions of innocence or guilt" for the events of 7 October.<sup>55</sup>

South Africa underscored an important point regarding the status of Gaza. The UN Security Council has repeatedly reaffirmed that Gaza is occupied territory. As such, Israel's actions in territories under its control do not fall under the principle of self-defence as laid out in Article 51 of the UN Charter. However, this was not the main point. Even if self-defence did apply to that war, this right can never justify genocide, which is absolutely prohibited in both wartime and peacetime. "The point is not simply that Israel is acting 'disproportionately'", South Africa's representative, Professor Vaughn Lowe, said, "The point is that the prohibition on genocide is an absolute, peremptory rule of law. *Nothing can ever justify genocide.* No matter what some individuals within the group of Palestinians in Gaza may have done and no matter how great the threat to Israeli citizens might be, *genocidal attacks on the whole of Gaza and the whole of its population with the intent of destroying them cannot be justified*".

In its application and oral arguments before the court, South Africa relied on reports by UN experts, statements by UN officials, and reports by international and Palestinian rights organizations. Some of these explicitly warned of the probability that a genocide was in progress against the Palestinian people.<sup>56</sup> Israel, South Africa stated in its application, not only failed to perform its duty under the Genocide Convention to prevent genocide and prosecute inciters of genocide, it was actively engaged in genocidal acts against the Palestinian people in Gaza. Already by the end of October 2023, it wrote, Israel had dropped an estimated 6,000 bombs a week on Gaza.<sup>57</sup> In just over two months, the destruction in Gaza exceeded the razing of Aleppo between 2012 and 2016 or, proportionately, the Allied bombing of Germany in the Second World War.

At the time the application was submitted, 21,110 Palestinians had been killed in Gaza, including at least 7,729 children. Another estimated 7,780 people were missing, presumed dead under the rubble, while over 55,243 were injured. The numbers now, as I write this, are far higher. Citing the latest statistics from the Gaza Ministry of Health, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that at least 45,541 Palestinians had been killed in Gaza between 7 October 2023 and 30 December 2024. The reported deaths included 13,319 children and 7,216 women. Over 10,000 people were missing under the rubble and around 108,338 were injured.<sup>58</sup> These figures did

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<sup>55</sup> "Public Sitting in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)", Verbatim Record 2024/1, International Court of Justice, 11 January 2024, accessed on 16/1/2025 at: <https://acr.ps/1L9zPK0>.

<sup>56</sup> United Nations, Office of the High Commissioner for Human Rights (UN OHCHR), "Gaza: UN Experts Decry Bombing of Hospitals and Schools as Crimes against Humanity, Call for Prevention of Genocide", 19/10/2023, accessed on 27/2/2024, at: <https://acr.ps/1L9zR80>

<sup>57</sup> South Africa v. Israel, para. 18.

<sup>58</sup> UNRWA, "UNRWA Situation Report #153: Situation in the Gaza Strip and West Bank, Including East Jerusalem", 4/1/2025, accessed on 6/1/2025, at: <https://acr.ps/1L9zR4r>; OCHA, *Gaza Humanitarian Access Snapshot: 8-13 November – 10 December 2024*, 13/12/2024, accessed on 6/1/2025, at: <https://acr.ps/1L9zQzi>

not include deaths caused by the conditions Israel created during the war, such as the spread of treatable diseases, malnutrition, displacement, and homelessness – factors that also constitute part of the ongoing genocide.

South Africa launched this legal battle against the Israeli occupying power in its capacity as a state party to the Genocide Convention and its consequent responsibility to prevent the recurrence of genocides like that in Rwanda in 1994. But it was also motivated by another factor: the still-vivid memories of the painful injustices its own indigenous population experienced under apartheid. In the application, it noted the numerous instances in which it expressed, through its officials and in diverse forums, its concerns that what was happening in Gaza constituted genocide. It also sent a *Note Verbale* to Israel to express these concerns and to formally communicate to that state that there was a dispute between them regarding the interpretation and the latter's breaches of the Genocide Convention.

Dugard reminded the court that despite the unilateral Israeli withdrawal from Gaza in 2005, the enclave is still considered "by the international community to be under belligerent occupation".<sup>59</sup> Israel has retained control over Gaza's airspace, territorial waters, land crossings, water and electricity grids, and civilian infrastructure, as well as over its official population records. Israel's continued complete or nearly complete control over the Strip is evidenced in its regulation of the quantities of food, electricity and water allowed into it and the need for its permission for every person wishing to enter or leave it. In a manner reminiscent of concentration camp administrators, Israel even sets the ceilings on foodstuffs allowed into Gaza based on calculations of minimal required calorie intake per capita. It also restricted goods on the pretext they could be used for dual military-civilian purposes. United Nations Conference on Trade and Development (UNCTAD) has warned that Israel's measures could render Gaza uninhabitable.<sup>60</sup> Many other sources have issued similarly dire warnings regarding the blockade and its effects on Gaza.

South Africa's submissions presented other facts testifying to calculated cruelty. During its violent suppression of the Great March of Return – the series of peaceful demonstrations from 30 March 2018 to 27 December 2019 to demand an end to the blockade – Israel killed 214 Palestinians, including 46 children.<sup>61</sup> On one lethal day, Israel killed 60 Palestinian demonstrators.<sup>62</sup> Over 36,100 Palestinians were injured during the March of Return, including three medics and two journalists. Among the

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According to a study published in *The Lancet* medical journal on 9 January 2025, the Palestinian Ministry of Health underreported fatalities by 41%. The study estimates that the real number of casualties in the Gaza between 7 October 2023 and 30 June 2024 (the period of the study) was 64,260. The article attributed the underreporting to the ministry's inability to accurately track deaths due to the escalation of the Israeli ground operation, the intensity of the bombardment and the attacks targeting healthcare facilities. As these attacks disrupted the facilities' ability to record deaths electronically, the ministry was forced to rely on less efficient data collection methods, especially when hospitals were under siege or experiencing telecommunication blockades. See: Zeina Jamaluddine et al., "Traumatic Injury Mortality in the Gaza Strip from Oct 7, 2023, to June 30, 2024: A Capture–Recapture Analysis", *The Lancet*, 9/1/2025, accessed on 20/1/2025, at: <https://acr.ps/1L9zQHD>

