



**British Institute of
International and
Comparative Law**

Reflections on the South Africa v. Israel Case at the International Court of Justice





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Comparative Law**

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Introduction

On 29 December 2023, South Africa filed an application instituting proceedings against Israel before the International Court of Justice (ICJ) concerning alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide in relation to Palestinians in the Gaza Strip.¹ Oral hearings were held on 11 and 12 January 2024, and the Court delivered its Order on the Request for the indication of provisional measures on 26 January.²

The British Institute of International and Comparative Law (BIICL) held a Rapid Response Webinar event on 9 February 2024 that convened a panel of experts to discuss legal issues relating to recent developments concerning the case, including discussion of provisional measures and the requisite elements of the crime of genocide under international law.³ The event was convened by Dr Jack Kenny, Research Fellow in International Law, BIICL.

The chair of the event was Professor Dapo Akande, University of Oxford. The session featured presentations from four experts that prompted a discussion among panellists before questions were taken from the audience. The speakers presented in the following order: Professor Marko Milanovic, University of Reading, began setting the scene for discussion by outlining how the order for provisional measures came about before discussing the key issue in the order of plausibility of the rights claimed before considering the real-world impact of the order. Professor Paula Gaeta, Geneva Graduate Institute, presented on the content of the provisional measures order and general allegations of violations of international humanitarian law. Dr Danae Azaria, University College London, presented on the parties' and Court's approach to the existence of a "dispute". Finally, Professor Christian J. Tams, University of Glasgow, presented on the position of third states vis-à-vis the genocide charge.

This event report was prepared by Dr Jack Kenny. A draft of this report was circulated to the speakers for their endorsement and to make any clarifications or corrections prior to publication. Given the sensitivity of the topic, where possible this event report has sought to closely follow language used by participants in their remarks (subject to further clarifications made by participants to the draft of this report).

BIICL extends its gratitude to all the panellists for their outstanding contribution to the discussion and to all attendees for their support of the event.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event as per the suggested citation provided on the second page of this document.

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, documents related to the proceedings available at <<https://www.icj-cij.org/case/192>>.

² Available at <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>>.

³ Video recording of the event available at <<https://www.biicl.org/events/11849/rapid-response-webinar-reflections-on-the-south-africa-v-israel-case-at-the-international-court-of-justice>>.

Professor Marko Milanovic: Overview of the provisional measures order and its real-world impact

The case was initiated by South Africa against Israel, alleging genocide under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which provides a jurisdictional basis. South Africa had to claim that Israel was committing genocide due to Israel's lack of consent to the Court's jurisdiction for other types of violations (e.g., crimes against humanity, war crimes, human rights violations). This context underscores the strategic use of the Genocide Convention as the only viable legal pathway for South Africa to pursue the case regarding Gaza. The issue of how we distinguish genocide from other possible violations of international law is an issue addressed by the second speaker.

The key issue in this case is the existence of this genocidal intent, to destroy a protected group as such. The entirety of the case both now and on the merits later will revolve around this question of intent. At this stage of proceedings, the issue that the court had to examine was whether the conditions for the issuance or the indication of provisional measures were met. One of these criteria is that the Court has *prima facie* jurisdiction, which it has because of Article IX of the Convention, but part of that is the question of whether the rights that are being claimed are plausible.

The court started using this language of "plausibility" relatively recently. It was only in the provisional measures of the *Belgium v. Senegal* case in 2009 that the Court first used this term,⁴ where the Court had not previously used that exact terminology. Following this there were several other cases in which the Court attempted to undertake some kind of plausibility analysis. Ultimately there is no grand theory on plausibility that is applied by the Court. The Court never really explained in any kind of particularly reasoned way what exactly it means by this standard. There are several separate opinions of judges of the Court that shed some light on the subject. Judge Abraham first made use of this language,⁵ and an opinion by Judge Greenwood in the *Certain Activities* case between Costa Rica and Nicaragua provided a good treatment of the subject.⁶ Through such contributions we are provided with snippets of what the Court might mean by "plausible" right.

In this particular case, this question of plausibility is essentially factual in nature. For example, in the *Ukraine v. Russia* case, which the Court decided on jurisdiction last week, the core of the case was legal: whether the Genocide Convention contained a right that Ukraine could claim, a right not to be subjected to military intervention on the basis of a false claim of genocide. That was the framing of that case, and at the provisional measures stage of the case, the Court found that right is plausible. Last week, the Court found by 12 votes to four, that that right does not exist. That is a primarily legal inquiry as it is a question of interpretation of the convention. By contrast, with *South Africa v. Israel*, the question is factual in nature. South Africa and Israel essentially agree on what genocide is, on what the elements of the crime are, even on basic questions of how one establishes intent. In that sense, there was not a huge amount of disagreement between the two parties on these issues. In this case, the law is relatively settled. The core question was factual, from examining all of the evidence in the case, in determining whether it is plausible

⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Provisional Measures), available at <<https://www.icj-cij.org/sites/default/files/case-related/144/144-20090528-ORD-01-00-EN.pdf>>.

⁵ Separate Opinion of Judge Abraham, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Provisional Measures) [2006] 141, para 11, available at <<https://www.icj-cij.org/sites/default/files/case-related/135/135-20060713-ORD-01-02-EN.pdf>>.

⁶ Declaration of Judge Greenwood, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Provisional Measures), available at <<https://www.icj-cij.org/sites/default/files/case-related/150/150-20110308-ORD-01-04-EN.pdf>>.

for South Africa to argue that Israel was committing genocide in Gaza. By plausible in this context, the Court really means some low level of possibility, not something that is likely. The Court does not mean something that is certain or convincing, only something that is more than a mere allegation. A relatively low evidentiary bar could reasonably be argued, and South Africa was able to meet that standard.

