

UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

With Intent to Destroy

A Study of the Use of Evidence in
South Africa v. Israel

Author: Joel Malmgren
Supervisor: Kristina Hultegård
Examiner: Erik Björling

University of Gothenburg; School of Business, Economics and Law
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List of Abbreviations

ICC	The International Criminal Court
ICJ	The International Court of Justice
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of Yugoslavia
IDF	Israel Defense Forces
NTN	The Supreme National Tribunal of Poland
UNGA	United Nations General Assembly
UNISPAL	United Nations Information System on the Question of Palestine
UNSC	United Nations Security Council

Abstract

Since 7 October 2023, Israel has conducted a military operation in Gaza, resulting in widespread destruction, death, and humanitarian suffering. Whether these actions amount to genocide as outlined in the 1948 Genocide Convention has become the subject of intense debate, and in December 2023, the Republic of South Africa initiated proceedings before the International Court of Justice, requesting the Court to adjudicate whether Israel has acted in violation of its obligations under the Convention.

This thesis seeks to analyze South Africa and Israel's legal claims and evidentiary strategies. To contextualize and evaluate the evidentiary material presented, the traditional hierarchy of legal sources, as detailed in Article 38(1) of the Statute of the ICJ, will be employed. Using this method makes it possible to situate the parties' legal strategies within an established legal framework, thereby facilitating the understanding of the parties' choices.

Additionally, the thesis applies a discourse-analytical approach to the case, primarily to the legal narratives constructed by the parties. Much of the tension in the case can be traced to the history of colonialism. South Africa, itself once subjected to colonial rule and apartheid, draws parallels between its past and what it perceives as Israel's present systematic oppression of the Palestinian people. Postcolonial legal theories are applied as part of the study to examine this aspect of the case and how the parties' narratives are articulated to align with their historical roots. The purported genocide in Gaza has also been a divisive geopolitical issue, with the UN adopting several resolutions demanding that Israel respects international law and numerous countries expressing concern that genocidal acts might have taken place. Other states maintain that Israel only exercises its legitimate right to self-defense. The controversy surrounding the case and the geopolitical implications of it presents a valuable opportunity to examine the intersections between international law and international politics.

South Africa and Israel's evidentiary strategies are found to be profoundly impacted by their respective positions of power and geopolitics, with South Africa primarily relying on third-party sources such as human rights organizations and media, due to its inability to access Gaza. Many of these sources, such as the Gaza health ministry, have also had their legitimacy contested by, e.g., Israel and the US, complicating their evidentiary value. Israel, on the other hand relies almost exclusively upon evidence gathered by its government institutions, without the need to further justify the validity of these. This asymmetry illustrates how seemingly neutral legal mechanisms, such as the use of evidence, are deeply affected by geopolitics and power structures.

Introduction

> We will eliminate everything. If it doesn't take one day, it will take a week, it will take weeks, or even months, we will reach all places.[1]

On 7 October, an armed incursion took place in southern Israel, near the Gaza Strip. Many lives were lost, and the long-standing tension between Israel and Hamas quickly escalated into what some describe as a war, or legitimate acts of self-defense, and others, a genocide. The question of how to understand Israel's actions in the Gaza Strip has become one of the most controversial political issues of our time.[2] Regardless of how Israel's actions are characterized, the profound tragedy of the massive loss of life is undeniable. It is, however, of legal importance to examine whether Israel's action in Gaza could constitute genocide. Armed conflicts are not only about control over land or political influence, but also part of a struggle concerning the right to define reality. Who gets to distinguish savior from savage, genocide from war? And what part can law play in this struggle, over military dominance and the power to shape the narrative?

South Africa's decision to initiate proceedings against Israel in the International Court of Justice (ICJ) for the crime of genocide constitutes a critical moment for the Court. The process brings some of the most complex and politically charged legal issues of our time to the forefront, putting the effectiveness and relevance of international law to the test. This thesis focuses on how the parties use evidence to support their claims in *South Africa v. Israel.* Hopefully, the study will illuminate, not only the case itself, but also the wider limitations and possibilities of international law in the face of mass atrocities, especially relating to evidentiary challenges.

1.1 Purpose and Research Questions

This essay examines the highly publicized genocide trial that South Africa initiated against Israel on 29 December 2023. Specifically, it analyzes the evidence submitted by both sides in support of their claims, and how these relate to evidentiary standards and underlying power structures. Genocide is notably challenging to prove, with a high evidentiary threshold, particularly to establish genocidal intent.[3] 'Examine' is here to be understood as a relatively open search for a deeper understanding of the case, focusing on the use of evidence, and the power dynamics affecting it, particularly in relation to colonial structures. Such an examination should not be confused with an in-depth analysis of a very specific issue or an attempt to reach a conclusive answer to the merits of South Africa's accusation.

The legal claims and supporting evidence identified will first be analyzed against the requisites of genocide, which will be outlined in the background part of this thesis, using traditional legal

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[1] South Africa quoting former Israeli Minister of Defense, Yoav Gallant. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Request for the Indication of Provisional Measures) General list No. 192 [2023] https://www.icj-cij.org/node/203447 accessed 15 Feb 2025 142–144, para 101.

[2] A sample of articles on the subject: Alice Speri, 'Defining Genocide: How a Rift over Gaza Sparked a Crisis Among Scholars', *The Guardian* (London, 20 Dec 2024) https://www.theguardian.com/us-news/2024/dec/20/genocide-definition-mass-violence-scholars-gaza accessed 15 Feb 2025; Omer Bartov, 'Genocide, the Holocaust and October 7: 'On the Use and Misuse of Terminology'', (2024) 8 (2) *Antisemitism Studies* https://muse.jhu.edu/pub/3/article/939630/pdf accessed 15 Feb 2025 272; Tom Dannenbaum and Janina Dill, 'International Law in Gaza: Belligerent Intent and Provisional Measures' (2024) 118 (4), *American Journal of International Law* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4978205 accessed 15 Feb 2025 659.

[3] Guénaël Mettraeux, *International Crimes: Law and Practice: Volume I: Genocide* (Oxford University Press 2019) 223.

sources. Thereafter, a discourse analysis will be employed to deconstruct the underlying power structures embedded in the arguments and evidence presented. Finally, these results will be discussed through the lens of postcolonial perspectives.

Research Questions

I. What legal claims and supporting evidence do the parties to the case present regarding the elements required to establish the crime of genocide under the 1948 Genocide Convention?

II. How do the parties construct the essential aspects of the case through their discursive practices?

III. How can the findings from questions I and II be understood through postcolonial perspectives?

1.2 Background

1.2.1 Historical Background and Recent Development

Short Historical Background

This background will focus on the conflict as it has evolved from 1947, the year when the British mandate of Palestine was terminated, and the UN proposed dividing the territory into two distinct parts, one for the Jewish population and one for the Arab population. The British supported the idea of Palestine as a haven for the Jewish people and adopted the idea as government policy through the Balfour Declaration of 1917.[4] The declaration echoes the goals of the project that the Zionist Federation, spearheaded by Theodor Herzl, initiated in 1897 when the First Zionist Congress was held in Basel.[5] Zionism as an ideology centers around the idea of Palestine as a homeland for Jews and national self-determination as an existential need for the Jewish people.[6] The movement gained a significant following due to widespread antisemitic persecution during the 20th century, particularly after the Holocaust, and the Jewish migration to Palestine surged. Jewish people living in Palestine were noted as comprising 8% of the overall population in 1890; by 1947, this number had increased to 32%. The rapid growth of the Jewish population and the Arab population's reaction to this demographic change created a politically tense and violent situation, causing the British to relinquish their mandate to the UN.[7]

The partition of the land into a Jewish and an Arab state, as outlined in UN Resolution 181 (II), failed to achieve lasting peace or a solution tolerable to all parties. Representatives of the Arab population perceived it as the UN favoring European interests and vowed never to accept any partition of the land. David Ben-Gurion, head of the Jewish Agency and Israel's first Prime Minister, saw partitioning as the only viable path to achieve a Jewish state and welcomed the

[4] Nur Masalha, *The Palestine Nakba: Decolonising History, Narrating the Subaltern, Reclaiming Memory* (Zed Books 2012) 33; United Nations, 'Origins and Evolution of the Palestine Problem: 1917-1947, Part I ' *(UNISPAL)* https://www.un.org/unispal/history2/origins-and-evolution-of-the-palestine-problem/part-i-1917-1947/#Origins_and_Evolution_of_the_Palestine_Problem_1917-1947_Part_I accessed 17 Feb 2025; Martin Gilbert, *Israel: A History* (3rd ed, RosettaBooks LLC 2014) 231.
[5] Ibid; Masalha (n 4) 35.
[6] United Nations, 'Origins and Evolution of the Palestine Problem, part II:1947–1977' *(UNISPAL)* https://www.un.org/unispal/document/auto-insert-202927/ accessed 17 Feb 2025.
[7] Ibid; Gilbert (n 4) 80–107.

plan as a first step.[8] As a result, a Jewish state was established within the borders proposed by the UN on May 14, 1948. The following day, the armies of four Arab states entered the territory. This initiated the first Israeli-Arab war, which ended a year later in a ceasefire. By then, the West Bank had fallen under Jordanian control, and Egypt had taken control over Gaza. During this period, a significant part of the Palestinian population was forcibly displaced from the territory, an ethnic cleansing that has become known as the *Nakba*.[9] Several wars followed, most notably the *Six-Day War,* in which Israel gained control over the West Bank, Gaza, the Golan Heights, the Sinai Peninsula, and East Jerusalem. Until this day, Israel controls most of these areas. The Sinai Peninsula was returned to Egypt in 1979, and in 2005, Israeli settlers and military forces were withdrawn from Gaza. However, Israel maintains a tight grip on the Gaza Strip through control of the area's airspace, borders, territorial sea, trade, etc.[10]

This historical background is, by necessity, brief, but something should be said about the Oslo process, as it established a new status quo. To create peace and stability in the region, Yasser Arafat of the PLO and Yitzhak Rabin, the Israeli Prime Minister, agreed that the Gaza Strip and parts of the West Bank should be governed by Palestinians. The Oslo Accords also led to the creation of the Palestinian National Authority, the administrative body set up to control Palestinian territories, which the UN and Israel recognized as legitimate. Arafat and the PLO were elected to lead Palestine in the first formal election in 1996.[11]

Even though an agreement was reached through the Oslo Accords, it was not universally accepted. Radical elements on both sides felt that the concessions of the agreement were too far-reaching. Most notably, *Hamas*, a Palestinian Islamic fundamentalist organization designated as terrorists by, e.g., the EU, US, UK, and Israel.[12] Hamas rose to power in the Gaza Strip after winning the 2006 general elections. The election results, along with the tension between Fatah (a part of PLO) and Hamas, led to a short civil war, resulting in the Palestinian territory being divided. As a result, Gaza and the West Bank are presently controlled by separate administrations.[13]

Recent Development

Many different factors can be identified as contributing to the present situation which, according to South Africa, amounts to genocide. The October 7 Hamas-led attack on Israel must, however, be regarded as the immediate catalyst to Israeli retaliation.

The October 7 Attack

Several Palestinian militant organizations worked together, under the leadership of Hamas, to breach the border between the Gaza Strip and Israel in an attack which Hamas leaders have referred to as 'Operation Al-Aqsa Flood'. Thousands of rockets were launched into Israeli

[8] Masalha (n 4) 174; Gilbert (n 4) 176.
[9] Ibid; United Nations, 'The Palestine Question – Timeline' *(UNISPAL)* https://www.un.org/unispal/history/ accessed 17 Feb 2025; Masalha (n 4) 174.
[10] United Nations, 'History of the Question of Palestine' *(UNISPAL)* https://www.un.org/unispal/history/ accessed 6 Mar 2025; *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 36, para 24.
[11] United Nations, 'The Origins and Evolution of the Palestine Problem, part V:1989-2000' *(UNISPAL)* https://www.un.org/unispal/document/auto-insert-209471/ accessed 17 Feb 2025.
[12] Maya Lester KC and Michael O'Kane, 'Hamas and PIJ', (*Global Sanctions,* 2025) https://globalsanctions.com/region/hamas-pij/ accessed 18 Feb 2025.
[13] Nathan J. Brown, 'The Hamas-Fatah Conflict: Shallow but Wide' (2010) 34 (2) *The Fletcher Forum of World Affairs* https://www.jstor.org/stable/45289503 accessed 6 Mar 2025.

territory, which was then followed by several communities close to the border being attacked by ground forces. According to Israeli estimates, approximately 6000 militants were involved in the assault on these communities.[14] The Israeli authorities were seemingly taken by surprise, and 1195 people were killed, mostly Israeli civilians, but also 373 IDF soldiers and 79 foreign nationals. There are several reports detailing sexual assault and rape. Around 250 Israeli citizens were taken to Gaza as hostages.[15] Immediately after the attack, Benjamin Netanyahu, Prime Minister of Israel, addressed the nation. He described the assault as a *casus belli,* a cause to go to war, and declared that Israeli retaliation would be forceful:

> The IDF will immediately use all its strength to destroy Hamas's capabilities. We will destroy them, and we will forcefully avenge this dark day that they have forced on the State of Israel and its citizens. As Bialik wrote: 'Revenge for the blood of a little child has yet been devised by Satan'. All of the places which Hamas is deployed, hiding and operating in, that wicked city, we will turn them into rubble. I say to the residents of Gaza: Leave now because we will operate forcefully everywhere.[16]

Other Factors

The 7 October attack drastically escalated the conflict between Israel and Hamas and had vast implications for both parties. It did, however, not happen out of nowhere. Considering the events that led up to it is necessary to get a comprehensive understanding of the current situation.

In 2022, Benjamin Netanyahu returned to the office of Prime Minister. The coalition government installed under him has been described as the most right-wing in Israeli history, including far-right parties such as *Noam* and the *National Religious Party- Religious Zionism*. The new leadership pledged to expand Israeli control over the West Bank and to encourage more settlers to move to the region.[17] Several of the newly appointed ministers have been outspoken about their wishes to discriminate against the Arab population. Some notorious examples are when Itamar Ben-Gvir, Minister of National Security, said in 2019 that 'Arabs

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[14] Jerusalem Post Staff, 'Probe Reveals 6,000 Gazans Infiltrated Israel During October 7 massacre-report, *Jerusalem Post* (2024) https://www.jpost.com/israel-hamas-war/article-817176 accessed 19 Feb 2025.
[15] Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel , *Detailed findings on Attacks Carried Out on and After 7 October 2023 in Israel* (UN Human Rights Council, 10 June 2024) https://www.un.org/unispal/document/coi-attacks-7october2023-report-10jun24/ accessed 19 Feb 2025; Donald Bloxham, 'The 7 October Atrocities and the Annihilation of Gaza: Causes and Responsibilities'(2025) 1–26, *Journal of Genocide Research.* https://www.tandfonline.com/doi/full/10.1080/14623528.2025.2483546#d1e123 accessed 20 Jul 2025.
[16] Netanyahu speaking on 7 October. Israeli Ministry of Foreign Affairs, 'Statement by Prime Minister Benjamin Netanyahu' (2023) https://www.gov.il/en/pages/statement-by-pm-netanyahu-7-oct-2023 accessed 17 Feb 2025.
[17] Eleanor H Reich, 'Israel Swears in New Parliament, most Right Wing in History', *Associated press* (15 Nov, 2022) https://apnews.com/article/middle-east-religion-israel-benjamin-netanyahu-347e906749a862ffcf905ee0056e068f accessed 17 Feb 2025; Carrie Keller-Lynn, ''I've Done It': Netanyahu Announces his 6th Government, Israel's Most Hardline Ever', *The Times of Israel* (2 Jan 2023) https://www.timesofisrael.com/netanyahu-announces-his-sixth-government-israels-most-hardline-yet/ accessed 17 Feb 2025.

not loyal to Israel should be expelled',[18] and when Finance Minister Bezalel Smotrich claimed that 'there is no such thing as Palestine or Palestinians' while speaking in Paris in 2023.[19]

The political tensions were also exacerbated due to Israeli actions related to Muslim holy sites. Itamar Ben-Gvir, made headlines when he, along with other Jewish worshippers, marched to the Temple Mount to pray. A place of worship supposedly reserved for Muslim worshippers. The Al-Aqsa Mosque, located on the Temple Mount, was also raided several times by Israeli police during the Ramadan celebration. Police in riot gear fired rubber bullets and used batons against Palestinian worshippers. During these raids, 50 Palestinians were injured and 400 were arrested. The events at the Al-Aqsa Mosque caused a great amount of distress within the Palestinian community. Rockets were launched from Gaza into Israel in response to the raid, and some rockets were reportedly also launched from Lebanon.[20] Mohammed Deif, commander of the Al-Aqsa brigades, is claimed to have devised the 7 October attack in retaliation for the desecration of the mosque.[21]

The political development in the Middle East might also have been a contributing factor. One of Palestine's allies had started to warm up its relationship with Israel. Saudi Arabia took several steps in 2023 to normalize its relationship with Israel. These talks, facilitated by the USA, could potentially have scared Hamas that they were losing friends and that Israel was strengthening its position in the region.[22]

Additionally, the humanitarian situation in Gaza was deteriorating. Several reports from organizations such as UNCTAD, OXFAM, Amnesty, and the WHO indicated that Gazans were suffering increased hardships due to the Israeli blockade and the international sanctions imposed after Hamas came to power. A deep economic crisis due to the restricted movement of people and goods, causing an inability to gain income from work. An underfunded healthcare system and a lack of essential medicines. Repeated harassment from Israeli security forces and non-judicial arrests.[23] These were all issues that the people of Gaza faced before 7 October and

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[18] Jacob Magid, 'Otzma Yehudit candidate: Critics Have to go Back 30 Years in Order to Attack Us', *The Times of Israel* (24 Feb 2019) https://www.timesofisrael.com/otzma-yehudit-candidate-critics-have-to-go-back-30-years-in-order-to-attack-us/ accessed 17 Feb 2025.

[19] Associated Press in Tel Aviv,' Israeli Minister Condemned for Claiming 'No Such Thing as Palestinian People', *The Guardian* (20 Mar 2023) https://www.theguardian.com/world/2023/mar/20/israeli-minister-condemned-claiming-no-such-thing-as-a-palestinian-people-bezalel-smotrich accessed 17 Feb 2025.

[20] Clothildre Mraffko, 'Israel: Itamar Ben-Gvir Plays with Fire by Visiting Al-Aqsa Mosque Compound', *Le Monde* (4 Jan 2023) https://www.lemonde.fr/en/international/article/2023/01/04/israel-itamar-ben-gvir-plays-with-fire-by-visiting-the-al-aqsa-mosque-compound_6010275_4.html accessed 17 Feb 2025 accessed 17 Feb 2025; Abeer Salman et al, 'Israeli Police storm Al-Aqsa Mosque for the Second Time on Wednesday, *CNN* (6 Apr 2023) https://edition.cnn.com/2023/04/05/middleeast/israel-al-aqsa-mosque-clash-intl-hnk/index.html accessed 17 Feb 2025.

[21] Samia Nakhoul, Laila Bassam, 'Who was Mohammed Deif, Hama's Oct 7 architect killed in Israeli Strike?', *Reuters* (1 Aug 2024) https://www.reuters.com/world/middle-east/obituary-elusive-hamas-leader-deif-masterminded-oct-7-attack-israel-2024-08-01/ accessed 17 Feb 2025.

[22] Asif Nawaz, 'Normalization of Relations Between Saudi Arabia and Israel: Assessment of Critical Aspects' (2002) 4(3) *International Journal of Advanced Academic Studies* https://www.researchgate.net/publication/372127338_Normalisation_of_Relations_Between_Saudi_Arabia_and_Israel_Assessment_of_Critical_Aspects accessed 17 February 2025, 175–176.

[23] E.g. Oxfam, 'Timeline: the Humanitarian Impact of the Gaza blockade' (2018) https://www.oxfam.org/en/timeline-humanitarian-impact-gaza-blockade accessed 17 Feb 2025; UNCTAD, 'Economic Crisis Worsens in Occupied Palestinian Territory Amid Ongoing Gaza Conflict' (2024) https://unctad.org/press-material/economic-crisis-worsens-occupied-palestinian-territory-amid-ongoing-gaza-conflict accessed 17 Feb 2025; *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 39–66, paras 25–37.

considering the rhetoric of the new Israeli government, the leadership in Gaza had reason to believe that conditions might deteriorate further.

1.2.2 Background on the Creation of the Genocide Convention and the ICJ

The Genocide Convention

In the aftermath of World War II, the international community as we know it today had begun to take shape. The United Nations was formed in 1945, providing a platform to discuss the atrocities committed during the last half century. Most notably, the Holocaust, but also several other instances of mass killings such as the Holodomor, served as glaring examples of states capacity to commit acts so cruel that mechanisms to demand accountability were required. These acts also highlighted the need for an international legal framework protecting peace and human rights.[24]

The UN commenced the work on an international convention making it possible to sentence any actor, state, or otherwise, for the crime of genocide. The term Genocide was coined by the Polish-Jewish lawyer Raphaël Lemkin, who spent much of World War II trying to get the world to act against the atrocities committed in the Holocaust. Lemkin was part of the US legal team prosecuting Nazi war criminals during the Nuremberg tribunal in 1945. Several of the prosecutors used the term genocide in their closing arguments, but since the crime was not fully established in international law, the defendants were convicted under broader charges of crimes against humanity. Lemkin felt that there was a need to further develop genocide as a crime, and in the following years, his work contributed to the recognition of the crime on the highest international level.[25]

The UN General Assembly formally recognized genocide as a crime in 1946 during its first session, and in 1948, it adopted the *Convention on the Prevention and Punishment of the Crime of Genocide of 1948*, the first ever human rights treaty adopted by the United Nations.[26] The treaty defines genocide as an act committed with the intent to destroy a group in whole or in part. It establishes that the crime can be committed by both state and non-state actors and stresses that international cooperation is necessary to combat this type of criminality. It does not explicitly address the question of evidentiary threshold.[27] It should be noted that the treaty deviates on some essential points from what Lemkin had envisioned. One of the key points of his definition of genocide was that it not only encompassed the physical destruction of a certain group, but also the destruction of its identity as a group, meaning cultural signifiers such as language and social structures. This was rejected by the UN, favoring a narrower definition. Genocide, as described by Lemkin, could also be committed against a wider range of different groups, such as cultural and social groups. In the final convention, protection was limited to national, ethnic, racial and religious groups.[28]

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[24] United Nations, 'History of the United Nations' (2025) https://www.un.org/en/about-us/history-of-the-un accessed 17 Feb 2025.
[25] Mettraeux (n 3) 6.
[26] Ibid 7.
[27] Convention on the Prevention and Punishment of the Crime of Genocide, preamble and article 1.
[28] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law, Washington 1944) 84; Mettraeux (n 3) 11–14.

The International Court of Justice

The International Court of Justice (ICJ) was established in 1945 as an integral part of the United Nations to serve as its primary judicial organ. It replaced the Permanent Court of International Justice as the venue to adjudicate disputes regarding international law between nations and to supply other UN organs with advisory legal opinions. The court was created through the United Nations Charter, Chapter XIV, also known as the Statute of the International Court of Justice.[29] The crime of genocide can also be prosecuted by the International Criminal Court, but whereas the ICJ tries accusations against states, the ICC only has jurisdiction over crimes committed by individuals.[30]

Normally, the ICJ does not grant members *locus standi* unless it has a clear legal interest in the case. The absence of a general *actio popularis* was clearly stated by the court in the *South West Africa cases (Ethiopia and Liberia v. South Africa)* from 1966, in which the ICJ rejected claims from Ethiopia and Liberia due to their insufficient legal interest in the dispute.[31] The exception to this rule is when accusations are leveled against a state and the relevant act is considered a crime *erga omnes,* i.e., a crime against the international community.[32] Genocide is a crime in this category, meaning that every member state has the right to initiate proceedings in the ICJ under Article IX of the Genocide Convention.

South Africa v. Israel is one of five genocide cases brought before the court. Out of these five, three are still ongoing: *Ukraine v. Russia*, *Gambia v. Myanmar,* and *South Africa v. Israel.* In *Croatia v. Serbia,* the ICJ ruled that no genocide had occurred but rather war crimes and ethnic cleansing. *Bosnia and Herzegovina v. Serbia and Montenegro* is the only case in which the ICJ has acknowledged the existence of a genocide. However, Serbia was found guilty of failing to prevent a genocide, rather than guilty of committing a genocide.[33]

Noteworthy is also that the ICJ has issued provisional measures in all genocide cases where this has been requested.[34]

1.2.3 Criticism of the Genocide Convention and the ICJ

This section will briefly present some of the most common criticism directed at the ICJ and the concept of Genocide in international law. Much of the criticism revolves around the slow pace

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[29] International Court of Justice, 'History' https://www.icj-cij.org/history accessed 17 Feb 2025.
[30] William A. Schabas, *Genocide in International Law- The Crimes of Crimes* (Cambridge University Press, 2000) 418; International Criminal Court, 'About the Court' https://www.icc-cpi.int/about/the-court accessed 17 Feb 2025.
[31] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Second Phase) (Judgment of 18 July 1966) ICJ Rep 6 https://www.icj-cij.org/sites/default/files/case-related/46/046-19660718-JUD-01-00-EN.pdf accessed 17 Feb paras 97–100.
[32] Mettraeux (n 3) 43–51.
[33] *Bosnia and Herzegovina v. Serbia and Montenegro* (Judgment of 26 February 2007) ICJ Rep 43 https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf accessed 17 Feb 2025 para 450.
[34] *Bosnia and Herzegovina v. Serbia and Montenegro* (Order of 8 April 1993) https://www.icj-cij.org/sites/default/files/case-related/91/091-19930408-ORD-01-00-EN.pdf accessed 17 Feb 2025 24, para 52; *Gambia v. Myanmar* (Order of 23 January 2020) https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-02-00-EN.pdf accessed 17 Feb 2025 28, paras 76–83; *Ukraine v. Russian Federation* (Order of 16 March 2022) https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf accessed 17 Feb 2025 229, paras 78–83. N.B. in this context, *Nicaragua v. Germany* should not be regarded as a genocide case, since it does not concern the main crime of the Genocide Convention i.e., committing genocide.

of the proceedings. Genocide cases have, without exception, taken several years to resolve. *Bosnia v. Serbia took* 14 years, and *Gambia v. Myanmar* has been ongoing for over five years. Some aspects of this issue are likely unavoidable, such as the difficulty related to collecting evidence from conflict zones that investigators have limited access to.[35]

Criticism has also been aimed at the perceived bias of ICJ judges. As a rule, all 15 judges must come from different countries to ensure a balanced representation. This notwithstanding, a study from the University of Chicago has shown strong evidence that the judges tend to look favorably on their own countries and countries with similar wealth levels and political systems. The same study showed weaker evidence that judges discriminate positively towards countries with similar languages and cultures to their own. This bias could potentially make the court susceptible to geopolitical pressure.[36]

As with many international legal organs, the ICJ has an enforcement structure often described as weak. The decisions of the court mainly serve to assert culpability. Since the ICJ is not a criminal court, it does not impose any punishments as such, but it can order a state to cease unlawful activities, demand that the state provide assurances against future violations, and compensate the injured party. This usually entails monetary reparations. If the respondent refuses to comply with these orders, the ICJ must request the UN to use its mechanisms for demanding compliance, which usually involves a decision from the Security Council.[37] A part of the UN famously deadlocked by political division, particularly between the US and its allies and Russia and China. Another example of how the effectiveness of the court is affected by geopolitics.