59 Verbatim Record 24/1, p. 19.

60 UN News, Global Perspectives Human Stories, *Gaza could become Uninhabitable in less than Five Years due to Ongoing 'de-Development' – UN Report*, 1/9/2015, accessed on 29/2/2024, at: <https://acr.ps/1L9zQio>

61 UN, The Question of Palestine, "Two Years On: People Injured and Traumatized During the 'Great March of Return' are Still Struggling", 6/4/2020, accessed on 29/2/2024, at: <https://acr.ps/1L9zRif>

62 Human Rights Council, *Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, A/HRC/40/74, 6/3/2019, para. 58, accessed on 29/2/2024, at: <https://acr.ps/1L9zQWg>

injured were 4,903 protestors whose legs were deliberately targeted by snipers.<sup>63</sup> One sniper admitted to shooting 42 Palestinian knees in a single day.<sup>64</sup>

There is a recurring pattern in Israel's treatment of Palestinian civilians during wars. South Africa's application cites a 2009 report by the UN Fact-Finding Mission on Gaza describing Israel's conduct in its wars on Gaza. The mission found that when residents are warned to leave their homes before a strike, soldiers often conclude that anyone who remains inside is an enemy combatant, even if they might be civilians. To their mind, this justifies killing them. The mission also found that Israel conducts operations aiming to destroy food and water services, sanitation, and infrastructure, in implementation of a policy of complete destruction. Afterwards, Israel attempted to portray its operations as responses to rocket attacks. The UN mission's report made it clear that Israel's destruction of food production facilities, water and sanitation stations, farms, and even animals was systematic and served no clear military purpose, but rather to deprive the civilian inhabitants of sustenance and to make their lives difficult.<sup>65</sup>

An independent investigation conducted by the UN Human Rights Council in 2015 regarding Israel's 2014 war on Gaza reached similar conclusions. It found that Israel presumed anyone remaining in areas that had received evacuation warnings to be an enemy, despite the protections afforded to civilians under international law, regardless of whether they evacuate or not. The HRC's report also criticized the Israeli military culture that is willing to accept grossly disproportionate civilian deaths through the use of heavy weaponry in densely populated areas.<sup>66</sup>

In his report to the General Assembly, in October 2021, on the situation of human rights in the occupied Palestinian territories, the UN Special Rapporteur lamented the international community's remarkable tolerance for "Israeli exceptionalism" in its conduct of the occupation, which has allowed "power to supplant justice and impunity to undercut accountability".<sup>67</sup>

In a section detailing the genocidal acts committed against the Palestinian people, the application noted that Palestinian journalists were being killed in the war on Gaza at a significantly higher rate than in any other conflict.<sup>68</sup> In the two months after 7 October 2023, the number of journalists killed exceeded that of the entirety of the Second World War. The South African submissions provided extensive detail on these and other acts, establishing that Israel committed the following:

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<sup>63</sup> UN, "Two Years On: People Injured and Traumatized During the 'Great March of Return'"; Human Rights Council, *Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory*, A/HRC/40/CRP.2, 18/3/2019, accessed on 28/2/2024, at: <https://cutt.ly/FwN9hNnk>

<sup>64</sup> Hilo Glazer, "'42 Knees in One Day': Israeli Snipers Open up about Shooting Gaza Protesters", *Haaretz*, 6/3/2020, accessed on 29/2/2024, at: <https://cutt.ly/cwMqYbld>

<sup>65</sup> Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25/9/2009, para. 36, 55, 60, 382, 391-392, 522, 629, 1026-1027, 1214-1215, 1883, 1888-1093, 1905, 1927, 1929, accessed on 29/2/2024, at: <https://acr.ps/1L9zQlh>

<sup>66</sup> Human Rights Council, *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, A/HRC/29/52 (24 June 2015), para. 26, 37, 44-45, 50-53, 55-58, accessed on 29/2/2024, at: <https://acr.ps/1L9zRi8>

<sup>67</sup> UN, General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, Michael Lynk, A/76/433, 22/10/2021, para. 32, accessed on 29/2/2024, at: <https://acr.ps/1L9zRIZ>

<sup>68</sup> South Africa vs Israel, para. 43.



1. Killing Palestinians in Gaza – including children – in large numbers.
2. Causing serious bodily and mental harm to Palestinians in Gaza, including children; and inflicting on them conditions of life intended to bring about their destruction as a group. These conditions include expulsions from homes and mass displacement, large-scale destruction of homes and residential areas, deprivation of access to adequate food and water, deprivation of access to adequate medical care, and deprivation of access to adequate shelter, clothes, hygiene and sanitation.
3. Destroying Palestinian life in Gaza, including by imposing measures intended to prevent Palestinian births.

All these crimes are listed in the Genocide Convention. Each point corresponds to a violation of one of convention's paragraphs.

Gaza "is the most dangerous place to be a child", South Africa wrote, citing the executive director of the UN International Children's Emergency Fund (UNICEF).<sup>69</sup> The UN Relief and Works Agency (UNRWA) Commissioner-General called the situation in Gaza "a living hell".<sup>70</sup> "*Nowhere is safe in Gaza*", the application stresses, quoting the UN Secretary General and many other UN experts.<sup>71</sup>

This is because Palestinians were being killed in their homes, in places where they sought shelter, in hospitals, in UNRWA schools, in churches, in mosques, and while trying to find food and water for their families. They were being killed if they failed to evacuate, in the places to which they fled, and while trying to escape along Israeli-declared safe routes.<sup>72</sup> The application cited reports of unarmed civilians – including Israeli hostages – being shot on sight despite waving white flags, as occurred on 15 December 2023.<sup>73</sup> The widely circulated photos and reports of Israeli snipers targeting other Israeli soldiers while waving white flags after fleeing captivity expose the fate of Palestinian civilians who happened to end up in Israeli crosshairs. The submission further notes that among the innumerable professionals that Israel deliberately targeted were 144 UN employees – "the highest number of aid workers killed in UN history in such a short time".<sup>74</sup>

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<sup>69</sup> UNICEF, "Statement by UNICEF Executive Director Catherine Russell on the Resumption of Fighting in Gaza", 1/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQjw>

<sup>70</sup> UNRWA, "Remarks of UNRWA Commissioner-General Philippe Lazzarini at the Global Refugee Forum", 13/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQzI>; "UNRWA". X, 12/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zRii>

