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Whither the global governance of protecting civilians? An initial assessment of the ICJ's decision on South Africa v. Israel of 26 January 2024

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Whither the Global Governance of Protecting Civilians?

An Initial Assessment of the ICJ's
Decision on *South Africa v. Israel*
of 26 January 2024

Matthew Tentler and Joachim A. Koops



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Table of Contents

Executive Summary.....	4
Introduction.....	6
International Humanitarian Law (IHL), the Responsibility to Protect (R2P), the Genocide Convention, and the Protection of Civilians (PoC)	7
International Humanitarian Law (IHL).....	9
Convention on the Prevention and Punishment of the Crime of Genocide	10
The Responsibility to Protect (R2P)	11
Protection of Civilians (POC).....	11
The Global Governance of Protecting Civilians: What is at Stake	12
The Case of Israel and the Occupied Palestinian Territories.....	14
The International Court of Justice and the 2023 Israeli-Palestine Conflict ..	16
Initial Decision of the Court	16
Provisional Measures: A helpful tool for preventing further violence?	18
Court’s Near-Unanimous Ruling	22
Political Implications: Initial International Reaction	22
UNRWA Once Again Under the Spotlight.....	23
The ICJ and the Genocide Convention	25
Israel and the International Criminal Court	26
The Global Governance of Protecting Civilians: Where Do We Go From Here?	27

Executive Summary

The atrocious events of 7 October 2023, when Hamas militants broke through the gates encircling the Gaza Strip and committed unspeakable crimes against Israeli civilians, caused an outcry and near-unanimous condemnation around the globe. The attacks were of a particularly heinous nature and have left an indelible mark on Israeli society. The abduction of 240 Israeli civilians and Hamas' tactics of using civilians (and hostages) as "human shields" add further crimes and human rights violations to the situation. The Israeli government has since undertaken military operations in the Gaza Strip with the official intention to eradicate all of Hamas and to remove the terrorist threat emanating from it. Yet, the level of devastation the Israeli government has imposed upon the Palestinian civilian population of Gaza has generated world-wide calls for restraint, and most recently, allegations that the Israeli government has violated its obligation to uphold the principles of the Convention on the Prevention and Punishment of the Crime of Genocide, resulting in South Africa filing an application with the International Court of Justice (ICJ). The developments since October 2023 add additional strains on the legal and political tools for the protection of civilians.

On 26 January 2024, the International Court of Justice found that the *South Africa v. Israel* case falls within the Court's jurisdiction and granted five provisional measures, mostly notably that the Israeli leadership must act in accordance with the Genocide Convention, prevent and punish any incitement to genocide, and facilitate humanitarian assistance to the Palestinians of Gaza. The decision by the Court is a notable development for both the

immediate needs of the Palestinians suffering en masse, as well as for the general development of the global governance of the protection of civilians. This goal has been enshrined in International Humanitarian Law, the Convention on the Prevention and Punishment of the Crime of Genocide, the Responsibility to Protect, and the Protection of Civilians. The Court's ruling contributes to the consistent advancement of these codified principles. Yet, the situation in Gaza, the continued operation of Hamas as well as the ongoing military campaign by the Israel Defence Forces are but the latest in a series of many concerning incidents of serious violations of international humanitarian law and the protection of civilians. It requires concerted effort by member states, regional and international organisations to reinforce legal, political and operational tools to prevent a further deterioration of the global governance of the protection of civilians. While the ICJ's initial decision and provisional measures are an important signal to strengthen and reinforce legal tools for the protection of civilians a reinforcement of member state commitments to the actual prevention and sanctioning of large-scale human rights violations is urgently needed.

This GGI Analysis will offer an initial reflection on the ruling of the International Court of Justice on the case of *South Africa vs Israel*. It will place the ruling in the wider context of global norms for the protection of civilians and offer a first assessment of the significance of the ICJ's ruling as well as its potential implications for the situation in Gaza and for the global goal for the protection of civilians more generally.

