



# A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine

Nimer Sultany

To cite this article: Nimer Sultany (09 May 2024): A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine, Journal of Genocide Research, DOI: [10.1080/14623528.2024.2351261](https://doi.org/10.1080/14623528.2024.2351261)

To link to this article: <https://doi.org/10.1080/14623528.2024.2351261>



© 2024 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 09 May 2024.



Submit your article to this journal [↗](#)



Article views: 5141



View related articles [↗](#)



View Crossmark data [↗](#)

## A Threshold Crossed: On Genocidal Intent and the Duty to Prevent Genocide in Palestine



Nimer Sultany

School of Law, SOAS University of London, London, UK

By any measure, Israel's onslaught on Gaza is unprecedented. Israel claims that the killing of civilians is typical of warfare. Yet by the end of November 2023 it was clear that "even a conservative reading of the casualty figures" showed that "the pace of death during Israel's campaign has few precedents in this century."<sup>1</sup> It also showed that the proportion of civilian deaths is higher than all other conflicts in the twentieth century.<sup>2</sup> After the first three months of Israeli attacks, a military historian maintained that "Gaza is one of the most intense civilian punishment campaigns in history" that surpassed Allied bombings of Germany during World War II in a much shorter period of time.<sup>3</sup> Doctors who entered Gaza said that it is not a "normal war," that it is worse than war zones they witnessed,<sup>4</sup> that the war's aim is "the destruction of all the components of modern life,"<sup>5</sup> and is thus better described as an "annihilation."<sup>6</sup>

What these descriptions convey is that the military logic of defeating an enemy in war has been crossed into the genocidal logic of elimination. This logic of elimination is evident in many expressions of genocidal intent by Israeli officials and soldiers that South Africa's December 2023 application to the International Court of Justice (ICJ) enumerates.<sup>7</sup> These include statements by Israeli army generals who were leading troops in Beit Lahia and who told Israeli TV on 4 November 2023 that Gaza will

---

**CONTACT** Nimer Sultany  ns30@soas.ac.uk  School of Law, SOAS University, 10 Thornhaugh St, London WC1H 0XG, UK

<sup>1</sup> Lauren Leatherby, "Gaza Civilians, Under Israeli Barrage, Are Being Killed at Historic Pace," *New York Times*, 25 November 2023.

<sup>2</sup> Yagil Levy, "The Israeli Army Has Dropped the Restraint in Gaza, and the Data Shows Unprecedented Killing," *Haaretz*, 9 December 2023.

<sup>3</sup> Julia Frankel, "Israel's military campaign in Gaza seen as among the most destructive in recent history, experts say," *Associated Press*, 11 January 2024; John Paul Rathbone, "Military Briefing: The Israeli Bombs Raining on Gaza," *Financial Times*, 6 December 2023.

<sup>4</sup> Chris McGreal, "'Not a Normal War': Doctors Say Dchildren Have Been Targeted by Israeli Snipers in Gaza," *The Guardian*, 2 April 2024; David Nott, "A Trauma Surgeon on why Gaza is the Worst of War Zones," *The Economist*, 15 April 2024.

<sup>5</sup> Geneva Abdul, "London Surgeon Says He Saw 'Massacre Unfold' While Working in Gaza hospitals," *The Guardian*, 27 November 2023.

<sup>6</sup> Irfan Galaria, "I'm an American Doctor Who Went to Gaza. What I Saw Wasn't War – it was Annihilation," *Los Angeles Times*, 16 February 2024.

<sup>7</sup> International Court of Justice, "Application Instituting Proceedings and Request for the Indication of Provisional Measures" (29 December 2023), Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), 59–66.

This article has been republished with minor changes. These changes do not impact the academic content of the article.

© 2024 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

become “a fallow land,” a “scorched earth,” unliveable, and without a future.<sup>8</sup> Another commander said on 21 December that the “entire Gaza should resemble” the destroyed town of Beit Hanoun, liking it to a biblical tale in which all the males were slaughtered and the women and children taken.<sup>9</sup> More generally, the application shows that soldiers who were operating in Gaza echoed statements by officials (like the prime minister and the president) and expressed an intent to “wipe off the seed of Amalek” and to “burn Gaza,” and denied the existence of innocent civilians in Gaza.<sup>10</sup>

Despite the preponderance of such Israeli statements, much of the mainstream commentary in the months that followed 7 October portrayed the eventual destruction of most of Gaza as an incidental outcome of urban warfare rather than the predictable outcome of a policy. The early legal commentary focused on the proportionality of particular strikes and ignored Israeli officials’ statements of intent regarding the overall policy.<sup>11</sup> Such legal analysis, thus, provided a partial view of Israel’s conduct. Moreover, instead of invoking the duty to prevent genocide it seemed to reserve judgment concerning genocide until after the actual and eventual decimation of Gaza.<sup>12</sup>

This separation between predictable outcomes and declared intentions distorts public perceptions of Israel’s conduct.<sup>13</sup> Consider, for instance, the UN humanitarian chief’s statement on 5 January 2024 that Gaza has become “uninhabitable,”<sup>14</sup> experts’ claims in March 2024 that Israel’s “ecocide” – the destruction of the ecosystems – made the Gaza strip “unliveable,”<sup>15</sup> and UN Special Rapporteurs condemnation in April 2024 of Israel’s “domicide” – the systematic and widespread destruction of housing, services and civilian infrastructure.<sup>16</sup> These outcomes cannot be separated from the general genocidal rhetoric to dehumanize the Palestinians and “flatten” Gaza that dominated Israeli discourse following 7 October.<sup>17</sup>

When South Africa submitted its application to the ICJ it undermined the pro-Israeli western discourse about the “war” and reignited debates about “genocide.”<sup>18</sup> It insisted

<sup>8</sup> *Ibid.*, 65, para. 103.

<sup>9</sup> *Ibid.*, 64–5. See video at Middle East Eye, 21 December 2023: <https://twitter.com/MiddleEastEye/status/1737895718436896966>.

<sup>10</sup> *Ibid.*, 65.

<sup>11</sup> See, e.g. Marc Schack, “In Defence of Preliminary Assessments: Proportionality and the 31 October Attack on the Jabalia Refugee Camp,” *EJIL Talk*, 8 November 2023, <https://www.ejiltalk.org/in-defence-of-preliminary-assessments-proportionality-and-the-31-october-attack-on-the-jabalia-refugee-camp/>.

<sup>12</sup> The main exception prior to South Africa’s ICJ application is: “Gaza: UN experts call on international community to prevent genocide against the Palestinian people” (16 November 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>. See also The Center for Constitutional Rights, “Israel’s Unfolding Crime of Genocide of the Palestinian People & U.S. Failure to Prevent and Complicity in Genocide,” 18 October 2023, [https://ccrjustice.org/sites/default/files/attach/2023/10/Israels-Unfolding-Crime\\_ww.pdf](https://ccrjustice.org/sites/default/files/attach/2023/10/Israels-Unfolding-Crime_ww.pdf).

<sup>13</sup> The Lemkin Institute for Genocide Prevention, “Statement on the Western Media Narrative Regarding Israel’s Genocide in Gaza” (13 April 2024), <https://www.lemkininstitute.com/statements-new-page/statement-on-the-western-media-narrative-regarding-israel-s-genocide-in-gaza->.

<sup>14</sup> “UN Relief Chief: The War in Gaza Must End,” OCHA (5 January 2024), <https://www.unocha.org/news/un-relief-chief-war-gaza-must-end>.

<sup>15</sup> Kaamil Ahmed, Damien Gayle and Aseel Mousa, “‘Ecocide in Gaza’: Does Scale of Environmental Destruction Amount to a War Crime?,” *The Guardian*, 29 March 2024.

<sup>16</sup> “Gaza: UN Experts Deplore Use of purported AI to Commit ‘Domicide’ in Gaza, Call for Reparative Approach to Rebuilding” (15 April 2024), <https://www.ohchr.org/en/press-releases/2024/04/gaza-un-experts-deplere-use-purported-ai-commit-domicide-gaza-call>.

<sup>17</sup> Chris McGreal, “The Language Being Used to Describe Palestinians is Genocidal,” *The Guardian*, 16 October 2023; Mark Landler, “Erase Gaza: War Unleashes Incendiary Rhetoric in Israel,” *New York Times*, 15 November 2023.

<sup>18</sup> Nimer Sultany, “It’s Not Just Israel in the Dock over Genocide, It’s Everyone Who Looked Away,” *The Guardian*, 12 January 2024.

in particular on the “broader context” in which Israeli actions and dehumanizing rhetoric needs to be understood: “its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza.”<sup>19</sup> Without the context of a regime of Jewish supremacy, as institutionalized in occupation and apartheid, it becomes easier to dismiss the invocation of genocide and frame Gaza 2023–2024 simply as a “war.” Yet Israel’s actions are committed within the context of an institutionalized regime of systematic oppression and domination.<sup>20</sup> In this regime, Palestinians are relegated to an inferior status, fragmented and ghettoized in Bantustans, and dehumanized to justify the inferiority and denial of basic rights.<sup>21</sup> Jewish supremacy is thus foundational to the commission of genocide against Palestinians in Gaza and a crucial element to understanding it.<sup>22</sup>

The invocation of genocide invites the ongoing debate concerning the shortcomings and limitations of the legal definition.<sup>23</sup> The main difficulty, as Dirk Moses highlights, is that “the genocide frame” is “fundamentally limited by the concept’s legal parameters.”<sup>24</sup> Yet, these parameters are not necessarily fixed. Admittedly, the definition of genocide is “narrow,” the judicial approach to interpreting it has been “relatively conservative,” and judges have hitherto declined to broaden it through judicial interpretation (as opposed to amending the Genocide Convention).<sup>25</sup> Nevertheless, law is a space for political contestation, and legal rules are interpreted and applied within a political context against a background of normative assumptions. This contestation includes interpretive choices and disagreements, such as whether judges should resort to a literal reading of the Genocide Convention or focus on drafters’ intent (e.g. regarding the inclusion of ethnic cleansing short of physical destruction within the definition). “Reliance upon the drafting history,” writes William Schabas, “tends to freeze the provision, preventing it from evolving so as to take into account historical developments and changed attitudes.”<sup>26</sup> In the context of Gaza, states like Ireland seek to broaden the definition to include blocking humanitarian aid, arguing that “restricting food and other essentials in Gaza may constitute genocidal intent.”<sup>27</sup> More generally, political mobilizations have undermined “longstanding rules of genocide gatekeeping,” writes Darryl Li, and may thus lead to “extricating genocide from a desiccated legalism that serves the status quo and injecting it with an explicitly anticolonial politics instead.”<sup>28</sup>

South Africa’s application to the ICJ is an example of an anticolonial mobilization of the law. An African state that suffered from the yoke of colonialism and apartheid, invoked the

<sup>19</sup> “Application Instituting Proceedings and Request for the Indication of Provisional Measures” (29 December 2023), 2.

<sup>20</sup> Amnesty International, *Israel’s Apartheid Against Palestinians: Cruel System of Domination and Crime Against Humanity* (1 February 2022).

<sup>21</sup> See, e.g. regarding the constitutionalization of Jewish supremacy and enshrinement of colonialism: Hassan Jabareen and Suhad Bishara, “The Jewish Nation-state Law: Antecedents and Constitutional Implications,” *Journal of Palestine Studies* 48, no. 2 (2019): 46–55.

<sup>22</sup> Raz Segal, “Opinion: Here’s What the Mass Violence in Gaza Looks Like to a Scholar of Genocide,” *Los Angeles Times*, 19 November 2023.

<sup>23</sup> See, e.g. Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1983).

<sup>24</sup> A. Dirk Moses, “More than Genocide,” *Boston Review*, 14 November 2023, <https://www.bostonreview.net/articles/more-than-genocide/>.