<sup>71</sup> Letter by the Secretary-General to the President of Security Council Invoking Article 99 of the United Nations Charter, 6/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/QwMjBA6P>; UNICEF, *A Dystopic Scene that Seemed to Stretch on Endlessly* (November 2023), accessed on 3/3/2024, at: <https://cutt.ly/SwMJNizg>; ICRC, "Israel and the Occupied Territories: Deescalate Now to Prevent Further Human Suffering", 28/10/2023, accessed on 3/3/2024, at: <https://bit.ly/3P6gk1o>

<sup>72</sup> UN OHCHR, "UN Human Rights has 'Grave Fears' about Toll on Civilians in Gaza", 17/10/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zRaT>; Bethan McKernan & Sufian Taha, "Gaza Civilians Afraid to Leave Home after Bombing of 'Safe Routes'", *The Guardian*, 15/10/2023, accessed on 3/3/2024, at: <https://bit.ly/3wBKbIS>; "The ICRC Urges Protection for Gaza Civilians Evacuating and Staying Behind", *ICRC Blogs*, 13/11/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zRcZ>

<sup>73</sup> UN, OCHA, "Hostilities in the Gaza Strip and Israel | Flash Update #70", 15/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQJj>; "Israeli Soldiers Kill Hostages Waving White Flag after Mistaking Them for Hamas Fighters", *Financial Times*, 17/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zR7D>

<sup>74</sup> UN, OCHA, "Hostilities in the Gaza Strip and Israel - Reported Impact | Day 82", 27/12/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zR75>; "UN Honours 101 Staff Killed in Gaza Conflict", UN News, 13/11/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQx0>

Israel murdered 4,037 Palestinian students and 209 educators, and it damaged or destroyed 352, or 74 per cent of the schools in the whole of Gaza, the application informed the court, citing UN agencies.<sup>75</sup> The casualty toll among Palestinian students and educators has tripled since the application was filed. According to recent figures from the Palestinian Ministry of Education, 12,943 Palestinian students and 630 teachers and administrative staff have been killed by Israel (in both Gaza and the West Bank). The ministry's figures also state that 425 schools, universities, and other educational buildings were damaged or destroyed in Gaza, in addition to 65 UNRWA-affiliated schools.<sup>76</sup>

As of the date that South Africa submitted its application, over 1.9 million Palestinians – 85 per cent of Gaza's population – had been forced to leave their homes.<sup>77</sup> Recent figures from December 2024 show that most of the population has remained displaced since October 2023. Large numbers of them have been displaced repeatedly, some more than ten times. Around 80 per cent of Gaza's territory remains under forced displacement orders, reflecting the perpetuation of displacement with no safe place to turn.<sup>78</sup>

Palestinians are shot down on the roads during their multiple forced displacements. The UN secretary general remarked that "the people of Gaza are being told to move like human pinballs – ricocheting between ever-smaller slivers of the south, without any of the basics for survival".<sup>79</sup> He and other UN officials are compelled to reiterate that even in those "ever-smaller slivers", there is "nowhere safe to go"; "No place is safe".<sup>80</sup>

The application details at length how Israel deprives Palestinians in Gaza of access to water and adequate food and prevents international organizations from performing their functions and duties. The UN secretary general has repeatedly complained of the absence of conditions necessary to conduct relief operations. Effective aid operations require security, safety for the staff, logistical capacities and resumption of commercial activity.<sup>81</sup>

Oxfam and Human Rights Watch have explicitly accused Israel of using "starvation as a weapon of war" against the Palestinians in Gaza.<sup>82</sup> The South African application cites expert predictions that more Palestinians could die from starvation and disease than from airstrikes.<sup>83</sup>

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75 UN, OCHA, "Hostilities in the Gaza Strip and Israel | Flash Update #78", 27/12/2023, accessed on 28/2/2024, at: <https://acr.ps/1L9zQvu>

76 "12,943 Palestinian Students Killed Since October 2023", *Middle East Monitor*, 31/12/2024, accessed on 7/1/2025, at: <https://acr.ps/1L9zQBV>

77 UN, OCHA, "Hostilities in the Gaza Strip and Israel – Reported Impact | Day 82".

78 UNRWA, *UNRWA Situation Report #153*.

79 UN, OCHA, "Hostilities in the Gaza Strip and Israel | Flash Update #63", 8/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/jwMA4kM5>

80 UNRWA, "Gaza: UNRWA School Sheltering Displaced Families is Hit", 17/10/2023, accessed on 3/3/2024, at: <https://cutt.ly/SwM8r7jx>; UN, Secretary-General, "Statement Attributable to the Spokesperson for the Secretary-General – on the Middle East", 29/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/jwM8iECV>

81 UN, Secretary-General, "People of Gaza 'Being Told to Move like Human Pinballs', but Nowhere Is Safe, Secretary-General Tells Security Council, Pleading for Humanitarian Ceasefire", 8/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/ZwM4xOer>; UN, OCHA, *Remarks to the Media by the Secretary-General*, 22/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/HwM4vjpR>

82 Oxfam, "Starvation as Weapon of War being Used against Gaza Civilians", 25/10/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQxv>; HRW, "Israel: Starvation Used as Weapon of War in Gaza", 18/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/bwM44x4f>

83 Oxfam, "Starvation as Weapon of War being Used against Gaza Civilians", 25/10/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQxv>; HRW, "Israel: Starvation Used as Weapon of War in Gaza", 18/12/2023, accessed on 3/3/2024, at: <https://cutt.ly/bwM44x4f>

UNRWA has been the main provider of humanitarian assistance to the more than 2.2 million people in Gaza. Yet its facilities have been bombed multiple times. On 8 December 2023, UNRWA reported that 1.2 million displaced persons were sheltering in 151 agency facilities, with an average of 10,500 people per shelter – more than four times their capacity. By 12 December 2024, the number had reached 380,000 displaced people registered in over 100 UNRWA school buildings in Gaza.<sup>84</sup> South Africa's application refers to a letter from the UNRWA commissioner-general to the UN General Assembly, testifying to the nightmarish conditions that already existed in December 2023: "In these overfull and unsanitary spaces, more than 700 people use a single toilet, women give birth (an average of 25 per day), and people nurse open wounds. Tens of thousands sleep in courtyards and streets. People burn plastic to stay warm".<sup>85</sup>