There are two main reasons why Israel's actions in Gaza may amount to genocide on this plausibility standard. The first is the enormous number of civilian casualties in Gaza, and the second are the numerous horrifying statements made by some Israeli officials which are of relevance in relation to demonstrating genocidal intent. It is the combination of these two factors that led the Court to conclude in paragraph 54 that some of the rights alleged by South Africa are plausible.⁷ This is the first time the Court has used this kind of formulation in a provisional measures order. When Gambia sued Myanmar for genocide,⁸ for example, the Court did not say that some of the rights alleged by Gambia were plausible. The Court's use of this particular formulation may indicate some disagreement among the judges about whether Israel plausibly is acting with genocidal intent. The aforementioned statements by Israeli officials clearly played a significant role in the Court's decision. Without the statements it is possible that the Court may have decided not to issue a provisional order. In any event, this generally means that when you have an inter-ethnic or inter-religious conflict of the kind you have between Israelis and Palestinians, and you have a large number of civilian casualties, the plausibility criterion will easily be met.

Finally, on the real-world impact of this order, it is too early to tell. Perhaps we will know whether this order has made a difference in a few years from now, while at this early stage we may only speculate. There are some parts of the order that just repeat or reiterate state party's obligations under the Genocide Convention. That does not mean they will not have an impact. There are parts in the order that essentially tell Israel that it must curb direct and public incitement to genocide, and that it has to make efforts to provide humanitarian assistance to Gaza. We have recently seen the defunding of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) following Israeli allegations that employees were involvement in the Hamas attack on 7 October,⁹ which does not exactly comport with that last sentiment of the Court. However, that does not necessarily mean that in the months to come, the order will not make any difference on the humanitarian assistance front. We shall see what the Israeli Attorney General does about hate speech and incitement to genocide more generally and whether that will provoke any kind of cases.

Certainly, one possible impact is that the order will factor into the assessments of third states who are assisting Israel. There is already litigation in several countries of that kind, we will see shortly, an appeals judgement in the Netherlands that deals with the transfer of aeroplane parts to Israel.¹⁰ It will be interesting to observe whether the Court's provisional measures order factors at all in the reasoning of the Dutch judges. The Court's provisional measures order may certainly make an impact in that sense.

⁷ 'In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.' Available at <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>>.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar)* (Provisional Measures) [2020] ICJ GL No 178.

⁹ 'US won't restart UNRWA aid until investigation ends: officials', Reuters (9 February 2024), available at <<https://www.reuters.com/world/us/us-wont-restart-unrwa-aid-until-investigation-completed-officials-2024-02-09/>> accessed 12 February 2024.

¹⁰ For developments on this case that have occurred since this event took place, see 'Dutch court orders halt to export of F-35 jet parts to Israel', Reuters (12 February 2024), available at <<https://www.reuters.com/business/aerospace-defense/dutch-court-orders-halt-export-f-35-jet-parts-israel-2024-02-12/>> accessed 12 February 2024.

Professor Paola Gaeta: The provisional measures order and general allegations of violations of international humanitarian law

There are two issues addressed in this presentation: i) the provisional measures that the Court has ordered to Israel; and ii) the relationship between international humanitarian law (IHL) and genocide.

Regarding the first issue, as previously discussed, provisional measures are requested and can be issued to protect the rights claimed by the parties. Thus, there exists a connection between the provisional measures the Court can order and the merits of the claim, which is a significant aspect to consider. South Africa has raised several claims, including that Israel, by conducting military operations in Gaza, is committing genocide in addition to other acts prohibited by Article III of the Convention. The latter include conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. Furthermore, it is alleged by South Africa that individuals acting as agents of Israel, at a personal level, are committing genocide or engaging in other prohibited acts under Article III. Therefore, it is crucial to maintain a clear distinction between the allegations that Israel, as a state, is committing genocide or other prohibited acts, and the allegations that individuals acting as organs of Israel are criminally responsible for genocide and public and direct incitement to commit genocide, among others.

Regarding the first claim, South Africa has requested the Court to compel Israel to cease its military operations in Gaza. However, the Court did not grant South Africa this provisional measure, leading to dissatisfaction from South Africa and the Palestinians. The request implied that the Court had to evaluate the plausibility of the claim that the nature of the conflict in Gaza is genocidal. This assessment posed a significant challenge for the Court, especially at this early stage of the proceedings. Israel defended its actions by stating that its military operations in Gaza are motivated by the need to protect its population, secure the release of hostages, and neutralize Hamas to safeguard its citizens. Additionally, Israel asserts its right to self-defence. The critical question, therefore, was whether it was plausible that the conflict in Gaza has a genocidal character, as claimed by South Africa.

This topic is critically important because, within genocide studies, there exists a divergent understanding of what constitutes genocide and how it is distinguished from war more broadly. Essentially, there are two prevailing schools of thought. The first maintains that during wartime genocide, a cautious approach is necessary to differentiate between mass killings and civilian casualties resulting from war and those from genocidal violence. It emphasises the need to identify a pattern of military violence in armed conflict that is specifically genocidal in nature. This is challenging to prove given the potential for alternative motivations behind civilian casualties caused by military actions.

Conversely, the second school of thought argues that the use of warfare methods characterised by indiscriminate violence or those leading to total destruction in themselves can signify that the conflict is genocidal. This concept might seem complex, but it is pivotal, especially in cases of international disputes, such as *Bosnia v. Serbia*, *Croatia v. Serbia* and the counterclaim of Serbia against Croatia. These instances underscore the importance of demonstrating whether a state engaged in warfare is conducting a conventional war or a conflict with genocidal characteristics.