<sup>25</sup> William A. Schabas, “The Law and Genocide,” in *The Oxford Handbook of Genocide Research*, ed. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 130.

<sup>26</sup> *Ibid.*, 134–5.

<sup>27</sup> Rory Carroll, “Ireland Backs Did to Include Blocking of Aid in Definition of Genocide,” *The Guardian*, 27 March 2024.

<sup>28</sup> Darryl Li, “The Charge of Genocide,” *Dissent*, 18 January 2024, [https://www.dissentmagazine.org/online\\_articles/the-charge-of-genocide/](https://www.dissentmagazine.org/online_articles/the-charge-of-genocide/).

crime of genocide against a western-supported colonial apartheid. The momentous ICJ orders that stipulated provisional measures against Israel in January and March 2024 have lent credibility to the charge of genocide, emphasizing the question of starvation. Despite Israel's indignation over the charge, and its invocation of the Holocaust to neutralize the accusation against it, there is an increasing legal consensus that Israel is committing genocide in Gaza. Different actors have acknowledged that Israel's actions violate elements of the Genocide Convention and stressed the need to prevent genocide.<sup>29</sup> Continued contestation notwithstanding, this consensus is emerging because the evidence is overwhelming. This emerging consensus strengthens the legal case against Israel.

This article is divided into two parts. The first part describes the increasing legal consensus, manifested in a convergence of the interpretations of Israel's intent and pattern of conduct in Gaza as genocide. In particular, it discusses the ICJ orders, the report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967 Francesca Albanese, and Colombia's intervention in support of South Africa.

It argues, however, that the focus of this emerging consensus should not be limited to Israel's weaponization of starvation. Instead, the "military" logic – and Israel's concomitant deployment of highly permissive interpretations of International Humanitarian Law (IHL) to frame its actions – should be critically examined. This framing conceals genocidal acts and intentions and ignores the context of occupation and apartheid in which Israel's conduct unfolds. There is ample evidence and compelling legal arguments to establish genocidal intent, despite the presumably high threshold required. Indeed, following the demand by six western states in the Myanmar case to lower the threshold required to determine intent, consistency requires the application of a similar threshold to determine the existence of genocide in Gaza. Additionally, Judge *ad hoc* Aharon Barak's separate opinions, which insisted on an exclusive IHL perspective, further show the weakness of the military rhetoric to frame Israel's actions. This rhetoric falsely presents the occupier who imposes an apartheid system as acting in "self-defence" in response to an "existential" threat.

Following this emphasis on "genocide" as opposed to "war," the article's second part focuses on paragraph 44 of the ICJ's March 2024 order to criticize the ICJ's reluctance to

---

<sup>29</sup> In addition to the examples discussed in this article, see: Lemkin Institute for Genocide Prevention, "Statement on Why We Call the Israeli Attack on Gaza Genocide" (29 December 2023), [https://www.lemkininstitute.com/statements-new-page/statement-on-why-we-call-the-israeli-attack-on-gaza-genocide#:~:text=In%20this%20regard%2C%20the%20Lemkin,life%20calculated%20to%20bring%20about;International%20Court%20of%20Justice,Application%20for%20Permission%20to%20Intervene%20by%20the%20Government%20of%20the%20Republic%20of%20Nicaragua,Application%20of%20the%20Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide%20in%20the%20Gaza%20Strip%20\(South%20Africa%20v.%20Israel\),23%20January%202024](https://www.lemkininstitute.com/statements-new-page/statement-on-why-we-call-the-israeli-attack-on-gaza-genocide#:~:text=In%20this%20regard%2C%20the%20Lemkin,life%20calculated%20to%20bring%20about;International%20Court%20of%20Justice,Application%20for%20Permission%20to%20Intervene%20by%20the%20Government%20of%20the%20Republic%20of%20Nicaragua,Application%20of%20the%20Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide%20in%20the%20Gaza%20Strip%20(South%20Africa%20v.%20Israel),23%20January%202024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240123-int-01-00-en.pdf> ("Nicaragua is of the opinion that the actions being taken by Israel amount to clear violations of the Convention on the Prevention and Punishment of the Crime of Genocide"); Amnesty International, "The Escalating Crisis in Gaza and Israel" (25 January 2024) ("Amnesty believes there are alarming warning signs of Genocide given the staggering scale of death and destruction"); Lauren Aratani, "Alexandria Ocasio-Cortez Calls Israeli Gaza Campaign an 'Unfolding Genocide,'" *The Guardian*, 23 March 2024; Morgan Rimmer, "Elizabeth Warren Suggests Israel's Actions in Gaza Could be Ruled as a Genocide by International Courts," *CNN*, 9 April 2024, <https://www.cnn.com/2024/04/08/politics/elizabeth-warren-israel-gaza-genocide> ("If you want to do it as an application of law, I believe that they'll find that it is genocide, and they have ample evidence to do so"); Haroon Siddique, Eleni Courea, and Patrick Wintour, "Former Supreme Court Judges Say UK Arming Israel Breaches International Law," *The Guardian*, 3 April 2024; "UK Judges' and Lawyers' Open Letter Concerning Gaza," 3 April 2024, <https://lawyersletter.uk/wp-content/uploads/2024/04/Gaza-letter-FIN-3-April.pdf>. The letter states:

These facts demonstrate a pattern of behaviour giving rise not only to specific violations of IHL and of crimes against humanity but also, when taken together with the evidence of genocidal intent in statements by senior Israeli officials cited by the ICJ in its Provisional Order, a serious risk of genocide.

explicitly order Israel to suspend its military operations as well as its refusal to elucidate third party obligations to prevent genocide beyond the parties before the Court. Consequently, the Court failed to adequately reinforce and elucidate the obligation to prevent genocide.

### Burgeoning Legal Consensus: Starvation, IHL, Intent

On 28 March 2024, the International Court of Justice (ICJ) reaffirmed the provisional measures it issued against Israel a couple of months earlier, on 26 January 2024, and ordered new provisional measures. It considered that the previous provisional measures “do not fully address the consequences arising from the changes in the situation” in Gaza where famine is no longer a risk but an unfolding reality.<sup>30</sup> The Court noted “the unprecedented levels of food insecurity experienced by Palestinians in the Gaza Strip over recent weeks, as well as the increasing risks of epidemics.”<sup>31</sup> It observed that “there is no substitute for land routes and entry points from Israel into Gaza to ensure the effective and efficient delivery of food, water, medical and humanitarian assistance.”<sup>32</sup>

When compared to the previous order on 26 January, the March order shows increasing consensus amongst the judges. Previously, Judge Sebutinde voted against all measures, now she joined the Court in supporting all the new measures.<sup>33</sup> Judge Nolte joined the Court in January reluctantly, narrowly focusing on the incitement to genocide, and expressing scepticism regarding whether genocidal intent is a plausible interpretation of Israeli actions and statements.<sup>34</sup> In March, however, Judge Nolte emphasized the weaponization of starvation and noted that the circumstances “constitute a qualitative change of the situation which is exceptional” and “also reflect a plausible risk of a violation of relevant rights under the Genocide Convention.”<sup>35</sup> This change in Judge Nolte’s position, Alonso Gurmendi highlights, indicates that South Africa’s case against Israel became stronger despite the high threshold required to prove the commission of a genocide.<sup>36</sup>

This burgeoning legal consensus weakens the repeated assertion since October 2023, by specialists and non-specialists, that genocidal intent is an insurmountable threshold that will be difficult to meet in the case of Israel’s onslaught on Gaza. In this context, the focus on the prevention of humanitarian aid and weaponization of starvation is justified. This is because it indicates the deliberate infliction of conditions of life calculated to bring about the destruction of a substantial part of the Palestinian people.<sup>37</sup> This Israeli

<sup>30</sup> International Court of Justice, “Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Provisional Measures, Order” (28 March 2024), paras. 21, 23, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>.

<sup>31</sup> *Ibid.*, para. 31.

<sup>32</sup> *Ibid.*, para. 35.

<sup>33</sup> Mystifyingly, however, she did not join in reaffirming the previous measures, despite the fact that the new ones are largely a modification of the previous ones.

<sup>34</sup> “Declaration of Judge Nolte” (26 January 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>.

<sup>35</sup> “Separate Opinion of Judge Nolte” (28 March 2024), para. 6, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>.

<sup>36</sup> Alonso Gurmendi, “Comparing the ICJ’s Provisional Measures Orders in South Africa v. Israel,” *Opinio Juris*, 29 March 2024, <https://opiniojuris.org/2024/03/29/comparing-the-icjs-provisional-measures-orders-in-south-africa-v-israel/>.

<sup>37</sup> Art. II (c) of the Convention on the Prevention and Punishment of the Crime of Genocide.

policy has a long history that predates 7 October. Israel counted calories' intake in Gaza for decades to engineer malnourishment and produce a destitute population.<sup>38</sup>

In its December application South Africa quoted several statements by Israeli officials in declaring their intention to impose a complete siege and deprive 2.3 million Palestinians in Gaza from food, water, medicine, and fuel.<sup>39</sup> One could add another statement: on 18 October Prime Minister Netanyahu declared: "we will not allow humanitarian assistance in the form of food and medicines from our territory to the Gaza Strip."<sup>40</sup> On 17 October, the day preceding Netanyahu's statement, the media reported that Palestinians in Gaza are in risk of dehydration because clean water was running out.<sup>41</sup> On 25 October Oxfam warned that Israel is using starvation as a method of war.<sup>42</sup> On 16 November the UN's World Food Program warned that "Gaza faces widespread hunger as food systems collapse."<sup>43</sup>

Despite these and many other warnings by UN officials and human rights organizations, Israel continued in its policy of starvation.<sup>44</sup> The second ICJ order in March 2024 was motivated by what the judges saw as a lack of Israeli compliance with the January orders, including regarding immediate and effective measures to allow humanitarian assistance.<sup>45</sup> The Court noted that in the aftermath of its January order "the catastrophic living conditions of the Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities."<sup>46</sup>

Undeterred, the Israeli military released after the second ICJ order in March 2024 a report that denied, in the face of international consensus, the factual existence of famine.<sup>47</sup> Israel's conduct thus suggested it has no intention to comply with the judicial orders. Indeed, Israel imposed "unprecedented" restrictions on humanitarian aid.<sup>48</sup> And despite reported pressure from the US, and subsequent Israeli statements regarding allowing more aid into the Gaza strip, Israel's policy of starvation persisted in April 2024.<sup>49</sup> Israel continued to kill and harm Palestinians on the food line, including killing over 100 in the "flour massacre" on 29 February.<sup>50</sup> It also continued to kill aid workers. Unlike the killing of Palestinian civilians, the killing of the western workers of World

<sup>38</sup> Neve Gordon and Muna Haddad, "The Road to Famine in Gaza," *New York Review of Books*, 30 March 2024.

<sup>39</sup> "Application Instituting Proceedings and Request for the Indication of Provisional Measures" (29 December 2023), 60–61.

<sup>40</sup> Ministry of Foreign Affairs, "Statement by PM Netanyahu," 18 October 2023, <https://www.gov.il/en/pages/pm-netanyahu-statement-18-oct-2023>.

<sup>41</sup> Bethan McKernan, "Fears Grow People are Dehydrating to Death in Gaza as Clean Water Runs Out," *The Guardian*, 17 October 2023.

<sup>42</sup> Oxfam, "Starvation as a Weapon of War is being used against Gaza Civilians," 25 October 2023, <https://www.oxfam.org.uk/media/press-releases/starvation-as-weapon-of-war-being-used-against-gaza-civilians/>.

<sup>43</sup> World Food Program, "Gaza faces widespread hunger as food systems collapse, Warns WFP," 16 November 2023, <https://www.wfp.org/news/gaza-faces-widespread-hunger-food-systems-collapse-warns-wfp>.