Critics of the Genocide Convention have focused mostly on the narrowness of the definition. As evidenced by the court's case law, it is exceedingly difficult to prove that atrocities committed reach the threshold of destructiveness required, and that the genocidal intent is sufficiently clear. A narrow definition was motivated by the interest of effective prosecution, but also necessary due to the need to compromise with different states fearing that their actions could constitute genocide, if, for example, social classes and political groups were included in the scope of protected groups.[38] This is, some would argue, a shameful legacy, protecting both Western colonialism and political persecution in the USSR. A criticism, which is of not only a legal, but also cultural and political nature, is that the legal standard set by the ICJ and the convention has monopolized the definition of genocide. The risk of such a monopoly on the interpretative priority is that mass killings and other atrocities that do not fit into the narrow frames drawn out in Article II of the genocide convention are downplayed and not treated as seriously by the international community. This is, for example, a key part of Turkey's defense against accusations of genocide in Armenia.[39] The *genocide or nothing* perspective described is

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[35] Julian Ku, 'Why I Don't Hate the ICJ or the U.N., But Why That Shouldn't Matter', (*Opinio Juris*, 1 November 2005) http://opiniojuris.org/2005/11/01/why-i-dont-hate-the-icj-or-the-un-but-why-that-shouldnt-matter/ accessed 19 Feb 2025.
[36] Eric A. Posner, Miguel F.P. de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 (2) *International Journal of Legal Studies* https://www.jstor.org/stable/10.1086/430765599 accessed 19 Feb 2025.
[37] S. Gozie Ogboda,'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) *Annual Survey of International & Comparative Law:* 18(1), Article 7 https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1159&context=annlsurvey accessed 19 Feb 2025 14.
[38] Mettraeux (n 3) 201–202, 215–217; Schabas (n 30) 102, 145–146.
[39] Schabas (n 30) 7; Conversation between Jeffrey Brown and Hrach Gregorian, 'Why Turkey Doesn´t Use the Word "Genocide" for Amenia', *PBS News Hour* (2015) https://www.pbs.org/newshour/show/why-turkey-doesnt-use-the-word-genocide-for-armenia accessed 19 Feb 2025.

also something that indigenous scholars have criticized since it downplays the seriousness of the cultural persecution suffered by indigenous populations.[40]

Everything noted above about the ICJ's ineffective enforcement mechanisms in general is also relevant criticism of their enforcement when it comes to genocide. The ICC, however, which can also prosecute on suspicions of genocide, has stronger punitive mechanisms, but even the ICC faces significant challenges in ensuring accountability due to international politics. As demonstrated by the fact that it issued an arrest warrant for Israeli Prime Minister Netanyahu in 2024, that Poland, a signatory of the Rome Statute, openly stated that it would ignore if he were to visit Polish soil.[41]

1.3 About the Case

South Africa applied for proceedings to be instituted on 29 December 2023; simultaneously, a request was made for provisional measures to be issued. The ICJ ruled on January 26, 2024, that it had *prima facie* jurisdiction to hear the case in accordance with Article IX of the Genocide Convention. This decision was justified on the basis that both states are signatories to the Genocide Convention, South Africa's claims appear plausible and fall within the scope of the convention, and that a legal dispute already existed between the countries about a potential Genocide in Gaza.[42] On 28 October 2024, South Africa filed its complete memorial containing over 750 pages of evidence and 4000 pages of exhibits and supporting annexes. Israel is required to file its counter-memorial by 28 July 2025.[43]

Several oral proceedings have been held. In January 2024, the introductory negotiations took place, in May 2024, further provisional measures were debated, and in October 2024, South Africa presented its evidence to the court. Israel has on all these occasions responded to the accusations, but its counter-memorial will contain a comprehensive presentation of its position on the charges along with supporting evidence. Submission of the counter-memorial will mark the beginning of the next stage of the case.[44] The ICJ has on three separate occasions during the process, issued provisional measures. On 26 January 2024, a general order to take all measures to prevent acts against genocide was issued. On 28 March, the previous orders were modified to emphasize the importance of Israel to allow humanitarian aid to reach Gaza, and lastly, on

[40] Lauren J. Eichler, 'Ecocide is Genocide: Decolonizing the Definition of Genocide' (2020) 14(2) *Genocide Studies and Prevention: An international Journal* article 9 https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1720&context=gsp&utm accessed 19 Feb 2025, 3; Murry Sinclair et al, 'What We Have Learned: Principles of truth and reconciliation', *Truth and Reconciliation Commission of Canada* (2015) https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Principles_English_Web.pdf accessed 19 Feb 2025.

[41] Alice Autin, 'Poland Sends Wrong Signal on Global Justice', *Human Rights Watch* (15 Jan 2025) https://www.hrw.org/news/2025/01/15/poland-sends-wrong-signal-global-justice accessed 19 Feb 2025.

[42] *Application of the convention on the prevention and punishment of the crime of genocide in the Gaza strip (South Africa v. Israel)* (Provisional Measures) Order of 26 January 2024 https://www.icj-cij.org/node/203447 accessed 19 Feb 2025 16–17, paras 33–34, 28–30, paras 75–85.

[43] Department of International Relations and Cooperation, ´South Africa Delivers Evidence of Israel Genocide to ICJ' (28 October 2024) https://dirco.gov.za/south-africa-delivers-evidence-of-israel-genocide-to-icj/ accessed 19 Mar 2025; *Application of the convention on the prevention and punishment of the crime of genocide in the Gaza strip (South Africa v. Israel)* (Fixing of Time-Limits, Memorial and Counter-Memorial) Order of 5 April 2024 https://www.icj-cij.org/sites/default/files/case-related/192/192-20240405-ord-01-00-en.pdf accessed 19 Feb 2.

[44] Ibid.

24 May, the Court addressed the situation in Rafah and demanded an immediate halt of all military operations there.[45]

Several states party to the Genocide Convention have decided to intervene in the case. The right to do so is derived from the ICJ Statute Article 63. Intervening grants the state the right to provide its legal viewpoints on the case. At the time of writing, following states have applied to intervene in the case: Turkey, Egypt, Maldives, Mexico, Chile, Cuba, Colombia, Palestine, Spain, Bolivia, Libya, Ireland, Nicaragua, and Belize.[46]

1.4 Delimitations

Comparing the evidence submitted with the prevailing opinion of what constitutes genocide according to the 1948 Genocide Convention is precisely the assignment that the ICJ is faced with. However, this essay should not be perceived as an attempt to determine what judgment the ICJ should render. A serious attempt at such an examination would extend far beyond the scope of a master's thesis, requiring the inclusion of a comprehensive review of evidence and legal arguments submitted by the parties. Furthermore, such an endeavor would demand access to all the evidence submitted by South Africa and Israel, most of which is not available to the public.

The limitations of the ICJ case law on genocide should also be acknowledged. At present, the court has only addressed the issue in five separate cases, whereof most remain ongoing. This study will focus on the proceedings of the ICJ; analogous interpretations of decisions made by other courts will therefore be included only as an exception. However, some reference to case law from the ICC and the ad hoc tribunals will be included. This is essential to establish a legal standard, particularly considering the few genocide cases in which the ICJ has issued final verdicts.

1.5 Outline

This thesis consists of seven parts, beginning with an introductory chapter providing historical context for the subsequent study. This chapter also contains a discussion on the choice of material, the scope of the study, and the formulation of research questions. The subsequent chapters of the thesis are as follows:

- Chapter Two, detailing the theoretical framework of the study.
- Chapter three, describing the relevant regulations, detailing the requisites of genocide, clarifying what provisional measures are and presenting the evidentiary threshold.
- Chapter four, analyzing the evidence and claims submitted to the ICJ in *South Africa v. Israel, using the traditional hierarchy of legal sources* in order to answer the first research question.

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[45] *South Africa v. Israel* (Order of 26 January) (n 42) 30–32, para 86; *Application of the convention on the prevention and punishment of the crime of genocide in the Gaza strip (South Africa v. Israel)* (Provisional Measures) Order of 28 March 2024 https://api.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf accessed 19 Feb 2025 11–12, paras 41–49; *South Africa v. Israel* (Order of 26 January) (n 42) 28–30, paras 75–84; *South Africa v. Israel* (Order of 24 May 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf accessed 19 Feb 2025 13–16, paras 48–57.

[46] A comprehensive overview of ICJ-decisions related to the case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel*) ICJ (2025) https://www.icj-cij.org/case/192 accessed 20 Feb 2025.

- Chapter five, containing a discourse analysis of the parties' legal strategies, providing an answer to the second research question.
- Chapter six, applying postcolonial perspectives on the findings of the study, offering a deeper examination of underlying postcolonial power structures and narratives affecting the case. The purpose of this chapter is to answer the third research question.
- Finally, the seventh chapter, containing the conclusion of the study, summarizing key findings and presenting answers to the research questions. It also includes some final reflections.

2. Theoretical Framework

2.1 Postcolonial Perspectives on International Law

The choice of methodological and theoretical approach for this essay is designed to fit its dual purpose: first, to analyze the process in the ICJ and how the Genocide Convention is applied by the parties, and second, to examine the broader power structures that influence the process. Given that this study concerns international law and the legal relationship between states and intergovernmental organizations, its methodological approach must consider the distinct nature of international legal processes, which significantly differ from domestic law. Martti Koskenniemi, describes international law in the following way:

> I shall attempt to show that our inherited ideal of a World Order based On the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means, and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested - political - principles to justify outcomes to international disputes.[47]

An important departure point for the project in this essay is echoed in the statement above. International law is deeply intertwined with ideology and dominant states exerting their power. One of the main reasons why this is more pronounced in international law, compared to domestic law, is the absence of an impartial central authority that can decide who is in the right. Domestic legal systems consider certain legal principles, such as legal certainty, procedural fairness, and non-discrimination, to be foundational for the *Rechtsstaat* or, 'a government of laws, not of men', as the American founding father John Adams described it.[48] Without a police force or impartial courts, these principles would be very challenging to uphold. The courts under the UN framework are generally dependent on the UN Security Council to enforce their decisions. A security council consisting of representatives from the most powerful and ideologically dominant states in the world. Further, all international conventions have been created through compromises between states. From the outset, the states with the most power have been instrumental in devising these norms, tailoring them to align with their interests. As a result, the boundary between law and politics in international legal processes is far more fluid than in domestic law.[49]

Margaret Davies presents a similar critique of the concept of law as something neutral in her book *Asking the Law Question*. She does not specifically address international law, but she challenges the idea that law exists as one neutral system, excluding all other perspectives on

[47] Martti Koskenniemi,'The Politics of International Law', *European Journal of International law* (1990)1(1) 7.
[48] J.L. Smith, 'John Adams and the Rule of Law' (24 May 2022) *Journal of the American Revolution* https://allthingsliberty.com/2022/05/john-adams-and-the-rule-of-law/ accessed 19 Mar 2025.
[49] Koskenniemi (n 47) 7.

justice as being illegitimate. Instead, she argues for a legal pluralism where the large number of different systems of rule that exist in society are recognized and studied. In this essay, her views on law as a colonial construct will be of most importance. Davies argues that law is based on the relatively recent concept of the state.[50] This is a common point between her and Koskenniemi, who also challenge the importance of state sovereignty in applying international law. This state-centric approach to justice does not mirror the social reality that people live in, and reproduces the colonial idea that states are the main bearers of rights. This is particularly damaging for marginalized communities lacking meaningful representation from their governments.[51]

With all this in mind, it would seem inadequate to just study the traditional legal sources, such as case law and doctrine, through the lens of traditional legal methods, since this would only reproduce the fallacy of international law being neutral. A combination of these methodological approaches will enable a more nuanced and comprehensive analysis than would be possible with any single one of them.

The postcolonial viewpoints will be drawn from the works of several theorists: Makau Mutua, especially his *savages, victims, and saviors*-construction, Margaret Davies' critique of the universality of law, and Antony Anghie's perspective on international law, its colonial roots, and ongoing colonial influence. These different outlooks will be employed to examine the underlying power dynamics and the unavoidable political dimensions of the legal argumentation and discourses present in the case.

In the article *Savages, Victims, and Saviors: The Metaphor of Human Rights* Makau Mutua describes international law as a system built around a colonial and Eurocentric understanding of the world. *Eurocentric,* meaning a perspective where Europe and the west is the norm, and the rest of the world, a deviation from the norm. To illustrate this understanding, Mutua constructs what he calls the *metaphor of human rights,* in which all subjects in international human rights disputes are characterized as either savages, victims, or saviors.[52] *The savages* are usually from the third world – presented as uncivilized people, oppressing women and minorities. Their primary interest is to protect their reactionary cultural practices and authoritative regimes; in this effort, they have no qualms about killing large parts of their population. Meanwhile, *the victims* are passive, harmless people of the third world, desperately needing to be saved from their oppressors. They suffer injustice but lack the means to change their situation and are dependent on help from an outside savior.[53] *The saviors* are usually represented by Western governments, the UN, or other Western non-governmental actors. Who intervenes and brings democracy and justice to a land where the evil prey on the weak. These Western states are not constructed as parties in the conflict as such. Their role is reminiscent of a police officer disrupting a gang war, not for any personal gain, but rather to protect innocent bystanders and restore order.[54]

Mutua argues that this metaphor is the basis of all human rights proceedings on the international level, infantilizing third-world populations while obfuscating the guilt of Western states. The focus on individual suffering and the construction of villains and heroes hides the real structural

[50] Ibid 14; Margaret Davies, *Asking the Law Question* (5th edn, Thomson Reuters 2023) 319.
[51] Ibid 301.
[52] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201–204.
[53] Ibid 203.
[54] Ibid 204.

reasons behind the human suffering: global capitalism, colonialism, climate injustice, etc. Further, Mutua claims that this metaphor depoliticizes complex conflicts, creating a simplistic view of the world as divided between good and bad, hiding the fact that Western states often are far more complicit in conflicts and humanitarian crises in the third world than they care to admit.[55]

Applying this metaphor to the case ties in with the discourse analysis and the aim to investigate who gets to define what a legitimate genocide is. It is especially relevant since the case potentially could change the dynamic of this metaphor. The metaphor is profoundly Eurocentric, constructing Western liberal democracy as the ideology of *the savior*.[56] Israel is the actor in the case most associated with this ideology due to its history and ties to Western states. However, convincingly describing Israel as the savior is becoming increasingly challenging due to the scale of the atrocities allegedly committed in Gaza. Meanwhile, Hamas fits neatly into the savage-archetype, but it appears unclear whether both Israel and Hamas can be constructed as savages within the same narrative. South Africa, an explicitly anti-colonial state, seems to be emerging as the savior, at least in its own construction of the case. This unusual dynamic is intriguing and could potentially redefine the established narrative of human rights within international law.

Antony Anghie's book *Imperialism, Sovereignty, and the Making of International Law* is a description of the origin of the international legal system that deviates radically from the established understanding advocated by, for example, the UN. Anghie argues that international law was developed as a tool to impose Western concepts of sovereignty on other 'uncivilized' states. Rather than an agreement between already existing sovereign states to ensure peace and development, he views the creation of international law as a tool for European dominance over non-European populations.[57] He also argues that the legal frames of the post-colonial era were constructed to ensure that former colonies continue to be dependent on their colonizers. Examples of this are the League of Nations mandate system (under which Palestine was a British mandate) and, in contemporary times, the International Monetary Fund (IMF) and the World Bank (IBRD, IDA), and former colonies dependency on these.[58] Meanwhile, Western countries are allowed to freely protect their own economic and political interests

This critical historical perspective is relevant for this thesis since the concepts of sovereignty and how the political interests of powerful Western states affect international legal processes are key aspects of the *South Africa v. Israel* case. The conflict between Israel's right to self-defense as a sovereign state and the human rights of the people in Gaza, who are not protected by a recognized state with full sovereignty, is at the core of the case and ties in with much of Angie's writings.[59]

2.2 Methods

The methodological approach for this essay has been selected to fit the bipartite purpose of the study. Two distinct methods are required to analyze the material in full, to both shed light on

[55] Ibid 206–210.
[56] Ibid 204.
[57] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2004) 115–116.
[58] Ibid 191.
[59] Ibid 236–244.

the formal implications of the legal arguments and evidence presented, and to lay bare the underlying power structures.

The traditional legal hierarchy, familiar to a legal audience, will be used to examine formal legal argumentation and to contextualize it. This is an essential part of the study since it anchors the analysis in the intellectual context and language of established international law.

The discourse analysis established by Ernesto Laclau and Chantal Mouffe will be used to explore how legitimacy, security, and the different subjects of the case are constructed and framed through legal arguments and the choice of evidence.

To employ these methods efficiently and credibly it is essential to stay true to the rhetoric and substance of the parties' argumentation. Therefore, quotations from the case files will be presented frequently to reinforce the claims made in the thesis.

2.2.1 The Traditional Hierarchy of Legal Sources

To be able to fully comprehend the legal actions of the parties, it is important to understand the methodological approach of the International Court of Justice. Since the legal strategies of the parties are adopted to align with these interpretative methods. Article 38(1) of the ICJ Statute delineates the legal sources that the court must consider in its adjudications and assessment of evidentiary value: a) International conventions b) International customs c) General legal principles recognized by civilized nations, and d) Subsidiarily, the judicial decisions and teachings of recognized scholars. The method of interpretation differs between sources:

a) When it comes to the treaties, they are to be interpreted in alignment with Articles 31 and 32 of the Vienna Convention. Article 31 stipulates that the interpretation should be in *good faith*, recognize the *ordinary meaning of the terms,* and acknowledge the *context and object, and purpose of the treaty*. According to Article 32, supplementary means, such as examination of the *preparatory works* and considerations of the *circumstances of the treaties' conclusion,* can be used when the means of interpretation detailed in Article 31 result in ambiguous or absurd conclusions.

b) Customary law is defined as *a general practice accepted as law* in Article 38 (1) (b). Customary law is of great importance to the legal interpretations made by the ICJ since the legitimacy of the court is dependent on the fact that it is widely accepted by the states involved. It is often identified by two main elements:

1. *The established practice of states*, which must be consistent, must be followed by an adequate number of states and for a reasonable amount of time. E.g., the legal immunity of visiting diplomats. This principle is outlined in the Vienna Convention on Diplomatic Relations (1961) and is widely respected. The validity of this customary law was reaffirmed in *UK v. Iran (ICJ, 1980)- The Tehran Hostages Case*, after several US diplomats had been forcibly detained by the Iranian state, and the ICJ found this to be in breach of international law.

2. *Opinio juris,* refers to the conviction of states that they are legally bound to respect certain norms and rules. Meaning that, a rule that is ignored by states is not *opinio juris* since it is not perceived as a binding obligation. *Opinio juris* is something to be inferred from states' actual compliance with international law, rather than something which is codified in legal documents, even though it is also clarified in the case law of the ICJ and other international courts. An

example of *opinio juris* is the prohibition of torture, which has been codified in many treaties and most domestic legal systems. The prohibition is often referred to as *Jus cogens,* a fundamental preemptory norm in the international community.[60]

2.2.2 Laclau and Mouffe's Discourse Analysis

A discourse analytical approach to legal texts may appear complex and arbitrary to readers unfamiliar with it. However, the purpose of the method is not to reach a definitive answer but rather to explore the power struggles embedded in language to learn about our common social reality.[61] There is an inherent conflict between the critical nature of discourse analysis and the positivist tradition that underpins most legal science. The different ontological and epistemological assumptions of discourse analysis are exactly what make it an appropriate tool for this thesis. If the aim is to challenge power structures and examine what lies behind the word of law, it seems logical to adopt another approach than the one employed by the people who seek to justify the status quo.

Ernesto Laclau and Chantal Mouffe present their method of discourse analysis in their book *Hegemony and socialist strategy.* As with all discourse analytical methods, the foundation it rests on is the assumption that language is not neutral and that the social reality we live in is constructed by discourses. *Discourses*, in this context, do not only refer to language itself but also to the system of meaning that shapes our understanding of language. This system of meaning is shaped by power structures.[62] To use the metaphor of a courtroom, the concept of self-defense used in an assault trial likely has a different meaning for the defendant, the plaintiff, and the judge. The court becomes the battleground for a struggle between meanings, and the discourse that the court finally bases its ruling on becomes the dominant discourse, or the hegemonic discourse.

Hegemony is a term borrowed from the Marxist thinker Antonio Gramsci, which the authors have made minor adjustments to. A hegemonic discourse fixates the meaning of a concept as objective and neutral in a way that makes all other interpretations seem charged and illegitimate. The hegemony of a discourse is neither absolute nor permanent, it can be challenged with the use of counter-hegemonic discourses.[63] One might, e.g., argue that there is a hegemonic discourse in the international community that Israel's bombings of Gaza is an act of self-defense justified by the state's need to protect its sovereignty and security. This discourse is challenged by South Africa in the ICJ case through their claim that Israel is not protecting its borders and population in accordance with international law, but rather committing a genocide, which can never be justified.

Another key element of discourse analysis is the way that discourses assign groups social identities, such as Israel's identity as a sovereign state and the only democracy in the Middle

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[60] Cornell Law School, 'Opinio juris (International law)', *Legal Information Institute* (2023) https://www.law.cornell.edu/wex/opinio_juris_(international_law) accessed 10 Mar 2025; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* https://academic.oup.com/ejil/article/26/2/417/423002 accessed 10 Mar 2025 417.

[61] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2nd edn, Verso 2014) 185.

[62] Marianne Jorgensen and Louise J. Phillips, *Discourse Analysis as Theory and Method* (Sage Publishing 2002) 32.

[63] Ibid 48.

East, and Hamas' identity as an illegitimate government in Gaza and a terrorist organization. These labels are not based purely on the groups' actions since Israel has killed far more people than Hamas in the last few years, but rather on how these acts are justified through language and the established understanding of international law and politics.[64] It is important to note that hegemonic discourses not only represent social reality but shape it; if the hegemonic discourse is that Israel is fighting terrorism, then that is a fact in our common social reality. Laclau and Mouffe explain how this struggle for hegemony works with the help of the terms *empty* and *floating signifiers*, *nodal points,* and *equivalence chains.*

An empty signifier is a concept that lacks a stable, fixated meaning but that all the actors participating in the struggle for hegemony claim to rally around. The emptiness of the signifier results in the different sides of the contested issue trying to fill it with their meaning. Justice and freedom, for example, are broad terms that unify Israel's and South Africa's political struggles, but they place completely different meanings in the words. Empty signifiers have a unifying function. Justice, for example, as constructed by South Africa, unifies the struggle for a free Palestine with the struggle against apartheid in the African country's history. This difference in opinion is, however, never actively discussed; rather, all sides act as if they speak the same language when they use empty signifiers such as safety.[65]

A floating signifier, on the other hand, is openly contested by the different sides, so rather than speaking the same language, the sides try to establish which language should be spoken. The struggle over the meaning of floating influences is key in establishing a hegemonic discourse regarding a concept. Describing them as floating is a way to illustrate that they are not fixated but rather floating around in the sky while the different subjects try to grab them and make them theirs. It is, e.g., necessary for South Africa to fixate the floating signifier genocide to cover the actions performed by Israel and to fixate the floating signifier self-defense to rebut Israel's legal strategy.[66]

Antagonism is intrinsic to all social reality. Every meaning, even those we take for granted, represents a conflict in language, where one side has succeeded in fixing it, or where the meaning remains contested. *South Africa v. Israe*l is not merely a legal process but also a linguistic dispute over who gets to define the relevant discourses and therefore control the dominant political narrative. The struggle to fixate empty and floating signifiers is inherently antagonistic, since two definitions can't co-exist; only one version of social reality can be hegemonic.[67]

Nodal points are the central points of the discourse, they can also be described as privileged signifiers. Central here means quite literally that they are at the core of the discourse, and all other signifiers are organized around the meaning of them. When a concept has the status of a nodal point, the other signifiers establishing the content of the discourse must fit into the structure surrounding it. E.g., democracy is a nodal point in Swedish politics; if a political party is to enact a policy, this must in some way be constructed as democratic. A party suggesting the abolishment of popular elections would find this very difficult to even discuss within the discourse of Swedish politics. It can be difficult to separate floating signifiers, empty signifiers, and nodal points, therefore, it is important to note that a concept can be both a nodal point and

[64] Ibid 50.
[65] Ibid.
[66] Ibid 51.
[67] Ibid 56; Laclau and Mouffe (n 61) 16.

a floating/empty signifier. For this to be the case, the floating signifier must be temporarily fixated, and the empty signifier must unify several different struggles.[68]

Finally, *Chains of equivalence* are the links between the nodal points and the signifiers surrounding them, determining the coherence of the discourse. They decide the content of the discourse and how far it can be drawn and still be seen as legitimate.[69] A relevant chain of equivalence in *South Africa v. Israel* can be identified from the Self-defense and safety discourse used by Israel to justify its actions:

Israel- Democracy in the middle east- Hamas- a threat to Israeli security- Hamas- an Islamic terrorist organization - Al Qaeda and ISIS - threat to Western democracy - Hamas threat to Western security and democracy - South Africa accusing Israel of Genocide of the people of Gaza - the people of Gaza- Hamas = South Africa's genocide process a threat to Western democracy.

This chain of equivalency ties together several different signifiers, both the empty and the floating variety, to construct a discourse around Israel's right to act in self-defense that justifies its military operations and delegitimizes South Africa's legal process.

The method as applied in this study will focus on the discourses that the parties try to establish around *genocide, self-defense,* and *international law.* Specifically, it will examine how each party tries to frame its opponent, using these discourses. The selection of these concepts is motivated by the fact that they are key components of the case, therefore, it seems probable that much of the parties' arguments can be derived from them.