Setting this aside, the Court, in its order for provisional measures, particularly focuses on the aspect of South Africa's claim is accusing organs of Israel to be committing genocide or public and direct incitement to commit genocide. Upon examining the initial three measures issued by the Court, Israel is instructed, first, to ensure measures are in place to prevent the commission of genocide in Gaza, an obligation that Israel already has under Article I. Additionally, Israel must ensure its military does not commit genocide, reinforcing its obligation to prevent genocide in relation to its military forces. Thirdly, Israel must prevent public and direct incitement to commit genocide. These are measures that Israel has to take vis-à-vis the possibility that some individual organs of Israel are committing genocide or any other of the acts

prohibited by the Genocide Convention. Contrastingly, the fifth provisional measure ordered by the Court emphasizes Israel's responsibility to ensure the preservation of evidence that might indicate the commission of genocide or other prohibited acts under the Genocide Convention. This preservation of evidence serves a dual purpose: it ensures Israel fulfils its duty to punish genocide and related acts at an individual level, and it may assist the Court in the future to determine whether the Israeli government had a genocidal intent during the conflict. Preserving evidence that senior state officials in the Israeli government may have had genocidal intent could be crucial for assessing the merits of the claim regarding Israel's state intent in this conflict.

Finally, reflecting on the relationship between international humanitarian law (IHL) and genocide, some scholars have argued that during a conflict, attacks on civilians are a result of collateral damage, which are not prohibited under IHL, and should not be considered genocidal killings. This perspective is based on the absence of the *actus reus* of genocide, as collateral damage deemed proportionate is not prohibited by IHL and therefore 'lawful'. This stance has been presented by Israel in its legal arguments. This is strange as the two legal issues are entirely separate because something that may be lawful (rectius: not unlawful) under international humanitarian law is not precluded from constituting a prohibited genocidal killing under the Genocide Convention. In other words, setting aside the question to prove genocidal intent, the *actus reus* of killing for genocide may exist, irrespective of whether casualties among civilians are proportionate or disproportionate. In this sense, IHL has no bearing on the determination of the existence of genocide.

The International Court of Justice (ICJ) in the *Croatia v. Serbia* counterclaim case discussed the interplay between IHL and genocide, where the Court generally suggested that it is possible that IHL has no bearing on findings of genocide.¹¹ However, the Court also said that if a military attack is not unlawful under IHL, namely, if civilians have been not killed deliberately, there cannot be the *actus reus* of killings of civilians for the purpose of genocide.¹² According to the Court, for killings to amount to the *actus reus* of genocide, they must be intentional. Therefore, according to the Court, if civilians are not targeted deliberately but 'collaterally', there is no killing of civilians which would count for genocide. This statement is problematic because the Court confuses two different issues, lawfulness (or not unlawfulness) under international humanitarian law and the intention element required for the commission of killings for the purpose of genocide. If during an armed conflict, a military object is targeted such as a hospital because there are weapons or combatants in the hospital, and there is knowledge that an attack on the hospital would cause the death of civilians or persons in the hospital, the killing of those civilians is intentional in criminal law terms. This is irrespective of whether their deaths result from a proportionate strike in compliance with IHL, making these killings not unlawful under IHL. However, this does not mean that that the killings of these civilians as collateral damage are not intentional. In this sense, the Court appears to have made a problematic statement in the *Serbia counterclaim versus Croatia*.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Merits)* [2015] ICGJ 470 para 153, available at <<https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-00-EN.pdf>>.

¹² *Ibid.*, para 474, where the Court stated: "Killing" within the meaning of Article II (a) of the Convention always presupposed the existence of an intentional element (which is altogether distinct from the "specific intent" necessary to establish genocide), namely the intent to cause death...It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention'.

Dr Danae Azaria: The parties' and Court's approach to the existence of a "dispute"

At the provisional measures stage, the Court must first be satisfied that it has *prima facie* jurisdiction to rule on the merits. In its provisional measures order, in *South Africa v. Israel*, the Court found that it *prima facie* had jurisdiction because it appeared that South Africa and Israel held clearly opposite views as to whether Israel's conduct violated the Genocide Convention and thus, there appeared to be a dispute. The Court also considered that the conduct complained of appeared to be capable of falling within the provisions of the convention and expressly without examining and contrary to Israel's argument whether or not there was genocidal intent. The Court had taken the same approach earlier, in the provisional measures in *Gambia v. Myanmar*, and the Court's reasoning on this aspect is not surprising. Thus, at the stage of *prima facie* jurisdiction, the crucial question was whether there was a dispute between South Africa and Israel on the basis of an objective determination of the facts.

On the existence of a dispute in this case, taking into account the party's pleadings and the Courts earlier decisions, the following analysis focuses, first, on the function and timing of the dispute's existence for the Court's jurisdiction, second, on the evidence on which the Court relied in order to establish that the dispute existed. Before this discussion, some consideration must be given to what exactly is meant by "dispute". The *Mavrommatis* definition, 'a disagreement on point of a law or fact if a conflict of legal views or of interests' is undoubtedly generic and abstract.¹³ The Court has since clarified, notably in *South West Africa* and reaffirmed consistency since and in fact, even in this order, that 'for a dispute to exist, it must be shown that the claim of one party is positively opposed by the other'.¹⁴ In real life, two states may be involved in actions, statements, inactions, silences; at times in direct exchange with each other, and on other occasions, independently from each other. A dispute may be generated owing to various contexts and statements until eventually it comes into existence: it crystallises.

Regarding the importance of the function and timing of the existence of the dispute, in *South Africa v. Israel*, the Court considered, as it has done in its recent case law, that the existence of a dispute is a condition for the existence of its jurisdiction; not the exercise of its jurisdiction. Additionally, the Court considered whether the evidence established a dispute *prior* to filing the application. The Court's reasoning is consistent with its reasoning since the *Marshall Islands* cases, and it is significant that both parties in *South Africa v. Israel* agreed in their pleadings that the dispute must exist prior to filing the application.