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Introduction

On 7 October 2023, approximately 1,000 Hamas combatants broke through the barbed wire and concrete fence surrounding the Gaza Strip (or simply 'Gaza') and proceeded to embark on two days of unspeakable atrocities, including the killing of over 1,200 Israelis and the abduction of another 240 Israeli civilians. State leaders, regional and international organisations as well as civil society organisations rightly condemned these attacks and acts of brutality in strongest terms. The Israeli government ordered the military to respond with a variety of campaigns. Whilst the government of Israel has a clear right to advance self-defence, every state must do so within the boundaries of international humanitarian law and with a particularly responsibility towards civilians and civilian infrastructure. However, the military response soon escalated with large scale bombings of Gaza and public statements on a "complete siege" of Gaza: "There will be no electricity, no food, no fuel, everything is closed...We are fighting human animals and we are acting accordingly," stated Defense Minister Yoav Gallant on 9 October 2023.¹ Speaking during a news conference in the days following the attack, Israeli President Isaac Herzog declared "It's an entire nation that is out there that's responsible. It's not true, this rhetoric about civilians not aware, not involved. It's absolutely not true."²

The response of the Israeli far-right government, under the leadership of Benjamin Netanyahu, included wide-ranging official inciting statements and a massive military operation from land, air and sea that has resulted in large-scale destruction, suffering and internal displacement. The estimated killing of at least 26,750 Palestinians (those still under rubble are not included in the count), the injuring of another 65,600 in Gaza, and systematic destruction of homes and civilian infrastructures should be of concern to anyone seeking to uphold international and global norms and codified regulations for the protection of civilians. They range from post-Second World War legally binding requirements under international humanitarian law (IHL)—particularly when it comes to preventing war crimes and genocide—to more recent international norms and practices such as the Responsibility to Protect (R2P), and the Protection of Civilians (POC). What is at stake in the current conflict in Gaza is not only the plight of many innocent civilians, but also the very foundations of a global mechanism to prevent states from unleashing disproportionate military force and destruction against non-military targets and civilians. Whilst there have been strong indications of war crimes committed by the Israeli Defence Forces (IDF), the current public and political discussions surrounding the current case in The Hague relates to the specific crime of genocide. As can be expected, the charge of 'genocide' has been a highly controversial, politicised and divisive one. Yet, it is of utmost importance to uphold

¹ Emanuel Fabian, "Defense minister announces 'complete siege' of Gaza: No power, food or fuel," [The Times of Israel](#), 9 October 2023.

² Chantal Da Silva, "'Everybody is scared': As Gaza faces threat of ground invasion, tensions run high in Israel," [NBC News](#), 13 October 2023.

the principles and legal provisions of the prevention and punishment of the crime of genocide and this means to unrestrictedly support the work of the International Court of Justice and core UN bodies.

On 29 December 2023 South Africa formally filed an Application instituting proceedings against the Israeli government in the International Court of Justice (ICJ), for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”).³ The Court decided, contrary to the position of the Israeli defence team, that the case meets the criteria of the Court’s jurisdiction; and as such, the Court has ordered Israeli government through so-called “provisional measures” to: refrain from committing acts that are prohibited under the Genocide Convention, prevent and punish incitement to genocide, allow for the facilitation of humanitarian assistance, prevent the destruction of evidence, and submit a report to the Court on the compliance of the aforementioned measures within one month from the decision of the Court.⁴

What does this ruling mean in the context of the ongoing and unfolding humanitarian catastrophe in Gaza and for the global governance of humanitarian law and the protection of civilians more generally? This GGI Analysis will offer an initial reflection on the ruling of the International Court of Justice on the case of *South Africa vs Israel*. It will place the ruling in the wider

context of global norms for the protection of civilians and offer a first assessment of the significance of the ICJ’s ruling as well as its potential implications for the situation in Gaza and for the global goal for the protection of civilians more generally.