2.3 Material

The primary source material for this study consists of several documents published by the ICJ detailing the claims made by the parties and the evidence presented to support these. Studying these documents is crucial to create an understanding of the legal process since they chronicle the case from its initiation and onward and constitute the most authoritative representation of the parties' argumentation. Text as a source is also necessary to perform a discourse analysis, since this is a linguistic method. The process is still in its early stages, which means that the number of documents available for examination is limited. By necessity, emphasis will have to be put on the documents that have been made public by the court.[70] Now follows a brief overview of these documents with the abbreviated form used to cite them given in brackets.

The *Application for Instituting Proceedings: application of the Convention on the Prevention and Punishment of the Crime of genocide in the Gaza Strip* that South Africa submitted on 29 December 2023 (cited as *South Africa v. Israel* (Application instituting proceedings) (n 1)) is of special interest. The 99-page document outlines the legal and factual basis of the genocide claim. This document contains much of South Africa's evidence accessible to the public since

[68] Jorgensen and Phillips (n 62) 16; Laclau and Mouffe (n 61) 15.
[69] Jorgensen and Phillips (n 62) 43; Laclau and Mouffe (n 61) 197.
[70] South Africa has released a dossier of publicly available evidence. The basis for this thesis is the evidence presented within the casefiles, but for further context see: UNISPAL, 'Letter from South Africa – Public Dossier of Openly Available Evidence on The State of Israel's Acts of Genocide Against the Palestinians in Gaza (28 February 2025) https://www.un.org/unispal/document/letter-from-south-africa-public-dossier-of-openly-available-evidence-on-the-state-of-israels-acts-of-genocide-against-the-palestinians-in-gaza/ accessed 8 May 2025.

the ICJ demands that the Memorial remain confidential.[71] It is difficult to determine whether the evidence presented in the application is representative of the content of the applicants more than 750-page-long Memorial. The application is, however, required to contain sufficient legal and factual material to form a legal basis for a *prima facie* case of genocide. Further, since the applicant has requested provisional measures, it must provide sufficient evidence for the court to assess plausibility.[72] Considering these procedural requirements, it is safe to assume that South Africa will have presented the court with evidence strong enough for the purposes of the study.

Additionally, the study will consider evidence introduced in oral arguments as presented in the Verbatim Records, transcripts of which are published on the ICJ's website. Israel's stance on the accusations and the supporting evidence will be derived solely from the Israeli legal team's statements as registered in the Verbatim Records. It is therefore important to acknowledge that this thesis reflects a legal process in which South Africa's claims, for procedural reasons, have been more elaborated and substantiated than the counterarguments made by Israel. Nevertheless, the material available representing the positions and supporting evidence is sufficient for the methodical approach to work, if not necessarily adequate to enable a thorough and credible assessment of the Genocide claims. The selection of sources is guided by the choice of methods and the purpose of the study. All documents included in the study, except for those drawn up by the ICJ, are inherently biased in favor of the party submitting them and will be treated accordingly. The reader should be cautious that the parties' presentation of their legal opinions could potentially be difficult to distinguish from the conclusions of the analysis since both litigation in the ICJ and the writing of a thesis concerns legal argumentation.

South Africa's arguments and evidence are presented in its application and in verbatim records from 11 January 2024 (cited as *South Africa v. Israel* (Oral Proceedings 11 January 2024) (n 231)) and 16 May 2024 (cited as *South Africa v. Israel* (Oral Proceedings 16 May 2024) (n 113)). Israel's arguments and evidence are presented in verbatim records from 12 January 2024 (cited as *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143)) and 17 May 2024 (cited as *South Africa v. Israel* (Oral Proceedings, 17 May (n 205)).

For the analysis using the traditional hierarchy of legal sources, the study will primarily rely on case law from the ICJ and other international courts addressing genocide and legal doctrine. These are selected based on the similarities they share with *South Africa v. Israel*. Meaning that a case concerning genocide is prioritized over a case e.g., concerning torture.

3. Relevant Regulations

3.1 The Requisites of Genocide

The crime of Genocide consists of two primary components, the *actus reus*, the objective element, and the *mens rea*, the subjective element. One could argue that the *special mens rea* or *dolus specialis* constitutes a third element. These terms will be expanded upon further.[73] The objective side of the crime thus means that physical acts must have been committed that affected a protected group in a destructive manner (*actus reus*). The relevant acts are enumerated in the Genocide Convention (Article II, paragraph 2). The specific groups that are protected by the

[71] *South Africa v. Israel,* (order of 5 April) (Fixing of Time-Limits: Memorial and Counter-Memorial) (n 43) 2.
[72] *South Africa v. Israel* (Order of 26 January) (n 42) 23, para 54.
[73] Schabas (n 30) 206; Mettraeux (n 3) 161–165; Lemkin (n 28) 79–81.

genocide convention are listed in Article II, paragraph 1. Both these lists are exhaustive, meaning that no other act or group can form the basis of a genocide charge.[74]

The subjective side, *mens rea*, concerns the mental aspects of the crime, or rather, the intent behind the acts committed. For genocide to have been committed, the intent of the perpetrator must cover both *dolus generalis* and *dolus specialis*. Which means an intent to perform the acts (*dolus generalis*) and for them to damage the protected group, as well as a specific intent to destroy said group in whole or in part (*dolus specialis*). It is not adequate to merely prove that the accused has killed a large group of people with the intent to end their lives; the court must also be convinced that the motive of these killings was to eradicate the protected group.[75]

3.1.1 Genocidal Intent

To determine how genocidal intent can be proven, we turn to case law and previous research. Given that case law from the ICJ is quite limited, it is necessary to supplement it with case law from other courts in the interest of establishing a norm within international law. In this segment, some references will be made to cases from the International Criminal Tribunal for Rwanda (ICTR).[76]

Establishing genocidal intent is essential, since it is what separates genocide from other atrocities such as war crimes or crimes against humanity. Statements from authority figures in positions to affect and direct genocidal acts can therefore be crucial as evidence. Relevant statements are not only those inciting mass killings, but also the use of dehumanizing rhetoric directed at the protected group. In the case *of Akayesu, Trial Judgement* (1998), the ICTR found that the accused, Jean-Paul Akayesu, a former mayor, had shown genocidal intent through public statements. The ICTR found that his statements encouraging and justifying violent acts against the Tutsi population constituted direct proof of his intent to contribute to a genocide.

> (…) the Chamber is satisfied beyond a reasonable doubt that the population construed the Accused's call as a call to kill the Tutsi. The Chamber is satisfied beyond a reasonable doubt that the Accused was himself fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against Inkotanyi accomplices could be construed as one to kill the Tutsi in general.[77]

For statements to serve as strong evidence, they need to clearly express the wish to exterminate a protected group. Ambiguous statements, such as implicit threats or dehumanizing rhetoric, may still have some value to prove genocidal intent, but if they are possible to interpret in

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[74] Mettraeux (n 3) 195, 285.
[75] Ibid 161; Schabas (n 30) 151–157.
[76] The International Criminal Tribunal for Rwanda (ICTR) was created in 1995 by the UNSC to prosecute those culpable for the Rwandan Genocide and related crimes against international humanitarian law. It has had monumental influence on Genocide case law, as the first court to have ever found someone guilty of genocide and the first to acknowledge rape as a part of the actus reus of genocide. The so-called *Media Case*, in which representatives of Rwandan press were held responsible for broadcasts and Articles that incited genocide, is also a landmark case in Genocide law. The court has indicted 93 individuals, convicted 61 and acquitted 14. The ICTR was formally disbanded in 2015. Source: *United Nations International Criminal Tribunal for Rwanda,* 'The ICTR in Brief' (United Nations Mechanism for International Criminal Tribunals) https://unictr.irmct.org/en/tribunal accessed 3 Mar 2025.
[77] *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)* CTR-96-4-T (2 September 1998) https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275 accessed 19 Feb 2025 85, para 361.

another way, they might be considered circumstantial evidence.[78] There are examples of this from the ICTR, where the court found that comparing the Tutsi to 'cockroaches that should be exterminated' was indicative of genocidal intent but did not, on its own, carry enough evidentiary weight to prove *mens rea.*

'Direct' incitement to commit genocide requires that the speech is a direct appeal to commit an act referred to in Article 2 (2) of the Statute. It must be more than a vague or indirect suggestion, and an accused cannot be held accountable for this crime based on hate speech that does not directly call for the commission of genocide. Even when a speech contains no explicit appeal to commit genocide, it may still constitute direct incitement to commit genocide in a particular context, so long as the speech is not considered ambiguous within that context. In order to determine the speech's true meaning, it can be helpful to examine how it was understood by the intended audience.[79] When there is no direct evidence available to prove *mens rea,* it may be inferred from a pattern of acts committed against the protected group. This pattern, however, must demonstrate the clear purpose of destroying the group in whole or part. In a wartime context, it may be difficult to prove that the motivation for certain acts is genocidal intent, and not strategic military considerations. However, genocidal intent is not required to be the sole motivation, it is sufficient for the intent to destroy the group to be one of several motivations.[80] Some signs of a genocidal pattern, implying such an intent, are mentioned in the following quote from the ICTR:

> The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, and the systematic manner of killing. Furthermore, the number of victims from the group is also important.[81]

The intent must be active. Genocide cannot be committed through mere indifference to the consequences of the acts. Neither does the fact that the defendant had knowledge of the genocidal acts but did not intervene constitute genocidal intent. It is, however, illegal according to international law for a state to fail to prevent or punish genocide. Meaning that a state with knowledge of a potential genocide and the capacity to stop it, which fails to do so, is not guilty of genocide according to the Genocide Convention art III, since it lacks genocidal intent but still in breach of the Genocide Convention Article I, prohibiting the failure to stop Genocide. This was the case in *Bosnia Herzegovina v. Serbia and Montenegro,* where Serbia was found in breach of its responsibilities according to the genocide convention Article 1.

> The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that given its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to

[78] Schabas (n 30) 222–223; Mettraeux (n 3) 315–322.
[79] *Prosecutor v. Bizimungu et al, "Judgement*", ICTR-00-56-T (30 September 2011) https://www.legal-tools.org/doc/7077fa/pdf accessed 19 Feb 2025 535, para 1974.
[80] Mettraeux (n 3) 161.
[81] *The Prosecutor v. Kayishhema and Ruzindana, (Trial Judgement)* ICTR-95-1-T (21 May 1999) https://www.refworld.org/jurisprudence/caselaw/ictr/1999/en/62079 accessed 19 Feb 2025 43, para 93.

have manifestly refrained from employing them (paragraph 438). To that extent, therefore, it failed to comply with its obligation of prevention under the Convention.[82]

In conclusion, evidence of genocidal intent can consist of statements as well as actions. Direct evidence can consist of incitement to murder and persecute members of the protected group made publicly by people in power. More veiled statements, such as dehumanizing language and implicit support shown for genocidal acts, have a lower evidentiary value, but can, in combination with corroborating acts of mass violence, still prove intent. Genocidal intent can also be proven by a pattern of conduct clearly aimed at destroying the group in whole or in part. The ICJ follows a high evidentiary standard for genocide, so most likely, evidence will have to consist of both statements and a pattern of conduct to convince the ICJ.

3.1.2 Genocidal Actions

The genocidal acts listed in Article I, paragraph 2 of the genocide convention must be committed against one of the protected groups in paragraph I for them to constitute genocide. This group that must be defined positively, meaning that you cannot, for example, commit a genocide against people who are *not* Jewish.[83] It is not necessary that the perpetrator of the acts occupy an official position. The ICJ, however, has jurisdiction over states and not individuals, meaning that the position of the people committing the genocidal acts is of relevance to prove the responsibility of the state. The acts must be related to the *mens rea,* i.e., be performed with the intent to destroy a group. They must also collectively reach a certain threshold of seriousness to risk the destruction of the group in whole or in part. Each genocidal act individually must be considered seriously harmful but does not necessarily have to pose an existential threat to the group on its own.[84] In the studied case law, *actus reus* has seldom posed the greatest evidentiary challenge to prove genocide. Particularly, the meaning of the first example of a genocidal act, i.e., killing, is relatively unambiguous. Nonetheless, some notes should be made about the different acts enumerated in Article III.

A. When the final wordings of the convention were decided upon, the inclusion of *killing members of the protected group* as an act of genocide was uncontroversial, and the decision to place it as the first genocidal act of the Article was made unanimously.[85] The act consists of two elements:

    1. The victim must be deceased
    2. The death must result from an unlawful act or omission on the part of the accused or a subordinate acting on their orders.[86]

B. *Serious bodily and mental harm* may include torture or any other infliction of serious injuries to the physical health that falls short of causing death. Rape is considered a potential genocidal act on both a physical and a mental level. Mental harm may consist of the forced administration of drugs or inhumane treatment such as enslavement, degradation, starvation, and other types

[82] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment of 26 Feb, 2007) [2007] ICJ Rep 43 https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf accessed 20 Feb 2025 194, para 461.
[83] Mettraeux (n 3) 202; Schabas (n 30) 102.
[84] Mettraeux (n 3) 253–254.
[85] Schabas (n 30) 157–159.
[86] Mettraeux (n 3) 254.

of deprivation. Importantly, the harm does not have to be permanent to meet the threshold of a genocidal act.[87]

C. *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction*. This is one of the most relevant acts when it comes to the Gaza case, since many international organizations have warned that the area is going through a severe humanitarian crisis.[88] Raphaël Lemkin described such acts concerning the extreme humanitarian situation in the Warsaw ghetto, where thousands of Jews perished from starvation and disease.[89] Denying members of the group clean water, access to healthcare, and food, confinement to a small and uninhabitable territory, and extreme workloads are some methods that have been identified as potentially genocidal.[90]

D. *Imposing measures intended to prevent births within the group*, often referred to as biological genocide. Such acts may include sterilization, forced abortion, gender segregation and sexual violence. When the paragraph was added to the Article, the drafters had *the Eichmann case* in mind. The supreme National Tribunal of Poland (NTN) considered Eichmann's policies of enforced sterilization and castration in Auschwitz an act of genocide.[91] The International Criminal Tribunal for Yugoslavia (ICTY) and the ICTR have affirmed that rape can constitute a form of biological genocide since it can cause physical and mental trauma with serious consequences for the victims means of reproduction. These acts do not need to have had a proven result on the demography of the group; the intent and implementation are what matter.[92]

E. *Forcibly transferring children of the group to another group*. The outlier of the acts listed in Article III. Especially since 'cultural genocide' is not considered to be a breach of the convention. It has been discussed in relation to Australia's forcible separation of Aboriginal children from their biological parents and their ethnic group.[93]

3.1.3 Provisional Measures

This section details the legal basis for, and the consequences of non-compliance with, provisional measures issued by the ICJ.

The mandate to issue provisional measures is derived from Article 41 of the ICJ statute, which grants the court the right to indicate *any measures that ought to be taken to preserve the respective rights of either party*. The primary purpose of the provisional measures is to ensure that the final judgement, which is usually issued after years of deliberations, is not meaningless, because that which could have been saved is destroyed.[94] The most recent provisional measure issued in *South Africa v. Israel* can serve as an example; it requires Israel to suspend all military operations in Rafah, a city in Gaza.[95]

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[87] Ibid 378.
[88] Schabas (n 30) 165.
[89] Lemkin (n 28) 46.
[90] Mettraeux (n 3) 269–271.
[91] Schabas (n 30) 172–173.
[92] Ibid 178; Mettraeux (n 3) 279–280.
[93] Schabas (n 30) 175–178; Mettraeux 282–284.
[94] Antônio Augusto Cançado Trindade, *Statute of the International Court of Justice*, United Nations Audiovisual Library of International Law https://legal.un.org/avl/pdf/ha/sicj/sicj_e.pdf accessed 20 Feb 2025.
[95] *South Africa v. Israel* (Order of 24 May 2024*)* (n 45) 13, para 50.

Provisional measures are legally binding to the party they are directed at, according to Article 94 of the UN Charter. Aside from loss of face and damaged credibility, a member state choosing to ignore the orders of the court can also be subjected to enforcement measures. These measures must be decided by the United Nations Security Council, which means that the U.S., an ally of Israel, would have to approve of these enforcement measures. Consequently, the likelihood of enforcement action in this specific case remains low.[96]

3.1.4 Notes on Evidence and Evidentiary Threshold

Processes in the ICJ follow the principle of 'free admissibility of evidence' and the parties are generally allowed to present any category of evidence they deem appropriate, if they do it within the set time-limit of the memorial/counter memorial. The burden of proof rests on whomever is trying to establish a fact, such as genocidal intent or the absence thereof. Regarding the standard of proof, there is no universal standard, instead, the evidentiary demands differ depending on the issue and often vary even within the same case.[97]

The evidentiary standard differs significantly in the provisional measures-phase, and the judgment-phase of a genocide case at the ICJ. Both standards have been constructed through caselaw and there is no guidance to be found in either the Genocide convention or the Statute of the Court. In order to prove the need for provisional measures, the applicant must prove that at least some of the acts cited by them *plausibly fall within the scope of the genocide convention*. This standard is expressed in cases such as *Gambia v. Myanmar* and *Qatar v. United Arab Emirates*.[98] The standard of *plausibility* was also confirmed by the ICJ to be the relevant threshold, of this phase, in its first order on provisional measures:

> At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which South Africa wishes to see protected exist. It need only decide whether the rights claimed by South Africa, and for which it is seeking protection, are plausible.[99]

Naturally, the threshold to prove that a genocide has occurred is higher than what is required to prove the need for provisional measures. Thus far, the ICJ has only rendered judgments in two Genocide cases. In *Croatia v. Serbia* the court argued that 'claims involving charges of exceptional gravity must be proved by evidence that is *fully conclusive*'.[100] A standard the applicant did not meet, which was not met in *Bosnia Herzegovina v. Serbia Montenegro* either.[101] The fact that the ICJ has never been satisfied with the evidence presented complicates

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[96] Diakonia International Humanitarian Law Centre, 'ICJ Order on Provisional Measures in South Africa v. Israel: Legal Consequences for Third States' (2 February 2024) https://www.diakonia.se/ihl/news/icj-order-provisional-measures-consequences-for-third-states/ accessed 20 Feb 2025.

[97] James Devaney, 'International Court of Justice (ICJ)' (2013) Max Planck Encyclopedia of Public International Law https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3430.013.3430/law-mpeipro-e3430 accessed 15 May 2025 paras 9–15.

[98] *Gambia v. Myanmar* (Order of 23 January 2020) (n 34) 19, Para 43; *Qatar v. United Arab Emirates* (Order of 23 July 2018) https://www.icj-cij.org/sites/default/files/case-related/172/172-20180723-ORD-01-00-EN.pdf accessed 20 Feb 2025 421–422, paras 43–44. Further analysis of case law pertinent to the evidentiary standard of provisional measures can be found in chapter 4 of this thesis.

[99] *South Africa v. Israel* (Order of 26 January 2024) (n 42) 17, para 36.

[100] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Judgment of 3 February 2015 [2015] ICJ Rep 3 https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf accessed 20 Feb 2025 75, paras 178 and 152 para 515.

[101] *Bosnia and Herzegovina v. Serbia and Montenegro, (*Judgment of 26 February 2007) (n 33) 90, para 209 and 185 paras 435–438.

the establishing of what would constitute satisfactory evidence.[102] The court employs a holistic approach to the assessment of evidence and evaluates all the presented material together in the relevant context. A quote supposedly expressing genocidal intent, for example, must be considered from the perspective of when and where it was said, who was listening and whether the person making the statement or the state he/she was representing had committed any potentially genocidal actions.[103]

4.Analysis of the Use of Evidence in *South Africa v. Israel*

The analysis contained in this chapter serves to answer research question I:
What legal claims and supporting evidence do the parties to the case present regarding the elements required to establish the crime of genocide under the 1948 Genocide Convention?

4.1 Overview

This section analyzes how the parties construct their claims, with particular attention to how they reinforce their factual claims with evidence and their legal claims with legal sources including case law and doctrine. The contextualization and assessment of these sources are guided by the traditional hierarchy of legal sources. Through this process an answer will be provided to Question I concerning the claims and evidence presented by the parties, and the similarities and differences that can be identified between them. The findings of this analysis will further constitute the foundation for the subsequent discourse analysis.

Part 4.1 will analyze the parties' claims, while part, 4.2, will delve further into the evidentiary material. The sections' different parts primarily focus on presenting the individual parties' arguments and evidence; however, the counterarguments of the other party are occasionally included to provide context.

4.1.1 South Africa's Legal Claims and Evidence

South Africa's legal claims and the evidentiary material supporting these will mainly be inferred from its document initiating proceedings: *Application instituting proceedings containing a request for the indication of provisional measures (South Africa v. Israel).* No other document matches the application in comprehensiveness and clarity. Some attention will also be given to the verbatim records from 11 January 2024 and 16 May 2024 concerning requests for additional provisional measures.

Procedural Claims and Legal Sources

South Africa must demonstrate the existence of an international dispute between itself and Israel to establish the jurisdiction of the ICJ. Several diplomatic efforts supposedly confirming such a conflict are detailed in its application such as a *note verbale* sent to Israel and a diplomatic demarché, both expressing concern over genocidal acts. South Africa further cites a speech held by the South African ambassador at the 10th Emergency Special Session of the

[102] For a thorough analysis of the evidentiary standard of genocide at the ICJ see: Brishna Gehani, 'Is the ICJ's Standard of Proof for Genocide Unattainable?' Research Society of International Law (16 February 2024) https://rsilpak.org/2024/is-the-icjs-standard-of-proof-for-genocide-unattainable/ accessed 8 May 2025.
[103] Mettraeux (n 3) 226.

UNGA, during which Israel's actions in Gaza were described as Genocidal, in the presence of an Israeli representative.[104]

South Africa emphasizes that the existence of a dispute is not a question of form; it can be demonstrated in many ways. South Africa points to documents and exchanges in multilateral settings being cited in *Gambia v. Myanmar* as particularly strong evidence. It further argues that Israel is not required to reply expressly to the accusations for a dispute to exist.[105] Israel has not replied expressly to the accusations on these occasions, this is undisputed by both parties. South Africa, however, argues that no such direct exchange is necessary:

> According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests" between parties. Such a disagreement or 'positive opposition of the claim by one party by the other need not necessarily be stated expressis verbis . . . the position or the attitude of a party can be established by inference, whatever the professed view of that party'.[106]

ICJ's jurisdiction is further reinforced through *Opinio juris*, with South Africa citing more than twenty representatives of states expressing the opinion that Israel is conducting a genocide in Gaza. These statements have been made on social media, in official documents and in multilateral settings such as UN-meetings.[107] Specific attention is given to the many statements South African officials have made regarding the potentially genocidal acts in Gaza and the different ways representatives of the country have expressed concern over the situation to Israel.[108] South Africa also points out that UNGA and UNSC, and many other international actors, have publicly condemned Israel's actions in Gaza, indicative of *opinion juris*.[109]

Additionally, South Africa claims that the implementation of provisional measures is required due to the urgency of the situation in Gaza. For this to be possible, the ICJ must determine *prima facie* jurisdiction over the case and assess that some of the acts committed by Israel could plausibly be genocidal. Irreparable damage to the rights at stake must also be a risk to justify the issuing of provisional measures. South Africa argues that at least some of the acts accounted for in its application must be considered plausibly genocidal.[110]

Genocide Claims and Evidence

South Africa alleges that Israel is responsible for both committing genocidal acts and failing to prevent and prosecute such acts. These acts will be detailed in the following section.[111]

Actus reus

South Africa builds its argument around several acts that form the *actus reus* as mentioned in Article II of the Genocide Convention: mass killings of Palestinian civilians, the causing of serious bodily and mental harm and the infliction of conditions of life designed to bring about

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[104] *South Africa v. Israel* (Application instituting proceedings) (n 1*)* 18–22, paras 13–14.
[105] Ibid 175–176, para 123.
[106] Ibid 22, para 15.
[107] Ibid 15–18, para 12.
[108] Ibid 18–22, para 13.
[109] Ibid 26, para 18, and 86, para 53 and 96, para 62.
[110] Ibid 176, para 125.
[111] Ibid.

the physical destruction of the Palestinian people in Gaza and the imposing of measures to prevent births within the group.[112]

Mass Killings

When proceedings were initiated 21 110 killed Palestinians were cited by name, an additional 7780 others were reported as missing, likely dead. By May 2024, this number had increased to 35,000 confirmed deaths.[113] Many casualties have been caused by Israel's extensive aerial bombings, often using 'dumb bombs', i.e., unguided bombs with a lethal radius of up to 360 meters, particularly devastating in densely populated areas such as Gaza. Civilian structures such as hospitals, schools and refugee camps have frequently been targeted.[114]

Many Palestinians have been killed by Israeli gunfire. South Africa cites reports of summary executions of whole families and civilians waving white flags. There are several examples of directed and conscious killings lacking evident military purpose, such as when an Israeli sniper killed Elham Farah, an 84-year-old Christian music teacher. Another example is the killing of Dr Ahmed Hamdi Abo Absa, Dean at the University of Palestine, who was reportedly shot dead as he walked away after having been released from three days of forced Israeli detainment.[115] Thousands have also died from starvation, dehydration and untreated disease and injuries. The collapse of healthcare, the forced evacuation of hospitals and the frequent electricity cuts has led some experts to warn that deaths from deprivation will likely surpass those caused by Israeli bombs and bullets.[116] UNICEF has characterized Israel's military operation as a 'war on children', with children making up 40% of the casualties–twice as many as in any other conflict over the past 20 years. South Africa noted, as it initiated the proceedings, that the assault on Gaza has hit vulnerable groups particularly hard, with 70% of the casualties being women and children.[117]

South Africa primarily relies on reports from UN-bodies, e.g., OCHA and UNICEF, and NGOs such as Amnesty, Palestine Red Crescent Society and Save the Children to reinforce its claims about killings. Several articles from media-sources such as CNN, BBC, Reuters and the Guardian are also cited.[118] The number of fatalities is retrieved from the Gaza Health Ministry, a source with contested legitimacy, which will be discussed further in the next section of this thesis.