<sup>44</sup> Human Rights Watch, "Israel: Starvation Used as Weapon of War in Gaza," *Human Rights Watch*, 18 December 2023, <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>.

<sup>45</sup> See the separate opinions of Judge Nolte (supra fn 35) and Judge Yusuf in March 2024. "Declaration of Judge Yusuf" (28 March 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>.

<sup>46</sup> International Court of Justice, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Provisional Measures, Order" (28 March 2024), para. 18.

<sup>47</sup> Itamar Eichner, "Israeli Report Disproves Hunger Claims in Gaza: 80% Increase in Aid Trucks Entering the Strip Daily," *Ynet*, 31 March 2024, <https://www.ynetnews.com/article/bj0o8uijc>.

<sup>48</sup> Niha Masih, "Crutches and Chocolate Croissants: Gaza aid Items Israel has Rejected," *Washington Post*, 11 April 2024.

<sup>49</sup> Emma Graham-Harrison and Julian Borger, "Aid 'Still Not Reaching Gaza', Top US Official Warns Famine Has Started," *The Guardian*, 12 April 2024.

<sup>50</sup> Katie Polglase et al., "Dying for a Bag of Flour: Videos and Eyewitness Accounts Cast Doubt on Israel's Timeline of Deadly Gaza Aid Delivery," *CNN*, 10 April 2024, <https://edition.cnn.com/2024/04/09/middleeast/gaza-food-aid-convoy-deaths-eyewitness-intl-investigation-cmd/index.html>.

Central Kitchen caused international outrage that forced Israel to dismiss two officers. Although Israel downplayed the incident as “tragic” and “unintentional,” one of the dismissed officers, the brigade’s commander, is a West Bank settler who signed, alongside 130 Israeli senior commanders, a statement in January 2023 demanding that Israel’s war cabinet deprive Palestinians in Gaza from humanitarian aid.<sup>51</sup>

How should these actions be framed? According to the Israeli human rights organization B’Tselem, famine is “the product of a deliberate and conscious Israeli policy” and Israel “has been operating for seven months in this spirit” of an order “to wipe out Gaza.”<sup>52</sup> Nevertheless, it frames starvation as a crime (in violation of the prohibition in the Rome Statute) committed to gain a military advantage or exact revenge.<sup>53</sup>

Unlike the UN Special Rapporteur on the Right to Food Michael Fakhri, B’Tselem makes no mention of the additional charge of genocide.<sup>54</sup> Yet, a proper consideration of

the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts,<sup>55</sup>

can reveal the genocidal nature of starvation in Gaza. In fact, the combination between starvation and the systematic destruction of hospitals, schools, and universities – and the killing of doctors, nurses, teachers, and academics who can provide health and education – can indicate the targeting of the three pillars of social existence and reproduction (subsistence, health, education).<sup>56</sup> This targeting has impacted over two million Palestinians in Gaza, for a lengthy period of over 200 days, at the time of writing. The destruction of these pillars endangers the ability of social groups to maintain continuity over time.

Considering Israel’s attempts to justify its conduct in the language of war, Jessica Whyte argues that “Israel has mobilized a deeply permissive account of IHL to justify its use of starvation as a tool of genocide.”<sup>57</sup> Defenders of Israel’s denial of genocidal intent represent “the extreme form of an argumentative strategy that views the destruction of peoples and whole worlds as ‘incidental’ to military necessities.”<sup>58</sup>

Yet in addition to the weaponization of starvation, other indicators of genocidal conduct and intent need to be considered. To take them seriously, the below briefly discusses the question of the coexistence of military goals with genocidal goals, that may potentially preclude the conclusion that genocidal intent is the only plausible interpretation of the Israeli statements and actions. Then, I discuss the arguments by six western states that the Court should lower this high legal requirement of “only reasonable inference” from the materials and instead assess genocidal acts and intentions in a more holistic way.

<sup>51</sup> Paul Nuki, Lilia Sebouai, and Samuel Lovett, “Top IDF Commander in Aid Strike Wanted to Block Humanitarian Supplies into Gaza,” *The Telegraph*, 11 April 2024

<sup>52</sup> B’Tselem, “Manufacturing Famine: Israel is Committing the War Crime of Starvation in the Gaza Strip,” *B’Tselem*, April 2024, [https://www.btselem.org/publications/202404\\_manufacturing\\_famine](https://www.btselem.org/publications/202404_manufacturing_famine).

<sup>53</sup> *Ibid.*

<sup>54</sup> Nina Lakhani, “Israel is Deliberately Starving Palestinians, UN rights Expert Says,” *The Guardian*, 27 February 2024.

<sup>55</sup> ICTY, *Prosecutor v. Popovic et al.*, AC 2015, at para. 468, [https://www.icty.org/x/cases/popovic/acjug/en/150130\\_judgement.pdf](https://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf) (Quoting: ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95- 10-A, 5 July 2001, para. 47).

<sup>56</sup> See, e.g. “UN Experts Deeply Concerned Over ‘Scholasticide’ in Gaza” (18 April 2024), <https://www.ohchr.org/en/press-releases/2024/04/un-experts-deeply-concerned-over-scholasticide-gaza>.

<sup>57</sup> Jessica Whyte, “A ‘Tragic Humanitarian Crisis’: Israel’s Weaponization of Starvation and the Question of Intent,” *Journal of Genocide Research* (17 April 2024): 3, doi:10.1080/14623528.2024.2339637.

<sup>58</sup> *Ibid.*, 14.



### **Military Goals that Conceal Genocidal Intent**

The ICJ's March order needs to be read alongside the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied Since 1967 Francesca Albanese's report on genocide. This report was published three days before the ICJ issued its new order. It details the ways in which Israel's statements and actions evidence genocide, both as a matter of pattern of conduct and declared intent. Israel's genocide, Albanese rightly argues, should be contextualized in a historical process of settler colonization in which Zionism and Israel have repeatedly sought to displace, and displaced, the Palestinians, "signalling a tragedy foretold."<sup>59</sup> Indeed, as Martin Shaw argues, the concept of genocide can illuminate Israel's actions in its "war of independence" in 1948.<sup>60</sup>

Writing prior to October 2023, George Bisharat notes that Israel has engaged in a systematic effort to reshape international law to allow a greater degree of infliction of violence on Palestinians. This has included the reframing of previous rounds of violence from "law and order" under an occupation to "armed conflict short of war," rewriting the "principle of distinction" between civilians and combatants, "voluntary human shields," and deliberate disproportionality. Thus, he writes, Israel's actions "threaten to turn international humanitarian law on its head, allowing law to extend the scope of violence and suffering to previously protected areas and persons."<sup>61</sup> Similarly, Albanese argues that a "core feature of Israel's conduct since 7 October has been the intensification of its de-civilianization of Palestinians, a protected group under the [Genocide] Convention."<sup>62</sup> By "de-civilianisation" Albanese means the designation of the entire population into a killable target. Albanese had highlighted this "de-civilianisation" in a previous report on Israel's carceral system.<sup>63</sup>

I noted a similar phenomenon of "legalization" in the 2014 onslaught on Gaza. Israel imposed on the Palestinians an impossible choice between slow death under colonial rule and spectacular death in a disproportionate colonial war. In this context, Israel has deployed legal discourse to effectively collapse the distinction between civilian and combatant and to remove legal protections over civilian populations. Accordingly, the civilian becomes a suspicious category, an exception, an afterthought, a negation ("non-combatants"). This permissive legal discourse hinders acknowledgement of responsibility and reconciles perpetrators of crimes with the horrors of civilian suffering. It quells their anxiety over the consequences of their own actions.<sup>64</sup>

In Gaza 2023–2024, however, Israel went beyond disproportionate colonial war. Having dispossessed, dominated, fragmented, and besieged the Palestinians for decades, it now

<sup>59</sup> "Anatomy of a Genocide, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Francesca Albanese," A/HRC/55/73, 25 March 2024, <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-a.uv.pdf>.

<sup>60</sup> Martin Shaw, "Palestine in an International Historical Perspective on Genocide," *Holy Land Studies* 9, no. 1 (2010): 1–24.

<sup>61</sup> George Bisharat, "Violence's Law: Israel's Campaign to Transform International Legal Norms," *Journal of Palestine Studies* 43 (2013): 68–84, at 69.

<sup>62</sup> Albanese, "Anatomy of a Genocide," para. 55.

<sup>63</sup> "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese," A/HRC/53/59, 9 June 2023, [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session53/advance-versions/A\\_HRC\\_53\\_59\\_AdvanceUneditedVersion.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session53/advance-versions/A_HRC_53_59_AdvanceUneditedVersion.pdf).

<sup>64</sup> Nimer Sultany, "Repetition," in *Gaza as Metaphor*, ed. Dina Matar and Helga Tawil-Souri (London: Hurst, 2016), 203. Similarly, James Eastwood uses the example of the Israeli army to show how militaries have been using ethics trying to reconcile soldiers with the realities of counter-insurgency and the horror of inflicting civilian deaths. James Eastwood, *Ethics as a Weapon of War* (Cambridge: Cambridge University, 2017).

moved towards annihilation. Consistent with the “logic of genocide,” Israel’s actions in Gaza envisage a “world without civilians” in which “everything from taking shelter in hospitals or fleeing for safety is declared a form of human shielding” and thus transforms “the entire civilian population” into “a legal target.”<sup>65</sup> The focus on “unintentional,” “proportionate,” and “collateral” killing became a recurrent pro-Israeli talking point to excuse mass slaughter and unlimited killing. The focus on “intent” and “civilians” became a dividing line between the “barbarians” and “civilized” in pro-Israeli discourse: Hamas kills deliberately whereas Israel kills collaterally, and Hamas does not care about Palestinian civilians whereas Israel seeks to minimize civilian deaths.<sup>66</sup> Thus, the argument goes, Israel’s killing is defensible even though it kills horrific numbers and many more than the Palestinians do:

To the extent that the Israeli bombing of Gaza kills Palestinian children, it’s a different sort of evil, and very likely a defensible, necessary evil . . . If you bomb the location of a terrorist cell or rocket depot, but your bombs also kill civilians, that is not deliberate targeting of civilians, it is collateral damage – a regrettable, anticipated, but unintended consequence of necessary military actions.<sup>67</sup>

The charge of genocide turns the tables for two reasons: its focus on intent undermines the “collateral” killing argument, and the emphasis on “the purely humanitarian and civilizing purpose” of the Convention undermines Israel’s self-identification as the “civilized” party.<sup>68</sup> In her March report, Albanese details five ways in which Israel have deployed International Humanitarian Law (IHL) to conceal genocidal intent. These ways constitute what she terms as “humanitarian camouflage.”<sup>69</sup> The first abuse of IHL is to designate the entire population as “human shields” even though “International law does not permit the blanket claim that an opposing force is using the entire population as human shields *en bloc*.”<sup>70</sup> “The accusation of using human shields,” Albanese writes, “has thus become a pretext, justifying the killing of civilians under a cloak of purported legality, whose all-enveloping pervasiveness admits only of genocidal intent.”<sup>71</sup>

A second abuse of IHL is to turn the entirety of the Gaza Strip into a military objective by expanding the category of military targets to include a vast range of civilian objects and kill large numbers of civilians in the process.<sup>72</sup> A third abuse of IHL is to justify indiscriminate killing by expanding the notion of “collateral damage” and redefining “proportionality” in relation to general war aims (as opposed to military advantage sought from a particular attack).<sup>73</sup> In this context, Luigi Daniele notes that the focus of legal discourse on proportionality analysis, when the principle of distinction between civilians and combatants is violated and large numbers of civilian victims are routinely and repeatedly

<sup>65</sup> Elyse Semerdjian, “A World Without Civilians,” *Journal of Genocide Research* (24 January 2024): 3, doi:10.1080/14623528.2024.2306714.