International Humanitarian Law (IHL), the Responsibility to Protect (R2P), the Genocide Convention, and the Protection of Civilians (POC)

The Israeli-Hamas war and the consequences for both Israeli and Palestinian civilians must be placed in the wider context of efforts to regulate warfare and for protecting non-combatants from the deliberate targeting and killing by military forces. The adoption of the first Geneva Convention exactly 160 years ago heralded the development of international legally binding commitments by states to protect the victims of armed conflict and develop rules and norms that would afford clear and uncompromisable protection to non-combatants. Under the auspices of the International Committee of the Red Cross (ICRC) and the United Nations after WWII, rules, treaties and norms that further reinforced the protection of civilians expanded and became the foundations of what is commonly referred to as International Humanitarian Law (IHL).⁵ Central pillars of IHL are not only the 4th Geneva Convention of 1949 with direct

³ See United Nations General Assembly (1948) [Convention on the Prevention and Punishment of the Crime of Genocide](#), Resolution 260 A (III), 9 December 1948.

⁴ International Court of Justice, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip \(South Africa v. Israel\)](#), Request for the

[Indication of Provisional Measures Order](#), General List No.192, 26 January 2024.

⁵ For a concise overview, see International Committee of the Red Cross, “History of the ICRC,” [International Committee of the Red Cross](#), 29 October 2016.

lessons from the large-scale and deliberate targeting of civilian populations, but also the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. The Rome Statute that came into force in 2002 and which serves as the founding treaty of the International Criminal Court (ICC) added a further important building block for the global governance of atrocity prevention, the punishment of war crimes and the protection of civilians.⁶ Articles 6-8 include the court's jurisdiction over the crimes of genocide, crimes against humanity and war crimes. Unlike the International Court of Justice which deals with dispute between states, the ICC can bring charges against individual persons. In 2005, all Heads of States of Government adopted in the UN General Assembly the World Summit Outcome document and endorsed the principle of the 'Responsibility to Protect' – or R2P in short.⁷ R2P emerged out of fundamental policy challenges and reflections from the 1990s and in particular the failure of states to prevent the genocides in Rwanda and Bosnia and the tensions between legitimacy and legality (i.e. UN Security Council mandate requirements) of military interventions to prevent or stop mass atrocities (in the case of Kosovo in 1999). As a result a panel of international experts first formulated in 2001 the principles and its three pillars (Pillar 1: the protection responsibilities of

the State; Pillar 2: international assistance and capacity building; and Pillar 3: timely and decisive response by the international community) in a landmark report.⁸ Since then, R2P has developed into a strong – albeit not uncontested – international norm that requires states to prevent or stop mass atrocities through diplomatic, humanitarian or military force – the latter requiring a UN Security Council authorization.⁹ At the same time and as a result of various challenges related to UN peacekeeping operations during the 1990s and their failure to protect civilians, the United Nations Secretariat developed the policy of "Protection of Civilians" (POC). POC requires UN peacekeepers to use both non-military and military tools and actions to actively protect civilians from gross human violations in area of operation of a blue helmet peace operation. Whilst the language of POC was introduced for the first time in a Security Council mandate in 1999, the policy was elaborated on in a variety of reports and documents throughout the last two decades, culminating in a comprehensive POC handbook published by the UN Department of Peace Operations in 2020.¹⁰ In addition and inspired by UN-led discussions, other regional organisation and member states developed their own POC policies and guidelines, including the European Union, African Union and North Atlantic Treaty Organization (NATO).¹¹

⁶ International Criminal Court (2011) [Rome Statute of the International Criminal Court](#), The Hague: International Criminal Court.

⁷ See United Nations General Assembly (2005) [Resolution Adopted by the General Assembly on 16 September 2005, 60/1: World Summit Outcome](#), A/RES/60/1, 24 October 2005, paras 138-140.

⁸ See International Commission on Intervention and State Sovereignty (2001) [The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty](#), 1 December 2001.