The Causing of Serious Bodily and Mental Harm

South Africa details the physical injury inflicted upon over 55,243 Palestinians, most of which are women and children. The most common form of physical injury is burns or loss of limbs. At the time of the application, 1000 children had lost one or both legs. The burns and damage from shrapnel are usually caused by bombings and debris related to these. White phosphorus is also claimed to have been used in populated areas, which is known to cause extreme burns. These injuries are made worse by the fact that the available healthcare has been so dramatically

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[112] Ibid 176, para 124.
[113] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Oral Proceedings, ICJ, 16 May 2024 https://www.icj-cij.org/sites/default/files/case-related/192/192-20240516-ora-01-00-bi.pdf accessed 22 Apr 2025 35, para 17.
[114] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 76–80, paras 46–47.
[115] Ibid 78, para 46, 134, para 93, 130, para 90.
[116] Ibid 29–30, para 19.
[117] Ibid 81–82, para 48, 136 para 95.
[118] Ibid nn 177–214.

limited, with only a few hospitals still functional and medical personnel having to perform surgeries without anesthetics.[119]

The mental harm related to a life surrounded by death and deprivation is described as immense. South Africa puts specific emphasis on the trauma experienced by children, who are greatly affected by the stressful and dangerous situation in Gaza. Many children have developed issues such as selective mutism, bedwetting, suicidal thoughts, and self-harm. The situation for children is worsened by the fact that most of them cannot attend school or experience any semblance of normalcy.[120] Parents endure the stress of having to pretend that they are still in control, even though they suffer, so as not to scare their children further. Israel has also caused mental harm through the dehumanization and humiliation of Palestinians, forcing them to strip naked and stand in cold weather for prolonged periods. There are many reports of torture being inflicted on people kept in Israeli detention facilities. Images of the burned and mutilated bodies of detained Palestinians are said to be in circulation in Israel through the social media platform Telegram.[121]

The presented evidence primarily consists of reports from UN-bodies such OCHA, NGOs such as WHO, Amnesty and Save the Children, media sources such as interviews with medical professionals in Gaza and news-articles containing relevant numbers and photos of hurt civilians. The media sources South Africa relies on are e.g., the Lancet, Al Jazeera, CNN and UN News.[122]

The Infliction of Conditions of Life Calculated to Bring About the Destruction of the Group

South Africa describes in detail how the destruction of critical infrastructure, such as healthcare, education, and the availability of food and drinking water, has turned Gaza into a place with extremely difficult living conditions. One of the greatest challenges is the availability of clean water. Israel has cut off piped water in most parts of the region, making Gazans dependent on desalinated saltwater. However, airstrikes and a lack of electricity have rendered most of the desalination plants inoperable. Damages from bombing raids have also laid waste to large parts of the water system. According to the World Food Programme, there is about 1,5-1,8 litres of water available per person and day, meaning less than the so-called survival threshold of 3 litres per day. This includes not only drinking water but also water needed for hygienic purposes, cooking, healthcare, etc.[123]

> Whoever stays until the end will tell the story. We did what we could. Remember us.[124]

The quote above is used by South Africa to illustrate what it claims is a desperate situation for medical personnel. It was written on a whiteboard at the Al Awda hospital by Dr Mahmoud Abu Nujaila who was killed less than a week later in an airstrike. Many hospitals and other healthcare facilities are said to have been destroyed in bombings. At the time the process was initiated, only 13 of 36 hospitals were still functioning. Doctors, nurses, and ambulance drivers have been killed in the hundreds, creating an imminent lack of medically skilled professionals. Healthcare has also been affected greatly by the lack of medical supplies, anesthetics, and clean water. Electricity shutdowns, evacuation orders, attacks on hospitals, and similar measures have

[119] Ibid 28, para 19.
[120] Ibid 84, para 52.
[121] Ibid, 88, para 54.
[122] Ibid nn 215–235.
[123] Ibid 102, para 66.
[124] Ibid 114, para 77.

created a dangerous situation for patients who often suffer and die when their lives could ordinarily have been saved. Not to mention the mental strain and suffering of the medical staff forced to leave patients to die when bombs start falling or IDF soldiers demand them to evacuate at gunpoint.[125] The water crisis has also had severe effects on agriculture, which, along with other factors, has resulted in an imminent risk of famine for everyone in Gaza. WHO are cited by South Africa as describing a situation where 93% of the population is experiencing 'crisis levels of hunger, with insufficient food and high levels of malnutrition'.[126]

1,9 million people are displaced within Gaza, most of whom have sought shelter in UNRWA-run facilities. With more than 60% of the homes in Gaza destroyed, people are left with no other option but to live in refugee camps, consisting mostly of tents, school buildings, and other public buildings.[127] According to UNRWA, these camps are both unhygienic and unsafe. They have been bombed on multiple occasions, resulting in many deaths, even though the UN has provided Israel with detailed information on the location of all their facilities. The camps also lack proper hygienic and sanitary facilities. In some cases, up to 700 people have been forced to share one toilet. This situation has led to the spread of disease, dangerous conditions, especially for children and women, and overall, much mental suffering. Generally, the possibilities for the people of Gaza to maintain personal hygiene are extremely limited, with an average of one shower per 4500 people.[128]

As with the other allegedly genocidal acts, the evidence invoked mainly consists of reports from international organizations and media sources. This is the purportedly genocidal act substantiated with the largest amount of evidence. The destruction of healthcare in Gaza is reinforced by reports from e.g., WHO, International Red Cross Committee and Médecins Sans Frontières. Claims of displacement and destruction of homes and infrastructure are reinforced by reports from e.g., OCHA and UNRWA. Claims of starvation and a water-crisis are backed up by reports from e.g., the UN World Food Programme, UNICEF and Action Against Hunger. Media sources such as the Guardian, Haaretz and CNN are employed to demonstrate e.g., the destruction of hospitals and killings of medical staff. UN-sources such as UN OCHR and UN OCHA, UN FAO, UNDP and the secretary general are cited throughout. Social media sources are also invoked. Notably, the IDF-twitter account is cited to demonstrate the frequent orders to evacuate areas in Gaza.[129]

The Imposition of Measures to Prevent Births Within the Group

Women and children are claimed to be disproportionately affected by the assault on Gaza and the humanitarian crisis it has resulted in. This has had consequences both for the reproductive health of women living in Gaza and the survival rate of newborn babies.

Women are, in many cases, forced to give birth in dirty, unhygienic locations such as shelters or even in the streets, among rubble and debris. Pregnant women are particularly sensitive to forced displacement since marching for hours and the harsh conditions in refugee camps endanger both their own and their unborn children's health. Oftentimes, there is no availability of clean water or medical supplies. Caesarean sections are performed without anesthesia, and life-threatening complications are often not treated by medical professionals. As mentioned earlier, many doctors and nurses have been killed, and the hospitals still in working condition

[125] Ibid 116, para 79.
[126] Ibid 190, para 142.
[127] Ibid.
[128] Ibid 110, para 73.
[129] Ibid nn 236–390.

are overcrowded with severely hurt people.[130] The deprivation of Gaza is also said to have had physical effects on women, preventing births within the group. Many women who have recently given birth experience problems producing breastmilk since they do not get enough water or food, leaving their children to starve or to get nourishment from formula prepared with contaminated water that may cause serious disease. Premature births have gone up by 25–30%, making newborns even more vulnerable to already extreme conditions. Babies die from ordinarily treatable conditions such as hypothermia and diarrhea, due to the necessary supplies to treat them not being available. Other newborns have died because the hospital lacks the fuel to provide their machines with electricity.[131] The most direct effect Israel's siege on Gaza is claimed to have had on births within the group, is the fact that Palestinian doctors, due to a lack of clean blood and medical supplies, have had to perform hysterectomies on women to prevent them from bleeding to death after childbirth.[132]

South Africa's evidence in this regard consists of reports by international actors such as UNICEF, OCHA, WHO and Oxfam but also data from regionally based NGOs such as the Palestine Red Crescent Society and Juzoor for Health and Development. News sources such as NBC, UN News, The New Arab and Al Jazeera are also cited to present interviews with medical staff and facts about the conditions for pregnant women and newborn children in Gaza.[133]

Mens Rea

Genocidal intent or *dolus specialis* is inferred from statements made by Israeli representatives on many different levels. Including those at the very top, such as the President and Prime Minister. Such intent can allegedly also be deduced from the nature and conduct of the acts committed by Israel in Gaza.

Many of the cited statements were uttered by the highest leadership of Israel. Notable examples are those made by Prime Minister Benjamin Netanyahu, such as his vow that 'the IDF will operate forcefully everywhere', implying that no area will be safe. When he on several occasions described the opponent as 'monsters' and described the military operation as 'a battle between light and darkness'.[134] This kind of allegedly dehumanizing rhetoric has been a recurring theme in Netanyahu's statements; he has repeatedly described Israelis as the sons of light and their opponents as the sons of darkness. Netanyahu has also made statements interpretable as inciting the destruction of Palestinians in Gaza. While the land invasion of Gaza was being prepared, the Prime Minister instructed the IDF: 'You must remember what Amalek did to you'[135]. Amalek is a group mentioned in the bible in a passage that could be perceived as incitement to genocide:

> Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses.[136]

[130] Ibid 122, para 84.
[131] Ibid 138, para 99.
[132] Ibid 137, para 97.
[133] Ibid 428–438.
[134] Ibid 140, para 101.
[135] Ibid 142, para 101.
[136] Ibid.

President Isaac Herzog has collectively blamed the totality of Gaza's population for the 7 October attack, underscoring that there should be no distinction between Hamas fighters and civilians:

> It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not being aware not involved.[137]

Yoav Gallant, Israeli Minister of Defense at the time, stated that Israel would 'eliminate everything', and that 'Gaza won´t return to what it once was.'[138]

Military commanders are also quoted as describing the situation they were creating in Gaza as 'hell', their goal of creating a severe humanitarian crisis in Gaza, and the population of Gaza as 'human animals'.[139]

Some of the most openly genocidal claims are said to have come from retirees, still given a platform in the public eye, but further away from power than the others cited. Giora Eiland, Israeli army reservist Major General and former head of the National Security Council as well as adviser to the Defense Minister claimed that Israel has no choice but to make Gaza 'a place that is impossible to live in' and to 'create a severe humanitarian crisis', he also stated that Israel has 'no interest in rehabilitating Gaza' and that 'the United States should get an explanation as to why Israel attacks hospitals so that they back the operation even when there are thousands of dead civilians in the streets'.[140] Ezra Yachin, a 95-year-old IDF reservist, was tasked on 11 October 2023 to give motivational speeches to troops in which he made several overtly genocidal statements. These were broadcast on social media, calling on the IDF, but also the people of Israel to 'erase them, their families, mothers and children', he went on to say that 'every jew with a weapon should go out and kill them' and 'if you have an Arab neighbor, don't wait, go to his home and shoot him'.[141]

The many statements presented by South Africa are retrieved from media sources such as ABC News, Bloomberg, Reuters, the Guardian and local media such as Yedioth Ahronoth and the Times of Israel. Government documents such as a press release from the Ministry of Foreign Affairs containing a transcription of a speech held by Netanyahu and a similar document from the Prime Minister's Office. The primary evidential category however is social media, with South Africa citing a multitude of X-statuses, such as the 'tweet' in which Israel Katz urges Palestinians to leave the world, along with several Facebook-statuses and YouTube-videos.[142] It should be noted that many of the statements have been translated from Hebrew to English, it seems unlikely however, that South Africa would translate them in a misleading way since this would give Israel's representatives an easy opportunity to frame its litigation as dishonest.

4.1.2 Israel's Legal Claims and Evidence

Procedural Claims

Israel denies South Africa's claim that there is an existing dispute between the states regarding the interpretation of the Genocide Convention, since no formal diplomatic actions have been

[137] Ibid.
[138] Ibid.
[139] Ibid 146–148, para 102.
[140] Ibid 147–148, para 102.
[141] Ibid 150, para 102.
[142] Ibid nn 439–506.

undertaken.[143] In response to South Africa's complaint that its *note verbale* went unanswered, Israel presents evidence in the form of a written reply by Israeli officials, suggesting further diplomatic conversation, which South Africa ignored. Israel argues that South Africa's actions in relation to the *note verbale* have been dishonest and calculating, aiming to mislead the court that there is an existing dispute between the states.[144]

Regarding the jurisdiction of the ICJ, Israel contends that the court cannot base its jurisdiction on the Genocide Convention since the treaty is not meant to regulate wartime conduct lacking a clear intent to destroy a specific group.[145] For the same reason, it is claimed, provisional measures cannot be issued since this would presuppose jurisdiction. Further, Israel argues, it would be unlawful, dangerous, and disproportionate to limit Israel's right of self-defense when the threat from Hamas persists.[146] Ordering Israel to cease military operations in an ongoing war would allegedly also be a step away from the precedent set in *Bosnia and Herzegovina v. Yugoslavia,* in which the court decided against such measures since it did not concern the rights protected by the Genocide Convention.[147] Israel further states that the provisional measures requested by South Africa are based on false premises, would infringe upon the sovereignty of Israel, give their counterpart an unjust advantage in the legal process, and put the Israeli population at risk of being attacked by Hamas. Enforcing these provisional measures would therefore be in breach of the principle of equality between parties, which was recognized in *Nicaragua v. United States of America.*[148] Israel also argues that provisional measures are not warranted by adequate urgency since the fighting in Gaza is decreasing and important humanitarian measures have already been undertaken.[149]

Genocide Claims

Israel categorically denies all accusations of Genocide. The actions presented as genocidal *actus reus* are instead framed as either directly caused by Hamas or as unfortunate collateral damage in a legitimate war.[150]

The argumentation of the Israeli legal team centers around the Israeli state's right of self-defense in response to the 7 October attack. Much emphasis is put on the atrocities committed by Hamas on that occasion. The legal team recounts testimonies about the torture of children, the killings of whole families, rape and gruesome sexual violence that Hamas have subjected their victims to. Israel states on several occasions that the events of 7 October are the real genocide and that Hamas' genocidal intent is widely known and recognized. Among others, by the head of the EU Commission. The descriptions of atrocities committed by Hamas are presented to the court as a way of explaining the threat facing Israel and to balance South Africa's, in Israel's view, one-sided presentation of facts. Nevertheless, Israel repeatedly recognizes that no actions, no matter how unforgivable, can justify genocide.[151]

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[143] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Oral Proceedings, ICJ, 12 January 2024 https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-ora-01-00-bi.pdf accessed 22 Apr 2025. 71, para 92.
[144] Ibid 27, para 21.
[145] Ibid 71, para 92.
[146] Ibid 17, para 27.
[147] Ibid 57 para 13.
[148] Ibid 62, para 22.
[149] Ibid 53, paras 16–20.
[150] Ibid 18–20, paras 36–47.
[151] Ibid 14–15, paras 12–21.

Actus Reus

Regarding the *actus reus,* Israel acknowledges the civilian suffering in Gaza but attributes it to the actions of Hamas. Not only because they forced the war upon Israel and its population, but also because much of the destruction of Gaza has been caused by misguided rockets fired from within Gaza hitting infrastructure such as hospitals. Many homes are also said to have collapsed, due to Hamas' tunnels beneath the buildings, affecting their structural integrity. Hamas has held many civilians at gunpoint, preventing them from fleeing conflict zones and directly killing them. Further, Israel claims that there is evidence of Hamas frequently stealing humanitarian resources such as food so that it does not reach Palestinian civilians. Much of the destruction resulting from Israeli bombs is also allegedly caused by Hamas and their strategy of hiding military resources and concealing their operations in civilian structures such as schools and hospitals. Footage of armed militants entering such facilities and rockets being launched from them is provided to the court.[152]

Israel disputes that the countries' military efforts could constitute genocide since they are not aimed at one of the protected groups mentioned in the Genocide Convention art II; rather, they are military acts only targeting Hamas militants, i.e., members of an internationally condemned terrorist organization. All civilian casualties are described either as the result of Hamas' disregard for civilian lives or as unfortunate and unavoidable consequences of military actions taken within the limits of international law.[153]

Israel does not directly address all the acts South Africa accuses it off, the amount of substantial evidence presented by its legal team is therefore significantly smaller. It invokes several media sources such as CNN, CBS and Times of Israel to demonstrate the atrocities committed by Hamas on 7 October.[154] Regarding the destruction in Gaza, Israel primarily presents photographic material and reports produced by its own authorities, such as the visual evidence presented in the Oral proceedings from 12 January 2024. It also cites some social media sources to clarify some of the statements South Africa alleges to be genocidal.[155]

Mens Rea

A key point made by Israel is the failure of South Africa to prove any *dolus specialis*. South Africa argues that *dolus specialis* can be inferred from public statements made by Israeli political and military leaders, using dehumanizing language and inciting violent acts towards Palestinians. In response to this, Israel asserts that representatives of the state have consequently made it clear that the enemy is Hamas and not the people of Gaza.[156] Israel submits several quotes from Israeli leaders supporting this assertion, such as the following:

> We are not fighting the Palestinian multitude and the Palestinian people in Gaza and declared on 13 November that [o]ur war is against the Hamas terrorist organization, not the people of Gaza.[157]

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[152] Ibid 18–20, paras 36–43.
[153] Ibid 31, paras 35–38.
[154] Ibid nn 4–7 presenting news sources, nn 12, 13, 15, 16, 18–16 citing independent inquiries and nn 27, 34 citing social media sources.
[155] *South Africa v. Israel: ICJ Oral Arguments on Genocide Allegations,* https://www.youtube.com/watch?v=aAKM3aUn3JA accessed 20 Feb 2025, visual evidence presented between 1:50 and 2:10.
[156] *South Africa v. Israel* (Oral Proceedings, ICJ, 12 January) (n 143) 33, paras 45–47.
[157] Israeli Minister of Defense, Israel Katz, Ibid 33, para 46.

Further, Israel brings forward statements made by Prime Minister Benjamin Netanyahu in which he emphasizes that the war is against Hamas and not Palestinians in general, that Israel has no intention of permanently occupying Gaza or displacing its population and that the IDF is doing everything in its power to minimize civilian casualties while Hamas are doing the opposite, using Palestinian civilians as human shields[158]. In another statement, the Prime Minister describes every civilian death as a 'tragedy', a sentiment that Israel claims to be echoed by the policies adopted by the state to protect civilians in Gaza.[159]

Israel goes on to comment some of the statements brought forward as evidence by South Africa, claiming that many of these are purely rhetorical, expressing anguish and an urge to restore safety to a people under threat, not to be considered of legal importance, but rather to be seen in the context of a painful war.[160] Some of the statements allegedly expressing genocidal intent are also said to be presented out of context and with a lack of understanding of their significance. Such is the case with a quote made by Netanyahu about *Amalek*, a historical ethnic group that God urged the Israeli people to 'blot out' according to the Hebrew bible. This phrase is interpreted as representing Hamas and, in extension, the population of Gaza when Netanyahu declares that the Israeli people should remember 'what Amalek did to you'. According to the Israeli legal team, *Amalek* is rather, in Judaism, a metaphor for all threats to the Jewish people. They go on to present a longer version of the relevant quote, which includes Netanyahu hailing the IDF as 'the most moral army in the world', 'doing everything to avoid harming the uninvolved'.[161] Israel also contends that many of these statements, out of context and misrepresented, lack evidentiary value since they are not made by officials who possess relevant influence over Israeli policies, e.g., a statement made by the Minister of Heritage who holds no power over military operations. The statement in question was also countered by members of the war cabinet and other ministers.[162] The accusation that Israel fails to act against incitement to genocide is repudiated, and the legal team cites several ongoing legal cases against people accused of inflammatory rhetoric in their attached annex.[163]

Regarding the pattern of conduct that South Africa claims a genocidal intent can be inferred from, Israel claims that this pattern consists of acts that cannot be perceived as genocidal since they lack a clear genocidal intent. All actions taken by the IDF are taken to combat Hamas militants, and if any of these should be in breach of the rules of conflict, which Israel does not accept that they are, that would be handled accordingly by the Israeli independent legal system.[164] Further, the measures taken to mitigate civilian harm are claimed to contradict South Africa's claims of intent to destroy a protected group. Examples of these measures are pre-strike warnings issued to the population of Gaza through telephone calls and leaflets, the coordination with organizations providing humanitarian assistance, and the use of humanitarian corridors to allow civilians to flee war zones. Other measures to mitigate the humanitarian crisis are also mentioned as contradicting genocidal intent, such as the construction of field hospitals and the facilitation of humanitarian aid reaching Gaza.[165]

It is stated repeatedly by Israel that the accusations brought forward by South Africa lack legitimacy. South Africa's legal actions are said to not be motivated by legal concern over an

[158] Ibid 34, para 47.
[159] Ibid 34, paras 47–48.
[160] Ibid 34, para 49.
[161] Ibid 35, paras 50–51.
[162] Ibid 32, para 40.
[163] Ibid 74, para 16.
[164] Ibid 31, para 36.
[165] Ibid 45, paras 45–47.

ongoing genocide but are rather described as a politically motivated attack on Israel and its legitimate right of self-defense. Israel warns the ICJ that this is a dangerous path to walk down since it opens the floodgates for more politically motivated cases to be brought before the court which would take up much of its valuable time, undermine the genocide convention and the ICJ's credibility and damage sovereign states' right to take justified military action against belligerents.[166]

4.2 Comments on the Evidence Presented by the Parties

To provide meaningful commentary on the evidentiary material provided by the parties as presented in the section above, it is necessary to distinguish the evidence supporting procedural claims from that supporting factual claims. Key procedural issues in the case are jurisdiction, evidentiary threshold, and the legal basis for issuing provisional measures. The parties primarily reinforce these claims with *legal sources* such as case law and academic doctrine, rather than evidence.

Factual claims made by South Africa, i.e., those that need to be supported by substantial evidence, include the occurrence of mass killings, the destruction of Gaza's infrastructure resulting in the region becoming uninhabitable, etc. From Israel's perspective, factual claims include the insistence that no acts amounting to genocide have occurred, and the assertion that any military action undertaken has been part of a reciprocal war, not a genocide.

While there is arguably value in distinguishing procedural and factual matters, and in identifying the evidence and the types of evidentiary material these call for, the distinction is often difficult to make. The categories overlap as a rule and are inherently attached. For instance, the establishment of ICJ jurisdiction, a procedural matter, requires an assessment of whether the acts cited could plausibly be genocidal, which is a factual matter.

4.2.1 Procedural Evidence and Legal Sources

Jurisdiction

To establish ICJ jurisdiction, South Africa must demonstrate the plausible occurrence of violations of the Genocide Convention and that a dispute exists between it and Israel.[167]

South Africa's enumeration of allegedly genocidal acts and its evidence of genocidal intent have already been accounted for in some detail and will be further elaborated under the section entitled *Substantive evidence*. It mostly consists of statements made by Israeli political and military leaders, the outlining of a pattern of genocidal conduct and statements made by representatives of other states recognizing the intent to commit genocide.[168]

Israel vehemently dismisses all this evidence, describing the cited statements as taken out of context, not mirrored in any state policy, and nothing but wartime rhetoric, distorted to fit South Africa's litigation purposes. Israel also submits context to some of the statements cited by South Africa, as well as declarations made by Israeli leaders that the target of the military campaign is Hamas militants and not civilians.[169]

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[166] Ibid 75, para 24.
[167] *South Africa v. Israel (*Order of 26 January 2024) (n 42) 11–12, paras 18–20.
[168] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 140–156, paras 101–106.
[169] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 34, paras 39–52.

Moving onto the legal Sources invoked by Israel, it refers extensively to case law and to a lesser degree to doctrine. Among the books cited is William Schabas' *Genocide: The Crime of Crimes,* a highly respected work of doctrine, referenced to underscore the exceptionality of Genocide as a crime. To differentiate military acts from genocidal acts, and to emphasize the importance of *dolus specialis*, Israel quotes Schabas, describing Genocide as the 'crime of crimes'. This use of doctrine appears to be primarily rhetorical, designed to reinforce the narrative that South Africa is abusing the Genocide Convention, and Schabas' writings are not employed in any substantial way to support Israel's legal arguments.[170]

Legality of Use of Force (Yugoslavia v. Belgium) is also cited by Israel to reinforce the notion that *dolus specialis* is crucial to establish the court's prima facie jurisdiction, and that use of force or threats of force are insufficient to form the basis of a genocide case. Israel further points out that the ICJ, in *Yugoslavia v. Belgium*, denounces the presence of the necessary element of genocidal intent in relation to the bombing carried out by NATO[171], implying that this might be the case also concerning Israel's bombings in Gaza:

> Whereas it appears to the Court, from this definition, "that [the] essential characteristic [of genocide] is the intended destruction of 'a national, ethnical, racial or religious group'" whereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision quoted above".[172]

Yugoslavia v. Belgium bears some resemblance to *South Africa v. Israel*; however, this depends on which framing of the case is considered legitimate. Belgium was tried by the ICJ on allegations of Genocide regarding its part in the NATO-bombings of Yugoslavia in 1999, which were carried out in response to the conflict between Yugoslavia and Kosovo. Israel argues that it, similarly to Belgium, acts within the framework of an ongoing military conflict to achieve military objectives. Israel's invoking of the case is successful in proving that the use of force is not sufficient to establish a genocide case. However, the comparison appears unconvincing since NATO acted on behalf of Kosovo, in the interest of international stability, while Israel holds significant influence over Gaza and acts in its own interest. Further, the destructiveness of Israeli airstrikes – both in terms of casualties and destruction of infrastructure – is incomparable to the airstrikes in Yugoslavia.[173]

Regarding the existence of a dispute, South Africa cites multiple instances where it has communicated concern that a genocide is being carried out in Gaza. Some of these have occurred in the presence of Israeli representatives, and some in public forums or media, where it is likely that the statements will reach Israeli officials. South Africa cites *Gambia v. Myanmar* and *Cameroon v. Nigeria* to reinforce its interpretation of a dispute as constituting a

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[170] Ibid 24, para 7. Interestingly, Schabas has expressed that South Africa has the strongest genocide case ever brought before the ICJ: 'Gaza Genocide: The Strongest Case at the World Court – William Schabas, Expert Witness.' *Middle East Eye*, January 11, 2024., https://www.middleeasteye.net/video/gaza-genocide-strongest-case-world-court-william-schabas-expert-witness accessed 22 Apr 2025.
[171] Ibid 24, para 8.
[172] *Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures) [1999] ICJ Rep 124* (order of 2 June 1999) https://www.icj-cij.org/sites/default/files/case-related/105/105-19990602-ORD-01-00-EN.pdf accessed 22 Apr 2025 138, para 40.
[173] Around 1000 casualties are mentioned in the request for the issuing of provisional measures. Ibid 8, para 6.