<sup>66</sup> See, e.g. Lazar Berman, “PM: ‘Never Again is Now,’ Israel Fighting ‘Humanity’s War Against the Barbarians,’” *Times of Israel*, 28 October 2023; Benjamin Netanyahu, “Our Three Prerequisites for Peace,” *Wall Street Journal*, 25 December 2023.

<sup>67</sup> Timothy P. Carney, “Israel War: There is a Difference between Treating Civilians as Targets and Treating Them as Collateral Damage,” *Washington Examiner*, 12 October 2023.

<sup>68</sup> International Court of Justice, Provisional Measures (26 January 2024), 21.

<sup>69</sup> Albanese, “Anatomy of a Genocide,” para. 55.

<sup>70</sup> *Ibid.*, para. 60.

<sup>71</sup> *Ibid.*, para. 62.

<sup>72</sup> *Ibid.*, paras. 63–7.

<sup>73</sup> *Ibid.*, paras. 69–75.

targeted, is misguided. It simply masks indiscriminate attacks and legitimates unlimited killing and destruction.<sup>74</sup> Indeed, an unnamed senior military officer dismissed the concern for “collateral damage” when he told the Israeli website Walla on 18 October 2023:

There are elements in the army for whom the penny has not dropped yet, who are still talking about collateral damage. If we informed the population to evacuate and Hamas is holding them as hostages then they should bear the responsibility.<sup>75</sup>

A fourth abuse of IHL is evident in the use of seemingly humanitarian measures. Measures like “warnings,” “evacuation orders,” “safe corridors,” “safe zones” can remove civilians from harm’s way during armed conflict and thus show compliance with IHL. Instead, as one study details, Israel’s “humanitarian measures” evidenced “humanitarian violence” and in fact facilitated genocidal acts.<sup>76</sup> Israel turned them into tools to organize genocidal violence.<sup>77</sup> Israel repeatedly targeted civilians in “humanitarian corridors” and “safe zones” in the southern part of Gaza.<sup>78</sup> Moreover, alongside the destruction of entire towns and neighbourhoods and the forcible displacement of hundreds of thousands of residents, many of Israel’s government ministers expressed the desire to colonize Gaza with Jewish settlers.<sup>79</sup> Thus, Albanese concludes that one can “reasonably infer that evacuation orders and safe zones have been used as genocidal tools to achieve ethnic cleansing.”<sup>80</sup>

Forcible displacement or ethnic cleansing do not always amount to genocidal acts and indicate genocidal intent, according to ICTY jurisprudence, but Israel’s actions have met the required threshold.<sup>81</sup> Indeed, the “forced displacements in Gaza are genocidal,” argues South Africa, because they occur in a context “calculated to bring about the physical destruction of Palestinians in Gaza.”<sup>82</sup> Moreover, as six western states argue, “forced displacement may also constitute evidence of specific intent” to commit genocide “even in cases where affected members of the group are not transferred to a place where they are subjected to conditions leading to their death or destruction.”<sup>83</sup> These states add that

<sup>74</sup> Luigi Daniele, “A Lethal Misconception, in Gaza and Beyond: Disguising Indiscriminate Attacks as Potentially Proportionate in Discourses on the Laws of War,” *EJIL: Talk*, 7 November 2023, <https://www.ejiltalk.org/a-lethal-misconception-in-gaza-and-beyond-disguising-indiscriminate-attacks-as-potentially-proportionate-in-discourses-on-the-laws-of-war/>. See, also, Luigi Daniele, “Incidentalities of the Civilian Harm in International Humanitarian Law and its Contra Legem Antonyms in Recent Discourses on the Laws of War,” *Journal of Conflict & Security Law* (2024): 1–34.

<sup>75</sup> Amir Buhbuht, “Criticism of Senior Officers in the IDF: ‘Don’t Send Us Back from Gaza before the End of the Mission,’” *Walla*, 18 October 2023, <https://news.walla.co.il/item/3616973?s=08> (Hebrew).

<sup>76</sup> Forensic Architecture, “Humanitarian Violence: Israel’s Abuse of Preventative Measures in its 2023–2024 Genocidal Military Campaign in the Occupied Gaza Strip,” 7 March 2024, [https://content.forensic-architecture.org/wp-content/uploads/2024/03/Humanitarian-Violence\\_Report\\_FA.pdf](https://content.forensic-architecture.org/wp-content/uploads/2024/03/Humanitarian-Violence_Report_FA.pdf).

<sup>77</sup> Nicola Perugini, “Safe Zones: Israel’s Technologies of Genocide,” *Al-Jazeera*, 6 January 2024, <https://www.aljazeera.com/opinions/2024/1/6/safe-zones-israels-technologies-of-genocide>.

<sup>78</sup> Hala Gorani and Briony Sowden, “NBC News Investigation Reveals Israel Strikes on Gaza Areas it Said Were Safe,” *NBCNEWS*, 26 April 2024, <https://www.nbcnews.com/news/world/palestinians-killed-israeli-strikes-safe-zones-exclusive-nbc-report-rcna148008>.

<sup>79</sup> Bethan McKernan, “Israeli Ministers Attend Conference Calling for ‘Voluntary Migration’ of Palestinians,” *The Guardian*, 29 January 2024; Nir Hasson, “The People of Israel Will Settle Gaza: Netanyahu’s Ministers at Far-right Conference Endorse Expulsion of Palestinians,” *Haaretz*, 29 January 2024.

<sup>80</sup> Albanese, “Anatomy of a Genocide,” para. 86.

<sup>81</sup> Jinan Bastaki, “Gaza, Forced Displacement, and Genocide,” *EJIL: Talk!*, 5 April 2024, <https://www.ejiltalk.org/gaza-forced-displacement-and-genocide/>.

<sup>82</sup> International Court of Justice, *South Africa’s Application* (28 December 2023), para. 60.

<sup>83</sup> International Court of Justice, “Joint Declaration of Intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom,” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (15 November 2023), at para. 72, <https://www.icj-cij.org/index.php/node/203299>.

a violent military operation triggering the forced displacement of members of a targeted group may ... contribute to evidence of a specific intent to destroy the protected group, regardless of whether the acts triggering the forced displacement fall within one of the five categories of underlying acts of genocide.<sup>84</sup>

Finally, a fifth abuse of IHL is “medical shielding” wherein Israel invokes IHL to remove legal protections from health facilities and transform hospitals into military targets. Consequently, Israel has systematically targeted and destroyed health services leaving most hospitals in Gaza non-functional. As Neve Gordon and Nicola Perugini show, “Israel mobilizes the laws of armed conflict dealing with human shields ... to legitimize the destruction of Gaza’s lifesaving and sustaining infrastructures.”<sup>85</sup> Accordingly, “medical lawfare” refers to Israel’s strategy “to legitimize attacks on lifesaving and sustaining infrastructures by shifting the blame for these attacks onto the Palestinians themselves.”<sup>86</sup> According to Albanese,

reliance on the strategy of treating hospitals as medical shields, disregarding their function as indispensable hubs of societal survival for the thousands injured and many more seeking shelter, exposes yet another aspect of the genocidal logic underpinning Israel’s military strategy.<sup>87</sup>

It follows from the preceding discussion that Israel cannot invoke IHL to frame and justify conduct that meets the threshold of genocide. According to Albanese, “there are reasonable grounds to believe that the threshold indicating the commission” of genocidal acts against Palestinians in Gaza “has been met.”<sup>88</sup> As Albanese’s report then shows, the legal community – including the ICJ and ICC – will need to scrutinize more critically the credibility of Israeli invocations of “security.” As Colombia argues, “the scale of indiscriminate suffering and widespread destruction wrought by the acts of the IDF as well [as] other measures enforced against all the members of the Palestinian population” refutes Israeli statements that sought to present a military objective whose focus is Hamas and thus deny the existence of a genocidal intent.<sup>89</sup>

Indeed, just a few days after the ICJ ruling, Haaretz published an article based on interviews with Israeli soldiers. The article reveals that Israeli troops created kill zones (or “extermination zones” in the Hebrew original) in Gaza and killed everyone who moved in these areas. The report thus doubts Israel’s numbers regarding designating those killed as “terrorists”:

The number of dead Gazans is now estimated to be over 32,000. According to the army, some 9,000 of these are terrorists. However, a host of reserve and standing army commanders who have talked to Haaretz cast doubt on the claim that all of these were terrorists. They imply that the definition of terrorist is open to a wide range of interpretation. It’s quite possible that Palestinians who never held a gun in their lives were elevated to the rank of ‘terrorist’ posthumously, at least by the IDF.<sup>90</sup>

---

<sup>84</sup> Ibid., para. 74.

<sup>85</sup> Nicola Perugini and Neve Gordon, “Medical Lawfare: The Nakba and Israel’s Attacks on Palestinian Healthcare,” *Journal of Palestine Studies* (9 April 2024): 3, doi:10.1080/0377919X.2024.2330366.

<sup>86</sup> Ibid.

<sup>87</sup> Albanese, “Anatomy of a Genocide,” para. 92.

<sup>88</sup> Ibid., para. 93.

<sup>89</sup> International Court of Justice, “Declaration of Intervention by the Republic of Colombia” (5 April 2024), Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), para. 127, <https://www.icj-cij.org/node/203860>.

<sup>90</sup> Kubovich, “Israel Created ‘Kill Zones’ in Gaza. Anyone Who Crosses into Them is Shot,” *Haaretz*, 31 March 2024.

In fact, even prior to 7 October 2023, several prominent human rights organizations made a similar argument questioning the justificatory discourse of “security.” As Amnesty notes in its 2022 apartheid report: “security is not a viable explanation for the prolonged and cruel discrimination to which Palestinians have been subjected.”<sup>91</sup> Similarly, Human Rights Watch in its 2021 report on apartheid states that Israel’s policies, individually justified by security arguments but constitute apartheid, are either a pretext or “have no legitimate security justification.”<sup>92</sup> Likewise, in its assessment of the siege imposed on Gaza in the 16 years preceding 7 October, Oxfam International dismisses Israel’s invocation of security to justify the imposition of restrictions on Palestinians in Gaza as lacking in credibility. Instead, it argues, predominantly political considerations have motivated these restrictions.<sup>93</sup> More recently, the Palestinian Authority asked ICJ to reject the argument that Israel’s “subjective determination” regarding its “security” can trump or condition the Palestinian people’s right of self-determination.<sup>94</sup>

Thus, “security” has long obscured the consolidation of apartheid, the prolongation of occupation, the imposition of siege, and the denial of self-determination. This backdrop of Jewish supremacy and increasing brutality of the Israeli regime contains within it the necessary dehumanization that justifies elimination. Thus, the frame of genocide should not be dismissed because of an alleged “coexistence of military and genocidal logics” because the invocation of military logic functions to obscure the genocidal logic. Hence, when considering whether genocidal intent can be inferred from the materials or context, the judges will benefit from considering Francesca Albanese’s analysis, beyond the question of starvation. In its Declaration of Intervention, Colombia asks the ICJ to take note of Albanese’s report and “give special probative status” to it because it can “assist the Court in assessing the substantive basis of the legal elements of genocidal conduct, as well as in attributing the required knowledge and intent.”<sup>95</sup>

### **Genocidal Intent**

Two other considerations need to be pointed out concerning the question of whether Israeli actions met the required threshold of genocidal intent: first, evidence presented in the provisional measures stage is not exhaustive and, second, the standard for assessing the intent should not be higher than that advocated by western states in the case of Myanmar. Demanding a higher standard in the case of Gaza would reveal, once again, the western hypocrisy in the interpretation and application of international law.

In its presentation before the ICJ in January 2024, South Africa argued that a “distinctive feature” of the case against Israel is the existence of overwhelming evidence for

---

<sup>91</sup> Amnesty International, *Israel’s Apartheid Against Palestinians*, 265.