⁹ For a general overview and different state perspectives on R2P, see Daniel Fiott and Joachim A. Koops (eds.) (2015) *The*

Responsibility to Protect and the Third Pillar: Legitimacy and Operationalization, Basingstoke: Palgrave Macmillan.

¹⁰ See United Nations Department of Peace Operations (2020) [The Protection of Civilians in United Nations Peacekeeping Handbook](#), New York: United Nations Department of Peace Operations.

¹¹ For an overview and comparison of UN, EU and NATO approaches to POC, see Joachim A. Koops and Christian Patz (2022) [UN, EU and NATO Approaches to the Protection of Civilians: Policies, Implementation and Comparative Advantages](#), New York: International Peace Institute.

Taken together, the above elements can be summarized under the umbrella term of a “global governance approach” to the protection of civilians with overlapping and mutually reinforcing elements in the forms of legally binding conventions, norms and policies. Before delving into an initial analysis of the ICJ’s *South Africa vs. Israel* case, the following sections will briefly elaborate on the background of these different elements.

International Humanitarian Law (IHL)

International Humanitarian Law (IHL) consists of a diverse and long-lasting series of attempts to regulate warfare.¹² The United Nations Charter’s Article 2(4) prohibits states from resorting to force, except for self-defence (Article 51) or if authorized by the United Nations Security Council through a legally binding mandate. What amounts to ‘self-defence’ under Article 51 has been subject to intense legal and political (and often politicized debate).¹³ Measures taken by the state exercising its right of self-defence also must be immediately reported to the Security Council.

Preceding the UN Charter, IHL is fundamentally constructed from two major conventions: the 1899 and 1907 Hague Conventions and the 1949 Geneva

Conventions, including the Additional Protocols from 1977. The Hague Conventions have become the basis for customary international law of warfare (Hague Convention IV – Laws and Customs of War on Land). The 1949 Geneva Conventions and Additional Protocols (AP) are the basis for IHL. While ‘Hague Law’ instructs the conduct of hostilities, ‘Geneva Law’ covers the safeguarding of the protection of civilians.

The Geneva Conventions include four Conventions and numerous Common Articles, with the most important being Common Article 3. AP 1 and 2, adopted in June 1977, related to international and non-international conflicts, respectively, and were adopted in response to the urgent need for the Geneva Conventions to address and protect those parties fighting against “colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹⁴ AP 1 and 2 have not received the widespread ratification as the 1949 Geneva Conventions, especially due to the affordances AP 1 and 2 give to guerrilla/resistance fighters and the perception that the Protocols may infringe upon State’s sovereignty and ability to maintain stability and rule of law. 174 and 169 States have ratified the AP 1 and 2, respectfully, with notable exceptions being India, Israel, and the United States.

There exist fundamental principles that underlie the IHL, both treaty-based and customary. These principles include: the

¹² For an overview of the historical developments in international humanitarian law, see Emily Crawford and Alison Pert (2020) *International Humanitarian Law*, Cambridge: Cambridge University Press, p. 4-28.

¹³ See for example the International Court of Justice’s ruling in the case of *Nicaragua vs. The United States of America* 1986,

available online at <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>

¹⁴ United Nations Human Rights, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, 8 June 1977, entry into force 7 December 1979, article 1(4).

principle of distinction, the principle of discrimination, the principle of proportionality, the principle of military necessity, the prohibition on causing unnecessary suffering and superfluous injury, the principle of neutrality, and the principle of humanity.¹⁵ Distinction, discrimination and proportionality are often seen as the most important principles underlying IHL. The principle of distinction is clearly stated in Article 48 of AP 1, and is also considered customary international law. The principle of distinction states that “...the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹⁶ The principle of distinction also applies in the opposing way: parties are required to take all feasible precautions to ensure military objectives are not located within or near densely populated areas.¹⁷ The principle of discrimination (and prohibition of indiscriminate attacks) is closely connected to distinction: attacks that fail the latter will also fail the former. The principle of proportionality is found in Article 51(5)(b). Under this article, collateral damage is not viewed as violating international law, as long as the “incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof” does not exceed the “concrete and direct military advantage anticipated [emphasis added].”¹⁸

¹⁵ Crawford and Pert, *International Humanitarian Law*, 42-50.