'disagreement on a point of law of fact, a conflict of legal views of interests' which does not necessarily require the explicit opposition of the other party.[174]

In *Gambia v. Myanmar,* the existence of a dispute was inferred from the following chain of events: a UN fact-finding mission had found evidence of genocide, in response, Gambia announced its intent to initiate a process at the ICJ. While Myanmar did not respond directly to Gambia's announcement, it expressed that the fact-finding mission was flawed and biased. Gambia – like South Africa in *South Africa v. Israel* – sent a *note verbale* to Myanmar, accusing it of genocide. The fact that Myanmar failed to reply to this *note verbale*, despite the serious accusations expressed in it, was seen by the court as indicative of a dispute between the states.[175] Israel denies the existence of a legal dispute, arguing that South Africa has not provided Israel with any meaningful opportunity to engage in dialogue about the allegations. Rather, it argues, South Africa appears to have decided preemptively that there is a dispute. Israel further cites a ruling from the *South West Africa* case reaffirming the need for the parties to be in clear opposition:

> Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other.[176]

The quote underscores the need for some degree of reciprocity for a dispute to exist. Israel goes on to cite the cases mentioned in the quote above as evidence that this has been the consistent opinion of the ICJ. Additionally, Israel cites *Marshall Islands v. United Kingdom,* in which the ICJ expressed that the United Kingdom must be afforded a reasonable chance to respond to the accusations before a process is initiated in court.[177] While that case concerned nuclear disarmament, Israel argues that the same principle should apply to other legal disputes, not least when the case concerns genocide – the crime of crimes:

> If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore, the rule that the dispute must in principle exist prior to the filing of the application would be subverted.[178]

Regarding the *note verbale,* Israel argues that South Africa's presentation of the chain of events has been distorted to align with the precedent of *Gambia v. Myanmar*. In support of this claim, Israel presents documents to the court proving that it did indeed reply to the initial *note verbale*, after which South Africa sent a second *note verbale* reiterating the accusations, instead of replying to Israel's reply to the first one.[179] Here, Israel makes a rather compelling case that the dispute between the states has mostly consisted of unilateral statements, presenting a challenge to South Africa's narrative that there is a dispute. Regarding the *note verbale*, Israel's recounting of events appears credible. This does not completely undermine the claims made by

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[174] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 23–24, para 15.
[175] *Gambia v. Myanmar* (order of 23 January 2020) (n 34) 13–14, para 28.
[176] *South Africa v. Israel* (Oral Proceedings of 12 January 2024) (n 143) 25, para 13; *South West Africa (Ethiopia v. South Africa; Liberia v South Africa) (Preliminary Objections)* Judgment of 21 December 1962 [1962] ICJ Rep 319 https://www.icj-cij.org/sites/default/files/case-related/46/046-19621221-JUD-01-00-EN.pdf accessed 22 Apr 2025 328.
[177] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 25, para 14.
[178] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Judgment) [2016]* ICJ Rep 833 https://www.icj-cij.org/sites/default/files/case-related/160/160-20161005-JUD-01-00-EN.pdf accessed 22 Apr 2025 22, para 43.
[179] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 26, paras 20–25.

South Africa, as it never denied that Israel had replied at all, but rather, not replied to the accusations. This is at least a plausible interpretation of the phrasing 'not replied directly'. Israel does, however, achieve some success in framing South Africa's diplomatic efforts as disingenuous.[180]

Nevertheless, Israel's reference to the *Marshall Islands v. United Kingdom* and the assertion that it has not been afforded an adequate opportunity to express its position on the case, ultimately, appears unconvincing. Nothing stood in Israel's way, preventing it from replying to South Africa's allegations. Indeed, South Africa cites several instances of Israeli leaders vehemently denying any genocidal acts or intentions. A notable example of this is a document published by the Israeli Ministry of Foreign Affairs entitled *The War against Hamas: Answering your most pressing questions,* in which Israel not only dismisses all accusations of Genocide as baseless but also 'morally repugnant'.[181] This public denial of culpability, along with similar statements, clearly demonstrates Israel's position on the matter, indicating that Israel was both aware of and opposed to South Africa's allegations.

In conclusion, the existence of a difference in opinion between the states is undeniable. South Africa has expressed concern over a genocide, a genocide which Israel has categorically denied. No direct exchange of opinion seems to have taken place between the states, which potentially could pose a challenge to establish the existence of a dispute. However, considering the high stakes of the case and the fact that a difference in opinion is evident, it is understandable that the ICJ chose a teleological interpretation of the rule, rather than a formalistic one, strictly bound to the linguistic meaning of the word dispute. Such a strict interpretation of Article IX would also arguably lead to unreasonable consequences if no process could ever be initiated simply because the respondent state deliberately chooses not to engage directly with the accusations. This approach would guarantee impunity for genocidal actors who play their cards right.[182]

Evidentiary Threshold

Both parties seem to agree that the evidentiary threshold is relatively low in the provisional measures stage of the case, although Israel maintains that it is somewhat higher than South Africa suggests. At the provisional measures stage, the applicant must make its claims appear plausible, it is not required to prove them conclusively.[183]

Article 41 of the ICJ Statute empowers the court to issue provisional measures if it deems that 'circumstances so require'. No more precise guidance regarding the evidentiary threshold is to be found in the rules of court, Articles 73–78, which concern provisional measures.[184] The same standard applies for both provisional measures and the establishment of the Court's jurisdiction, since these are co-dependent during the provisional measures stage of the process. Guidance on this issue can be retrieved from case law, which will be examined presently.

[180] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 21–222, paras 13–14.
[181] Ibid 22, para 14 and n 43.
[182] S*outh Africa v. Israel* (order of 26 January) (n 42) 15, para 28.
[183] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 179–180, para 129; *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 35, para 53.
[184] Statute of the International Court of Justice Article 41; Rules of Court (1978) arts 73–78.

South Africa supports its assertion of the relatively low evidentiary demands by citing *Gambia v. Myanmar*[185], in which the court stated that:

> For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Myanmar's obligations under the Genocide Convention have occurred. Such a finding, which notably depends on the assessment of the existence of an intent to destroy, in whole or in part, the group of the Rohingya as such, could be made by the Court only at the stage of the examination of the merits of the present case. What the Court is required to do at the stage of making an order on provisional measures is to establish whether the acts complained of by The Gambia are capable of falling within the provisions of the Genocide Convention.[186]

The quote underscores that no definitive proof of genocidal intent is required at this stage, only that 'some of the acts alleged could fall within the provisions of the convention'. The focus is not to conclusively assess the merits of the accusations but to determine whether it is plausible that preemptive measures are needed to protect the rights in question.

Israel argues that the evidentiary threshold, low as it is, is still higher than what South Africa reaches with its evidentiary material. It cites *Costa Rica v. Nicaragua* in which plausibility is stated to be 'something more than assertion but less than proof', implying that what South Africa is doing is simply asserting that the rights concerned fall within the frames of the genocide convention, without adequately supporting the plausibility of these claims. Judge Greenwood, participating in the ruling, is quoted as mentioning 'a reasonable prospect of success'.[187]

Israel reinforces this stricter evidentiary threshold further by citing *Ukraine v. Russia* and *Jadhav* (*India v. Pakistan),* emphasizing that relevant rights do not simply need to be at play – the breach of these must also appear plausible. The case law referenced by Israel is relevant to affirm the previous position of the ICJ regarding plausibility. However, the applicability to the case at hand is limited since the previous cases do not concern genocide but breaches of CERD and the Vienna Convention. An ongoing potential genocide presents a unique risk of destruction and loss of life, which reasonably should affect the decision of the ICJ on whether to indicate provisional measures.[188]

Israel's assertion that the breach of the relevant rights must be shown to be plausible is reinforced by statements from, e.g., *Ukraine v. Russia*. However, the ICJ, in the same case law, clearly ascertains that any definitive assessment is reserved for the merit-stage of the process and that the responsibility of the court during the provisional measure-stage is limited to determining whether the rights claimed plausibly exist. Thus, Israel's case for a higher evidentiary threshold at this stage is ultimately quite unconvincing.

> At this stage of the proceedings, the Court, however, is not called upon to determine definitively whether the rights which Ukraine wishes to see protected exist; it need only

[185] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 182, para 134.
[186] *Gambia v. Myanmar* (Order of 23 January 2020) (n 34) 14, para 30.
[187] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 36, para 54.
[188] Ibid.

decide whether the rights claimed by Ukraine on the merits, and for which it is seeking protection, are plausible.[189]

South Africa's claim of a low evidentiary threshold was ultimately reaffirmed by the ICJ, which in its order indicating provisional measures, found that it was sufficient to demonstrate the plausibility of the rights in question falling within the framework of the Genocide Convention and that a link existed between the measures requested and these rights.[190]

Provisional Measures

For the court to issue provisional measures, the applicant must demonstrate that the suggested measures are necessary due to 'a real and imminent risk of irreparable prejudice and urgency' and have a clear link to the rights allegedly at risk.[191]

South Africa references *Ukraine v. Russi*a, arguing that ongoing attacks and insufferable living conditions for civilians can be reasons to issue provisional measures. It invokes the same case law to illustrate that an ongoing armed conflict does not negate the risk of genocide, thereby making the indication of provisional measures possible. Further, South Africa references *Equatorial Guinea v. France* to point out that past violations of the rights can be an indication of further violations and thereby justify the indication of provisional measures. South Africa cites *Gambia v. Myanmar* to contend that the measures need to be directly linked to the rights in question and maintain that its suggested provisional measures meet this requirement.[192]

Israel repeats the criteria that a real and imminent risk must be at hand and insists that the case law shows that provisional measures should only be issued in 'exceptional circumstances. In support of this claim, Israel invokes *Canada and the Netherlands v. Syrian Arab Republic*.[193] Indeed, the court reiterates the requirement of a real and imminent risk in the case; it does not explicitly state that provisional measures are only to be adopted in exceptional circumstances – this is Israel's own interpretation of the ruling.[194]

Israel goes on to claim that provisional measures cannot be issued if the respondent state has adopted concrete measures 'recognizing and ensuring the rights of the group' and that this can be inferred from *Gambia v. Myanmar.*[195] This claim is not supported explicitly by the cited paragraph but is a possible interpretation of it. The concrete measures in question, however, need to be sufficient and effective in the eyes of the court. Meaning that the undertaking of concrete measures to protect the rights of the group does not automatically preclude provisional

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[189] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017 https://www.icj-cij.org/sites/default/files/case-related/166/166-20170419-ORD-01-00-EN.pdf accessed 22 Apr 2025 26, para 64.
[190] S*outh Africa v. Israel* (Order of 26 January) (n 42) 24, paras 58–59.
[191] *Gambia v. Myanmar* (Order of 23 January 2020) (n 34) 24–25, paras 64–66.
[192] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 188, para 140 and 192, para 145.
[193] *South Africa v. Israel* (Oral Proceedings of 12 January) (n 143) 50, para 6.
[194] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and The Netherlands v. Syrian Arab Republic*), Provisional Measures, Order of 16 November 2023 https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf accessed 17 Feb 2025 606–607 para 65. 'However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a *real and imminent risk that irreparable prejudice will be caused to the rights claimed* before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case'.
[195] Ibid 50, paras 7–8.

measures.[196] Israel does not provide any strong evidence supporting the claim that provisional measures are reserved for *exceptional* cases. In fact, the court indicated provisional measures in both the cases cited by Israel and has done so in all genocide cases where they have been requested.[197]

When it comes to the requirement of a link between the measures requested and the rights at stake, Israel challenges South Africa's reliance on *Ukraine v. Russia*, claiming that the circumstances in this case are completely different. Israel, unlike Russia does not legitimize its military operation using the genocide convention.[198] Israel bases its arguments on *Bosnia v. Yugoslavia,* in which the court found that it was disproportionate and unjustified to order Yugoslavia to cease all military operations. This is claimed to be particularly disproportionate, in the situation at hand, where only one combatant, Israel, is forced to cease all military actions, while Hamas can continue its operations unrestricted. Since the measures exceed the limits of necessity and proportionality, they cannot be deemed to be linked to the rights at issue in a relevant way.[199]

Israel's notion that the necessity of provisional measures must be balanced against the interests of the respondent is supported by extensive case law, including the *Pulp Mills Case (Argentina v. Uruguay)*. The arguments presented by Israel on this matter are compelling, and it seems reasonable that the legitimate interests of the respondent should be considered by the court when indicating provisional measures. However, if the ICJ finds that there is a real and imminent risk of irreparable prejudice, the negative impact the provisional measures would have on the respondent would have to be considerable to be prioritized. Ultimately, which interest the ICJ should prioritize is a factual question and should be evaluated based on substantive evidence.[200]

Regarding the necessity of the requested measures, Israel references *Greece v. Turkey,* in which the court allegedly found it unnecessary to issue provisional measures in a situation where the respondent state was willing to comply with the UNSC's directives. Israel claims that it has already demonstrated its willingness to adopt the measures required to comply with the UNSCs demands. Further, the assurance of the respondent that it will respect its obligations under international law can render the issuing of provisional measures unnecessary. Israel reinforces this claim by referencing case law such as Gambia *v Myanmar, Belgium v. Senegal*, *Finland v. Denmark,* and *Switzerland v. United States*. These cases do reinforce the notion that assurances from the respondent state can have bearing on the indication of provisional measures, but it does not follow that an assurance from the respondent automatically precludes the indication of such measures. It should also be noted that the stakes were lower in many of these cases since they did not concern Genocide, with the notable exception of *Gambia v. Myanmar*.[201]

4.2.2 Substantive Evidence

As detailed above, South Africa accuses Israel of large-scale human rights violations in Gaza. Israel denies many of the actions attributed to it by South Africa. While acknowledging some

[196] *Gambia v. Myanmar* (Order of 23 January 2020) (n 34) 27 para 73. 'In the view of the Court, however, these steps do not appear sufficient in themselves to remove the possibility that acts causing irreparable prejudice to the rights invoked by The Gambia for the protection of the Rohingya in Myanmar could occur.'
[197] See this thesis, note 35.
[198] *South Africa v. Israel* (Oral Proceedings of 12 January) (n 143) 55, paras 7–10.
[199] Ibid 57, para 13 and 55, para 3.
[200] Ibid 58, para 16.
[201] Ibid 53–54, paras 19–21.

of the humanitarian issues in Gaza, it frames them as unavoidable consequences of the war and the result of Hamas' irresponsible and callous governance.

Israel denies targeting civilians or civilian structures without a clear military purpose. Further, it questions the number of dead civilians, since the source for this is the Gaza health department that Hamas holds influence over. As mentioned, Israel places much of the blame on Hamas when it comes to destroyed infrastructure and violence against civilians in Gaza. Establishing who has done what is challenging, and the evidentiary threshold is high to reach a final verdict.[202] Israel has criticized some of the sources cited by South Africa for being biased and untrustworthy, such as the Hamas-led Gaza Health Ministry, which Israel describes as 'hardly a reliable source'.[203] In its application, South Africa briefly discusses the reliability of the casualty figures reported by the Gaza Health Ministry:

> Due to the ongoing bombardment, the United Nations is currently relying on numbers provided by the Gaza Ministry of Health. UN officials see no reason to doubt the figures, which have not been inflated in the past, and which recent studies demonstrate are not now being inflated (...) There may in fact be underreporting, as those whose bodies are not brought to a hospital or morgue are not routinely included in the casualty numbers. In circumstances where so many hospitals have ceased functioning, where Palestinians are unable to reach them — and indeed, as there are repeated reports of people having to resort to burying bodies on the street where they find them, the underreporting could be significant. At present, approximately 7,780 people are missing, presumed dead, but not yet included in the official statistics.[204]

South Africa's reliance on figures retrieved from a Hamas associated organization demonstrates the complicated nature of the evidentiary situation. Hamas is widely regarded as illegitimate due to it being designated a terrorist organization; it is also an active party in the conflict, which may benefit from high casualty figures to put pressure on Israel. Meanwhile, Israel restricts international observers from entering Gaza, making figures from the Gaza Health Ministry the only ones available. This does not mean that the Gaza Health Ministry's figures are accurate, but it underscores the difficulty of creating a reliable and comprehensive picture of the scale of death and destruction in Gaza. Indeed, the UN has struggled to report casualty figures, which has sparked some controversy. Understandably, Israel objects to the usage of figures possibly manipulated by Hamas, a group it is in an active conflict with. Yet, Israel has not presented any alternative casualty figures. Even if it did, the suspicion of bias would likely lead to these being challenged as well. Given all these factors, and in the absence of a more reliable source, the figures from the Gaza Health Ministry arguably satisfies the principle of best evidence, a recognized standard within international law.[205]

Many of South Africa's claims are reinforced by different UN bodies and agencies, sources that the ICJ generally seems to regard as credible. Understandably, given that the ICJ is part of the UN-framework and must operate on the presumption that the United Nations is a legitimate international institution. Israel, however, argues that these sources are not completely trustworthy either:

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[202] Ibid, e.g.., 18, para 36 and 71, paras 1–7.
[203] Ibid 19, para 41.
[204] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 76, see note 184.
[205] Alain Pellet, 'International Court of Justice (ICJ)' (2012) *Max Planck Encyclopedia of Public International Law* https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1266.013.1266/law-mpeipro-e1266 accessed 17 Feb 2025.

> An additional flaw in this regard is South Africa's heavy reliance on documents prepared by third parties or under the auspices of the United Nations, when these cannot be said to constitute sufficient evidence of a reliable quality. Indeed, the Court has itself had occasion to observe that UN reports may only be of such quality "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources". The Court, moreover, stated that "the precise evidentiary value accorded to any report, including those produced by United Nations entities, also depends on the methodology and amount of research underlying its preparation".[206]

This statement is based on ICJ case law, *specifically Democratic Republic of the Congo v. Uganda*, in which the court asserted that the relevant reports of UN bodies could shed light on specific incidents, but not form the basis for a credible estimate of total deaths caused by Uganda.[207] As Israel points out, the evidentiary value is of course dependent on the quality and rigor of the specific report. In its orders on provisional measures to date, the ICJ has not questioned the validity of the reports cited by South Africa. It has however not questioned the validity of the photographs, reports, and other evidentiary material presented by Israel either.[208]

Hitherto, the Court has predominantly ruled in favor of South Africa's claims, which is likely the result of it adopting a cautious approach so as not to risk irreparable harm to the rights at stake. The stakes must be considered very high when acts allegedly reaching the threshold of genocide are being committed and the number of people allegedly killed are in the many thousands. The Court's rulings may also reflect that Israel's evidence, at this early stage of the case, has been insufficient to disprove the plausibility of South Africa's claims. Nevertheless, it does not conclusively mean that the court has accepted the strength of South Africa's evidentiary material as sufficient to prove anything more than *prima facie* jurisdiction and the need for provisional measures.

4.2.2.1 South Africa's Substantive Evidence

Reports from UN Bodies

South Africa retrieves most of its substantive evidence from reports issued by UN bodies, among these are several reports from OCHA (the UN Office for the Coordination of Humanitarian Affairs) and OHCHR (the UN Human Rights Office). These are cited throughout the application. Similar reports are cited in many other genocide cases such as *Bosnia and Herzegovina v. Yugoslavia* and the use of such reports appears to be a relatively well-established custom of international law. South Africa also cites several different UN Special Rapporteurs – independent human rights experts appointed by the UN Human Rights Council. These appointments are made based on the individual's recognized expertise and professionalism and they pledge to uphold neutrality and fairness. Reports from UN special rapporteurs are generally considered as credible sources.[209]

However, the Special Rapporteur on the Occupied Palestinian Territories, Francesca Albanese, repeatedly cited by South Africa in its application, has received widespread criticism. She has

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[206] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* Oral Proceedings, ICJ, 17 May 2024 https://www.icj-cij.org/sites/default/files/case-related/192/192-20240112-ora-01-00-bi.pdf accessed 17 Feb 2025 18, para 64.
[207] Ibid.
[208] *South Africa v. Israel* (Order of 26 January 2024) (n 42) 28, paras 75–84.
[209] *Guide to Humanitarian Law*, 'Special Rapporteurs' https://guide-humanitarian-law.org/content/article/3/special-rapporteurs/ accessed 20 Feb 2025.

been accused of antisemitism and of holding an anti-Israeli bias by the United States and Israel, as well as several other actors.[210] In 2024, Israel went as far as to ban Albanese from entering Israeli territory due to comments she had made about the 7 October attacks, a move further reinforcing the narrative that Israel is working to make Gaza and the West Bank inaccessible to independent experts. Albanese has been publicly defended by the UN and in 2025, her mandate was extended until 2028, meaning that she retains the confidence of the UNHRC. The use of Albanese's reports, characterizing Israel's conduct towards Palestinians as apartheid and genocide,[211], is controversial in the eyes of Israel and its allies, considering her reappointment, however, the ICJ will likely consider her reports as meeting the methodological standard and impartiality required for it to be admissible as evidence.

A notable aspect of South Africa's application is the sparse use of UNRWA (the UN Relief and Works Agency for Palestine Refugees in the Near East). UNWRA has been described as the most significant humanitarian actor in Gaza. Its credibility has, however, become the subject of controversy. Israel has claimed that more than 1200 of the organization's employees have links to terrorist organizations[212], leading several Western states to publicly question the legitimacy of the organization.[213] The United Nations has denied these allegations. South Africa cites UNWRA in a few instances, but primarily relies on sources that base their reports on findings and data from UNWRA.[214]

Other Humanitarian Organizations

Many humanitarian organizations are cited such as: Amnesty, WHO, UNICEF, Oxfam, Action Against Hunger, Save the Children and Diakonia International Humanitarian Law Centre. South Africa attaches great significance to statements and data from these organizations, and along with UN organizations, they form the central part of its evidentiary foundation. All these organizations have conducted humanitarian work for decades, and there is little reason to question their competence or objectivity.[215]

It could be argued that humanitarian organizations have an interest in inflating the severity of the humanitarian crisis to attract funding or attention. That risk seems negligible, however,

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[210] Times of Israel Staff, 'Anti-Israel UN Investigator Keeps Mandate Despite Push for Removal by US, EU Lawmakers', *The Times of Israel* (5 Apr 2024) https://www.timesofisrael.com/anti-israel-un-investigator-keeps-mandate-despite-push-for-removal-by-us-eu-lawmakers/ accessed 20 Feb 2025.
[211] UNISPAL, Francesca Albanese, *Genocide as Colonial Erasure*, Special Rapporteur on the Situation of Human Rights in the Palestinian Territories (1 Oct 2024) https://www.un.org/*unispal*/document/genocide-as-colonial-erasure-report-francesca-albanese-01oct24/ accessed 20 Feb 2025.
[212] The Times of Israel**,** 'Israel Cuts Ties with UNRWA over Links With Terror Groups, as Ban Comes Into Effect'. (Jan 30, 2025) https://www.timesofisrael.com/israel-cuts-ties-with-unrwa-over-links-with-terror-groups-as-ban-comes-into-effect/ accessed 7 May 2025.
[213]Abdullahi Jimoh, 'UNRWA Impartiality Challenged by US at ICJ Gaza Aid Hearings'. News Central Africa (30 Apr 2025). https://newscentral.africa/unrwa-impartiality-challenged-by-us-at-icj-gaza-aid-hearings/ accessed 7 May 2025; SVT Nyheter 'Sverige Slopar Stödet till FN-organet Unrwa'. (20 Dec 2024) https://www.svt.se/nyheter/inrikes/sverige-slopar-stodet-till-fn-organet-unrwa accessed 7 May 2025.
[214] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) nn 140, 155, 67, 270, 285, 145, 400.
[215] For background on these organizations: Amnesty International USA, 'Our History' https://www.amnestyusa.org/about-us/history/ accessed 20 Feb 2025; World Health Organization (WHO), 'History' https://www.who.int/about/history accessed 20 Feb 2025; United Nations Children's Fund (UNICEF), 'UNICEF History' https://www.unicef.org/history accessed 20 Feb 2025; Oxfam GB, 'Our History' https://www.oxfam.org.uk/about-us/history-oxfam/ accessed 20 Feb 2025; Philanthropy News Digest, 'Action Against Hunger' (Nonprofit Spotlight) https://philanthropynewsdigest.org/features/nonprofit-spotlight/action-against-hunger accessed 20 Feb 2025; Save the Children, 'History – Why Save the Children' https://www.savethechildren.org/us/about-us/why-save-the-children/history accessed 20 Feb 2025; Diakonia International Humanitarian Law Centre, 'About Us' https://www.diakonia.se/ihl/about-us/ accessed 20 Feb 2025

considering the large number of different organizations consistently describing a similar humanitarian situation. Assessed together, these accounts of the destructiveness of Israel's actions paint a compelling picture and strongly support the claim that Gaza is a region in a severe ongoing humanitarian emergency.

Government Documents

A selection of official government documents is presented to illustrate the international condemnation of Israel and to substantiate Israeli statements implying Genocidal intent. There is no need to question the authenticity or admissibility of these documents, since they were published on official government platforms, e.g., the website of the Israeli Prime Minister's Office.[216]

Social Media Sources

South Africa references several posts made on, e.g., the IDF's Official twitter/X-account and other social media accounts of Israeli representatives, as well as social media posts published by foreign leaders expressing condemnation of Israel's conduct in Gaza. Disinformation is notably prevalent on social media, however, the statements cited by South Africa are retrieved from verified accounts, and the falsification of statements made by public officials would be easy for Israel to refute. The evidentiary value of these sources is therefore relatively strong, in the context of reinforcing genocidal statements and reactions by foreign leaders.[217]

Media Sources

Articles published by newspapers are used extensively. South Africa relies on these as sources documenting Israeli Statements inciting Genocide, such as the Times of Israel, ITV News, Middle East Eye, and Yedioth Ahronoth, but also to reinforce claims of the destruction in Gaza, such as the BBC, The Guardian, The New York Times, and Washington Post.[218] These sources differ considerably when it comes to how globally recognized they are, the ones citing genocidal statements are in many cases mostly focused on regional-specific news, some of these are Israeli-based, while the media outlets referenced regarding the facts on the ground in Gaza are some of the world's most established news sources, generally based in Western countries such as the United States or the United Kingdom.

The validity of media sources can never be taken for granted since their collection of data is not required to follow any scientifically established norms or methodology. Media outlets are, however, expected to observe basic journalistic norms such as fact checking and source verification, ensuring at least a modicum of credibility.[219]

4.2.2.2 Israel's Substantive Evidence

Media Sources

[216] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) See e.g., nn 33–35, 162.
[217] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) e.g., nn 168, 171, 460, 494–498 and nn 10, 12,15,16.
[218] Ibid e.g., nn 198, 232, 401, 403.
[219] For some context: New York Times**,** 'Editorial Standards', https://www.nytimes.com/editorial-standards/ethical-journalism.html accessed 20 Feb 2025.

Like South Africa, Israel references media sources such as CBS News and Times of Israel, however, far less frequently than South Africa. Most of these references to the media are made to describe the atrocities of October 7 and to support Israel's claim of Hamas's genocidal intent.[220] The media outlets cited are well established and globally recognized, and further, Israel can reinforce the media reports with findings and data from investigations that Israeli authorities have carried out. The use of dual sources gives Israel the possibility to corroborate its claims and strengthen its evidentiary foundation regarding the events of October 7, something it is unable to do regarding its claims about the situation in Gaza.