<sup>92</sup> Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (27 April 2021).

<sup>93</sup> Oxfam International, “Israel’s Blockade of Gaza Hits 15 Years with No Diplomatic Resolution in Sight,” 15 June 2022, <https://www.oxfam.org/en/press-releases/israels-blockade-gaza-hits-15-years-no-diplomatic-resolution-sight>.

<sup>94</sup> International Court of Justice, *The Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Request for Advisory Opinion Submitted by the General Assembly of the United Nations), Public Sitting (19 February 2024), Philippe Sands, “The Violation of the Right to Self-Determination of the Palestinian People,” 86, at 93–4.

<sup>95</sup> Declaration of Intervention by the Republic of Colombia (5 April 2024), paras. 36, 73.

genocidal intent as well as incitement to genocide.<sup>96</sup> Similarly, Albanese points out in her March report that “direct evidence of genocidal intent is uniquely present” in statements that “painted the whole population as the enemy to be eliminated and forcibly displaced.”<sup>97</sup> Likewise, in its 5 April submission to the Court, Colombia argues that regarding “specific intent” in Article II of the Genocide Convention, “all of these thresholds have been clearly surpassed, as the Application of South Africa showed.”<sup>98</sup> Genocidal intent can be “reasonably inferred” from both Israel’s pattern of conduct and its officials’ statements, Colombia further argues.<sup>99</sup> It concludes that the case presented by South Africa is compelling, and that Israel has “committed all of the acts punishable under Article III of the Convention.”<sup>100</sup>

It should be recalled, however, that evidence introduced by South Africa to the ICJ and included in Albanese’s report is merely illustrative and not exhaustive. South Africa can present additional evidence in the merits stage before the ICJ. For example, the commander of the 36th Armored Division, Brig. Gen. David (Dadu) Bar Khalifa, wrote at the end of October a public letter to the troops who were about to enter Gaza in the ground invasion. The leading Israeli website Ynet published this letter, which included the following:

What has been will be no more! We shall go out to it in war, we shall pulverize every accursed plot of land from which it came, we shall destroy it and the memory of it ... and we shall not return until it is annihilated, and [God] doth render vengeance to his adversaries, and doth make expiation for the land of His people ...<sup>101</sup>

Adding more statements like this one will further bolster South Africa’s case by increasing the number of statements cited and thus weaken Israel’s ability to dismiss genocidal statements or explain them away. Despite Israel’s invocation of contrary statements,<sup>102</sup> the ICJ should give statements in Hebrew for domestic audiences greater weight than statements in English.

The second point relates to the required threshold itself. It is helpful in this context to recall the Joint Declaration of Intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom,<sup>103</sup> which they submitted in the ICJ case of *The Gambia v. Myanmar*.<sup>104</sup> This Declaration should be treated as the benchmark for assessing the hypocrisy of western states in the case of holding Israel to account for its genocide in Gaza.

---

<sup>96</sup> International Court of Justice, Verbatim Record, Public Hearing on 11 January 2024, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), para. 36, p. 41, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf>.

<sup>97</sup> Albanese, “Anatomy of a Genocide,” para. 50.

<sup>98</sup> Declaration of Intervention by the Republic of Colombia (5 April 2024), paras. 112, 117.

<sup>99</sup> *Ibid.*, paras. 124–5.

<sup>100</sup> *Ibid.*, paras. 155–6.

<sup>101</sup> Quoted in Uri Misgav, “Israel, Beware: In War, Apocalyptic Jewish Ultra-Nationalists Are in a State of Ecstasy,” *Haaretz*, 2 November 2023. The complete Hebrew letter was published in Yoav Zeitun, “The Division Commander’s Letter to the Fighters: ‘The Enemy Who Asked for Hell, Will Get Hell,’” *Ynet*, 29 October 2023, <https://www.ynet.co.il/news/article/b1tj8tozt>.

<sup>102</sup> See reference to such Israeli statements in “Separate Opinion of Judge *ad hoc* Barak” (26 January 2024), 8, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>.

<sup>103</sup> Joint Declaration of Intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom (15 November 2023).

<sup>104</sup> International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), <https://www.icj-cij.org/index.php/case/178>.

Crucially, these six western states argue with respect to the assessment of the “special intent” that is required to prove the commission of a genocide:

the Court’s approach has prompted mixed reactions among commentators, some of whom take the view that the standard of “the only inference that could reasonably be drawn” sets the bar unduly high. The Declarants submit that, precisely because direct evidence of genocidal intent will often be rare, it is crucial for the Court to adopt a balanced approach that recognizes the special gravity of the crime of genocide, without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide near-impossible ... when determining whether or not specific intent can be inferred from conduct, a court or tribunal must weigh the evidence before it, and filter out inferences that are not reasonable. Put differently, the “only reasonable inference” test applies only between alternative explanations that have been found to be reasonably supported by the evidence.<sup>105</sup>

The states emphasize that the “only reasonable inference” test relates to assessing an inference from a “pattern of conduct” and not to other evidence.<sup>106</sup> They also add that “when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically.”<sup>107</sup> Indeed, “the specific intent requirement in Article II should be construed in such a way that the overall factual picture is taken into account, rather than each individual incident or alleged underlying act of genocide being considered in isolation.”<sup>108</sup>

Consider specifically the example of the targeting of children (including, “serious bodily or mental harm,” “conditions of life that will bring about the physical destruction of members of a group,” and “forced displacement”).<sup>109</sup> These states declare that “the targeting of children is relevant to the determination of specific intent” as per Art. II of the Convention.<sup>110</sup> They offer three reasons in support of this argument: First, “Evidence that children have been targeted on a significant scale would be likely to preclude a defense that members of a protected group were targeted solely for certain other reasons, such as that they posed a security threat.”<sup>111</sup> Second,

the targeting of children provides an indication of the intention to destroy a group as such, at least in part. Children are essential to the survival of any group as such, since the physical destruction of the group is assured where it is unable to regenerate itself.<sup>112</sup>

Thirdly,

where children are targeted ... this may assist in demonstrating the existence of the requisite intent. Given the significance of children to the survival of all groups, evidence of harm to children may contribute to an inference that the perpetrators intended to destroy a substantial part of the protected group.<sup>113</sup>

When these considerations are applied to the case of Israel’s actions in Gaza, it is difficult to see how any of these six western states can deny the existence of a genocide given

---

<sup>105</sup> Joint Declaration of Intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, paras. 51–2.

<sup>106</sup> *Ibid.*, para. 53.

<sup>107</sup> *Ibid.*, para. 54.

<sup>108</sup> *Ibid.*, para. 56.

<sup>109</sup> Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>110</sup> *Ibid.*, para. 71.

<sup>111</sup> *Ibid.*, para. 68.

<sup>112</sup> *Ibid.*, para. 69.

<sup>113</sup> *Ibid.*, para. 70.

Israel's pattern of conduct. On 13 October 2023, the World Health Organization urged Israel to rescind its mass evacuation orders and warned that:

With ongoing airstrikes and closed borders, civilians have no safe place to go. Almost half of the population of Gaza is under 18 years of age. With dwindling supplies of safe food, clean water, health services, and without adequate shelter, children and adults, including the elderly, will all be at heightened risk of disease.<sup>114</sup>

Despite these warnings, as of 22 April 2024, Israel killed 34,151 Palestinians in Gaza, including 14,685 children.<sup>115</sup> With thousands more estimated to be buried under the rubble, these numbers are expected to be even more horrific when final numbers become available. Crucially, the deliberate nature of the targeting is clear in that, by 22 January, forty two per cent of the victims in Gaza were killed in Southern areas that Israel had declared as "safe."<sup>116</sup> Already on 29 October 2023 Save the Children declared that the "number of children reported killed in just three weeks in Gaza is more than the number killed in armed conflict globally – across more than 20 countries – over the course of a whole year, for the last three years."<sup>117</sup> On 10 November, the World Health Organization stated that a "child is killed on average every 10 min in the Gaza Strip."<sup>118</sup> Witnesses and doctors revealed that Israeli snipers and quadcopter drones targeted Palestinian children, with gunshots in the head.<sup>119</sup> In addition to direct killing, the "serious bodily harm" that Israel inflicted on Gaza's children is evident in the unprecedented numbers of amputations.<sup>120</sup> The "serious mental harm" that Israel inflicted on Palestinian children was evident already in October 2023,<sup>121</sup> and became even more evident in April 2024.<sup>122</sup> In February 2024 UNICEF estimated that at least 17,000 children were left orphaned or separated from their parents.<sup>123</sup> Finally, the destructive conditions that Israel inflicted are clear in the effect of starvation on children. This is illustrated not only in the 27 children who died by mid-April 2024, but also in the fact that "for many

<sup>114</sup> "WHO Pleads for Immediate Reversal of Gaza Evacuation Order to Protect Health and Reduce Suffering," 13 October 2023, <https://twitter.com/WHO/status/1712887617539186991>.

<sup>115</sup> "UN Human Rights Chief Deplores Harrowing Killings of Children and Women in Rafah" (23 April 2024), <https://www.ohchr.org/en/press-releases/2024/04/un-human-rights-chief-deplores-harrowing-killings-children-and-women-rafah>. Those killed also include 9,670 women. Although these innocent victims include men, the "gendered" nature of genocide is often inferred from "the wanton killing of women and children" because genocide is "motivated by making impossible the reproduction of the ethnic or national group." Ronald Grigor Suny, "Genocide in Real Time," *The Nation*, 25 April 2024, <https://www.thenation.com/article/world/palestine-israel-genocide-gaza-war-biden/>.

<sup>116</sup> Albanese, "Anatomy of a Genocide," para. 80.

<sup>117</sup> Save the Children, "Gaza: 3,195 Children Killed in Three Weeks Surpasses Annual Number of Children Killed in Conflict Zones Since 2019," 29 October 2023, <https://www.savethechildren.net/news/gaza-3195-children-killed-three-weeks-surpasses-annual-number-children-killed-conflict-zones>.

<sup>118</sup> Michelle Nichols, "A Child Killed on Average Every 10 Minutes in Gaza, Says WHO Chief," *Reuters*, 11 November 2023, <https://www.reuters.com/world/middle-east/child-killed-average-every-10-minutes-gaza-says-who-chief-2023-11-10/>.

<sup>119</sup> Chris McGreal, "'Not a Normal War': Doctors Say Children Have been Targeted by Israeli Snipers in Gaza," *The Guardian*, 2 April 2024; OCHA, "Hostilities in the Gaza Strip and Israel | Flash Update #152," 12 April 2024, <https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-152>; Irfan Galaria, "I'm an American Doctor who Went to Gaza. What I Saw Wasn't War – it was Annihilation," *Los Angeles Times*, 16 February 2024.

<sup>120</sup> Eliza Griswold, "The Children who Lost Limbs in Gaza," *New Yorker*, 21 March 2024.

<sup>121</sup> Harriet Sherwood, "Children in Gaza 'Developing Severe Trauma' after 16 days of Bombing," *The Guardian*, 22 October 2023.

<sup>122</sup> Bethan McKernan, "'Chronic Traumatic Stress Disorder': The Palestinian Psychiatrist Challenging Western Definitions of Trauma," *The Guardian*, 14 April 2024.

<sup>123</sup> Al-Jazeera, "UN Estimates 17,000 Gaza Children Left Unaccompanied amid Israel's War," 2 February 2024, <https://aje.io/an3k76>.



more, it may be too late to reverse the excruciating toll that starvation takes on small, growing bodies.”<sup>124</sup> In light of these facts, it is unsurprising that UN officials have repeated for months that this is a “war on children” and on childhood,<sup>125</sup> and that Gaza has become a “graveyard for children.”<sup>126</sup>

It follows that if these six western states were to deny that Israel has committed a genocide, they would exhibit double standards.<sup>127</sup> The reasonable inference from the application of such standards is that they are motivated by a racist approach that considers Palestinian lives expendable. Israel’s invocation of security pretexts is not credible because, as these states stipulate, targeting children on this scale is “likely to preclude a defense that members of a protected group were targeted solely for certain other reasons, such as that they posed a security threat.”<sup>128</sup> Moreover, these states effectively argue that the law is not immutable, and they made an argument stipulating how it should be interpreted in future genocide-related cases.