In terms of the evidence on which the Court relied to establish *prima facie* the existence of a dispute, the Court recalled its earlier case law according to which it takes into account in particular any statements or documents exchanged between the parties as well as any exchanges made in multilateral settings. It found *prima facie* a dispute by relying, however, on the combination of South Africa's public statements and a public statement by Israel. On the one hand, the Court indicatively and expressly relied on a statement made by South Africa at the tenth emergency special session of the United Nations General Assembly on 12 December 2023. More specifically, at that time South Africa stated that the events in Gaza had illustrated that Israel is acting contrary to its obligations under the Genocide Convention. Although the Court did not state so, it seems that this statement makes a clear legal claim, both in terms of *who* is the addressee of the claim, in terms of the *conduct* being complained of, and in terms of the *subject matter* of the claim. The Court further noted that Israel was represented at this meeting and it

¹³ *Mavrommatis Palestine Concessions (Greece v. UK)* (Objection to the Jurisdiction of the Court) [1924] PCIJ, Rep Series A No. 2, 11.

¹⁴ *South West Africa Cases (Ethiopia v South Africa; Liberia v. South Africa)* (Preliminary Objections, Judgment) [1962] ICJ Rep 319, 328, available at <<https://www.icj-cij.org/sites/default/files/case-related/46/046-19621221-JUD-01-00-EN.pdf>>.

also noted that South Africa recalled this statement in its note verbal of 21 December 2023 sent to Israel. Again, although the Court did not state so, it can safely be assumed that the Court asserted from the circumstances, namely Israel's presence in the General Assembly and the receipt of the note verbal, that Israel was *actually* aware of South Africa's claim since at least the 12 December 2023. In other words, that Court continued to rely on its reasoning, especially since *Marshall Islands*, that for a dispute to exist, a prospective respondent must be aware or could not have been unaware of their prospective claim of the applicant.¹⁵

The Court did not stop there, it also relied on a statement by Israel which had expressly dismissed any accusation of genocide in Gaza.¹⁶ This statement was made in a document that had been published by the Israeli Ministry of Foreign Affairs, and it was reproduced on the public website of the Israel defence forces.¹⁷

First, what the Court did not do is important, the Court did *not* reason that a dispute existed by virtue of Israel's conduct in Gaza, on the one hand, and South Africa's subsequent complaints against this conduct on the other hand.

Second, Israel had argued that the evidence submitted by South Africa did not prove that there had been any direct exchanges between the parties, and thus no dispute existed. South Africa, Israel argued, did not give Israel a reasonable opportunity to engage with it on the matters under consideration before filing its application. In its order the Court impliedly, but in a manner consistent with established reasoning in its earlier caselaw, has rejected that prior negotiations are required for a dispute to exist. However, the reasoning of the Court seems to also imply that the statements of South Africa and Israel fell within the concept of "exchanges". It is true that the Court has not explained in this order or in its earlier decisions, what it means by "exchanges" between the parties and the term certainly does not require prior negotiations. Exchanges may be informal and can take place bilaterally or in multilateral settings. *Georgia v. Russia* and *Gambia v. Myanmar* support these propositions. The Court's reasoning in *South Africa v. Israel* also confirms that exchanges can also be indirect as long as the claims are connected in their substance. It is also important that the Court considered that claims made through modern communications technology on a public website, for instance, are capable of establishing a dispute.

Third, South Africa alleged that Israel was silent in response to South Africa's note verbal. However, Israel had responded to South Africa offering immediate discussions to which South Africa did not respond. The Court did not address the issue of Israel's alleged silence. It did not have to, since it *prima facie* established the existence of a dispute from the parties' positively opposed claims that they had made expressly. However, the case emphasizes the significance of how State silence is conceptualized, including in relation to the existence of a dispute.

¹⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Jurisdiction and Admissibility, Judgment) [2016] ICJ Rep 255, [38], [48], [52], available at <<https://www.icj-cij.org/sites/default/files/case-related/158/158-20161005-JUD-01-00-EN.pdf>>; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Jurisdiction and Admissibility, Judgment) [2016] ICJ Rep 552, [38], [48], [52], available at <<https://www.icj-cij.org/sites/default/files/case-related/160/160-20161005-JUD-01-00-EN.pdf>>; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK)* (Preliminary Objections, Judgment) [2016] ICJ Rep 833, [41], [52], available at <<https://www.icj-cij.org/sites/default/files/case-related/160/160-20161005-JUD-01-00-EN.pdf>>.

¹⁶ At para 27 of the order.

¹⁷ Available at <<https://www.idf.il/en/mini-sites/hamas-israel-war-24/all-articles/the-war-against-hamas-answering-your-most-pressing-questions/>> accessed 12 February 2024.

Professor Christian J. Tams: The position of third states

So far discussion has focused on crucial issues of law concerning the proceedings as brought by one state against another. However, there are broader implications of this case that warrant significant attention. A key factor of these proceedings is that while they are a bilateral ICJ case, they are really a multilateral dispute of global concern, not just in terms of the public interest but also with respect of states that are not formally party to these proceedings but that have taken positions vis-à-vis the dispute.

If we want to assess the impact of this case and evaluate the proceedings, we need to take those statements by non-party states into account. In this respect, there are three fundamental points to make. First, from the record of states taking a view as non-parties, we can see that the ICJ is a powerful forum in shaping a diplomatic discourse about matters of international law. Secondly, if we engage with the statements, as international lawyers we need to leave our comfort zone and apply parameters that are not used to appreciating standard exercises in dispute settlement before courts. Third, it appears that the ICJ procedural regime is not really suited to integrate statements by third states into the process.