Government Documents

The official documents submitted by Israel come from both Israeli and South African government bodies. Primarily, the Israeli documents are cited to affirm Israel's commitment to preserve the rights of Gazans.[221] The South African government documents are presented to demonstrate the sympathy South Africa allegedly has shown for Hamas.[222] Furthermore, foreign government documents and documents from international bodies are invoked to prove *opinio juris* regarding Israel's right of self-defense, mainly in relation to 7 October.[223]

Independent Inquiries

The most significant part of Israel's evidentiary material consists of evidence gathered by Israel's own authorities, likely government bodies such as the Home Department, the Ministry of Defense, and the military. These sources are difficult to review since they are not made available to the public but presented to the court in a separate volume.[224] Some of the pictures and videos presented to the court can be seen in the recordings of the oral proceedings available online.[225] These look genuine; nothing implies that they have been doctored. Photos taken in Gaza are claimed to prove Hamas' strategy of integrating its military activities within civilian structures. This material includes pictures of tunnels, hostages being led into a hospital, projectiles hidden beneath a child's bed and holes made in a residential house to be used to launch rockets through. Photographic material is also presented to illustrate the efforts Israel has made to alleviate the suffering in Gaza such as photos of ambulances and food transports.

The fact that Israel has unique access to the region is a double-edged sword when it comes to the value of the evidence presented by it. Its permanent presence in the region provides a better opportunity to gather photographic footage, witness testimonies, and other evidentiary material than any other actor comes close to. The downside, however, is that this material cannot be independently verified since little to no material assembled by other actors exists to put it into context and to corroborate it. Further, Israel is not only a party in the case but also engaged in an armed conflict, meaning that third-party sources could be of value to it, since internally collected evidence is, for understandable reasons, met with skepticism and suspicions of bias. E.g., how can the Court assess whether rifles found hidden in a hospital in Gaza were placed

[220] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) e.g., nn 5–7.
[221] Ibid n 103.
[222] Ibid n 11.
[223] Ibid nn 33, 86.
[224] Ibid e.g., nn 93–102.
[225] *South Africa v. Israel: ICJ Oral Arguments on Genocide Allegations,* https://www.youtube.com/watch?v=aAKM3aUn3JA accessed 20 Feb 2025, visual evidence presented between 1:50 and 2:10.

there by Hamas or by the IDF? In such a scenario, it comes down to good faith; such an issue would not arise if independent experts presented footage of such a find.

4.2.3 Notes on the Statements Allegedly Expressing Genocidal Intent

Regarding the statements presented as evidence of Israel's genocidal intent, many of these are relatively vague, and the majority can be interpreted both as referring to all Palestinians in Gaza or specifically to Hamas militants. Some of the statements specifically refer to civilians, but the intent to destroy them is usually not explicitly stated; it is reasonable, however, to interpret them as inciting violence against Palestinian civilians such as the quote below:

> We will fight the terrorist organization Hamas and destroy it. All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world.[226]

Katz describes how Israel will 'fight' Hamas and 'destroy it'; this is a clear threat of destruction. As for the civilians, they are ordered to leave, which implies that no harm will befall them if they follow these orders. The addition that they must leave the world, however, contradicts this assumption and makes the statement ambiguous. Ambiguous statements and veiled threats are not uncommon as evidence in genocide cases and can be used successfully to prove intent if paired with a pattern of conduct indicative of such intent.[227] Israel's defense against accusations of genocidal intent brings up two interesting issues.

Firstly, Israel denies that the statement from government officials proves genocidal intent since they do not represent the official government policy. According to caselaw from international courts, genocidal intent can exist without being explicitly incorporated in official government policy.[228]

Secondly, the Israeli legal team responds to the statements supposedly expressing genocidal intent by submitting counterstatements made by, e.g., the Prime Minister and the President. Case law from the ICJ and other international courts, e.g., the ICTR, suggests that statements condemning violence and genocide can imply a lack of genocidal intent, it must however be assessed in relation to the actions taken by the person and other statement condoning violence.[229] A statement in favor of peace and the protection of civilians does not automatically cancel out a statement of a dehumanizing or inciting nature, but rather the totality of evidence must be considered.

There are examples of statements that clearly demonstrate genocidal intent as well. Such as the quote of 95-year-old reservist, Ezra Yachin, urging 'every Israeli with a gun in their hand to go out and kill Palestinians, to attack their Arab neighbors and to leave no one behind.' His statements leave no room for other interpretations than the wish to destroy Palestinians as a group. However, the fact that he is so far removed from actual political or military influence might weaken the evidentiary value of these statements. It is, however, notable that he was given a platform by army officials and that no effort was made to remove the videos from social media or to punish him for clear incitement of violence against civilians. In other words, if these

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[226] South Africa v. Israel (Application Instituting Proceedings) (n 1) 144 para 101. Quote by Israeli Minister of Defense Israel Katz.
[227] Mettraeux (n 3) 425.
[228] Mettraeux (n 3) 257–258.
[229] E.g., *Prosecutor v. Radovan Karadžić* (IT-95-5/18-T, Trial Judgment, 24 March 2016) paras 2654–2655.

are not genocidal statements attributable to Israel then they may be evidence of their failure to punish incitement to genocide.

4.3 Conclusions

South Africa relies primarily on third-party sources such as reports from UN bodies and NGOs, to substantiate its claims of genocidal acts. Social media and media sources are employed to present statements expressing genocidal intent. Such statements are plentiful but often ambiguous. Statements from leaders of different states are also cited, retrieved from social media, news reporting and government documents, to present an *opinio juris* in favor of South Africa's case. Israel generally relies on the same categories of sources, but to a much smaller extent. It is not primarily concerned with disproving South Africa's allegations of different acts, but rather proving that these lack genocidal intent and are made necessary due to the actions of Hamas. Israel invokes several statements made by its political leaders allegedly disproving genocidal intent, these are retrieved from social media, traditional media and government documents. Further, it presents photographic material showing its own humanitarian efforts in Gaza and Hama's strategy of using civilian structures for military purposes thereby making them legitimate targets.

While the majority of South Africa's evidence is assembled by third party-actors such as the UN, Israel primarily relies on evidence produced by its own authorities, such as the photos mentioned above. This is a clear and important difference between the parties, with great implications for their possibilities to substantiate their claims.

5. Discourse Analysis

The purpose of the analysis contained in this chapter is to provide an answer to research question II: *How do the parties construct the essential aspects of the case through their discursive practices?*

This section of the study applies Laclau and Mouffe's discourse analysis to the legal arguments put forward by South Africa and Israel before the ICJ, analyzing how the parties aim to construct and stabilize their discourses per their hegemonic agenda.

5.1 Genocide

The meaning of genocide is of central importance and the fixation of its meaning is paramount to win the case. It serves as an empty signifier, since both parties construct their cases around it, treating it as monumentally important, but at the same time, understand it through completely different antagonistic discourses. Every articulation of what genocide means, in the context of the case, is part of Israel and South Africa's struggle for hegemony.

South Africa's Construction of Genocide

South Africa tries to determine the meaning of genocide by connecting it to the context of Israel's conduct in Gaza, focusing on the oppressor-oppressed dynamic. Israel is constructed as a settler-colonial project, having occupied Palestine for decades. Consequently, Israel's attempt to frame its conduct as self-defense is weak and full of contradictions since it as an occupying

power wields almost absolute power over Gaza. Furthermore, it is weakened by the fact that customary international law recognizes occupied peoples' right to resist their occupiers.[230]

> South Africa is also aware that acts of genocide inevitably form part of a continuum — as Raphaël Lemkin who coined the term "genocide" himself recognized. For this reason, it is important to place the acts of genocide in the broader context of Israel's conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza.[231]

South Africa's discursive strategy is to frame the ongoing atrocities in Gaza as a continuation of a 75-year-long apartheid-regime and a 56-year-long belligerent occupation. It uses language associated with what is universally recognized as oppression and unjust exercise of power, terms such as 'apartheid' and 'discrimination', to bring the crimes of other apartheid-states to mind. Thus, constructing a historic context where Israel will go down as a violator of human rights.[232]

The first *floating signifiers* identified in South Africa's arguments are *apartheid* and *colonialism*. South Africa uses these to construct a discourse about Israel where it is not the defensive party but rather the primary actor, with massive influence over the territory and the intent and means to commit genocide. Israel frames apartheid as something completely different from what it has been doing in Palestine, expressing complete disbelief over the accusations and describing them as 'outrageous'.[233]

The meaning of this signifier is reinforced by South Africa referring to Nelson Mandela, highlighting the similarities between Palestinian and South African history and constructing them as being part of a common fight against apartheid and colonial oppression. Positioning the Palestinian struggle for self-determination as an extension of the South African liberation movement constructs both South Africa and Palestine as historically justified champions of human rights, partaking in the fight against global injustice. This construction of a *social identity* for South Africa and Palestine is of central importance to the case, since Israel aims to construct the target of its attacks as Hamas, a symbol of evil, against which military power is justified and necessary. In presenting an alternative discourse where emphasis is put, not on Hamas, but on the Palestinian people in general and its legitimate fight for liberty, South Africa frames the recognition of the genocide as a necessity for the court to be on the right side of history.

> In extending our hands across the miles to the people of Palestine, we do so in the full knowledge that we are part of a humanity that is at one". These were the words of our founding President Nelson Mandela. This is the spirit in which South Africa acceded to

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[230] E.g., recognized by The Declaration on Friendly Relations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) art 1: 'Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.'

[231] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Oral Proceedings, ICJ, 11 January 2024) https://www.icj-cij.org/sites/default/files/case-related/192/192-20240111-ora-01-00-bi.pdf accessed 20 Feb 2025 17, para 5.

[232] Ibid.

[233] *South Africa v. Israel* (Oral Procedings**,** 12 January 2024) (n 143) 39, para 71.

> the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention") in 1998.[234]

Another purpose of framing South Africa and Palestine as representatives of the fight against colonialism and oppression is that it clearly situates Israel on the wrong side of history. Israel is constructed as 'the other'. Positioning Israel as a defendant of an outdated, immoral colonial worldview that does not align with international law, is a strategy to create the post-colonial human rights narrative as the hegemony. This can be described as the creation of social identity through differentiation.[235]

The construction of Israel as a Western colonialist power is made stronger by the statement that Israel has been able to commit human rights violations with *impunity* for decades, underscoring that it has been protected by powerful allies in the international community. Impunity functions as a *floating signifier* in this case. Israel constructs itself as the region's only real democracy, and consequently, it always acts in accordance with international law and modern, righteous values. For Israel, impunity has no place in its political project, rather it has 'the world's most moral army', and its legal system is 'robust and independent', i.e., it is exceptionally just. In South Africa's construction of Israel this exceptionalism: Israel's role as the region's only democracy, is the basis of its impunity. The framing of Israel as exceptional in the Middle East, the brave David facing off time after time with the Arab Goliath, protecting Western values, is seen as justifying its blatant violations of international law in the eyes of the international community.

> Decades-long impunity for widespread and systematic human rights violations, has emboldened Israel, in its recurrence and intensification of international crimes in Palestine.[236]

The Holocaust occupies a unique place in our understanding of what a genocide is. South Africa does not refer explicitly to the Holocaust, but it cites Raphaël Lemkin, who coined the term genocide in response to the crimes of the Third Reich. It also uses words such as 'concentration camp', and 'zones of extermination' floating signifiers that bring the holocaust to mind. Israel has interpreted these words as referring to the holocaust and has expressed its disgust over the historical indelicacy of using them in this context. Another notable omission is the word Jew or Jewish, South Africa never mentions the Jewish culture of Israel. Its counterpart however refers to the Jewish people and Jews repeatedly.[237]

South Africa appears to have a discursive strategy to distinguish the Jewish identity and the state policy of Israel. A strategy that makes sense, considering that Israel being the guarantee that Jews will never experience a genocide again is one of the main discourses Israel uses to justify its actions. Implying similarities between the situation in Gaza and the Holocaust gives South Africa's genocide claim legitimacy, since a genocide with no similarities to the Holocaust seems inconceivable. Not naming it explicitly is however also a part of constructing the claims

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[234] *South Africa v. Israel* (Oral Proceedings 11 January 2024) (n 231) 18, para 1.
[235] E.g., 'For this reason, it is important to place the acts of genocide in the broader context of Israel's conduct towards Palestinians during its 75-year-long apartheid, its 56-year-long belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza, including the serious and ongoing violations of international law associated therewith.', *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 8 para 2.
[236] Ibid 17, para 4.
[237] E.g., *South Africa v. Israel* (Oral Proceedings of 12 January) (n 143) 12, para 2, 13, para 9, 14, para 14, and 21, para 54.

as legitimate, since comparing Israel to Nazi Germany is extremely historically indelicate and might be perceived as antisemitic, as illustrated by the following quote from Israel:

> We heard plenty such outrageous distortions and misrepresentations yesterday as well. Perhaps most repugnant is South Africa's suggestion that Israel has created "zones of extermination", evoking terminology reminiscent of the systemic extermination of European Jews during the Holocaust.[238]

Unlike Israel, South Africa focuses exclusively on the devastation in Gaza. The 7 October attack is not constructed as essential to the case. South Africa only mentions it in passing, lamenting the lives lost, and expressing that no atrocity, no matter the severity, can justify genocide.[239] The events that transpired on 7 October function as a *floating signifier* in the discursive projects of the parties' construction of the acts claimed to be Genocide. It is however a nodal point only in Israel's discourse. South Africa has less to gain from explicitly engaging with the attack, since its brutality and disregard for human life complicates the construction of legitimate Palestinian resistance against occupation. Instead, the absence of any deeper analysis of the attack serves to construct it as legally unimportant to the case.

> This Application concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023. South Africa unequivocally condemns all violations of international law by all parties, including the direct targeting of Israeli civilians and other nationals and hostage-taking by Hamas and other Palestinian armed groups. No armed attack on a State's territory no matter how serious — even an attack involving atrocity crimes — can, however, provide any possible justification for, or defence to, breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[240]

This framing of the event is essential to counter Israel's aim to articulate the attack as a unique security crisis and an existential threat of unprecedented proportions, thereby legitimizing heavy military action. There is a *hegemonic struggle* over what importance the 7 October attack should have for the case – a struggle that South Africa is engaging in simply by omitting it from its legal arguments.

South Africa devotes a significant portion of its arguments to detailing the mass killings and humanitarian crisis in Gaza. Structural violence is constructed as a crucial part of genocide, with alleged acts such as manmade famine, withholding of medicine and destruction of housing and sanitary infrastructure mentioned as key causes of the ongoing destruction of the Palestinian people in Gaza.[241] The legal team frames these structural acts of violence as equally indicative of genocide as the launching of missiles or summary executions. Israel's structural violence as a conscious strategy to destroy the Palestinian people in Gaza is a *floating signifier* and a *nodal point* in South Africa's discourse about Genocide. Moreover, Israel's pattern of conduct, including both direct and structural violence, is emphasized as a way of inferring its genocidal intent. This framing of genocidal intent is crucial to its case since it would be very challenging to prove intent on statements alone:

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[238] *South Africa v. Israel* (Oral Proceedings, 17 May (n 205) 19, para 69.
[239] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 6, para 1 and 68, paras 40–42.
[240] Ibid 6, para 1.
[241] Ibid 88–136, paras 55–94.

> Repeated statements by Israeli State representatives, including at the highest levels, by the Israeli President, Prime Minister, and Minister of Defense express genocidal intent. That intent is also properly to be inferred from the nature and conduct of Israel's military operation in Gaza, having regard, inter alia, to Israel's failure to provide or ensure essential food, water, medicine, fuel, shelter and other humanitarian assistance for the besieged and- blockaded Palestinian people, which has pushed them to the brink of famine.[242]

Furthermore, South Africa rejects the notion that the assault on Gaza is a war since that term should be reserved for hostilities between combatants with more symmetrical military power. The military operation is instead described as both a 'war on children' and a war 'on women', constructing Israel's actions as genocidal acts targeting civilians, rather than conventional warfare. South Africa largely omits any mention of Hamas, constructing the legal case as something in which it plays no, or a minimal, role. It does not address Israel's claims that Hamas are primarily responsible for the suffering in Gaza.

Nor does South Africa respond to the accusations that it is allied with Hamas. Instead, it tries to meet Israel's claims with silence in the hopes that focus will not be on Hamas, as Israel's narrative about self-defense would require, but rather on the suffering of the Palestinian people in Gaza. Of which Hamas is, of course, a part. South Africa's refusal to engage with Hamas as an important factor also highlights its framing of the conflict as a question of colonialism and genocidal targeting of an oppressed group, rather than a war between two aggressive governments. South Africa does not deny that Israel has the right to protect its people from Hamas – rather, it claims that Israel's true intention is to destroy the Palestinian people. Not a question of national security, but rather, a question of human rights being violated, which is the last *empty signifier* and *nodal point*.[243]

The concept of human rights is of great importance in the case but means different things for the parties. South Africa argues that, while there may be a threat against Israel, its sovereign right to use violence in self-defense is outweighed by the violations of human rights it is committing. This is an antagonistic discourse since Israel constructs the defense of its population as a matter of human rights. The equivalency chain constructing Israel's actions as genocide is as follows:

Israel – Apartheid and colonialism – Impunity - Structural violence in Gaza - Violations of human rights – Genocide

Israel's Construction of Genocide

Israel frames genocide through the historical lens of the Holocaust, identifying the Hamas-led attack on 7 October as the true genocide. Within Israel's discourse, the term genocide is completely incompatible with the war it is waging. The military operation differs from genocide in at least two ways:

Firstly, genocidal acts must be carried out with intent, e.g., bombings that cause civilian deaths are not inherently genocidal. The same applies to the structural violence described by South Africa: lack of water and medicine due to a war that Israel did not initiate are not automatically conditions of life brought about by Israel to destroy Palestinians in Gaza. Rather, these

[242] Ibid 10, para 4.
[243] *South Africa v. Israel* (Oral Proceedings, 11 January) (n 231) 81, para 33.

conditions are unfortunate side effects of the war. The lack of intent is particularly apparent since Israel has taken measures to alleviate the suffering in Gaza – something that deviates radically from Israel's construction of a genocide.[244]

Secondly, the perpetrators of genocide are barbaric, they take pleasure in the suffering of their victims, as Hamas did during the attack on Israel. Israel's construction of genocide can be described as a binary antagonistic discourse, situating Israel in stark contrast to Hamas. Hamas is described as a group whose 'brutality knows no bounds', and their acts are described as 'the true genocide in this situation', Israel on the other hand is described as having taken 'extraordinary measures in order to minimize civilian harm'. The first *nodal points* in Israel's *equivalency chain* are therefore the *floating signifiers* benevolent state, referring to Israel's moral and justified conduct, and genocidal threat, referring to Hamas.[245]

Israel endeavors to shift the understanding of the violence in Gaza from being part of a long history of colonial violence, as South Africa claims, to a justified military operation that must be seen in the context of 7 October. Israel goes on to detail the atrocities committed by Hamas on 7 October as a way of framing its own acts as justified. Generally, it tries to construct Hamas as the most important factor in the case, since the terrorist group made it necessary for Israel to attack Gaza, thereby causing all the suffering of the Palestinian people. Hamas is not on trial, but their agency is of utmost importance to Israel's arguments, framing them as the primary actor in the situation. The quote below illustrates how South Africa and Israel's framing of the ongoing violence differs:

> South Africa casts its net widely. In its application it uses the word "context" many times. In particular, it declares that: "it is important to place the acts of genocide in the broader context of Israel's conduct towards [the] Palestinians during its 75-year-long apartheid". Leaving aside the outrageous nature of that statement, why stop at 75 years? Why not refer to 1922 and the approval by the Council of the League of Nations of the British Mandate? Or 1917, the proclamation of the Balfour Declaration? Maybe also include the entry into the land of Israel of the Israelite tribes some 3,500 years ago?
>
> No, the immediate and proximate context for the specific allegations of genocide claimed by South Africa lies in the events of 7 October, when Hamas militants and other armed groups and individuals stormed into the internationally recognized sovereign territory of Israel and committed acts of barely credible atrocity.[246]

Hamas is a floating signifier with central importance to how the case is to be understood. Israel frames the threat from Hamas as a way of legitimizing its own actions, delegitimizing South Africa's case and as a symbol of utter evil and an absolute enemy. Hamas is framed as a military organization with illegitimate methods and motives, rather than the legitimate government of Gaza, which is important to justify Israel's goal to bring about the group's destruction. Israel questions the fact that South Africa has had diplomatic relations with Hamas and points to these talks as detrimental to South Africa's credibility as a defender of human rights.[247] Describing the attack on 7 October as the immediate context for the military operation in Gaza is a way of constructing it as *legitimate self-defense*, which is a floating signifier and nodal point in Israel's construction of its actions.

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[244] *South Africa v. Israel* (Oral Proceedings, 12 January) (n 143) 37, para 62.
[245] Ibid 50, para 5.
[246] *South Africa v. Israel* (Oral Proceedings, 12 January 2024) (n 143) 23, para 3.
[247] Ibid 17, para 31.

The discourse of the Holocaust as the archetype of a genocide is apparent in Israel's arguments.[248] It is also a key factor in construction of Israel as a legitimate safekeeper of the genocide treaty, rather than a genocidal perpetrator. Israel was founded in response to the horrors of the holocaust – a state established to protect the world's Jewish population from further persecution. The Israeli legal team emphasizes the historical experience and trauma of the holocaust for the Jewish people in their opening remarks, asserting Israel's historical role and how it, more than other states, understands the implications of genocide:

> The State of Israel is singularly aware of why the Genocide Convention, which has been invoked in these proceedings, was adopted. Seared in our collective memory is the systematic murder of six million Jews as part of a pre-meditated and heinous programme for their total annihilation.
>
> Given the Jewish people's history and its foundational texts, it is not surprising that Israel was among the first States to ratify the Genocide Convention, without reservation, and to incorporate its provisions in its domestic legislation. For some, the promise of "Never Again" for all peoples is a slogan; for Israel, it is the highest moral obligation.[249]

The Holocaust functions as a floating signifier in this case, meaning that momentous symbolic weight is attached to it, but that its political meaning differs depending on who refers to it and how it is articulated. For Israel it is part of an equivalence chain where antisemitism and its historic connection to genocide justifies intense and resolute acts of self-defense. The Holocaust's role as a signifier in Israel's construction of its actions can be described as the 'never again discourse'. The atrocities of history repeating themselves must be avoided, and this justifies the use of any force necessary. Antisemitism is also an important signifier and nodal point, since it places Hamas and the perpetrators of the Holocaust in a common historic context of hatred against the Jewish people.[250] Through this discourse, Israel's actions are framed as necessary to prevent genocide, rather than genocidal in themselves. The legitimacy of self-defense is further connected to the Zionist perception of a sovereign Jewish state as an existential necessity, and the most effective way to stop antisemitic persecution. When Israeli sovereignty is constructed as a safeguard against antisemitism and genocide, the critique of Israel becomes easy to equate with antisemitism.

Another aspect of genocide that Israel emphasizes more than South Africa, is the exclusion of any possible motive other than genocidal intent for acts claimed to be genocidal. This strict interpretation of the genocide convention suggests that a group that can fall victim to a genocide must be 'innocent' in the sense that no members or parts of the group pose a threat to the alleged perpetrator. If they pose an actual threat, then this justifies an armed response as part of legitimate self-defense, regardless of how many people die who pose no direct threat at all.

> We do so not because these acts, however sadistic and systematic – release Israel of its obligations to uphold the law as it defends its citizens and territory. That is unquestionable. We do so because it is impossible to understand the armed conflict in Gaza, without appreciating the nature of the threat that Israel is facing, and the brutality and lawlessness of the armed force confronting it.[251]

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[248] Ibid 74, para 19.
[249] Ibid 12, para 2.
[250] Ibid 14, para 14.
[251] Ibid 14, para 15.

Israel's discourse about genocide places the clearly expressed intention of the genocidal state to destroy the protected group as its most central component. It is of no matter to this definition how many people are killed or how much physical harm is caused, the validity of a genocide accusation can only be determined by the intent. This position also aligns with Israel's construction of the 7 October massacre as the real genocide, since Hamas has been vocal about the wish to destroy Israel.[252]

> The issue is this. What determines the existence of the crime of genocide is the intention to destroy, in whole or in part, a particular group, as such. That is what distinguishes genocide- from other international law crimes, such as war crimes or crimes against humanity. To consider the acts alone as listed in Article II, with no reference at all to the intent criterion, is thus to denude the crime of its very essence: Hamlet without the Prince; a car without an engine.[253]

Sovereignty is another nodal point in Israel's discourse, since it is the base for Israel's self-defense. In an antagonistic sense, it is also crucial to construct the opponent as a legitimate military target. If Hamas were understood as the legitimate government of Gaza, no matter how deplorable their politics are, it would be challenging to legitimize Israel's repeated statement that it must be destroyed. The fact that Hamas is a military organization designated as terrorists by most of the world is mentioned repeatedly[254], but the fact that it has also been elected by the people in Gaza is omitted. Changing government in another sovereign state is difficult to reconcile with international law, but when framed as a terrorist organization posing an immediate threat, the military operation is understood as justified.

> The simple reality is that the events which are the subject of these proceedings are occurring in the framework of a war instigated by Hamas, governed by the legal framework of international humanitarian law. They do not fall within the remit of the Genocide Convention.[255]

Furthermore, Israel's discourse about genocide depends on it being something *completely distinct from warfare*. A genocide is constructed as a one-sided act with one group seeking to destroy the other group, an ideal perpetrator subjecting an ideal victim to atrocities. Like the holocaust in which Nazi-Germany systematically killed Jews, Roma people, and other groups who posed no military threat to them. Within this discourse, it is important to emphasize that there are two parties, Hamas and Israel, engaging in reciprocal violence. Thus, the last signifier in Israel's chain of equivalence is legitimate warfare. Defined antagonistically to the holocaust that South Africa is trying to frame Israel's actions as.[256]

The equivalence chain constructing Israel's conduct as legitimate looks like this:

Israel - Benevolent state - Genocidal threat/Hamas - Anti-Semitism - Never again - Self-defense - Sovereignty - legitimate warfare

[252] Ibid 15, paras 22–23.
[253] Ibid 30, para 32.
[254] Ibid e.g.12, para 4, 13, para 12, 17 para 31.
[255] Ibid 71, para 1.
[256] Ibid 19, para 39.