Ultimately, the law is what the judges say is the law. If the ICJ judges find the arguments made by Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom convincing, they will need to apply it consistently. If this interpretation is applied consistently, without double standards, the conclusion should be that the threshold of intent is met, and Israel violated the Genocide Convention by committing acts with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>129</sup>

### **Judge Barak’s Existential War**

To further question Israel’s use of the security logic to frame its actions in Gaza, consider Judge *ad hoc* Barak’s interventions. Barak was appointed by Israel to sit on the bench for the duration of the case of South Africa v. Israel. In January Barak wrongly claimed that the Court accepted Israel’s right to self-defence.<sup>130</sup> In fact, the Court simply noted Israel’s argument and ignored it. This is understandable because “self-defence” is irrelevant since genocide can be committed in a state of war or peace, as the Convention makes clear. Even states acting in self-defence are required to comply with international law, including the prohibition on genocide and apartheid. Moreover, it is crucial to remember that despite the invocation of self-defence, Israel did not respond to an external attack by an entity that crossed a sovereign border. Rather, the attack originated from an occupied

<sup>124</sup> Bethan McKernan, “It’s Death There’: Babies and Children Hit Hardest as Famine Tightens Hold on Gaza,” *The Guardian*, 15 April 2024.

<sup>125</sup> See, e.g. “Gaza: Number of Children Killed Higher than from Four Years of World Conflict,” 14 March 2024, <https://news.un.org/en/story/2024/03/1147512>.

<sup>126</sup> UNICEF, “Gaza has Become a Graveyard for Thousands of Children,” 31 October 2023, <https://www.unicef.org/press-releases/gaza-has-become-graveyard-thousands-children>; UN, “Gaza ‘Becoming a Graveyard for Children’, Warns UN Secretary-General, Calling for Humanitarian Ceasefire – Press Release,” 6 November 2023, <https://www.un.org/unispal/document/gaza-becoming-a-graveyard-for-children-warns-un-secretary-general-calling-for-humanitarian-ceasefire-press-release/>.

<sup>127</sup> The UK maintains “that Israel’s actions in Gaza cannot be described as a genocide, which is why we thought South Africa’s decision to bring the case was wrong and provocative.” Foreign, Commonwealth & Development Office, “Press Release: International Court of Justice Interim Ruling on South Africa vs Israel: FCDO Statement,” 27 January 2024, <https://www.gov.uk/government/news/statement-on-the-interim-icj-ruling-in-south-africa-vs-israel>.

<sup>128</sup> Joint Declaration of Intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, para. 68.

<sup>129</sup> Art. II, Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>130</sup> “Separate Opinion of Judge *ad hoc* Barak” (26 January 2024).

territory. Thus, as argued with respect to previous onslaughts on Gaza, Israel cannot invoke the right to self-defence when its actions are seeking to maintain an illegal occupation and apartheid and when it is attacking a population it occupies.<sup>131</sup>

In his March 2024 opinion, and echoing the language used by Israel's submission on 15 March,<sup>132</sup> Judge Barak charges that "the Court has accepted South Africa's invitation to become the micromanager of an armed conflict and use the Genocide Convention as an excuse to rule on the basis of international humanitarian law."<sup>133</sup> He thus deploys the Israeli narrative that seeks to return the legal framing to IHL, as in previous rounds of Israeli onslaughts on Gaza, despite the unprecedented nature of the genocidal campaign, even when compared to the previous highly disproportionate onslaughts on Gaza.

Yet, this invocation of IHL by a judge whose career was defined by his role as a "diplomat judge,"<sup>134</sup> or Israel's main defender abroad, is particularly unconvincing. Positing a neat separation between law and politics, Judge Barak accuses his fellow judges with "leaving the land of law and entering the land of politics. The ideas of a judge as a human being should not determine the opinions of a human being when he or she acts as a judge."<sup>135</sup>

But to what extent Barak himself is acting as a "judge" rather than a partisan? After all, prior to his appointment, Barak had declared that Israel's conduct is consistent with international humanitarian law.<sup>136</sup> In other words, he denies the applicability of the Genocide Convention, appeals to IHL, but had already determined even before the legal proceedings began that Israel's conduct was compliant with IHL. No wonder that, after announcing his appointment, Israeli media declared that this will be an occasion to examine the "High Court saves Israel at the Hague" theory that he propagated.<sup>137</sup> Towards the end of his 28 March opinion, Barak states: "The war in Gaza is Israel's second war of independence. Israel's very existence was imperilled on 7 October 2023, and since that time, the daughters and sons of Israel have made the ultimate sacrifice to safeguard their nation's survival."<sup>138</sup>

This statement is revealing for three reasons. First, fifteen out of sixteen ICJ judges said that there is a grave risk of genocide, that man-made famine is already present in Gaza, and that Palestinians in Gaza should be protected from this risk. This horrific and morally

<sup>131</sup> International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, at para. 139, p. 62, <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; Noura Erakat, "No, Israel does Not Have the Right to Self-defense in International Law against Occupied Palestinian Territory," *Jadaliyya*, 11 July 2014, <https://www.jadaliyya.com/Details/27551>; John Dugard, "Debunking Israel's Self-defense Argument," *Al-Jazeera*, 31 July 2014, <http://america.aljazeera.com/opinions/2014/7/gaza-israel-internationalpoliticsunicc.html>.

<sup>132</sup> International Court of Justice, "Observations of the State of Israel on the Request Filed by South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated" (15 March 2024), <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240315-wri-01-00-en.pdf>.

<sup>133</sup> "Separate Opinion of Judge ad hoc Barak" (28 March 2024), para. 6, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>.

<sup>134</sup> Nimer Sultany, "The Legacy of Justice Aharon Barak: A Critical Review," *Harvard International Law Journal Online* 48 (2007): 83–92, <http://www.harvardilj.org/online/113>; Nimer Sultany, "Activism and Legitimation in Israel's Jurisprudence of Occupation," *Social & Legal Studies* 23, no. 3 (2014): 315–39.

<sup>135</sup> "Separate Opinion of Judge ad hoc Barak" (28 March 2024), para. 10.

<sup>136</sup> Nathan VanderKlippe, "Israel not in Violation of Humanitarian Law, Israeli Jurist Says," *The Globe & Mail*, 2 November 2023.

<sup>137</sup> See, e.g. Netael Bandel, "The Test of Aharon Barak: Will the High Court Really Save us from the Hague?" *Israel Hayom*, 7 January 2024 (Hebrew), <https://www.israelhayom.co.il/news/law/article/15063422>; Dina Zilber, "Barak's Appointment is a Flak Jacket for Israel at the International Court of Justice," *Haaretz*, 8 January 2024.

<sup>138</sup> "Separate Opinion of Judge ad hoc Barak" (28 March 2024), para. 34.

indefensible situation is described by Barak as “Israel’s second war of independence.” This begs the question of what it says about Israel when its “independence” equates with or requires the commission of the crimes of starvation, ethnic cleansing, and genocide. Repeatedly. As Israeli cabinet minister (and former director of Israel’s internal intelligence service, Shin Bet) Avi Dichter said in November 2023: “We’re rolling out Nakba 2023,” in reference to the ethnic cleansing of over 750,000 Palestinians and the destruction of more than 500 villages and towns in 1948.<sup>139</sup>

Second, to understand why Judge Barak’s statement “this is an existential war” is indefensible, it suffices to compare him to current and former Israeli security officials who contradict him. During October 2023, former prime minister, defence minister, and chief of staff Ehud Barak stated that “We’re not facing an existential threat from Hamas,”<sup>140</sup> and that “Israel is not under existential threat.”<sup>141</sup> Similarly, Yossi Cohen, former head of the Israeli intelligence agency, the Mossad, declared in November 2023: “There is no existential threat, this is not an independence war. We are not fighting over our existence, and we are not fighting for independence.”<sup>142</sup> Likewise, Military Intelligence Director Maj. Gen. Aharon Haliva said on 1 November 2023: “It is not an existential war. The existence of the State of Israel is not at stake. But this is a war about the manner of our existence.”<sup>143</sup> Finally, Tamir Pardo, former director of the Mossad, criticized in late November 2023 Prime Minister Netanyahu “for giving the false impression that the country’s very existence was at stake, when in fact it was not.”<sup>144</sup>

These statements by key experts in Israel show that Judge Barak’s rhetoric, which echoes Netanyahu’s propoganda, is highly problematic. Moreover, even if Hamas’s attack could be construed as an existential threat on 7 October, it cannot be construed this way in military terms, in the days, weeks, and months that followed when Israel regained the upper hand and powerful western states lined up to support it. Thus, Barak’s should be dismissed as tendentious and mendacious rhetoric that seeks to conceal the reality of mass slaughter and to subordinate the legal assessment to overriding policy goals.

Thirdly, what is missing from Barak’s logic of “existential war” and “war of independence” is the gross asymmetry of power between those who impose apartheid and those who are subjected to it, between occupier and occupied, between colonizer and colonized. The stronger party is the one claiming to be under “existential threat” when it is the one killing the weaker party *en masse*. Notwithstanding these representations, Hamas’s attack did not change this structural disparity, and did not remove Israel from the status

---

<sup>139</sup> Michael Hauser Tov, “‘We’re Rolling Out Nakba 2023,’ Israeli Minister Says on Northern Gaza Strip Evacuation,” *Haaretz*, 12 November 2023.

<sup>140</sup> “Ehud Barak Blames Binyamin Netanyahu for ‘The Greatest Failure in Israel’s History,’” *The Economist*, 15 October 2023, <https://economist.com/middle-east-and-africa/2023/10/15/ehud-barak-blames-binyamin-netanyahu-for-the-greatest-failure-in-israels-history>.

<sup>141</sup> “Israel is not Under Existential Threat, says Former Israeli Prime Minister Ehud Barak,” *CNBC*, 11 October 2023, <https://cnbc.com/video/2023/10/11/israel-is-not-under-existential-threat-says-former-israeli-prime-minister-ehud-barak.html>.

<sup>142</sup> Nir Cohen, “Yossi Cohen: Independence War? There is No Existential Threat ... ” *Ynet*, 3 November 2023 (in Hebrew), <https://www.ynet.co.il/news/article/yokra13661303>.

<sup>143</sup> Video available at: Leilach Shoval, “Director of Military Intelligence: ‘We are not in an Existential War,’” *Israel Yayom*, 1 November 2023 (Hebrew), <https://www.israelhayom.co.il/news/defense/article/14774816>.

<sup>144</sup> Jamie Dettmer, “Israel’s Trauma was Compounded by Talk of an Existential Threat,” *Politico*, 27 November 2023, <https://www.politico.eu/article/israels-trauma-was-compounded-by-talk-of-an-existential-threat/>.

of the dominant party. This, indeed, is the crucial background for the following part of the article that discusses the duty to prevent and the lack of judicial order to cease fire.