One of the most appalling aspects of the war on Gaza is Israel's targeted destruction of the health system, ruthlessly bombing hospitals whose names became familiar to Arabs from the Atlantic to the Gulf. On 7 December 2023, the UN special rapporteur released a statement condemning Israel's "unrelenting war" on the health system. "The healthcare infrastructure in the Gaza strip has been completely obliterated", she said. "We bear witness to a shameful war on healthcare workers... We are in the darkest time for the right to health in our lifetimes... We have descended into depths from which we must quickly emerge".<sup>86</sup>

In addition to homes, hospitals, neighbourhoods, infrastructure, bakeries, and mills, Israel targeted municipal buildings, such as Gaza's Palace of Justice. The main judicial complex in the Strip, it houses the Palestinian Supreme Court, the Constitutional Court, the Court of Appeals, the Court of First Instance, the Administrative Court, and the Magistrates' Court. Israel destroyed the courts' archives and invaluable historical records. It bombed the Palestinian Legislative Council complex and the Central Archive building in Gaza City, which contained thousands of historical documents and national records documenting the population, their properties, and personal status affairs dating back a century. This type of destruction testifies to genocidal determination to assassinate the Palestinian social body.

South Africa's application details Israel's full-scale assault on all aspects of Palestinian social and cultural life, including cultural institutions, symbols, and creators of its cultural heritage—journalists, teachers, thinkers, intellectuals, public figures, filmmakers, writers, singers. It mentions many of them by name. It includes a chilling section specifically on "Imposing measures intended to prevent Palestinian Births", which notes that approximately 70 per cent of those killed in Gaza are women and children. It also cites numerous eyewitness accounts of pregnant women being killed by Israeli soldiers.

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<sup>84</sup> UNRWA, "UNRWA Situation Report #47: Situation in the Gaza Strip and West Bank, Including East Jerusalem", 8/12/2023, accessed on 8/1/2025, at: <https://acr.ps/1L9zQHR>; UNRWA, "UNRWA Situation Report #151: Situation in the Gaza Strip and West Bank, Including East Jerusalem", 12/12/2024, accessed on 12/12/2024, at: <https://acr.ps/1L9zQpL>

<sup>85</sup> UNRWA, "Letter from UNRWA Commissioner-General Philippe Lazzarini to the UN General Assembly President Mr. Dennis Francis", 7/12/2023, accessed on 4/3/2024, at: <https://acr.ps/1L9zQBO>

<sup>86</sup> UN, OHCHR, "Gaza: UN Expert Condemns 'Unrelenting War' on Health System Amid Airstrikes on Hospitals and Health Workers", 7/12/2023, accessed on 7/1/2025, at: <https://acr.ps/1L9zQM2>

In his oral argument before the court, Max du Plessis, a senior counsel for South Africa's case, quoted Arif Husain, the chief economist at the United Nations World Food Programme, who warned on 3 January 2024:

"I've been doing this for the past two decades, and I've been to all kinds of conflicts and all kinds of crises. And, for me, this [the situation in Gaza] is unprecedented because of, one, the magnitude, the scale, the entire population of a particular place; second, the severity; and, third, the speed at which this is happening, at which this has unfolded, is unprecedented. In my life, I've never seen anything like this in terms of severity, in terms of scale, and then in terms of speed".<sup>87</sup>

## V Evidence of Israeli Genocidal Intent in the War on Gaza

Warnings that a genocide was unfolding in Gaza emerged in late October 2023. In a letter dated 28 October 2023, Craig Mokhiber tendered his resignation as Director of the Office of the High Commissioner for Human Rights (OHCHR) in New York to protest the UN's failure to act effectively in the face of what he described as a "textbook case of genocide".<sup>88</sup>

Mokhiber chose his words carefully. In his letter, he held that "explicit statements of intent by leaders in the Israeli government and military", coupled with the slaughter in Gaza and decades of systematic persecution of the Arabs, "leaves no room for doubt or debate". Like other human rights lawyers and genocide experts, he understood that the CPPCG requires proof of genocidal intent and its linkage to the crimes committed in order to hold perpetrators and advocates of genocide accountable.

Myanmar claimed that genocidal intent was absent in the case brought against it. Like other states that deny committing genocide, it took refuge in the most amorphous element of the Genocide Convention: the mental element, or intent.<sup>89</sup> Ashley Kinseth describes how the Myanmar leadership denied the Rohingya's existence as a distinct ethnic group, but remarks and exchanges by and between officers and soldiers betrayed the intent to displace or annihilate the Rohingya population as a group. Modern tools were needed to bring such evidence to light, such as devices to intercept the officers' and soldiers' wireless communications. This proved effective in the case of Rwanda, where external actors had intercepted radio broadcasts with clear calls to eliminate the Tutsi population.<sup>90</sup> A similar tool would serve in the case against Myanmar. Kinseth relates a Facebook exchange by a Burmese officer in which he made no secret of his plans to destroy the Rohingya.<sup>91</sup> This was just one of the countless pieces of evidence that abound due to modern technologies, which make it possible to compile them to establish genocidal intent.<sup>92</sup>

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<sup>87</sup> Verbatim Record, 24/1, p. 50.

<sup>88</sup> United Nations, Letter from Craig Mokhiber to Volker Türk, High Commissioner for Human Rights (New York: 28/10/2023), accessed on 3/3/2024, at: <https://cutt.ly/Gw1gk9sM>

<sup>89</sup> Kinseth, p. 117.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid., p. 119.

<sup>92</sup> Ibid., p. 121.

In the case against Israel, these techniques could produce tens of thousands of incriminatory social media postings. Israel, however, made such efforts unnecessary, as its political and military officials, from the prime minister on down, broadcast their genocidal calls live and repeatedly, on television and in press conferences. When confronted with them at the ICJ, the Israeli counsel attempted to pass them off as angry rhetoric made in the heat of the aftermath of the crime of 7 October.