To the first point, there is a rich body of international practice of pronouncements on the merits of this case. Dozens of states have, since late December, taken a view on whether they consider South Africa's case to be, either welcome, or an abuse of process. It is easy to dismiss such statements as off-the-cuff assessments lacking depth, or on the basis that they reflect biases of states looking to this dispute. Clearly, some statements were not based on a detailed study of the material that was presented to the ICJ—for the simple fact that they were made before the actual proceedings commenced. However, if examining the statements in the round, we can find a considerable amount of specific and detailed engagement with the issues. States like Malaysia and others have said that they found Israel to be in breach of the Genocide Convention. Other states have said that they could not see that a state acting defensively could ever plausibly be accused of genocide. Since the order of the Court there has been a similarly vocal response from states, commenting on the proper interpretation of the order, and for example, assessing whether the temporary “un-funding” of UNRWA would amount to a violation of the Court's interim order, or whether Israel, by not permitting certain forms of humanitarian access, would violate its duties.

All this of might at some point be scrutinised by the Court. But even now, third states are taking views that are quite specific. This points to a crucial quality of ICJ proceedings that goes beyond the legal assessment. The proceedings are a factor of global public diplomacy. A hearing before the ICJ amplifies the discourse, and amplifies interest in the issues that are being litigated; and they focus the discourse on legal matters.

On the second point, addressed perhaps to the international lawyers in the audience and to us on the panel: I am wondering whether as international lawyers we have the tools—the parameters or the concepts—to address these effects of ICJ proceedings. It may of course be too early to measure the impact of the Court's proceedings on the ground. However, if we measure the impact of the order on global public conduct, it seems to be that the statements by states—their taking of positions, and reactions following them—constitute a dramatically relevant source of material that awaits empirical assessment. To reiterate, third states react to the temporary defunding of UNRWA; states take a view on what Israel does, and perhaps criticise it; and so on and so forth. This is all part of a public discourse about the scope of international law. As in international law we so often have to work with nothing but the auto-assessment and auto-determinations of the immediate parties to a dispute, it is important that these reactions by third states provide a rich body of often genuine and sincere engagement.

Can we factor that in as international lawyers? I am not sure—but one thing is certain: If we want to come to terms with the impact of the proceedings on global disputes and major conflicts like this one, we need to move away from traditional visions of binding dispute settlement by the Court. Cases like South Africa's do not fit the idea of adjudication as the necessary next step after negotiations, taken when

diplomacy has failed. Rather, we see how a Court process is used to trigger new diplomatic initiatives, to shape diplomatic initiatives for conflict resolution, to draw in third parties that are not parties to the proceedings, and to build up pressure. As international lawyers, do we have the concepts to assess that? Many of our textbooks continue to treat international Court proceedings as part of the peaceful dispute resolution process, the focus is on compliance as the major indicator of impact. But is compliance with the Court order really the important factor here? It seems to me that if we want to appreciate the role of the Court, we need to see ICJ proceedings as means of triggering responses by third states. That is the relevant factor, that is what we need to assess when we want to evaluate impact. I would encourage us as international lawyers to stop viewing Court proceedings like these as part of a sequence of peaceful dispute resolution procedures, going from negotiations via a mediation, conciliation to arbitration and adjudication. Rather than assessing compliance as our central benchmark for the effectiveness or success of proceedings, we need to be prepared to take account of a much wider, much more diverse set of evidence, notably third State reactions.

Finally, third, is the ICJ prepared for this level of interest in the proceedings? Perhaps not. A while ago, the ICJ opened up its procedural regime for litigation about multilateral disputes, and—in its judgement in the *Gambia Myanmar case*—recognised that applicants could bring proceedings for breaches of public interest rules. However, if we are looking at the role of other, third states in proceedings, it would appear that the ICJ regime is perhaps not well suited.

The main venue or avenue for third states to be involved in the proceedings is of course intervention, that is, intervention proceedings under Article 63 or Article 62 of the Statute, and this has been used in the case between Ukraine and Russia. It is also highly likely to be used in the present case, at least many states have already announced that they will intervene. Nicaragua recently announced that it would intervene, not as a state interested in the construction of the convention under Article 63, but as an intervener under Article 62. It is unclear as yet exactly how far that can carry. The case between Ukraine and Russia demonstrates that the Court and the parties are still coming to terms with these procedural tools, especially the interventions under Article 63—which seem to become popular again in this case. The Ukraine Russia case has made relatively clear interventions under Article 63 are really limited to the construction of the convention, but must not go beyond; as a result, interventions probably have a more limited role than anticipated by states rushing out with statements that they would intervene in support of one side or the other.

It seems likely that despite opening up to permit public interest litigation by claimants such as South Africa, the ICJ will not easily find proper room to accommodate the wide measure of public interest that we have seen in this case. This is not a plea for reform, it may just be the nature of the Court as it is. But (to come back to my earlier points) even where third states struggle to find a proper role in the proceedings, we need to treat their statements as a rich body of state practice, triggered by and focused by international litigation. As international lawyers we probably have some homework to do to come up with the right categories to assess this rich body of practice properly.

Panel discussion

Following the speaker presentations a panel discussion was facilitated by the chair of the event. This discussion provided an in-depth look into the Court order and explored the potential future developments related to this specific case, including what directions it might take next.

In relation to the order of the Court, South Africa requested that the Court issue a provisional measures order requiring Israel to cease the conduct of the military operation. While the order of the Court did not do so in this case, in the Ukraine versus Russia case which was also brought under the Genocide Convention it did issue such an order. Why did the Court not issue such an order in this case but did so in the Ukraine versus Russia case? What similarities or differences are there that serve to explain that difference in treatment?

Professor Milanovic: I believe there is both a formal reasoning and a real reasoning behind this. The formal reason for distinguishing the two cases lies in their significant legal differences. In this instance, the accusation is that Israel is committing genocide, suggesting that the entirety of its conflict or war in Gaza is genocidal. Conversely, in the case of Ukraine versus Russia, the situation was reversed. Ukraine argued that Russia's invasion was based on a false accusation of Ukraine committing genocide against its people. Therefore, the Court could determine that Russia's entire military operation might be based on a false claim that Ukraine committed genocide, justifying a directive for Russia to cease all military actions.