### **Erga Omnes, Duty to Prevent, and Paragraph 44**

On the 6 March 2024, South Africa applied to the ICJ with an urgent request to indicate additional measures and modification of the previous measures that were ordered in January. The application warned that “South Africa fears that this Application may be the last opportunity that this Court shall have to save the Palestinian people in Gaza” and added:<sup>145</sup>

In the Bosnian Genocide case, the Court declined to order the additional provisional measures requested on 27 July 1993. Within two years, approximately 7,336 Bosnians in the so-called ‘safe area’ of Srebrenica had been slaughtered, in what this Court retrospectively determined to have been a genocide. Here, South Africa respectfully calls on this Court to act again now – before it is too late – to do what is within its power to save Palestinians in Gaza from genocidal starvation.<sup>146</sup>

This urgency was also reflected in the provisional measures that South Africa requested. These included the following three measures that the Court declined to indicate in its March order:

1. All participants in the conflict must ensure that all fighting and hostilities come to an immediate halt, and that all hostages and detainees are released immediately. 2. All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must ... take all measures necessary to comply with all of their obligations under the Convention ... 3. All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must ... refrain from any action, and in particular any armed action or support thereof, which might prejudice the right of the Palestinians in Gaza to be protected from acts of genocide ... or which might aggravate or extend the dispute before the Court ...<sup>147</sup>

In its March order, the ICJ conveys an implicit demand for ceasefire without making it explicit or articulating it in the new measures that the Court issued. The Court notes “certain declarations of representatives of the UN and the various organizations attempting to provide relief in Gaza, according to which the catastrophic humanitarian situation can only be addressed if the military operations in the Gaza Strip are suspended.”<sup>148</sup> Moreover, considering the consequences of Israel’s military operations, and the inability to provide humanitarian relief without suspending military activity, the Court reaffirmed the risk of genocide in Gaza.<sup>149</sup>

Nevertheless, the ICJ declined to issue an explicit order regarding ceasefire, pointing to Article 59 of the ICJ Statute and the fact that the court’s judgments are binding on the parties before it, and not on third parties (such as Hamas) that are not a party to the

<sup>145</sup> International Court of Justice, “Urgent Request and Application for the Indication of Additional Provisional Measures and the Modification of the Court’s Prior Provisional Measures Decisions Pursuant to Article 41 of the Statute of the International Court of Justice and Articles 75 and 76 of the Rules of Court of the International Court of Justice” (6 March 2024), para. 33, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240306-wri-01-00-en.pdf>

<sup>146</sup> *Ibid.*, para. 34.

<sup>147</sup> *Ibid.*, para. 17.

<sup>148</sup> International Court of Justice, “Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Provisional Measures, Order” (28 March 2024), para. 36.

<sup>149</sup> *Ibid.*, para. 40.

legal proceedings before the Court. Yet, this part of the ruling (paragraph 44) is the most controversial and problematic part of the ICJ's order. First, it exposes disagreement amongst the judges. Secondly, it ignores the question of third state obligations to prevent genocide.

At the outset, it should be recalled that the Court rejected South Africa's request for three measures, not one, as the previous quote from the 6 March application shows. Whereas the first requested measure was directed at "participants in conflict," the second and third were directed at "All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide." The Court did not distinguish between these two categories nor provide a compelling reasoning for the rejection of all these three measures. It thus failed to adequately reinforce and elucidate the obligation to prevent genocide.

### ***Participants in the Conflict: Ordering Israel to Cease its Military Activity***

As far as the demand for ceasefire is concerned, it is not clear why the Court approvingly referred to the UNSC 2728 ("Ramadan Ceasefire Resolution") without taking the additional step of following the example of the UNSC and making a similar determination. In January, when the Court issued its first order, the judges would have noticed the repeated failure of the UNSC to issue a ceasefire resolution in light of the US intransigence. One thus can speculate that the judges feared that a judicial ceasefire order would not be respected by Israel nor enforced by the UNSC. Courts, whether international or domestic, are dependent on other authorities for enforcement, and do not want to expose their weakness. Yet, by the end of March, UNSC Resolution 2728 had provided the Court with a political opening that seemed to allow the Court to go further than it did in January. This step seemed required, considering the increasing consensus amongst the judges regarding the effect of Israel's actions in Gaza and the recognition that the humanitarian catastrophe cannot be effectively addressed without a cessation of the Israeli military activities.

Surprisingly, Judge Bhandari joined the majority in March, even though in January he stood out by emphasizing the need to go further and order a cessation of fighting. The Court, he writes in his January separate declaration, "must, in this case, take into account the widespread destruction in Gaza and loss of life that the population of Gaza has thus far endured."<sup>150</sup> He then concludes that "Going further, though, all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt."<sup>151</sup> Considering that by the end of March Israel has inflicted much more killing and destruction on Gaza than it did in January, it is unclear why Judge Bhandari retreated and refrained from "going further."

In contrast, seven judges (Salam, Xue, Brant, Gómez Robledo, Tladi, Yusuf, and Charlesworth), in separate declarations, point out the flaw in the Court's brief reasoning in that it did not adequately respond to the situation it itself identified. These judges stipulate that the Court should "explicitly" have ordered Israel to suspend its military operations,<sup>152</sup> "precisely because" – Judge Charlesworth writes – "this is the only way to ensure that

---

<sup>150</sup> "Declaration of Judge Bhandari" (26 January 2024), para. 8, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-03-en.pdf>.

<sup>151</sup> *Ibid.*, para. 11.

<sup>152</sup> "Joint declaration of Judges Xue, Brant, Gómez Robledo and Tladi" (28 March 2024), para. 4 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>.

basic services and humanitarian assistance reach the Palestinian population.”<sup>153</sup> In other words, the Court declined to order the means that are “indispensable” to achieve the end it itself indicated.<sup>154</sup>

In support of this reasoning, it is worth highlighting two additional arguments. First is Judge Charlesworth’s argument that even if the Court cannot order a ceasefire directed at Israel and Hamas, it can at least mitigate the risk of genocide by ordering Israel, the party before it, to cease its military activities in Gaza.<sup>155</sup> Call this the “doing the minimum possible in the circumstances” argument. The fact that you cannot order both, does not mean you cannot order one, especially when it is the primary party accused of genocide and the unquestionably dominant party amongst the two involved in the fighting: the stronger party, the occupying party, the nuclear state.

Another argument is Judge Yusuf’s invocation of the obligation to prevent. Highlighting the “function to prevent,” he writes that “the Court cannot take the position of a powerless bystander in the face of the possible commission of acts which are so offensive to the conscience of humanity.”<sup>156</sup> Thus,

When the evidence indicates ... that the extent of the atrocities committed against civilians ... is of an order which exceeds by far the necessities of war and the limits imposed by the laws of war, it is the duty of the Court to call for an end to the killing ...<sup>157</sup>

Accordingly, the absence of an order for Israel to cease its military activity in this case, on the grounds that Hamas is not a party to the proceedings, undermines the logic of the judicial function in accordance with the Convention:

The argument that a State party to the Convention that is involved in a conflict with a non-State actor is not under an obligation to suspend its military operations to prevent genocide or should not be ordered to do so, unless the non-State actor is disarmed, makes no sense whatsoever. It is contrary to the very idea of prevention of genocide and to the objectives of the Convention ...<sup>158</sup>

What underlies these two judicial opinions by Yusuf and Charlesworth is a distinction between war and genocide. While demanding a ceasefire between two parties is typical in a traditional war situation, demanding a cessation of military activities by one party to protect the population of the second party from the risk of genocide is necessary in a situation of genocide. International law does not prevent war, but it prevents genocide. And if the conduct of war is genocidal then the suspension of military activity is the only solution. This is especially the case when the military activities are waged against a population within the state’s territory or a population in a territory that has been occupied for decades. Indeed, as judges Xue, Brant, Gómez Robledo, and Tladi remind readers:

Israel is the occupying Power in the Gaza Strip. It controls Gaza’s land border and all its land crossing access as well as its air and maritime areas. Israel’s dominant control over Gaza explains why Israel has the primary responsibility to ensure unhindered and unimpeded

---

<sup>153</sup> “Declaration of Judge Charlesworth” (28 March 2024), para. 7, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-05-en.pdf>.

<sup>154</sup> “Joint declaration of Judges Xue, Brant, Gómez Robledo and Tladi” (28 March 2024), para. 7.

<sup>155</sup> “Declaration of Judge Charlesworth” (28 March 2024), paras. 6 and 7.

<sup>156</sup> “Declaration of Judge Yusuf” (28 March 2024), para. 3, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>.

<sup>157</sup> *Ibid.*, para. 5.

<sup>158</sup> *Ibid.*, para. 8.

access, in particular, the land crossing access, for the delivery of humanitarian assistance to the Palestinians in Gaza. For that purpose, suspension of military operations, including its planned military operation in Rafah, under the circumstances, appears indispensable for any meaningful implementation of the provisional measures indicated.<sup>159</sup>

This is a crucial reminder precisely because the rhetoric of war, self-defence, and ceasefire has obscured the reality of the situation, which is an Israeli attack on a population it has occupied and subjugated for decades. As the ICJ stipulates in its 2004 Advisory Opinion on the Wall, Art. 51 of the UN Charter and self-defence are irrelevant in relation to threats emanating from territories under Israel's effective control.<sup>160</sup> The judges could have added in their March 2024 order that this is a population that has been dominated in an apartheid system, as extensive reports by both Amnesty International and Human Rights Watch had illustrated in the two years preceding 7 October.<sup>161</sup>

In addition to obscuring the gross asymmetry of power between the parties, the language of ceasefire obscures the fact that Israel must comply with its legal obligations regardless of the existence of a ceasefire (or a war). Indeed, the lack of ceasefire order in the ICJ's January provisional measures, despite Israeli and US propaganda, did not mean that Israel can ignore the measures requiring it to prevent and refrain from genocidal activities. Consider further that according to the negotiated terms of the November 2023 temporary ceasefire, Israel agreed to allow more humanitarian aid. But allowing humanitarian aid is an obligation upon Israel, even in the absence of a ceasefire. As UNSC Resolution 2417 stipulated in 2018, it is unlawful to starve civilians and deny them humanitarian access as warfare tactics.<sup>162</sup> Thus, since Israel has been using these unlawful tactics and since it was clear to the Court (see, e.g. judges Nolte and Yusuf) that Israel violated the January provisional measures, the Court should have ordered Israel in March to suspend its unlawful military activities, as demanded by the seven judges.

Ultimately, these disagreements between the judges show that legally the Court could have ordered Israel to cease its military activity if it wanted to, but it chose not to. As the seven judges demonstrate, there is no necessity, as a matter of legal reasoning and legal materials, in reaching the conclusion preferred by the majority. The judges had a choice.

### ***Obligations of All Parties to the Convention***

The same can be said regarding the second and third measures directed at "All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide." The implications of this demand are clear because they involve both the question of obligation to prevent genocide and the complicity of third parties in the commission of genocide. States are under a positive obligation to prevent when there is a "serious danger" of genocide, whereas complicity consists in assisting the perpetrator with the knowledge that

---

<sup>159</sup> "Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi" (28 March 2024), para. 7.

<sup>160</sup> International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, at para. 139, p. 62.

<sup>161</sup> Human Rights Watch, *A Threshold Crossed*; Amnesty International, *Israel's Apartheid Against Palestinians*.