South Africa's application to institute proceedings against Israel contains a separate section on "Expressions of Genocidal Intent against the Palestinian People by Israeli State Officials and Others" since 7 October 2023. It begins with dozens of quotes from the Israeli prime minister, such as an excerpt from his formal address to the Knesset on 16 October 2023, in which he described the war as "a struggle between the children of light and the children of darkness, between humanity and the law of the jungle".<sup>93</sup> Netanyahu returned to this theme on numerous occasions. "This is a battle not only of Israel against these barbarians, it's a battle of civilization against barbarism", he said in a "Christmas address"<sup>94</sup> and later before the US Congress after the case against Israel was filed with the ICJ.

He also stressed another significant theme. On 28 October 2023, as Israeli forces prepared for the ground invasion of Gaza, Netanyahu invoked the Biblical story of God's command to the Israelites to destroy the Amalek. Quoting from the Old Testament, he said, "[Y]ou must remember what Amalek has done to you".<sup>95</sup> The passage Netanyahu cites here is "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses" (1 Samuel 15:1-34). He reiterated the reference to Amalek in his letter to Israeli soldiers and officers dated 3 November 2023.<sup>96</sup>

Equally unforgettable are Israeli President Isaac Herzog's remarks in a press conference to foreign media on 12 October 2023: "It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware not involved".<sup>97</sup> Herzog is one of the many Israelis and their American guests who wrote handwritten "messages" on the bombs and missiles to be dropped on Gaza.<sup>98</sup>

The blatantly genocidal statement issued by Israeli Defence Minister Yoav Gallant on 9 October 2023 has been translated into every language on earth. "I have ordered a complete siege on the Gaza Strip. There will be no electricity, no food, no fuel, everything is closed. We are fighting human animals and we are acting accordingly".<sup>99</sup> On 10 November 2023, Israeli National Security Minister Itamar

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<sup>93</sup> Ministry of Foreign Affairs of Israel, "Press Release: Excerpt from PM Netanyahu's Remarks at the Opening of the Winter Assembly of the 25th Knesset's Second Session", 16/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zR1l>

<sup>94</sup> Ministry of Foreign Affairs of Israel, "Christmas Message from PM Netanyahu", 24/12/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQDW>

<sup>95</sup> "Address by the Prime Minister of Israel", Israeli PM, YouTube, 28/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQLh> (In Hebrew); "Israel-Hamas War: 'We Will Fight and we Will Win', Says Benjamin Netanyahu", *Sky News*, 28/10/2023, accessed on 6/3/2024, at: <https://cutt.ly/Ww1s8AhP>

<sup>96</sup> "Prime Minister's Office in Hebrew, @IsraeliPM\_heb", X, 3/11/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQI8> (In Hebrew)

<sup>97</sup> Rageh Omaar, "Israeli President Isaac Herzog Says Gazans Could Have Risen Up to Fight 'Evil' Hamas", *ITV News*, 13/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQOo>

<sup>98</sup> "President of the State of Israel, @Isaac\_Herzog", X, 25/12/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQGT>

<sup>99</sup> "Statement by Yoav Gallant", Knesset TV, YouTube, 9/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zR1q> (In Hebrew); Emanuel Fabian, "Defense Minister Announces 'Complete Siege' of Gaza: No Power, Food or Fuel", *The Times of Israel*, 9/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zR4W>



Ben-Gvir offered a similar blanket definition of the target: "To be clear, when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy – they're all terrorists, and they should also be destroyed".<sup>100</sup> Likewise Minister of Energy and Infrastructure Israel Katz who stated on 13 October 2023: "All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world".<sup>101</sup>

Other Israeli officials have been equally forthcoming about their intentions. On 1 November 2023, Minister of Heritage Amichai Eliyahu said, "The north of the Gaza Strip, more beautiful than ever. Everything is blown up and flattened, simply a pleasure for the eyes".<sup>102</sup> On 11 November, Minister of Agriculture Avi Dichter alluded to the Nakba of 1948 and said, "We are now actually rolling out the Gaza Nakba".<sup>103</sup>

South Africa's application quotes extensively from Giora Eiland, retired Major General and former head of the Israeli National Security Council. Eiland, who also served as advisor to the defence minister, authored the notorious "generals' plan" which advocates transforming the deprivation of food, water and electricity into a fully-fledged strategy to create a severe humanitarian crisis and make Gaza a place that is impossible to live in.

The genocidal remarks by Netanyahu and other officials became widespread chants. "We know our motto: 'there are no uninvolved civilians'" and "Wipe off the seed of Amalek" went viral on Israeli social media and could even be seen on bumper stickers. A genocidal disposition had permeated popular Israeli culture, including its military culture. The rhetoric spread from government and military officials to Knesset members, prominent journalists, social media influencers, artists, and musicians. Songs that incorporated the genocidal chants became hits.

In her opening presentation to the ICJ on 11 January 2024, Adila Hassim, Senior Counsel for South Africa, explained the need to infer intent from the actions and statements of the perpetrator. "Genocides are never declared in advance", she said, implying that this is not what is meant by "intent", since perpetrators of genocide cannot be expected to explicitly announce their plans to carry out a genocide.<sup>104</sup> However, she argued, the court has the benefit of concrete evidence and documented statements from which to infer intent. The accumulated "evidence shows incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts".

Dr Hassim's submission was followed by Senior Counsel Tembeka Ngcukaitobi, who elaborated on the genocidal intent of Israel.<sup>105</sup> In addition to recapitulating the genocidal acts committed, he

<sup>100</sup> "Interview with Itamar Ben-Gvir on Channel 12", Jewish Power, YouTube, 11/11/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQZS>; "Quds News Network, @QudsNen", X, 12/11/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQms>

<sup>101</sup> "Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, @Israel\_katz", X, 13/10/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQDy>

<sup>102</sup> "Amichai Eliyahu", Facebook, 1/11/2023, accessed on 3/3/2024, at: <https://acr.ps/1L9zQpl>

<sup>103</sup> "Interview with Avi Dichter on Channel 12. Hanno Hauenstein, @hahauenstein", X, 11/11/2023, accessed on 6/3/2024, at: <https://acr.ps/1L9zQlp>

<sup>104</sup> Verbatim Record 24/1, p. 30.