However, the situation here is different. Turning to the real reasoning, in the Ukraine-Russia case, Russia's actions were clearly unlawful and morally indefensible by any measure of moral or policy standards. This case, however, presents more complexity. From a moral or policy standpoint, consider the events of October 7th, where over a thousand Israelis were reportedly killed. The dynamics are not as straightforward as the Ukraine-Russia scenario, indicating that the moral landscape is not entirely black and white.

In this light, Israel can reasonably argue that its actions are in self-defence, compliant with International Humanitarian Law (IHL), and not genocidal. This combination of factors led to the Court's decision not to mandate Israel to halt its operations, reflecting the nuanced considerations involved, regardless of one's perspective on the outcome.

Looking further forward, this was the provisional measures phase, we've talked about plausibility of rights, what predictions are there as to where the case goes next. With regards to the actual claim that South Africa has made, in this case, is South Africa likely to be successful on any aspects of that claim or not?

Professor Gaeta: Addressing this issue is challenging because the Court's decision on the merits will emerge in the coming years, and it will largely depend on the developments on the ground. Regarding the allegations of Israel committing genocide, the Court must address an ambiguity present in the Bosnia genocide case, which I have criticized. Although the Court attempted to clarify this ambiguity in the Croatia case, the resolution is not yet complete. The challenge lies in applying the criminal law definition of genocide, as outlined in the Genocide Convention, to a state to determine its commission of a wrongful act. This involves defining when a state possesses genocidal intent.

In the Bosnian case, the Court's stance was somewhat ambiguous, suggesting that if the leaders or state organs possess genocidal intent, such intent could be attributed to the state, indicating genocide. The Court also suggested that any person acting as an organ of the state with genocidal intent could imply the state is committing genocide. Therefore, if there is plausible evidence that current leaders or members of the Israeli military are committing genocide, then it could be concluded that Israel is committing genocide, regardless of the military campaign's overall purpose, even if it were for self-defence.

The Court now faces the challenge of addressing this issue directly, as it cannot avoid it. It remains uncertain what the Court will determine regarding these aspects, but it is a question that the Court must indeed tackle.

On this issue of who's genocidal intent matters when we're dealing with state responsibility for genocide, how do you see the merits of this case playing out on this question, and indeed more generally?

Professor Milanovic: My perspective is straightforward. It is not necessary for the state leadership alone to possess intent for the state to be held responsible for genocide. The state bears responsibility for the actions of all its organs. If, for example, a colonel with genocidal intent commits acts constituting genocide, the state is accountable for those acts of genocide. Similarly, if a regular soldier commits rape, the state is responsible for that act as well. The specific intent, or *mens rea*, does not need to be shared by the leadership for the state to be held accountable.

The issue then becomes whether the evidence supports this on the facts. In cases such as Croatia and Bosnia, the Court has indicated it needs to be fully convinced of the genocidal intent. It is important to note that the absence of genocidal intent does not absolve Israel from potentially committing other crimes; it simply means the Court would not have jurisdiction over such crimes. This was the outcome for the majority of claims in Bosnia and all claims in Croatia. My confident prediction is that, unless the evidentiary record significantly evolves from what is currently known, or unless the Court alters its approach to evidentiary requirements—which seems unlikely—the Court will conclude that, while terrible acts may have occurred, genocide did not.

An interesting point before addressing the merits involves preliminary objections. Israel faces a strategic dilemma: whether to challenge the Court's jurisdiction, for instance, by invoking the supposed absence of a dispute between the parties, or to proceed without objection. Historically, states frequently object, which prolongs the case by adding years to its duration. However, strategically, it might be in Israel's interest not to object. Advancing quickly to the merits could prevent the development of a comprehensive factual record on genocidal intent by entities like a UN Commission of Inquiry. While it is speculative, Israel might opt for a swift move to the merits, potentially aligning with its interests.

On this question of preliminary objections, at the Provisional Measure stage, the Court is only looking at whether it has jurisdiction, prima facie. Regarding the existence of a dispute, the Court hasn't actually decided any of this, in terms of whether it has jurisdiction. Given recent developments in the Ukraine Russia case, having ordered provisional measures, the Court then decides that it does not have jurisdiction to decide what Ukraine requested. If Israel does decide to object, and if they decide to object on grounds of jurisdiction, how might this play out? Do you think that on both the dispute point discussed today but also perhaps on other points, there are good grounds in this kind of case for arguing that it falls outside the jurisdiction of the Court?

Dr Azaria: At the provisional measures stage, the decision by the Court is *prima facie*, indicating that there 'appears' to be a dispute. After this *prima facie* finding, it would be challenging for the Court to conclude that there is no dispute regarding the Genocide Convention at the preliminary objections, especially considering that the evidence that the Court relied on, in the provisional order, were two opposed express statements. Therefore, I anticipate the Court will maintain the same stance during the preliminary objections phase.

Connecting to Christian's point about global public diplomacy, I concur that this aspect is important, but I do not consider this to be what makes this case exceptionally significant for the Court. If one views international law, as one of the various means through which states conduct their international affairs, then diplomacy and international law run in parallel, and they are even intertwined. Therefore, the Court's

role in 'global diplomacy' does not strike me as extraordinary. What I find notably significant about this case, aside from the public interest litigation aspect, is that states, particularly from the global south, call upon the Court to play a role in major global political situations, especially where other United Nations organs have been unable to act.

It is essential to acknowledge that international law and the Court's role within it are just one of the means through which international disputes are addressed, each with its own limitations. The Court must always establish jurisdiction, and in contentious, adversarial contexts, it must be proven that there is a bilateral dispute between the parties, even if it seems apparent that the dispute may be of multilateral nature. This requirement underscores the complexity and procedural demands of the Court's involvement in international disputes.

Q & A

Following the panel discussion, the chair fielded questions submitted by the audience that were put to members of the panel.