<sup>162</sup> "Adopting Resolution 2417 (2018), Security Council Strongly Condemns Starving of Civilians, Unlawfully Denying Humanitarian Access as Warfare Tactics," 24 May 2018, <https://press.un.org/en/2018/sc13354.doc.htm>.

the perpetrator is engaged in genocide.<sup>163</sup> The ICJ's January order alerted all states that there is a risk of genocide in Gaza, that the population need to be protected, that state parties to the Convention have an obligation to prevent it, and that they at the very least should not be complicit in it. After the January order no state can plead ignorance of the unfolding genocide.<sup>164</sup> After the March order this knowledge of all states of a serious risk of genocide is even more established. After all, as Judge Yusuf explains in his separate opinion, "The alarm has now been sounded by the Court. All the indicators of genocidal activities are flashing red in Gaza."<sup>165</sup>

Thus, the failure to issue the second and third measures requested by South Africa is baffling, particularly in light of the continued supply of more deadly arms shipments to Israel from states with strong financial, military, and political links with Israel, chief amongst them the US, despite the UNSC ceasefire resolution 2728.<sup>166</sup> When analysing the commission of genocide in Gaza, the reasonable conclusion is that the US is a major enabler and partner in crime to Israel.<sup>167</sup> In the words of a leading Israeli commentator: "without arms and ammunition from the US, we would have had to resort to fighting with sticks and stones long ago."<sup>168</sup> In light of the reservations that the US attached to its ratification of the Convention,<sup>169</sup> requiring its consent to allow ICJ jurisdiction,<sup>170</sup> this importance is heightened in the proceedings that Nicaragua instituted in the ICJ against another state, Germany, in relation to its complicity in Israeli genocide.<sup>171</sup> Moreover, even after the second ICJ provisional measures, the UK announced that it will continue to licence arms' exports to Israel.<sup>172</sup> Continued arms supply and the suspension of financial support to UNRWA clearly illustrate these states' failure to discharge their duty to prevent.<sup>173</sup>

Considering this, in Paragraph 44 of the March order in *South Africa v. Israel*, the ICJ fails to explain why it refrained from elucidating the *erga omnes* obligations (i.e. directed towards all states) that were invoked in the second and third requested measures by South Africa. These obligations are not relevant only to questions of standing before the Court (and thus directed to third parties like South Africa that decide to intervene and initiate a legal proceeding), but to all state parties to the Convention. Consider first Judge Charlesworth statement in her March separate opinion:

<sup>163</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 521–2.

<sup>164</sup> Jinan Bastaki, "The ICJ's Provisional Orders Measures and the Responsibility of Third States," *Opinio Juris*, 5 February 2024, <https://opiniojuris.org/2024/02/05/the-icjs-provisional-orders-measures-and-the-responsibility-of-third-states/>.

<sup>165</sup> "Declaration of Judge Yusuf" (28 March 2024), para. 12.

<sup>166</sup> Julian Borger, "Why do Arms Continue to Flow from US to Israel Despite Ceasefire Resolution?" *The Guardian*, 1 April 2024.

<sup>167</sup> Avi Scharf, "OSINT Reveals Unprecedented Extent of U.S. Arms Airlift to Israel Since Oct. 7," *Haaretz*, 7 March 2024.

<sup>168</sup> Nehemia Shtrasler, "Netanyahu is Prolonging the Gaza War and Israel can't Afford it," *Haaretz*, 7 April 2024.

<sup>169</sup> Jordan J. Paust, "Congress and Genocide: They're not Going to Get Away with it," *Michigan Journal of International Law* 11 (1989): 90–104; Maria Frankowska, "The United States Should Withdraw its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal," *Michigan Journal of International Law* 12 (1990): 141–9.

<sup>170</sup> "(1) That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case." See <http://www.preventgenocide.org/law/convention/reservations/>.

<sup>171</sup> International Court of Justice, *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)* (2024), <https://www.icj-cij.org/case/193>.

<sup>172</sup> Pippa Crerar, "UK will not Suspend Arms Exports to Israel, David Cameron Says," *The Guardian*, 9 April 2024.

<sup>173</sup> Jinan Bastaki, "The 'Capacity to Influence', State Responsibility, and the Obligation to Prevent Genocide," *Opinio Juris*, 30 March 2024, <https://opiniojuris.org/2024/03/30/the-capacity-to-influence-state-responsibility-and-the-obligation-to-prevent-genocide/>.



While it is Israel's conduct that is in issue before the Court, it does not follow that South Africa has no role to play in preserving the rights in dispute. After all, invocation of responsibility for the breach of *erga omnes* obligations carries duties with it ... is open to the Court to order both Israel and South Africa to take all reasonable measures within their power to achieve an immediate and sustained humanitarian ceasefire ...<sup>174</sup>

These *erga omnes* obligations were invoked in previous ICJ jurisprudence, such as the 1996 case of *Bosnia and Herzegovina v. Yugoslavia*,<sup>175</sup> the earlier 1970 case of *Barcelona Traction*,<sup>176</sup> as well as legal scholars.<sup>177</sup> In *The Gambia v. Myanmar* case the ICJ held on 23 January 2020 that: "all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented," and that these obligations "are owed by any State party to all the other States parties to the Convention."<sup>178</sup>

This common interest was also invoked in paragraph 33 of the 26 January 2024 order for provisional measures in *South Africa v. Israel*. However, the duty to prevent genocide loses its "erga omnes" character if the Court hides behind technicalities and narrows down the discussion to the parties before it, ignoring "All Parties to the Convention on the Prevention & Punishment of the Crime of Genocide" that South Africa invoked.

Worse, while the Court invokes Art. 59 of the Statute ("The decision of the Court has no binding force except between the parties and in respect of that particular case") in paragraph 44 of its March order, it ignores another article in the ICJ Statute. Art. 41(1) states: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Seemingly, Art. 41 would have allowed the Court, if it wanted to or judges agreed, to indicate measures two and three, as requested by South Africa. Such provisional measures would have exhibited a proper understanding of the nature of this particular genocide, whose scale and duration would not have been likely without the crucial support of third parties with ties with, and influence over, Israel.

While there have been increasing calls to impose an arms embargo and sanctions on Israel,<sup>179</sup> it is crucial to remember that the illegality of Israel's conduct necessitating such an embargo and sanctions preceded the genocide in Gaza. Recall that the ICJ, in its discussion of the *erga omnes* character of the right to self-determination, in the *Wall Advisory Opinion* in 2004, states that:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory ... They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In

---

<sup>174</sup> "Declaration of Judge Charlesworth" (28 March 2024), para. 8.

<sup>175</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at para. 31.

<sup>176</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at paras. 33–4.

<sup>177</sup> Schabas, *Genocide in International Law*, 527.

<sup>178</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Order* (23 January 2020), para. 41, <https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

<sup>179</sup> "Arms Exports to Israel Must Stop Immediately: UN experts," 23 February 2024, <https://www.ohchr.org/en/press-releases/2024/02/arms-exports-israel-must-stop-immediately-un-experts>.

addition, all the States parties to the Geneva Convention ... are under an obligation ... to ensure compliance by Israel with international humanitarian law as embodied in that Convention.<sup>180</sup>

Considering the long-term denial of the Palestinian right to self-determination,<sup>181</sup> and Israel's long-standing impunity, Judge Xue was justified in her separate opinion in the ICJ January order, to highlight the special responsibility of UN organs including the ICJ towards Palestinians. "This responsibility requires that the United Nations, including its principal judicial organ, ensures that the Palestinian people are protected under international law, particularly protected from the gravest crime – genocide," Judge Xue writes.<sup>182</sup> Similarly, in its April intervention, Colombia further calls upon the ICJ "to execute" its "mandate" to prevent genocide "with a view to ensuring the safety and, indeed, the very existence of the Palestinian people."<sup>183</sup>

The ICJ's rejection of all three measures requested by South Africa – that is, a combined failure to order Israel to suspend the onslaught and to order third parties other than South Africa to comply with ICJ orders – is a failure to exercise this responsibility and execute this mandate. It is also a failure to articulate what it means that all state parties are on notice that they have a duty to prevent genocide in Gaza when everyone can see that western states have continued their support for Israel despite two ICJ orders. This failure defeats the purpose of prevention in the Genocide Convention.

## Conclusions

At the time of writing, 205 days have passed since Israel started its assault on Gaza. The media have published ceaseless revelations about Israel's crimes, such as the killing of 6-year-old Hind Rajab,<sup>184</sup> and the mass graves in Shifa and Nasser hospitals.<sup>185</sup> Despite this, an end to the decimation of Gaza and the annihilation of its population is still out of sight.

Legal discourse needs to match the reality of horror to maintain its relevance. Although legal scholars and commentators were slow to recognize the severity and urgency of the situation, this article sought to show that there is an emerging consensus that Israel's actions in Gaza are not another instance of armed conflict but instead amount to genocide. This genocide is committed against an integral component of the Palestinian people, a protected group under the Genocide Convention. The preceding discussion shows that obstacles facing a legal determination of genocide (namely, assessing the credibility of military logic and the existence of genocidal intent) are not insurmountable. The emerging consensus described here may not be overwhelming and will have to face

---

<sup>180</sup> International Court of Justice, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion," at para. 159, p. 200.

<sup>181</sup> Sands, "The Violation of the Right to Self-Determination of the Palestinian People," 94

The right of self-determination requires that UN Member States bring Israel's occupation to an immediate end. No aid. No assistance. No complicity. No contribution to forcible actions. No money, no arms, no trade, no nothing. All UN Members are obliged by law to end Israel's presence on the territory of Palestine.

<sup>182</sup> "Declaration of Judge Xue" (26 January 2024), para. 2, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-01-en.pdf>.

<sup>183</sup> Declaration of Intervention by the Republic of Colombia (5 April 2024), para. 188.

<sup>184</sup> Meg Kelly et al., "Palestinian Paramedics Said Israel Gave Them Safe Passage to Save a 6-year-old Girl in Gaza. They Were All killed," *Washington Post*, 16 April 2024.

<sup>185</sup> "Mass Graves in Gaza Show Victims' Hands Were Tied, Says UN Rights Office," 23 April 2024, <https://news.un.org/en/story/2024/04/1148876>.

opposition and potential judicial disagreement. Yet an overwhelming body of evidence supports it and a consistency in the application of standards requires it.

The legal discourse pertaining to the Question of Palestine has hitherto been dominated by International Humanitarian Law: the laws of armed conflict and occupation. These rules do not prevent war but regulate it, and do not prevent occupation but regulate it.<sup>186</sup> The interpretation and application of these rules have failed to humanize war and to prevent the consolidation of a colonial apartheid in Palestine under the guise of unlawful occupation. In the last few years, this discourse has advanced with the additional prisms of apartheid and genocide. While adding more law does not guarantee justice or accountability, apartheid and genocide give a relatively more comprehensive, and thus more accurate, framework for describing and analysing what Israel has inflicted on the Palestinian people after decades of depriving them of the right to self-determination.<sup>187</sup>

Law and politics are intertwined.<sup>188</sup> Thus, rather than a “belief” in the law that separates it from politics, and a cynical attitude that disregards law as irrelevant (or reduces it to politics), supporters of Palestinian freedom and human rights should capitalize on positive legal developments and mobilize to change the law when it falls short of the demands of justice.

## Acknowledgment

I would like to thank Michelle Staggs Kelsall, Nicola Perugini, Lutz Oette, Maha Abdallah, Omar McDoom, and Dirk Moses for helpful comments on a previous draft.

## Disclosure Statement

No potential conflict of interest was reported by the author(s).

## Notes on Contributor

**Nimer Sultany** is Reader in Public Law at SOAS University of London and the Editor-in-Chief of *The Palestine Yearbook of International Law*. Prior to joining SOAS, he practiced human rights law in Palestine, and was the director of the Political Monitoring Project at Mada al-Carmel – The Arab Centre for Applied Social Research. His book *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, 2017) won the 2018 Book Prize awarded by the International Society of Public Law and the 2018 Peter Birks Prize for Outstanding Legal Scholarship awarded by the Society of Legal Scholars.

---

<sup>186</sup> Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War,” *Columbia Journal for Transnational Law* 43 (2004): 1–71; Samuel Moyn, *Humane: How the United States Abandoned peace and Reinvented War* (London: Verso, 2022).

<sup>187</sup> Nimer Sultany, “The Question of Palestine as a Litmus Test: On Human Rights and Root Causes,” *The Palestine Yearbook of International Law* 23 (2022) 3–49.

<sup>188</sup> Duncan Kennedy, *A Critique of Adjudication* (fin de siècle) (Cambridge: Harvard University Press, 1998).