¹⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict (Protocol I), Geneva, adopted 8 June 1977, vol. 1125, article 48.

¹⁷ AP I, art. 58.

¹⁸ AP I, art. 51 (5)(b).

Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Genocide Convention’) was adopted by the UN General Assembly on 9 December 1948 and entered into force on 12 January 1951. The Genocide Convention was a response to the crimes committed during World War II and the global commitment to ensuring such acts are not repeated. The 153 signatories of the Genocide Convention are expected to prevent and punish the crimes of genocide. Genocide is defined in Article II as the “following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.”¹⁹ Article III of the Convention provides the acts which are punishable as being: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.²⁰

¹⁹ Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III) of 9 December 1948, Article II.

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III) of 9 December 1948.

The Responsibility to Protect (R2P)

As mentioned above, the Responsibility to Protect (R2P) is an international norm that arose out of the failure to prevent the mass victimisation of civilians in Rwanda (1994) and the former Yugoslavia (1991-2001). R2P was adopted in 2005 during the UN World Summit, and with its adoption it called upon both states and the international community to prevent war crimes, crimes against humanity, ethnic cleansing, and genocide from occurring. Each state has a responsibility to uphold basic human rights and safety for their civilian population, and in equal measure, the international community has the responsibility to utilise the appropriate mechanisms present in the UN Charter to protect populations around the world. Three pillars, each of which carries equal importance, are the foundation to R2P. Pillar I is the responsibility of each State to protect its population. Pillar II is the responsibility of the international community to assist States in the protection of their civilians. And lastly, Pillar III is the responsibility of the international community to act and protect the civilian population after the State has failed to do so.

Since the adoption of R2P in 2005 there has been some positive developments regarding the development of the norm; however, all too often the international community fails to respond to situations wherein the civilian population is victimised by the State. Most recently, a UN General Assembly Plenary Meeting was held in June and July of 2018. 79 member states

and the European Union engaged in a debate on the key concepts of R2P. The key themes of the debate ranged from domestic implementation of early warning systems to peacekeeping operations; but the one issue raised that plays a critical role in implementing the principles of R2P is the UN Security Council veto. The UN Security Council is the fundamental enforcement mechanism for the international community to uphold R2P and act within the framework of the UN Charter, and States often encounter politics and the threat of a UN Security Council veto when seeking to pursue an international response to a failure to protect.²¹

Protection of Civilians (POC)

As introduced above, the Protection of Civilians (POC) policy can be seen as the active operationalisation of the duty and responsibility to protect civilians in a conflict zone and during a peacekeeping operation from harm, human rights violations and from threats to their lives. Crucially, POC goes beyond IHL requirements of 'harm mitigation' and proportionality. Instead, the "protection of civilians" approach includes a variety of policies, tools, instruments and operational approaches to actively protect civilians from the attack of third parties. As outlined above, this policy has been developed in particular by the United Nations in relation to the mandates duties of blue helmet staff to actively protect civilians under their area of operation from attacks and human

²¹ Summary of the UN General Assembly Plenary Meeting on the Responsibility to Protect, Global Centre for the Responsibility to Protect (July 2018): 4.

rights violations committed by others (i.e., militia or other armed forces). This has been a direct reaction to the failures of UN peacekeepers to protect civilians from genocide and large-scale atrocities during the 1990s. After initially introducing POC requirements into the UN peacekeeping mission in Sierra Leone in 1999 a wide range of consultations and policy initiatives resulted in the development of a more extensive UN POC policy. “Building on experiences and innovations in the field, an independent study on POC in 2009 and Security Council Resolution 1894, the UN adopted its first operational concept on POC in 2010. This document established the ‘three tiers’ of POC (‘protection through dialogue and engagement,’ ‘provision of physical protection,’ and ‘establishment of a protective environment’). These three tiers have subsequently been referenced in more recent UN POC documents, including the 2015 POC policy, the revised 2019 POC policy, and the 2020 POC handbook.”²² Indeed, the UN POC handbook can be regarded as one of the most comprehensive documents and manuals for implementing the three tiers of POC with non-military and military tools.