Beyond whether or not Israel complies with the Court's order, what implications does the order have for third state's obligations to prevent genocide? As mentioned earlier, one of the questions raised concerns the significance of this order for third states who are for example, supplying arms to Israel. Does the order itself mean that they now have some kind of duty not to do that, especially given that all parties to the Genocide Convention, and presumably, all states have an obligation to prevent genocide? Since the Court has found that a violation of rights under the Genocide Convention is plausible, must states take action to prevent?

Professor Tams: I believe my analysis can be divided into two stages. Formally, there appears to be little in the order that necessitates third states altering their conduct towards Israel, as all measures are directed at Israel itself. The State of Israel is instructed on specific actions, which differs from South Africa's request for an order that would imply all states have a duty to prevent genocide. This request was not granted, so the International Court of Justice (ICJ) order from January 26th does not address the potential responsibility of bystanders. However, this isn't the conclusion of the matter. The duty to prevent, as outlined in Article One of the Genocide Convention, exists independently of the Court's order.

The question now is whether, in light of the Court's order, this duty of prevention has been clarified, leading states to reconsider their discretion in determining their course of action, especially concerning conduct like support or the delivery of weapons. Recent press reports suggest Nicaragua is preparing a case against states supplying weapons to Israel, accusing them of complicity in genocide under the Genocide Convention. These reports are currently unconfirmed, and no official claim has been made, but the issue is significant.

I should add that whether weapon deliveries to Israel necessarily conflict with the duty to prevent genocide is not clear-cut. Opinions on the desirability of such deliveries may vary. But as we look at the legal position, much will depend on how these weapons are used, on whether their delivery comes with limitations on use or instructions that they should not be used in certain ways. I lack insider information on these matters, so this should not be interpreted as suggesting there is no legal basis for enforcing the duty to prevent. However, at this stage, the mere delivery of weapons, without additional context, does not seem to me to constitute a breach of the duty to prevent genocide.

Concerning the implications of the order for Israel itself, what exactly does the order require of Israel to do, how do we interpret the order in terms of Israel's own obligations? And under that order, what would we say to observers that have interpreted the order as requiring Israel to stop all killing of Palestinians, because the order just says Israel should not commit the acts that constitute the actus reus of genocide?

Professor Gaeta: The Court's position is somewhat ambiguous, but it indicates that genocidal acts fall under Article Two if committed with genocidal intent. Thus, the Court is not directly asking Israel to cease killing Palestinians; rather, it is emphasising the need to ensure that killings do not occur with genocidal intent. This distinction is crucial in the Court's order.

Additionally, an interesting aspect of the order pertains to humanitarian assistance. The Court requests Israel to enable humanitarian aid access to Gaza. This directive is significant, possibly linked to concerns that the conditions in Gaza, potentially leading to the destruction of its population, could fall under the definition of genocide as outlined in Article II of the Genocide Convention, specifically letter (c). This suggests the Court might be convinced of the adverse impact on Palestinian life in Gaza.

However, the situation also intersects with International Humanitarian Law (IHL), depending on the conflict's classification and whether certain IHL provisions, such as Article 70 of Additional Protocol I or Article 18 of Additional Protocol II, apply as reflecting corresponding rules of customary international law. The order notably mandates Israel to enable humanitarian assistance to Gaza without exceptions or justifications, not explicitly referencing IHL. This strong stance raises questions, especially considering Israel's claims that some humanitarian assistance is blocked to prevent aid from supporting Hamas' military efforts.

This aspect of the provisional order is worth further exploration, considering the complexities around humanitarian aid and the allegations of its misuse. It would be interesting to hear other colleagues' perspectives on this matter, as it represents a significant part of the provisional order.

What are the implications for the impact of the order and the proceedings more generally, on the Court itself?

Professor Tams: The fundamental issue at hand is indeed significant, particularly for those concerned with the situation in Gaza and the role of the International Court of Justice (ICJ) in addressing it. This case represents a critical test for the Court, reflecting on its capacity to influence and manage significant legal challenges. Historical precedents, such as the *Nicaragua* case and the *South-West Africa* case, have tested the Court's jurisdiction and its ability to maintain confidence among the international community. These cases underscore the ICJ's pivotal role in handling contentious issues and the expectations placed upon it.

The Court possesses unique potential to address this case, highlighting its capacity to amplify and focus attention on legal proceedings. This is crucial, especially when considering the pace at which the Court can operate. Unlike the International Criminal Court (ICC), the ICJ can respond swiftly to urgent matters, as demonstrated by the quick scheduling of public hearings within 14 days of the initial request. This responsiveness is a significant aspect of the ICJ's capability to address urgent concerns, offering a promptly accessible forum for legal redress at the provisional measures stage.

However, there are limitations to what the Court can achieve. Jurisdictional constraints mean that the full scope of issues may not be addressed, and the slow pace of proceedings in the main can impact the Court's ability to effectuate change. In this specific case, the lengthy written proceedings phase may dilute the immediacy of the Court's impact, relegating its eventual decision to a historical rather than a contemporaneously impactful role. Despite these challenges, the provisional measures stage remains a critical component of the Court's toolkit, watched closely for its potential to influence the situation on the ground. Those are factors that determine the Court's approach.

Dr Azaria: It is important to acknowledge the significant potential the International Court of Justice (ICJ) holds in engaging with public interest litigation and cases that involve highly political and multilateral disputes. With this potential, however, comes an increased risk of states potentially losing confidence in the Court, particularly due to its consensual basis for jurisdiction. The question of whether a dispute exists is becoming increasingly contested, often argued in detail before the Court.