5.2 Self-defense

The internationally recognized right for states to defend themselves against military threats is central to the case. Questions such as: who has the right to invoke self-defense, what are the limits of legitimate self-defense, etc., are crucial for the parties to answer convincingly to gain the upper hand in the struggle for hegemony.

South Africa's Construction of Self-defense

South Africa disputes Israel's attempt to claim its right of self-defense as a hegemonic discourse, constructing it as an empty signifier that must be put into context and arguing that Israel is using it as an excuse to justify genocide. It perceives Israel's actions as a systematic effort to oppress a people under occupation. It challenges the construction of Israel's conduct in Gaza as a direct response to the 7 October massacre, not by excusing the massacre but rather by framing it as an atrocious consequence of the colonial oppression of Palestinians. South Africa argues that the genocide in Gaza must be understood, not only in the context of 7 October, but through the discourse of Israel's apartheid-regime and belligerent occupation of Gaza.[257] Colonialism is therefore the first relevant signifier and nodal point of the equivalence chain, constructing Israel's claims of self-defense as illegitimate.

> The facts relied on by South Africa in this Application and to be further developed in these proceedings establish that — against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and the ongoing denial of the right of the Palestinian people to self-determination — Israel, since 7 October 2023 in particular, has failed to prevent genocide and has failed to prosecute the direct and public incitement to genocide.[258]

Israel emphasizes, in its arguments, the fact that Hamas is a terror-designated group, constructing it as an opponent against whom the Israeli people must be defended at all costs. South Africa does not question the merits of calling Hamas terrorists, it does not explicitly express any opinion of Hamas. However, its perception of the group is likely quite different from Israel's, informed by the historical experience of the ANC and Nelson Mandela, instrumental in the foundation of post-apartheid South Africa who were also designated terrorists for many years. This does not imply that South Africa sympathizes with Hamas' methods or all their goals. However, South Africa has its own historical experience that a multitude of actors can work for the same legitimate goal, even though some of them use methods and have other secondary motives that are unjustifiable. Therefore, it is understandable why South Africa has engaged diplomatically with Hamas.[259]

By emphasizing Israel's alleged status as an apartheid-state and a settler-colonial project, Israel's claim of self-defense is constructed as defending not only actions taken to protect its population but also actions taken to protect the subjugation of Palestinians.[260] The way that Israel is conducting its self-defense is framed as conflicting with the liberty of Palestinians, I.e., to defend its population, Israel must violate the human rights of Palestinians. This creates a dichotomy between Israeli safety and the Palestinian right to freedom, which begs the question of where the limits of self-defense should be drawn. The framings of Israel's actions as either self-defense or genocide are antagonistic, they cannot exist at the same time, meaning that the

[257] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 8, para 2.
[258] Ibid 10, para 4.
[259] *South Africa v. Israel* (Oral Proceedings, 12 January 2024) (n 143) 17, para 31.
[260] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 62, para 35.

case can only be resolved by one definition being fixed and gaining a position of hegemony. In its construction of the situation, South Africa frames Israel as protecting the status quo by claiming that it acts to defend itself, the status quo being that Israel can act with impunity, while South Africa challenges this norm. *Impunity* is a key signifier and nodal point in South Africa's equivalence chain.

> I should address the question of self-defence. In its Advisory Opinion in the Wall case, the Court noted that the threat that Israel had argued justified the construction of the wall was not imputable to a foreign State, but emanated from territory the Occupied Palestinian Territory over which Israel itself exercises control. For those reasons, the Court decided that as a matter of international law, the right of self-defence under Article 51 of the United Nations Charter had no relevance in such circumstances.[261]

South Africa also challenges the idea that self-defense is a universal right in the sense that it can always be invoked to justify any act responding to another violent act. Rather it must be put into context and be limited by proportionality, effectiveness, etc. In this case, the factor that Israel occupies Palestinian territory is the most relevant. South Africa further invokes statements by several states to strengthen its claim that Israel's actions have surpassed the limits of proportionate self-defense and crossed over into violations of international law.[262] The mass killings of civilians and repeated violations of international laws, both the laws of war and other laws protecting human rights, are nodal points in the equivalence chain constructed by South Africa.

> The point is not simply that Israel is acting "disproportionately": the point is that the prohibition on genocide is an absolute, peremptory rule of law. Nothing can ever justify genocide. No matter what some individuals within the group of Palestinians in Gaza may have done and no matter how great the threat to Israeli citizens might be, genocidal attacks on the whole of Gaza and the whole of its population with the intent of destroying them cannot be justified.[263]

While never explicitly stated, it is implied that Palestinians also have a right to self-defense since they have been under belligerent occupation for many years.[264] The case is not about the 7 October massacre, but if it were, one could use the same argument as Israel is using to justify Hamas atrocities, meaning that any number of civilian casualties can be justified by the interest of protecting people from enemies. In its argumentation, it frames Israel's violence as offensive rather than defensive, specifically pointing to the fact that Israel has killed members of the hostage by mistake, and many thousands of uninvolved Palestinians. Even using snipers to take out uninvolved civilians.

> Fifty-seven hostages are reported to have been killed in Israeli bombardments of Gaza; a further three hostages are confirmed to have been shot dead by Israeli soldiers in Gaza. Israel has killed an "unparalleled and unprecedented" number of civilians, with the full knowledge of how many civilian lives each bomb will take.[265]

The construction of Israel's claim of self-defense as illegitimate can be mapped out like this:

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[261] *South Africa v. Israel* (Oral Proceedings, 11 January 2024) (n 231) 80, para 28.
[262] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 14, para 12.
[263] Ibid 81, para 33.
[264] *South Africa v. Israel* (Oral Proceedings, 11 January 2024) (n 231) 49, para 6.
[265] *South Africa v. Israel* (Oral Proceedings, 11 January 2024) (n 231) 24, para 15.

Apartheid - Settler colonialism - Impunity - Targeting civilians - Violations of international law - Illegitimate self-defense

Israel's Construction of Self-defense

> Madam President, Members of the Court, the Genocide Convention was a solemn promise made to the Jewish people, and to all peoples, of "never again". The Applicant, in effect, invites the Court to betray that promise.[266]

The Israeli discourse of self-defense is centered around the need to protect its population and sovereignty from enemies, particularly Hamas. Israel is always under threat since it is surrounded by states that deny its right to exist. The 7 October attack is the worst instance of violence in a long time, and it proves that when given the opportunity, the enemies of Israel will use any means available to hurt Israel and its people. Israel constructs its right to defend itself as a necessity, but also, part of a moral and historical obligation to offer a haven to the Jewish people – the idea that the state was founded on.[267] Jewish survival is a key nodal point in the construction of Israeli self-defense. Linked to this is the construction of Hamas as an existential threat, which is also a nodal point in the equivalence chain.

Self-defense, as framed by Israel, can consist of actions that might be perceived as aggressive. Intended not only to stop attacks against the country, but to destroy the enemies of Israel so that they can never attack again.[268] In the case at hand, the right to defend Israel is also extended to the hostages held by Hamas, meaning that military acts targeting Gaza can be justified by this goal as well as the aim to destroy Hamas.

> The intention, faced with the 7 October atrocities and the continuing rocket fire and incarceration of the hostages, on the part of Israel to act to defend itself so as to terminate the threats against it and to rescue the hostages, certainly exists. The intent to deal with the armed militants of Hamas and the other such groups is undeniable. Were it the case, which we deny, that Israeli forces have transgressed some of the rules of conflict, then the matter would be tackled at the appropriate time by Israel's robust and independent legal system.[269]

Another important part of the Israeli discourse on self-defense is that it is legitimate. This right has been recognized by states around the world, and Hamas and Hezbollah have been designated terrorist organizations. Further, Israel is allied with many Western countries that perceive it as an outpost of their interests in the region, something worth protecting. Consequently, Israel's acts of self-defense are widely accepted as happening within the limits of international law, not challenging the status quo. International recognition is an empty signifier and a nodal point in the chain of equivalence.

Proportionality is a signifier in the discourse, and the Israeli legal team discusses this aspect of the military operation in detail. It is, however made clear that the proportionality and effectiveness of Israel's operation is not a matter for the ICJ, since war crimes and genocide are completely different legal concepts. Regarding proportionality, Israel states that it is essential to avoid civilian casualties and that the IDF is doing its utmost, but that it is impossible to completely avoid killing uninvolved people due to Hamas' habit of hiding within civilian

[266] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 21, para 54.
[267] Ibid 74, para 23.
[268] Ibid 21, para 50.
[269] Ibid 31, para 36.

structures.[270] The heavy casualties of the operation must also be seen in the context of the threat against Israel, it is not a matter of a minor threat against national security but rather an existential threat against the whole of Israeli society.

> Listening to the presentation by the Applicant, it was as if Israel is operating in Gaza against no armed adversary. But the same Hamas that carried out the 7 October attacks in Israel is the governing authority in Gaza. And the same Hamas has built a military strategy founded on embedding its assets and operatives in and amongst the civilian population.[271]

Israel further frames its right to self-defense as universal, not to be diminished by its influence over Gaza. It argues that, since 2005, no belligerent occupation has been maintained in Gaza.[272] Moreover, the 7 October attack demonstrated that Israel remains under threat. Furthermore, the right to defend oneself is universal, and the idea that it would not extend to Israel is not only incorrect but shocking and immoral. In fact, Israel's need for self-defense surpasses that of many other countries, considering the intensely hostile regional context it exists in. The accusations that Israel's acts of self-defense are conducted with impunity are contradicted by the incessant political and legal attacks it suffers from states such as South Africa.

> Professor Lowe yesterday sought to maintain that Israel has no right to self-defence in this situation. How could anyone possibly argue that Israel could not defend itself, faced with the 7 October atrocities and the incessant attacks against its civilians since? Indeed, a very wide range of States has acknowledged the right of self-defence here, ranging from the United Kingdom to the United States, France, Germany, Italy, Canada, Japan, Ghana and Guatemala and others.[273]

Chain of equivalence: **Sovereignty - Jewish survival - Existential threat - Proportionality - International Recognition - Self Defense**

5.3 International Law

Aside from the merits of the case, the parties also disagree strongly on the function and limits of international law. This is closely related to their social identities and is interesting to examine within the frame of this study.

South Africa's construction of international law

Within South Africa's discourse of international law, which can be described as a post-colonial discourse, its main purpose is to protect *human rights* and to uphold the lofty values of the United Nations: peace, non-discrimination, justice, sustainability, and sovereignty. Sovereignty is a *floating signifier*, and the way South Africa uses it is more related to the right of self-determination for oppressed people living under occupation and colonization. It is an important nodal point in the postcolonial discourse on international law, underlining the right of every people and state to self-determination.[274] South Africa rejects the notion that sovereignty gives the great military powers, such as the United States and Israel, the right to do as they please. It

[270] Ibid 41, para 6.
[271] Ibid 41, para 6.
[272] Ibid 38, para 63.
[273] Ibid 39, para 67.
[274] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 11, para 5.

focuses instead on the construction of sovereignty as a defensive shield limiting these powers' right to military intervention in other states.

> In our application, South Africa has recognized the ongoing Nakba of the Palestinian people through Israel's colonization since 1948, which has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately denying them their internationally recognized, inalienable right to *self-determination*, and their internationally recognized right of return as refugees to their towns and villages, in what is now the State of Israel.[275]

South Africa v. Israel is an example of how international law can be used as an arena for anti-colonial solidarity, to combat the oppression Western states and their allies wishes to impose upon others. *Anti-colonial solidarity* is an important signifier in the post-colonial discourse on international law since the cooperation of former colonies is crucial to challenge the Western hegemony of international law.

South Africa constructs international law as something deeply intertwined with international politics and the tensions that exist within the international community between Western states and the Global South. In its view, it is futile to treat law and politics as different things since international law was created through political processes and compromises between the most powerful states. Therefore, it is rigged to continue to protect the interests of these states, as they serve their political purposes. The signifier of a *Western bias* in international law is a nodal point in the postcolonial discourse. South Africa's postcolonial discourse represents a skeptical and critical perspective on international law. The Western bias can be inferred from quotations such as the one below, describing how Israel has been able to act with impunity. Even though it is not explicitly stated, it is safe to assume that this impunity is related to protection from powerful Western allies.[276]

> We are also particularly mindful of Israel's institutionalized régime of discriminatory laws, policies, and practices designed and maintained to establish domination, subjecting the Palestinian people to apartheid, on both sides of the Green Line. Decades-long impunity for widespread and systematic human rights violations, has emboldened Israel, in its recurrence and intensification of international crimes in Palestine.[277]

Furthermore, South Africa's critical view of the international community, as it is organized presently, and its limitations to have a meaningful impact is underlined by its denunciation of Resolution 2720. South Africa describes the UNSC resolution as 'watered down' and cites multiple sources calling it 'ineffectual' and even, 'a green light for continued genocide'. Some of these sources are themselves part of the United Nations-framework, such as the Secretary-General and a senior UNWRA official. The main objection to the resolution is the lack of an explicit call for a ceasefire and a clear condemnation of Israel's conduct. A strong criticism of the bias in favor of Israel and the impunity it is allowed, can be inferred from this part of South Africa's arguments.[278]

There is, however, a hopefulness in South Africa's construction of international law, a belief it can be used as a tool to highlight injustice and atrocities and to change the world for the better. Even though it believes that the ICJ is not completely unaffected by the interests of for example

[275] *South Africa v. Israel* (Oral Proceedings, 11 January 2024) (n 231) 17, para 3.
[276] *South Africa v. Israel* (Oral Proceedings, 16 May 2024) (n 113) 12, para 8.
[277] *South Africa v. Israel* (Oral Proceedings, 11 January 2024) (n 231) 17, para 4.
[278] *South Africa v. Israel* (Application Instituting Proceedings) (n 1) 96–97, paras 61–62.

the United States, it still sees a potential to affect the situation in Gaza for the better by engaging with it and trying to be a representative of the downtrodden, in this case, Palestinians in Gaza. South Africa believes that it is possible and necessary to change the status quo of international law to move away from a colonial international society and create a new where the former colonies collaborate to ensure their self-determinacy and development without dependency on Western powers. This potential is another important nodal point in the post-colonial discourse.

> This hearing is concerned with South Africa's request to the Court for the indication of provisional measures and will necessarily have a narrow and particular focus. I invoke the words of Martin Luther King when he said: "The arch of the universe is long, always bending towards justice." [279]

Chain of equivalence: **Human Rights – Sovereignty- Political dimension- Western bias – Anti-colonial Solidarity – Potential to create a more just world**

Israel's construction of international law

Israel constructs international law as a tool to resolve conflicts between states and emphasizes the importance of it fully recognizing and respecting the sovereignty of these. In its discourse international law must be used appropriately for it to not lose its value or credibility. It is important that international law be separated from politics since no state or international organization has the right to influence another state's policies.[280] Israel's discourse can be described as a *status quo-discourse* on international law. An example of when international law might serve a purpose is when an actual genocide is ongoing, not like the one in Gaza which is a war justified by legitimate interests, but an extermination campaign with no other goals than the destruction of a protected group. Israel argues that South Africa is abusing international law by weaponizing an important treaty in order to hurt Israel's interests, ultimately jeopardizing the legitimacy of international law.

> The attempt to weaponize the term genocide against Israel in the present context, does more than tell the Court a grossly distorted story, and it does more than empty the word of its unique force and special meaning. It subverts the object and purpose of the Convention itself with ramifications for all States seeking to defend themselves against those who demonstrate total disdain for life and for the law.[281]

International law is also of importance since it draws up the limits of warfare, defines war crimes and the legitimate reasons to go to war and to hold accountable those who violate these norms. The application of international law must however be flexible and evolving, considering that the shape of threats to national security changes and becomes more sophisticated. E.g., the enemy Israel is fighting in Gaza, Hamas uses human shields and entrench itself in civilian structures such as schools and hospitals. A total prohibition against attacking these structures would mean that Israel could not defend itself – an unacceptable result.

> In urban warfare, civilian casualties may be the unintended, but lawful, result of attacks on lawful military objectives. International humanitarian law recognizes this reality and

[279] Ibid 20, para 8.
[280] *South Africa v. Israel* (Oral Proceedings, 12 January 2024) (n 143) 58, para 15.
[281] Ibid 13, para 11.

> provides a framework for balancing military necessity with humanitarian considerations. These do not constitute genocidal acts.[282]

Human rights are an important signifier of international law, Israel believes that all human rights should be protected as much as possible. It does, however, also underscore that the threat of terrorism facing the Israeli people is a threat to their human rights and that it has an obligation – as a government – to do everything to protect the rights of its own people. Terrorism, is also a global threat and the establishment of strongholds for Hamas, Hezbollah, etc. in the region must be combated not only to protect Israeli interests but also those of the United States, Europe etc. Israel's very existence helps the Western world protect itself from terrorists operating out of the Middle East since it gives Western powers a strong ally with regional influence. The very existence of Western values such as democracy and liberty depend on the Israel's fight against reactionary Islamic terrorists. This importance is something that the international community and international law must recognize. Western values are never specifically cited in the source material, but they can be inferred from e.g., statements about Israel's democracy and freedom of speech.[283] Counter terrorism is an important floating signifier in its equivalency chain, as a foundational element of Israel's construction of international law.

> Israel aims to ensure that Gaza can never again be used as a launch pad for terrorism. As the Prime Minister reaffirms, Israel seeks neither to permanently occupy Gaza or to displace its civilian population. It wants to create a better future for Israelis and Palestinians alike, where both can live in peace, thrive and prosper, and where the Palestinian people have all the power to govern themselves, but not the capacity to threaten Israel.[284]

The equivalency chain looks like this: **International law – Sovereignty – Self-defense – Counter terrorism - Western values**

Israel frames the way international law is used by some actors, such as South Africa, as illegitimate, politicizing and weaponizing treaties and attacking other states through *lawfare*.[285] This is made possible by the international legal system being vulnerable to bias and politics. Israel constructs its policies regarding Palestine as a matter of national security, falling within the remit of its sovereignty.[286] The United Nations are limited when it comes to reaching a solution to the Israel-Palestine conflict, as demonstrated by the failure of the Oslo accords and now it is up to Israel and its allies, such as the United States to find a solution. Israel frames South Africa's use of the Genocide Convention as a perversion of its purpose and warns of the consequences it might have for the ICJ and for international law.

> Madam President, Members of the Court, in living memory of the atrocities that gave birth to the term genocide in the aftermath of which the State of Israel was founded we are witness to a concerted and cynical effort to pervert the meaning of the term "genocide" itself. The Genocide Convention is too important a foundation in humanity's aspiration to defeat barbarism and evil to be belittled in this way. And the faith that has been placed

[282] Ibid 41, para 8.
[283] Ibid 73, para 16.
[284] Ibid 21, para 50.
[285] Ibid 13, para 8.
[286] Ibid 17, para 28.

in international law and its institutions is too cherished an asset to be squandered. We appeal to this Court not to be taken down that dangerous road.[287]

5.4 Conclusion

It is important to emphasize that the discourses constructed by Israel and South Africa around the concepts Genocide, self-defense and international law are antagonistic, i.e., mutually exclusive. If Israel's construction of self-defense gains hegemony, then the discourse constructing its actions as genocide is precluded. The same goes for the separate constructions of international law, in the context of this case, only one perception of international law can come out victorious.

Israel's Status Quo-discourse

As mentioned, Israel builds its case on an interpretation of international law and the Genocide Convention that aligns with the status quo. It has been able to reinforce its arguments with much case law, anchoring its legal viewpoints in previous authoritative interpretations of international law.[288] Further, Israel has been able to reference several scholars in support of its arguments, proving that its interpretation of international law aligns with the established discourse.[289] The positioning of Israel's argumentation within the status quo is also due to the central role of sovereignty in the justification of its actions. Sovereignty has been a foundational pillar of international law since the Peace of Westphalia and is the basis for many countries understanding of international relations.[290] It also frames Hamas' attack as a very serious breach of its sovereignty and South Africa's court case, a continuation of the attack on the country's capacity to defend its democracy and its people.[291] South Africa, engaging in lawfare and Hamas, engaging in terrorism, are framed as the dangerous 'other', while Israel is constructed as the norm. If the Court accepts these social identities completely, Israel will come out victorious.

The never-again discourse detailed above, is also a politically powerful framing of Israel's historical purpose to prevent genocide. It is easy to understand the Jewish people's fear over history repeating itself and to sympathize with Israel's determination to stand in the way of this. It also constructs the directing of Genocide-accusations against Israel as politically sensitive which might hinder some states from openly supporting South Africa's case. This discourse if of course threatened by an ever-growing estimate of Palestinians killed in Gaza. It is challenging, verging on impossible, to reconcile the social identities 'designated protector against genocide' and 'mass murderer'. Further, the framing of Israel's military operation in Gaza as a war and not a genocide. building upon the notion that these are different by nature, is a discourse that the military powers who hold great influence over international law gain from. Such as those in the UNSC might want to protect in order to defend their own actions. Such as the United States' actions in Iraq or Russia's conduct in Ukraine. Killings, harming and displacement perpetrated against a colonized population by a settler-colonialist has generally not led to legal consequences ordered by international courts, this lack of precedent strengthens Israel's discourse that it is not committing genocide.

[287] Ibid 75, paras 23–24.
[288] Ibid e.g., nn 1, 16, 37–41.
[289] Ibid e.g., nn 14, 35, 111.
[290] Anghie (n 57) 310.
[291] *South Africa v. Israel* (Oral Proceedings, 17 May 2024) (n 205) 14, para 35.

Israel's close ties to certain political and military powers, such as the three Western permanent members of the UNSC, place them in the context of Western hegemony. This gives Israel a strong position to defend itself from, as the Court would break established norms by finding it guilty. International law is impossible to separate from international politics and it is safe to say that Israel holds a stronger position than South Africa, in international politics, due to its powerful allies and status in the region.

South Africa's Counter-Hegemonic Discourse

South Africa, on the other hand emphasizes human rights and the rights of people over the rights of states. It constructs sovereignty and the right of self-defense as much more limited, not overriding the human rights of opponents. Further, it constructs Israel as a colonial power violating Palestinians right to life and self-determination.[292] Its discourse about genocide and international law is less established in case law and doctrine. The extent to which it is reframing international norms of accountability is illustrated by the fact that no Western-backed state has ever been found guilty of genocide in an international court before. Israel's many expressions of disgust and astonishment that the accusations are even articulated also underscore the groundbreaking implications of the case. This notwithstanding, South Africa is successful in framing Israel's actions as potentially genocidal, as proved, at least partially, by the issuing of provisional measures. Further, the many states that have decided to intervene in the case have generally expressed their support for South Africa's characterization of Israel's conduct as genocidal, implying the existence of *opinio juris*.[293]

South Africa's emphasis on structural violence and attacks on civilian infrastructure is another uncommon aspect of its Genocide case. The precedent has mainly been set by direct mass killings and related acts. This attempt to change the hegemonic discourse of what a genocide is could open the definition to include more crimes committed by colonial powers against the people they have subjugated through their colonization. It is also supported by the formulation of the crime in the Genocide Convention and a reflection of the wishes of Lemkin who wanted Genocide to have a broader definition, including e.g., the destruction of cultures.

6. Postcolonial Perspectives

This chapter of the study aims to provide an answer to research question III:
How can the findings from questions I and II be understood through postcolonial perspectives?

6.1 Israel as a Colonial Actor

The question of whether Israel is a colonial power is the subject of much contention. Supporters of Israel vehemently denounce the idea, while supporters of Palestine regard it as foundational for their political struggle.[294] Colonialism refers to the expansionist projects of western states in the early modern era, such as the Dutch in South Africa, while postcolonialism refers to the lingering effects that foreign rule and exploitation of the colonized states still have, even after these have gained independence.[295]

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[292] *South Africa v. Israel* (Oral Proceedings, 16 May 2024) (n 113) 11, para 5.
[293] Ibid 14, para 12.
[294] Examples of high profile supporters of Israel and Palestine respectively expressing such opinions: Noam Chomsky interviewed by Mouin Rabbani, 'The Standard Colonial Pattern' (1995) *Chomsky.info*, https://chomsky.info/199510__/ accessed 7 May 2025.; Rich Lowry, 'Israel Is Not a Colonial State' *National Review* (10 October 2023) https://www.nationalreview.com/2023/10/israel-is-not-a-colonial-state/ accessed 7 May 2025.
[295] Davies (n 50) 315.

The theoretical framework of this essay relies heavily on postcolonialism, and the study presupposes that the dynamic between Israel and Palestine bears sufficient resemblance to that between a colonial and a colonized subject for this perspective to be relevant. In the interest of balance, however, a short account of the arguments for and against the characterization of Israel as colonial power is warranted.

Israel is frequently described as a colonial power due to its influence over Palestinian territories such as Gaza and the West Bank, this influence has remained even after the end of Israel's belligerent occupation. The *Nakba,* when a significant portion of the Palestinian population was driven away from their homes, is also often described as a colonial act.[296] Israel has frequently been defined as a *settler-colonial* power, referring to the fact that many Israelis moved to territories already inhabited by other people who were then displaced for the settlers to establish a society where their own superiority is recognized in law.[297]

Moreover, Israel's close relationship to powerful Western countries, and the fact that much of its population has historical ties to Europe and North America also serves to establish Israelis as colonizers. There are, however, arguments against this characterization of Israel that deserve to be mentioned. The people of Israel, unlike past colonial powers, do not have a country to return to. Israel is not a foreign outpost of an empire; rather, it is perceived by Israelis as their historic and spiritual homeland, holding enormous significance within the Jewish culture.
The Jewish people originate from the ancient region of Canaan, located in present-day Israel and Palestine, and were later dispersed throughout the world. A significant difference between the Jewish people and e.g., the Dutch and British colonizers of South Africa, who lacked any such connection to the land. The acquisition of territory is also a distinguishing feature, since Israel's creation was mandated by a UN decision rather than through military conquest, in the way past colonial powers have expanded their territory.[298]

With that said, the territory that Israel presently controls extend well beyond the borders awarded to the state in 1948 and this expansion has happened using military means. Israeli settlements on the West Bank and in Gaza have continued to spread, in clear contradiction to international law.[299] Undeniably, the fact that Israel and its people have a historical connection to the land is of significance. It should be added, however, that Israel's close financial and political ties with the United States and European countries function in a similar way to the practical relationship between past imperial centers and their colonies. Further, the establishment of Israel as a state was supported by the former colonizer of the territory, the British Empire, through the Balfour Declaration. Thus, there is an unbroken line between the former colonizers and Israel, meaning that colonial oppression of Palestinians never went away, the role of dominant power was just assumed by a new state.[300]

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[296] Masalha (n 4) 28.
[297] Tariq Dana, 'Notes on the "Exceptionalism" of the Israeli Settler-Colonial Project' (2024) 33(2) *Middle East Critique* 165–172 https://doi.org/10.1080/19436149.2024.2342733 accessed 21 April 2025.
[298] Lior Sternfeld**,** 'Why Israel isn't a Settler-Colonial State' (The Jewish Studies Program, University of Washington, 2024) https://jewishstudies.washington.edu/israel-hebrew/why-israel-isnt-a-settler-colonial-state/ accessed 20 Feb 2025.
[299] United Nations, 'Security Council Press Statement on the Situation in the Middle East' (UN Press Release SC/12657, 2016) https://press.un.org/en/2016/sc12657.doc.htm accessed 22 Feb 2025; Also see this thesis, section 1.2.1 'Historical Background and Recent Developments'.
[300] Masalha (n 4) 36.