<sup>105</sup> Ibid., p. 31.

connected them to "the reiteration and repetition of genocidal speech throughout every sphere of the state of Israel". He then reminded the court of the identity and authority of the persons inciting genocide – the Prime Minister, the President, the Minister of Defence, the Minister of National Security, the Minister of Energy and Infrastructure, members of the Knesset, senior army officials, and foot soldiers – and concluded: "Genocidal utterances are therefore not out in the fringes; they are embodied in State policy".<sup>106</sup>

## VI Israel's Arguments before the ICJ

In his opening statement before the ICJ on the second day of the oral proceedings, Co-Agent for Israel, Tal Becker, led with "Never Again".<sup>107</sup> In the context of genocide, this promise, for all other peoples, is a slogan, he said, but "for Israel, it is the highest moral obligation".

In practice, this "highest moral obligation" serves as a cover for what is effectively the Zionist slogan: Never Again—for the Jews. The vow that Jews will never again be subjected to a Holocaust has become a political and cultural pretext for politics of 'might makes right'. So pervasive is this instrumentalization of the Holocaust that any criticism of Israel is treated as a sign of its imminent recurrence. In the Zionist creed, there is no moral obligation to prevent genocide against other peoples.

Israel's representatives spent much of their presentation on the attack of 7 October 2023. They presented a lurid account of the attack, screened videos and suggested that the suffering endured by Israeli civilians evoked memories of the Holocaust. They spoke of the 1,200 people who were killed that day, the more than 5,500 people "maimed" and the 240 hostages abducted. They reiterated the unverified claims about children being tortured in front of their parents, people burned alive, and systematic rape and mutilation, and read out unsubstantiated testimonies.

The entire first part of the respondent's pleading was dedicated to flipping the script. The respondent framed the 7 October events so as to turn South Africa's claims against Israel into allegations against Hamas: It was Hamas that attempted to perpetrate genocide while Israel was just exercising its right to defend itself. According to Israel's counsel, the South African team ignored the atrocities of 7 October, even though, in the previous day's sitting, all of South Africa's representatives had unequivocally condemned Hamas's 7 October attack and the crimes committed against civilians that day.

Israel rested its defence on three contentions:

1. The applicant ignored the existence of the armed conflict, Israel's right to self-defence, and the nature of urban warfare, which is typically highly destructive. The destruction and high casualty rates in urban warfare are not evidence of genocide, the respondent maintained. It

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<sup>106</sup> Ibid., p.41.

<sup>107</sup> "Public Sitting in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)", Verbatim Record 2024/2, International Court of Justice, 12 January 2024, accessed on 16/1/2025 at: <https://acr.ps/1L9zQuj>

further claimed that "many thousands" of the buildings destroyed had been booby-trapped by Hamas, whose military strategy relied on using civilian areas for military purposes and using civilians as human shields.

2. Israel had no intent to destroy the Palestinian people in whole or in part, and official Israeli government statements have made this clear. Evidently, Israel's counsel would have the court believe that states would publicly proclaim their intent to commit genocide and then issue official statements confessing to it when accused.

3. The provisional measures that South Africa requested from the court did not fall under the court's jurisdiction.

Every representative on the Israeli team opened their argument with an account of the Israeli suffering on 7 October. The leading legal expert, Malcolm Shaw, cited an ICJ order of 2 June 1999,<sup>108</sup> stating that the use of force and instanced bombings lacking the element of intent do not constitute genocide. He argued that if the genocide charge were applied broadly to instances of bombing, it would dilute what is in essence "the crime of crimes" and strip it of its distinct status.

In Shaw's view, the main matter the court needed to consider at the first stage was not the acts committed but rather the element of intent. Without intent, there can be no genocide and hence, no provisional measures would be warranted. South Africa, he argued, was not required to prove that genocidal acts occurred, but rather to show that the acts in question fell under the provisions of the Genocide Convention, which required proof of intent. Only then would the court have the right to determine the question of provisional measures.

What is the Israeli sleight-of-hand here? It lies in the artificial separation between intent (the mental element) and conduct (the material element), as if intent exists in isolation, must be explicitly declared, and must be proven before the court can even begin to consider the acts and behaviours from which intent can be inferred.

Shaw argued that even if it were the case – which the counsel denied – that Israeli forces had transgressed what they called "rules of conflict", this would not constitute intent to destroy all or part of a people.

As discussed above, South Africa in its application and oral arguments presented an extensive list of Israeli statements demonstrating genocidal intent. Shaw's next step was to dismiss them as an attempt on the part of South Africa to "present a distorted picture" which misconstrues the nature and the provenance of certain comments made by some Israeli politicians.<sup>109</sup> Most of these comments, according to Shaw, were rhetorical, impassioned remarks made in the immediate aftermath of a traumatic event and could not, therefore, be seen as calls for genocide. Indeed, he argued, Israel was doing its utmost to minimize damage and mitigate human suffering, which refuted any claim of genocidal intent.

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<sup>108</sup> International Court of Justice, "Order of 2 June 1999", accessed on 20/1/2025, at: <https://acr.ps/1L9zQj7>

<sup>109</sup> Verbatim Record 24/2, p. 31.



Contrary to the impression the Israeli counsel sought to create, the comments by Israeli officials have been persistent, repeated at multiple levels, and indicative of a broader culture, mindset, and attitude toward Palestinians. The implications of these statements permeate Israeli society and the military, especially given how they invoke religious heritage, on the one hand, and stoke vengeful hatred, on the other. Moreover, the comments can be linked to actual military actions, including mass killings.

As for the Israeli claims regarding efforts to mitigate suffering, they are belied by the starvation blockade imposed on Gaza, which was then reinforced to maximize human suffering by obstructing the entry of humanitarian aid. Only after immense international pressure did Israel begin allowing a few UN organizations to carry out relief operations in Gaza.

Galit Ragan, who served as advisor to the Israeli Ministry of Justice at the time, reiterated Shaw's argument regarding the nature of urban warfare and absence of intent. To this she added that the tragic outcomes of urban warfare were multiplied in Gaza because these were the desired outcomes of Hamas which, she said, uses homes, schools, mosques, UN facilities and shelters for military purposes, including as rocket launching sites. Hamas had also built hundreds of kilometres of tunnels under inhabited areas. Ragan acknowledged the extensive damage to infrastructure in Gaza, but she rejected South Africa's attempt to portray that damage as deliberate.