In response, the Court is expected to adopt a more rigorous and consistent approach in assessing facts and evidence. It also faces the challenge of clarifying its methodology for determining the existence of a dispute. This includes providing clearer guidance on the weight it assigns to different types of evidence, for instance distinguishing between evidence that have determinative probative value and evidence that has confirmatory value. The Court is anticipated to be more explicit and cautious regarding issues of jurisdiction, ensuring it clearly communicates how its jurisdiction has been established. This shift towards greater clarity and consistency is crucial for maintaining the confidence of states in the Court's jurisdictional decisions.

Proposals to expand the International Court of Justice's (ICJ) role encounter significant challenges, including member states' reluctance to increase the Court's resources and the difficulty in persuading more states to accept its compulsory jurisdiction. The ICJ's rapid case processing and low threshold for provisional measures, contrasted with the more stringent standards for merit rulings, may incentivize states to seek immediate impacts through provisional measures despite uncertain outcomes in final judgments. Are there any reflections on questions about how the ICJ can manage the increasing caseload and the associated resource constraints amidst these pressures?

Professor Milanovic: A logical solution for the Court could be to increase the plausibility requirements and other criteria for issuing provisional measures, making it more challenging to secure them. This adjustment is the only viable action the Court could take. However, it does not appear we have reached that point yet.

Returning to the implications of the Court's orders, specifically the reporting order requiring Israel to report within 30 days and the order on the preservation of evidence, what are the potential impacts of these orders, will Israel's report will be public and what are the overall effect these procedural elements might have?

Professor Milanovic: In previous instances where reporting obligations were imposed, such as *The Gambia v. Myanmar*, the reports were not made public, diminishing the potential for a naming and shaming effect. However, this does not preclude the possibility of such outcomes. In this case, Israel is expected to submit its report soon, after which South Africa may review it and, likely dissatisfied, could request another hearing from the Court. This is what occurred between Armenia and Azerbaijan, suggesting that Israel's compliance might be challenged further. The situation indicates that the Court's involvement with provisional measures may continue, especially if the conflict persists. The Court may eventually need to make more definitive statements regarding compliance and the specifics of the measures. Predicting these developments is challenging.

Given that the Court has found that there is a plausibility of rights with regard to genocide, does that tell us anything as to Israel's compliance or non-compliance with its IHL obligations? Or are these two totally separate things?

Professor Gaeta: The question concerns the relationship between human rights violations and genocide, an area the Court has explored but not conclusively defined. The Court has previously indicated that certain actions could plausibly constitute genocide, as evidenced by its consideration of civilian casualties and specific statements in its provisional orders. These instances suggest the Court believes some civilian losses may result from unlawful acts under International Humanitarian Law (IHL). Drawing on the Court's reasoning in the Croatia case counterclaim by Serbia, which posited that only unlawful IHL acts might amount to genocide, it can be inferred that the Court is also indirectly contemplating Israel's potential violation of IHL. This suggests a possible link between IHL violations and genocide, though the relationship remains complex and not explicitly clarified by the Court.

Are there potentially unintended consequences of a case brought under the Genocide Convention possibly diminishing the significance of other allegations due to the focus on genocide?

Professor Milanovic: There is a significant and concerning risk that focusing on genocide to the exclusion of other violations can diminish the perceived gravity of those other crimes. For instance, in the case of Darfur, a UN fact-finding commission concluded that the atrocities constituted crimes against humanity rather than genocide, leading to misleading perceptions that no grave crimes were committed, as

evidenced by subsequent media reports. This phenomenon was similarly observed in the context of Bosnia and Croatia, where judicial findings led to public misconceptions about the extent of wrongdoing. Such situations underscore the danger of overemphasizing genocide, potentially overlooking the severity of other atrocities like crimes against humanity and war crimes.

Professor Tams: Echoing those concerns, the differentiation between genocide and other grave crimes poses a significant challenge, with some experts advocating for a unified category of atrocity crimes rather than singling out genocide. This issue is compounded by historical emphasis on genocide as the “crime of crimes”, a distinction reinforced by its unique trigger for International Court of Justice (ICJ) access under Article IX of the Genocide Convention for interstate proceedings. While initially seen as beneficial for allowing judicial scrutiny of certain crimes, the risk of diminishing the severity of other atrocities when genocide is not proven is substantial. For example, if Myanmar were to be found not guilty of genocide in the Rohingya case, such verdict could be perceived as a victory for Myanmar, even though evidence of other grave crimes, outside the Court's jurisdiction, is conclusive.

Professor Gaeta: It is concerning that allegations of genocide dominate discussions, overshadowing the broader issue of state criminality. The International Law Commission has moved away from the notion of state criminality, preferring to categorize serious wrongful acts by states as serious breaches of jus cogens obligations rather than labelling them as crimes of State, reflecting a shift in legal terminology. Despite this, genocide remains unique, as its prohibition is enshrined in a treaty that besides providing for individual criminal responsibility also applies to states. The Convention's terms genocide as a crime which therefore highlights a persistent challenge in distinguishing between state actions (that in principle do not constitute crimes) and individual criminal responsibility. This distinction is crucial, as states may be responsible for serious violations of International Humanitarian Law (IHL) and human rights, but concepts such as war crimes and crimes against humanity are typically associated with individual criminal responsibility. This nuanced understanding influences how legal debates are framed and perceived, offering a perspective on the complexity of attributing criminality to state actions.

Dr Azaria: As my colleagues have pointed out, the focus on genocide might not only reduce attention towards other crimes but also diminish their perceived severity. Currently, the topic of crimes against humanity is under discussion in the Sixth Committee, with the International Law Commission (ILC) having adopted draft articles on this matter. The increase in cases before the Court regarding the Genocide Convention calls for progress in the discussions about a convention on crimes against humanity. However, at the same time, there's concern that the frequent recourse to the Genocide Convention may cause some states to be hesitant about negotiating and committing to a new convention on crimes against humanity. This situation suggests a complex dynamic, underscoring the need for further discussion about a convention on crimes against humanity.

The event ended with closing remarks from the chair and the convenor thanking participants for their excellent contributions.

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