It is important to acknowledge the Jewish people's historical experience of racist persecution and systematic oppression. Through these experiences and the significant role Jews have played in establishing the state, Israel starkly deviates from past colonial powers.
Generally, colonizers have considered themselves to belong to the 'white', normative race. Jews, however, have throughout history often been defined as lesser than white people and excluded from this normative identity.[301] Nonetheless, the power dynamic that characterizes the relationship between Israel and Palestine is undeniable. Israel's influence over Gaza appears almost limitless, and this power is regularly employed to subjugate the Palestinian people living there. While Jews have lived in the region for millennia, this does not negate the historical fact of the *Nakba*, and the forced displacement of hundreds of thousands of Palestinians. While labelling Israel a colonial power might be politically, and somewhat academically, controversial, colonialism remains a relevant and interesting lens through which to analyze the asymmetrical relationship between Israel and Palestinian territories such as Gaza.

6.2 Postcolonial Perspectives on the Framing of the Case

Colonialism is a running theme in the case, with South Africa arguing that the colonization of Palestine provides the immediate context for the genocide. The parties' construction both of each other and of Palestine is also deeply entrenched in colonial and postcolonial structures.

To establish genocidal intent, South Africa emphasizes the dehumanizing rhetoric allegedly prevalent among Israeli officials: references to Palestinians as human animals, sons of darkness etc. Israel's legal team argues that these statements as a rule have referred to Hamas and not Palestinians in general. Israel manages to clarify a few of these statements by providing additional context, some however, remain ambiguous. The case files also contain unambiguous references to Hamas, such as the ones made by the Israeli legal team during the oral proceedings, describing Hamas as a group of 'complete lawlessness', whose 'brutality knows no bounds'. The mention of lawlessness evokes the notion that indigenous people are not governed by law which has been used by colonial powers to legitimize their territorial expansion.[302] This rhetoric constructs Hamas as a barbaric entity, which by existing poses a threat to civilization and order.[303]

The Palestinian people are portrayed as victims, in need of saving. It is described as a population ruled by a genocidal terrorist organization. An interesting conflict is that Israel criticizes South Africa for denying Palestinians any agency, yet its own legal argument benefits from a clear separation between Hamas, the subject acting, and the Palestinian people as passive civilians. Admission of a collective punishment directed at all Palestinians based on the notion that everyone is to blame for the 7 October-massacre, would be a strong indication of genocidal intent towards Palestinians in Gaza.[304] Using Mutua's metaphor of international law, two parallel constructions of the Palestinian civilian population can be inferred from Israeli rhetoric. One where they as a people are seen as barbaric, echoed for example by the statement by Yoav Gallant, that 'no one is innocent', framing Palestinians as complicit in Hamas crimes and justifying massive military operations. And another construction, more prevalent in the case where Palestinians are framed as innocent sufferers under a violent, extremist regime, used by Israel to legitimize its military intervention and its continued influence over Palestine. A

[301] Davies (n 50) 307.
[302] Anghie (n 57) 90.
[303] Mutua (n 52) 202–203; *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 14, para 15.
[304] Ibid 13, para 9.

sentiment echoed in statements about the wish to create a better future for both Palestinians and Israelis.[305]

The construction of Palestinians is also relevant to how Israel wants to position itself in the scheme of things. Israel is the stabilizer of the region or the 'savior'. Saving both Palestinians from Hamas and the Jewish people of the world from antisemitic persecution. It is in a unique position to affect stability and security in the Middle East and its massive military operations are justified by this historical necessity to bring civilization to a region wrought by war and extremism.[306] In many ways Israeli plays the role of the 'savior', in alignment with Mutua's metaphor of international law. Like the traditional colonial powers, it claims to be fighting against barbarism, wishing to bring civilization to the suffering victims of brutal leaders. Furthermore, Israel can be claimed to represent Western values, not least due to its strong ties to the West politically and culturally.[307]

The Palestinian people seem to be secondary in Israel's agenda, its focus is protecting itself at any cost. A further divergence from past colonial powers is that Israel frames itself as both the norm – embodying Western values and democracy etc., – but also as the 'other'. The Jewish identity is associated with historical oppression and current antisemitism, meaning that Israel fits the role of victim as well as the role of savior. Israel is also 'the other' in the context of the region, as a democracy recognized by the international community, and a Jewish state in a predominantly Muslim region. In a sense Israel is simultaneously the norm and the exception, playing different roles in the international community at large, and in the Middle East. The duality of Israel's identity reinforces its claims on both legitimacy and vulnerability.

The use of vulnerability as a tool for legitimizing oppression of another group is a distinct feature of modern colonialism. Bringing Russia's rhetoric about protecting the Russian-speaking people in Donbass and Luhansk, as a way of legitimizing its invasion of Ukraine, to mind. It is a colonial strategy building on the same concept of sovereignty and discriminatory narratives about otherness as past colonial projects – but with an added justification of self-defense to be compatible with a modern context where international courts demand better explanations than the wish to spread civilization.[308] Israel justifies its disregard for Palestinian sovereignty through colonialist logic. Palestinians cannot be trusted with sovereignty until they overthrow Hamas. Whether the election of another leadership would be sufficient for Israel to grant Palestine self-determination is far from evident.[309] This echoes a colonial sentiment that an indigenous population can be allowed a limited amount of autonomy, but only if they use it in conformity with the colonial power's wishes. Israel refuses to accept the notion that Palestinians might choose Hamas to govern, not necessarily out of ideological sympathies but simply because it is the only military actor on the Gaza Strip with the capacity to resist Israeli occupation. From the perspective of an indigenous population under occupation the question of self-governance is likely a political issue of the highest priority. The failure of the Palestinian Authority, backed by Israel and the UN, to govern Gaza, raises the question of whether a

[305] Ibid; *South Africa v. Israel* (Oral Proceedings 16 May 2024) (n 113) 15, para 42.
[306] Mutua (n 52) 204.
[307] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 335, para 50.
[308] Shpend Kursani, 'Beyond Putin's Analogies: The Genocide Debate on Ukraine and the Balkan Analogy Worth Noting' (2023) 25 (3–4) *Journal of Genocide Research* https://www.tandfonline.com/doi/full/10.1080/14623528.2022.2099633 accessed 22 Mar 2025 371.
[309] Anghie (n 57) 27.

leadership openly endorsed by Israel could ever be seen as legitimate among the Palestinian people.[310]

South Africa's legal strategy is deeply informed by its own experiences of colonialism, drawing parallels between Dutch colonialism in South Africa and Israel's settler colonial policies in Palestine. In this context, it positions itself as a kind of 'savior', challenging the status quo and standing up for the subjugated peoples of the world against dominant military powers. South Africa is also explicit about its goal to put an end to the impunity Israel has been allowed by the international community – suggesting that it wants to bring about a radical shift in the international legal order. Davies' view on law as an arena for contestation where different power relations are reinforced and challenged, rather than a neutral set of rules seems to be mirrored in South Africa's perspective on the case.[311]

Israel rejects the portrayal of South Africa as the spokesperson of the subjugated peoples of the world, trying to delegitimize its intentions and portraying them as allies to Hamas and enemies of international law. In one instance Israel takes this rhetoric as far as suggesting that South Africa are responsible for civilian deaths in Gaza, urging South Africa to tell its 'ally' Hamas to stop hiding exploiting civilian structures so that Israel won't be forced to attack these.[312] The repeated associations made between South Africa and Hamas also serves to construct South Africa as a representative of barbarism, distorting the meaning of the genocide convention and even complicit in genocide, since South Africa are allegedly in an alliance with Hamas whose acts on 7 October constitute the real genocide.[313]

This rhetoric is reminiscent of the mutual genocide accusations levied between Ukraine and Russia. The increasing occurrence of genocide claims being met with reciprocal accusations indicates that states recognize the power of victimhood to construct themselves as legitimate actors within the international legal order. Nobody is an aggressor, everybody is acting in self-defense and even suggesting that a victim is a perpetrator is an objectionable thing to do. Koskenniemi's theory about the indeterminacy of international law is particularly relevant to explain how both these constructions of a state can exist simultaneously. International law is not one thing, a system which clearly states that Russia or Israel is the villain and Ukraine or Palestine the victim – the correct interpretation of the situation is the one which best corresponds with the narrative that holds the most influence in the international community. Thus, legal claims are usually not constructed in accordance with the best reflection of the true circumstances, but rather what asserts the most dominance within the international political and legal system and in the political arena of the courtroom.[314]

The repeated accusations Israel directs at South Africa about disrespecting the purpose of international law and the ICJ ties in with how former colonizers typically have reacted to former colonies trying to assert themselves within the international legal system – accusing them of violating and misunderstanding sacred and essential legal principles. Anghie argues, like Davies and Koskenniemi, that international law is not universal. It is well suited to handle conflicts between equal and sovereign states, building on a heritage of conflict resolution from *the peace of Westphalia*, but it is not at all adapted to conflicts between recognized states and

[310] Anghie (n 57) 116–120.
[311] Davies (n 50) 335.
[312] *South Africa v. Israel* (Oral Proceedings 16 May 2024) (n 113) 27, para 29.
[313] *South Africa v. Israel* (Oral Proceedings 16 May 2024) (n 113) 14, para 35.
[314] Koskenniemi (n 47) 31–32.

people inhabiting a borderland between independence and colonization.[315] States occupy a privileged position as the primary actor within the system of international law, a people not represented by a clearly recognized state struggle to protect their rights and easily fall victim to interventions from other states.[316]

Israel positions itself as a protector of the interests of the Palestinians, arguing that its actions, destroying Hamas, are not only for the sake of Israelis but also for the sake of Palestinians. An effort to liberate them from the clutches of a genocidal terror organization. In Israel's narrative the destruction of Hamas is exclusively a positive development for all concerned. What opinion Palestinians in Gaza might have of Hamas is irrelevant. The Israeli perception of itself as responsible for the development of Palestinian society mirrors that of the British protectorate of Israel. It does not explicitly say that Gaza must become a part of Israel, though there have been discussions along those lines, but Israel asserts clearly its sense of responsibility for the development of democracy and security in Gaza which effectively undermines the Palestinian right to self-determination.[317]

The fact that Gaza is not representing itself at the ICJ is also partly due to the legal importance of sovereignty and the contested statehood, of Palestine in general, and Gaza in particular. This complicates the self-representation of Palestine in this case. Hamas is not recognized as a legitimate government and Gaza is not recognized as a state. Yet Hamas retains effective control over Gaza and the Palestinian Authority holds no real political influence over Gaza, therefore no government exists that could initiate a case representing the population of Gaza. Besides the formal obstacles, Palestinians in Gaza would of course face significant challenges representing themselves at the ICJ, due to constant Israeli attacks and the practical consequences of these. Davies describes how the colonial structures influencing the international community lead to colonized people being objectified and not seen as bearers of knowledge or people governed by law. The fact that Palestinians are represented by another state in the court is a factor that might reinforce the construction of Palestinians as passive objects rather than legitimate bearers of knowledge and human rights.[318]

South Africa has also met Israeli criticism for even engaging with Hamas, implying that only discussions with a Palestinian leadership approved by Israel is acceptable, everything else is not diplomacy but complicity in terrorism. This reinforces the colonial notion that savages cannot be part of the solution, they must be destroyed so that a leadership meeting the standards of the occupying state can be installed in their stead.[319]

6.3 The Colonial Nature of the ICJ and International Law

The ICJ itself has often received criticism from postcolonial scholars such as Antony Anghie, arguing that the court is deeply embedded in a colonial legal mindset, in which a state must fit into a Western norm of sovereignty and democracy to be seen as legitimate.[320]
South Africa v. Israel is still in the provisional measures phase of the proceedings making it difficult to perform a comprehensive analysis of the court's rulings and to what extent these are influenced by colonial narratives. However, an interesting shift can be noted: initially the court

[315] Anghie (n 57) 310–311.
[316] Ibid.
[317] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 21, para 50.
[318] Davies (n 50) 30.
[319] *South Africa v. Israel* (Oral Proceedings 12 January 2024) (n 143) 17, para 31.
[320] Anghie (n 57) 111.

refrained from issuing provisional measures ordering Israel to cease all military operations, out of respect for Israel's sovereignty. A few months later, it issued a similar order anyway, ordering the halting of all military action in Rafah, arguing that the human suffering outweighed Israel's sovereign rights in this instance. This evolution might be indicative of a change in how sovereignty is understood and valued, creating space for a more postcolonial legal framework.

An intriguing aspect of the case is the importance of *opinio juris*. Few countries have come out in support of Israel. Those that have, e.g., the United States and Germany, all have a colonial heritage. Many other traditional allies of Israel, such as the EU, have chosen to remain silent, opting not to engage with the process, their actions however, clearly show that they do not perceive Israel as genocidal, such as supplying Israel with weapons.[321] South Africa's case on the other hand has received explicit support from over fifty countries, joining or intending to join the case against Israel. Many of these are countries from the Global South, but also Western States such as Belgium, Ireland and Spain. Typically, the indeterminate nature of international law gives powerful states in the West a significant privilege. *Opinio juris* and customary law both depend on the recognition of other states – meaning that the countries wielding massive economic and political influence, potentially could put pressure on other states, thereby manipulating *opinio juris* to their will.[322]

In *South Africa v. Israel* this dynamic appears to have shifted, as *opinio juris* aligns more with the position held by South Africa, a country in the global south acting against Israel, a Western-backed state. It remains to be how the case will develop and whether this shift in legal consensus will be mirrored by the court's final ruling. This shift is made possible by the fact that international law is not rigid or constant – but rather a stage for political and social conflicts being solved in the way best suited to appease the international community and create stability.

7. Results and Final Reflections

The ambition of this thesis has been to analyze an ongoing legal case. While this may appear to be a relatively modest project, the case in question has such immense implications that doing it justice has presented a significant challenge. This is the first central insight of the study: the narratives employed to frame the case are historic in scale – the antisemitic horrors of the holocaust juxtaposed with the dehumanizing racial politics of apartheid-era South Africa. International law is sensitive to political structures, making this case pose a rare challenge since two powerful discourses and two important geopolitical powers clash: Western liberal democracy *v.* postcolonial resistance and the Global North *v.* the Global South.

What legal claims and supporting evidence do the parties present regarding the elements required to establish the crime of genocide under the 1948 Genocide Convention?

South Africa argues that Israel has committed Genocide and is continuing to do so. The *Actus Reus* consists of all the acts enumerated in the Genocide Convention Article III, except for the forcible transfer of children. South Africa presents the court with extensive substantial evidence to reinforce the characterization of these acts as genocidal, and an array of quotes allegedly expressing genocidal intent to prove genocidal intent i.e., *Mens Rea*. It further claims that the ICJ has jurisdiction and asserts that provisional measures are required. In evidence of the court's jurisdiction, South Africa highlights several communications it has had with Israel concerning

[321] David Gritten, 'Gaza war: Where does Israel get its weapons?' *BBC News* (3 September 2024) https://www.bbc.com/news/world-middle-east-68737412 accessed 21 Apr 2025.
[322] Anghie (n 57) 46–47; Koskenniemi (n 47) 25.

a potential genocide in Gaza demonstrating the existence of a dispute, something that is necessary for the ICJ to take on the case.

Israel dismisses all allegations, particularly that it has acted with genocidal intent. It is conducting a legitimate military operation against Hamas. While Israel does not deny all acts detailed by South Africa, it maintains that these are ultimately attributable to the actions of Hamas, whose conduct is the direct cause for the humanitarian crisis in Gaza. Israel denies the jurisdiction of the ICJ since there is no dispute and no plausible genocide-allegation. Further, Israel contends that the prerequisites for provisional measures are not met, as Israel has already taken action to protect the rights of the people in Gaza, the ICJ lacks jurisdiction and since the proposed measures would disproportionately affect Israel's right of self-defense.

Israel and South Africa often invoke the same categories of evidence such as statements made by political leaders and news articles. However, the difference in their usage of evidence, particularly, how it is retrieved, is considerable. South Africa primarily relies on substantive evidence from third-party sources. Israel, on the other hand, depends almost exclusively on the substantive evidence collected by its own authorities. This disparity highlights the different positions of the parties in the case. South Africa, acting on behalf of Palestinians in Gaza, must rely on information from external sources such as the UN and Amnesty, and, however reluctantly, data from Palestinian authorities in Gaza. Authorities, whose legitimacy is internationally contested due to Hamas' influence over them. Israel, in contrast, can present first-hand evidence without any demands to merit the legitimacy and relevance of this. Enjoying full and internationally recognized sovereignty grants Israel a clear advantage in this matter.

The interplay between international law and international politics becomes clear when considering how many of South Africa's available sources have had their legitimacy questioned. The Health Ministry of Gaza, from which South Africa retrieves its death toll figures has been under much scrutiny due to it being controlled by Hamas. The UNWRA, has likewise been accused of close ties to Hamas and had its funding revoked by several states. Francesca Albanese, the special rapporteur on Gaza has been described as an antisemite by several powerful states such as Israel and the US. Meanwhile, South Africa are not left with many alternatives to these contested sources since Israel does not allow journalists and humanitarian organizations access to Gaza. Thereby, Israel has a clear evidentiary advantage over South Africa.

Further, the parties rely on media sources, statements made by authority figures, such as Israeli and South African politicians. South Africa cites many foreign political leaders expressing concern over Israel's actions potentially being genocidal. The employment of such sources is of greater relevance to South Africa, to reinforce its claims of Israeli genocidal intent. Generally, South Africa employs far more third party-sources such as media and social media, this is both due to its need to demonstrate genocidal statements and to its lack of presence on the ground in Gaza.

Regarding legal sources, both parties invoke a lot of case law, South Africa relies much on *Gambia v. Myanmar* while Israel relies more on *Yugoslavia v. Belgium*. Naturally, the parties have chosen precedents that support their own case. *Gambia v. Myanmar* reinforces the idea that South Africa has the right to intervene on the part of the Palestinians, similarly to how Gambia intervened on the part of the Rohingya. *Yugoslavia v. Belgium* is presented to support the need to distinguish legitimate warfare or war crimes from genocide, a cornerstone in Israel's defense strategy. Israel leans more heavily on legal precedent and frequently cites caselaw in

support of its claims, Israel also relies more on doctrine, citing several authors such as Schabas and Lemkin. This reliance on legal sources, surpassing the employment of substantial evidence, is of course because of Israel's greater interest in repudiating South Africas legal claims than its factual claims, but likely also because its arguments align more closely with the political status quo than South Africa's. Thereby, Israel's claims are easier to substantiate with the help of case law and doctrine, both describing the court's previous decisions. Yet, South Africa has had more success in establishing the jurisdiction of the ICJ. Much of this success can be attributed to the *opinio juris* supporting South Africa's case, likely reflecting a wish, harbored by many states, to challenge the status quo, seeking a somewhat broader definition of genocide.

How do the parties construct the essential aspects of the case through their discursive practices?

Both parties act as if the stakes of the case are monumental in scale and place the interests they are seeking to protect in the context of broader historical narratives.

Israel employs two primary discourses to frame its legal arguments:

Firstly, the *never again discourse*, in which Hamas is cast as an existential threat to the Jewish people, South Africa as collaborators, on the wrong side of history, and Israel as the only guarantee that the atrocities of the Holocaust will not be repeated.

Secondly, the *status quo discourse*, portraying Israel as the only actor adhering to international law, showing due respect for the purpose of the genocide conventions. Within this discourse, South Africa is depicted as a disruptive force, using lawfare and false allegations to slander Israel and to abuse the genocide convention.

Both these narratives build on colonialist notions, *the Never Again discourse* frames Israel as the primary right holders in the region, obliged to protect not only its own population and the Jewish people of the world but also to liberate Gazans from Hamas. Naturally, Israel must therefore be able, not only to control what happens on Israeli territory, but also the borders and political leadership of Gaza and the West Bank. The *status quo discourse* is based on the construction of Israel as the norm and South Africa as the 'other', an exterior actor trying to abuse the legal structures of the establishment that Israel is a natural part of. Particularly, Israel's strategy to associate South Africa with Hamas reinforces the idea of a divide between the civilized, rule-abiding side, represented by Israel, and the chaotic, lawless side, represented by Hamas and South Africa.

South Africa's framing of the case can also be divided into two primary discourses: the *human rights discourse* and the *counter hegemonic discourse*. These are, in sharp contrast to those employed by Israel, deeply informed by post-colonialism.

The *counter hegemonic discourse* situates Israel's acts within a broader history of settler-colonial violence and discrimination. These acts have allegedly been carried out under the protection of Western impunity and an international legal system reluctant to defend indigenous people. Within this discourse Israel is framed as a part of an oppressive colonial norm, South Africa is constructed as a symbol of resistance against colonialism and the Palestinian people as victims of colonialism. Fitting Hamas into this equation is complex, South Africa's rhetoric does not challenge the designation of Hamas as terrorists, or that its methods are justified. Rather it frames Hamas as, among other things, part of an anti-imperialist struggle.

The *discourse of human rights*, frames international law as a potential tool, not only to manage inter-state relations, but also to protect the inherent rights of stateless and marginalized peoples– such as the Palestinian people. This discourse is a departure from the construction of international law as intrinsically linked to sovereignty, and the nation-state as the primary guarantee that human rights are protected.

How can the findings from questions I and II be understood through postcolonial and critical perspectives?

Colonial structures permeate the parties' legal reasoning. Israel emphasizes its sovereignty and the right to self-defense that follows from it, even if it is at the expense of Palestine's sovereignty. Further, Israel constructs itself as a savior, willing to take responsibility for the people in Gaza and liberate them from 'the genocidal terror organization' in government. Palestinians on the other hand, are constructed either as, passive victims or, in the case of Hamas and its supporters, uncivilized savages.

South Africa's identity as a former colony, and its experience of overcoming apartheid, are reflected in its discursive construction of the case. South Africa wishes to emphasize the similarities between present-day Gaza and apartheid-era South Africa to highlight what it perceives as a historical injustice. The similarities between Israel and the Dutch who colonized South Africa are repeatedly highlighted, some essential differences are however not addressed by South Africa. One such difference is that Israel's primary goal is not to spread 'civilization' but to eradicate threats against its security.

The fact that South Africa is representing Palestine, arguably reinforces the colonial narrative of Palestine as a passive object, a people not able to speak for themselves. However, it also serves to create an anti-colonial alliance, through which the people of Gaza, otherwise represented by Hamas, can profit from South Africa's international legitimacy. *Sovereignty* is of central importance to both actors. Israel invokes the concept to justify its military actions in Gaza. Framing them as necessary measures to protect its borders and population from threats. South Africa challenges this definition, instead emphasizing the right of small sovereign states and stateless people striving for independence to defend themselves from powerful aggressors.

Final Reflections

A central insight of this thesis is the extent to which international law is inextricably linked to international politics – this is a point made repeatedly throughout the text, it is, however, impossible to overstate. For South Africa, this politicizing of international law presents evidentiary challenges since the UNWRA, the Gaza Health Ministry and Francesca Albanese, the UN special rapporteur, have become politically controversial. Yet, these remain actors with unparalleled insight into the conditions in Gaza, impossible for South Africa to ignore even if it damages the credibility of its case. Israel, on the other hand, uses primarily evidence assembled by its own authorities which demonstrates its strong position in the case. However, it also underscores its growing isolation. The fact that few of Israel's claims and the validity of its photos, videos and numbers can be corroborated by independent actors, can be regarded as detrimental to their credibility. Yet, the choice not to allow independent observers to enter Gaza was made by Israel. This implies that Israel has concluded that such a presence in the region would be too great a risk for its interests. The few international expressions of support for its

case, invoked by Israel, also implies a growing isolation and weakening political support for Israel's conduct in Gaza.

During the writing of this thesis, Israel, supported by the US, agreed to a ceasefire with Hamas, which was subsequently broken.[323] Startlingly, the United States has proposed that it should assume administrative control over Gaza, expel all its current inhabitants to neighboring countries, and construct a holiday resort on top of the rubble.[324] In May 2025, Israel announced its ambition to 'capture' the Gaza strip, i.e., to occupy the territory, in whole or in part, a goal it had denied up until this point, giving accusations of expansionist ambitions more credibility.[325]

The International community and in extension, international law, seems to be going through a process of change. On one hand, the ICC arrest warrants issued by the ICC for Benjamin Netanyahu and Yoav Gallant on suspicion of crimes against humanity and war crimes. This decision marks the first time the ICC has demanded the detention of high-ranking Western-backed leaders. The arrest warrants along with the growing support for South Africa's genocide case suggest the possibility of an era in which more scrutiny is placed on Europe, the United States and its allies. On the other hand, this development has also provoked significant pushback. As previously noted, Poland explicitly stated its intention to defy the arrest warrant issued for Netanyahu. Hungary, similarly, invited Netanyahu to the country, and ignored the orders of the ICC. Hungarian Prime Minister Viktor Órban even declared Hungary's intention to withdraw from the ICC, denouncing the court as 'politically biased'.[326]

Not to mention Donald Trump's actions on the international stage, many of which are likely to have lasting consequences for international law. Most notably, the Trump administration's decision to impose sanctions on the ICC, banning Prosecutor Karim Ahmad Khan from entering U.S. territory as well as freezing any U.S.-based assets of his. Measures adopted in direct retaliation for the ICC's arrest warrant on Netanyahu and Gallant.[327]

At times, it has felt as though history is being rewritten in such a high pace, that keeping up with the unfolding of the present becomes nearly impossible.

The development of the Israel-Palestine conflict equally remains uncertain. After 75 years of tensions and violence, the humanitarian disaster in Gaza and the 7 October attack marks a new low point. What will follow, renewed violence or genuine opportunities for lasting peace in the Middle East, remains to be seen. Can International Law play any part in providing a solution, or will it be sidelined as one actor vanquishes the other, and the conflict is finally resolved through sheer destruction?

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