She also rejected South Africa's claim that Israel's repeated evacuation orders were genocidal acts, arguing that evacuation ahead of bombardment was a duty, not a crime. She did not discuss how repeated evacuation orders displaced over a million and a half people – far out of proportion to any preventive measure – or how Israeli forces classified those who refused to or were unable to evacuate as exterminable enemy combatants. Nor did she mention how Israeli forces opened fire on columns of evacuees on the roads while Israeli missiles bombarded the designated "safe zones" and schools and hospitals where the evacuees sought refuge.

Israel's representatives rejected all nine provisional measures requested by South Africa. All the harm was the consequence of a war that Hamas started, they argued, and the proposed measures would only protect terrorism and prevent Israel from defending itself. They also accused Hamas of preventing people from evacuating their homes to increase the civilian death toll and of stealing humanitarian aid entering Gaza. Not only do such claims contradict the facts, they also defy political logic. Clearly, Hamas would understand that its greatest political risk lies in the heavy toll paid by the population in Gaza after its operation and the likelihood of being held at least partially responsible. Officials in Israel are aware of this and act accordingly; they consider the Genocidal acts against the population to be the most effective pressure on Hamas.

Article 3 of the Genocide Convention obliges state parties to punish direct and public incitement to genocide, yet no one in Israel has been formally charged with this crime. This obligation is also outlined in Article 25(e) of the Rome Statute of the International Criminal Court. Israel claims to be a state governed by the rule of law, where freedom of expression is protected, and that any incitement

outside that framework would constitute a criminal offense. Yet, despite the abundant evidence of genocidal incitement from the highest levels of government, no one in that country has ever been held to account. Meanwhile, a hateful and vindictive rhetoric targeting Gaza and its population pervades the print and audiovisual media, while the death, destruction, and anguish of the Palestinians in Gaza have been entirely ignored. The prevailing mood in Israel is such that not only is there a lack of pity and human empathy, but any expression of such sentiments is met with ridicule. It would be difficult to convey that atmosphere in the formal, protocol-bound chambers of the court, but anyone who has followed Israeli print and audiovisual media is fully aware of its substance and significance.

## VII The ICJ Order

In its order of 26 January 2024, the ICJ noted that, at that stage of the proceedings, it was not required to determine definitively whether the rights South Africa claimed and wished to protect actually existed – only whether they were plausible. It acknowledged South Africa's argument that Israel's stated intention to destroy Hamas does not preclude the presence of a genocidal intent against the whole or part of the Palestinian people. It also recapitulated Israel's counterarguments: the contention that the appropriate legal framework for this matter was international humanitarian law rather than the Genocide Convention, and the argument that if crimes were committed, they were excesses that occurred within the context of urban warfare and were unintended consequences of the lawful use of force.

In addition, the court quoted extensively from UN officials and their assessments of the situation in Gaza. It read out statements by the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator and the UNRWA Commissioner-General, both describing in detail the dire, life-threatening humanitarian conditions. It also read out some statements by senior Israeli officials and then cited statements by UN officials expressing their alarm regarding Israeli intent and their concerns over the irreparable harm to civilian life in Gaza if Israel persists in its conduct.

In light of the foregoing considerations, the court determined that the case fell under its jurisdiction, that South Africa's claims were plausible, and that the conditions required under its statute for indicating urgent provisional measures were met. Accordingly, it ordered a range of measures to prevent further commission of crimes listed in Article II of the Genocide Convention pending its final determination on the charges. However, these measures stopped short of ordering a halt to the war.

Specifically, the ICJ stated:

- 1) The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions

of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.

- 2) The Court is also of the view that Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.
- 3) The Court further considers that Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.
- 4) Israel must also 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 against members of the Palestinian group in the Gaza Strip.
- 5) Regarding the provisional measure requested by South Africa that Israel must submit a report to the Court on all measures taken to give effect to its Order, the Court recalls that it has the power, reflected in Article 78 of the Rules of Court, to request the parties to provide information on any matter connected with the implementation of any provisional measures it has indicated. In view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order. The report so provided shall then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.
- 6) The Court recalls that its Orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 230, para. 84).<sup>110</sup>

On 29 May 2024, South Africa provided the UN Security Council with a comprehensive dossier of evidence documenting Israel's intent and incitement to commit genocide. One section contained evidence of Israel's non-compliance with the provisional measures the ICJ ordered to prevent further irreparable harm to civilians. It included statements by Israeli officials demonstrating contempt for the binding orders issued against them by the court and for the court itself.

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<sup>110</sup> ICJ, "Order of 26 January 2024", para. 78-82, accessed on 16/1/2025 at: <https://acr.ps/1L9zPJH>

In the note accompanying the dossier, South Africa states that the "scale, duration, and indiscriminate nature of Israel's attacks can only be understood as an attempt to destroy the Palestinian group in Gaza". This was why South Africa had turned to the ICJ in keeping with its obligations under the Genocide Convention. As Israel refused to implement the provisional measures ordered by the ICJ on 26 January 2024, South Africa asked the court to take firmer action. In response, the court reminded Israel that ICJ orders were binding, and that Israel was duty-bound to comply with the provisional measures. Due to the increasingly perilous humanitarian conditions in Gaza, South Africa returned to the court again on 6 March 2024. On 28 March 2024, the ICJ, finding urgency and the existence of a real and imminent risk of irreparable harm, issued further provisional measures, and once again reminded Israel of its binding obligations. Israel continued to flout the court's orders. Then, in further defiance of the court, it launched an assault on Rafah, leading to the displacement – "yet again" – of 40 per cent of Gaza's population, including more than 815,000 Palestinians who had been seeking refuge in Rafah.

The court rejected Israeli claims that it was doing all it could to mitigate civilian suffering and that the designated zones for evacuees were safe. By a vote of 13 to 2, the court ordered Israel to immediately halt its military offensive in Rafah, to cease all genocidal actions, to allow in urgent humanitarian aid, as well as any UN fact-finding missions to investigate allegations of genocide.

The court delivered this order in the same week that the chief prosecutor of the International Criminal Court requested warrants for the arrest of Israeli Prime Minister Benjamin Netanyahu and Defence Minister Yoav Gallant, as well as three Hamas leaders, on charges of committing crimes against humanity and war crimes since 7 October 2023.

Despite the ICJ's binding orders issued on 26 January 2024, 28 March 2024, and 24 May 2024, Israel persisted in its genocidal campaign against the Palestinian people. Moreover, it officially reaffirmed its refusal to comply with the ICJ's orders, and it continues to restrict the flow of food and medical aid into Gaza.

Because of Israel's persistent refusal to comply with ICJ orders, South Africa turned to the UN Security Council as the only instrument of enforcement available to the ICJ. In so doing, South Africa was acting in accordance with Article 94(1) of the UN Charter, which obliges UN members to comply with the court's decisions, and Article 94(2), which grants any party the right to seek recourse to the Security Council in the event that another party's non-compliance with ICJ orders.

The accompanying enclosures in the dossier compile all statements by Israelis at all levels – from the highest ranks of authority in the government and the army to politicians, Knesset members, soldiers and reservists. Through this extensive documentation, South Africa seeks to demonstrate that the enclosed statements are not merely commonly heard remarks by individuals but rather expressions of what has effectively become the prevailing political culture within the military and broader society. This is a culture that fully grasps the implications of "there are no uninvolved in Gaza" and the biblical command to "remember what Amalek has done to you" when it comes to dealing with

the Palestinians. The destruction of Gaza, the mass killing of civilians, rendering the enclave unfit for human habitation, and other diabolical plans have gained near-universal acceptance in Israel. The Amalek command is not the only Old Testament citation invoked in the rhetoric generated by the current genocidal culture in Israel.

The dossier left out nothing, including the songs that went viral calling for death to all Palestinians. The dossier includes four "enclosures" containing materials in the following categories: 1- genocidal statements by senior government officials, 2- statements and audio-visual materials of senior military officials and soldiers on the ground in Gaza, 3- examples of widespread incitement to genocide against Palestinians in broader Israeli society, including members of the Knesset, former military and intelligence officials, journalists and singers, and 4- statements and actions taken by Israel in contempt of the binding orders issued by the ICJ. This latter enclosure includes awards presented to soldiers who committed or incited genocidal crimes.

In the context of Israel's defiance of the ICJ and its orders, South Africa raised the matter of Israel's intensifying campaign to dismantle UNRWA and reiterated its plea for urgent measures to ensure the provision of vital services and humanitarian aid to the Palestinians in Gaza. It also cited the many Israeli statements expressing contempt of the ICJ, whether through ridicule or by dismissing its orders as "antisemitic". They did not shrink from hurling this charge at The Hague for daring to challenge Israel, which "rose from the ashes" of the Holocaust.

Having shared this dossier with the Security Council, South Africa appealed to it to take urgent action to ensure Israel's compliance with the ICJ's binding orders, and to protect UN institutions and process and the international rule of law. The Security Council failed to act.

## VIII On a closing note

We approach the subject of genocide with trepidation and awe, as if, heads bowed, we enter a boundless graveyard where the burials never cease. Tens of thousands are murdered in a barbaric frenzy of violence driven by racism and revenge fuelled by hatred or fear of the other.

To maintain the outrage over the atrocity, lest the horror be dissipated by judicial routine, the pleadings combined the outcry of the accusation with documentation that must be clinically precise, both quantitatively and qualitatively. However, the respectable jurisprudential debate over the definition of the crime and the fulfilment of its constituent parts soon stifles the outcry. That is the nature of jurisprudence. Due to the terms of the jurisprudential debate, establishing the presence of "intent" to commit genocide took precedence over the horrific crimes laid bare.

One is struck by how defence attorneys for those accused of committing genocide consider the classification of the crimes their clients are charged with as "mere" crimes against humanity a victory, because these crimes in and of themselves do not constitute genocide. In fact, genocide is a crime against humanity. What distinguishes it, according to the jurisprudence we have addressed in

this article, is the presence of an "intent" or "purpose" to exterminate a group protected under the Genocide Convention, in whole or in part. In an ordinary criminal court, lawyers for the defence will often enter a plea of loss of control or temporary insanity. Israel's counsel this court has rested its case on similar plea. They argued that all expressions of genocidal intent – that is, the intent to eliminate a portion of the Palestinian people – were fuelled by momentary rage and lack of emotional control – in short, a temporary state of insanity.

Yet, these statements are by senior state officials and manifest a political culture that pervades the whole of society, including the army and media. The statements are in Hebrew, and when these expressions of intent to commit and incite genocide are translated into English, or any other language, those concerned are surprised by what they read. This is definitely not "us". When they speak Hebrew, they are communicating within the tribe thirsting for revenge. To them, it seems normal. But when translated into English and echoed in the chambers of The Hague, it seems bizarre – indeed, a state of temporary insanity at best.

This article questioned the usefulness of this trial. The enormity of the crime will not change whether it is called genocide or not and there is a risk that Israel will be "acquitted" of the crime of genocide, despite its actions classified as crimes against humanity. If the court accepts that Israel can "only" be charged with war crimes and crimes against humanity, Israel will appear to have emerged victorious. Conversely, even if Israel is convicted of genocide, there will be no international will to punish it, or to compel it to stop. This has already been made clear since the court ordered the provisional measures intended to avert further irreparable harm to the victims – measures that Israel brazenly refused to implement with overt or tacit support of world powers.

There is no definitive answer to this question – certainly no definitive answer for the victims, their families, or perhaps any of us more generally. But let us remember that Israel falsely claims to represent the victims of the Nazis' genocide of the Jews in World War II. While it is true that it is difficult to imagine the establishment of Israel without this catastrophe that befell the European Jewry, Israel does not represent these victims in any sense. Neither did they choose it to represent them, nor does it represent Jews worldwide who are citizens of their own countries. Rather, Israel is the cultural, civilizational, and historical negation of the Jewish diaspora and their respective cultures.

It is highly significant that Israel, which instrumentalizes the tragedy inflicted on Jews in the diaspora to justify its aggression and atrocities and deflects any criticism with allegations of anti-Semitism, is being tried for genocide and rightly so. The value of this cannot be overstated. First, henceforth, any Israeli political instrumentalization of the Holocaust will trigger repercussions related to its genocide of the Palestinians, challenging its monopolization of victimhood. Second, this trial presented an opportunity to carry out a project of tireless documentation. Numerous organizations in Palestine and abroad have contributed to this endeavour, striving for comprehensiveness and accuracy – comprehensiveness, because not a single detail must be missed when documenting genocide, and accuracy, because these documents had to be submitted to the International Court of Justice. This trial will cement the documented facts in history so that they can never be buried.

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