As a result of intensive dialogue between the UN Secretariat and regional organisations as well as UN member states, various other actors have developed their own POC policies and guidelines, including the European Union, NATO and the African Union as well as several Western states. While the

implementation of POC still faces a variety of challenges and obstacles, particularly in high risk peacekeeping operations, the international community has come a long way in institutionalising and refining POC tools and approaches.

The Global Governance of Protecting Civilians: What is at Stake

International law has made numerous advancements, especially within the realm of enforcement, since the adoption of the Geneva Conventions in 1949. Originally, the enforcement of international humanitarian law for violations committed by individuals was restricted to two mechanisms: domestic law as enforced by the State or through the creation of ad hoc tribunals. Such tribunals were utilised immediately after World War II, through the Nuremberg Trials (1945-1946) and the Tokyo Trial (1946); and later, through the creation of the International Criminal Tribunal for the former-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both being formed in the 1990s and lasting roughly thirty years. The positive developments that stemmed from these tribunals is undeniable.²³ However, as recognized as early as the 1950s, the enforcement of international humanitarian law cannot be contingent upon the creation of ad hoc tribunals for each conflict and a more stable court for

²² Joachim A. Koops and Christian Patz (2022) [UN, EU and NATO Approaches to the Protection of Civilians: Policies, Implementation and Comparative Advantages](#), New York: International Peace Institute, p. 3

²³ Theodor Meron, “Reflections on the Prosecution of War Crimes by International Tribunals,” *The American Journal of*

International Law 100, no. 3 (2006): 551-579; Darryl Robinson and Gillian MacNeil, “The Tribunals and the Renaissance of International Criminal Law,” *The American Journal of International Law* 110, no. 2 (2016): 191-211.

adjudicating violations of international law must be considered.

The formation of an international criminal court was already being considered by the UN and the International Law Commission had been drafting statutes for such a creation in the early 1950s. The issue of the creation of an international court for prosecuting individuals responsible for violating international criminal law was taken up once again in the 1990s. The Rome Statute of the International Criminal Court ('Rome Statute' or ICC) of July 1998 covers the crimes of genocide, crimes against humanity, war crimes, and aggression. It is important to note that the jurisdiction of the Court is restricted to instances wherein the individual being prosecuted is a national of a State that is a Party to the Court or the State where the conduct occurred is a party to the Court. Exceptions are made when the Security Council refers to a specific case.

The International Court of Justice (ICJ) is yet another avenue for seeking to address violations of international law; however, the ICJ's jurisdiction is strictly limited to inter-State disputes between UN member states. Established in 1945, the ICJ provides a setting for resolving disputes between UN member states and advisory opinions on international disputes. Given the age and wider jurisdiction, the ICJ has dealt with more cases than the ICC; however, a recurring issue arises with the ICJ, which is that of enforcement. The decisions made by the ICJ are legally binding and if not followed the Security Council can vote to pass a resolution for enforcing the Court's ruling—decisions that can be upended by a single veto. Often the decisions of the Court are less impactful

than the advisory opinions given by the Court, the fact-finding missions undertaken during the decision process, and the legitimacy attached to the Court's findings. Public opinion can be influenced and mobilised by well-substantiated findings on a contentious issue, thus compelling States to re-evaluate their positioning on the issue under scrutiny. Hence, the 'soft power' and influence the Court possesses can be useful for further enforcing the Court's orders.

The continued expansion and reinforcement of legal mechanisms to punish violations of international law are key to the continued positive development of IHL and legal global governance mechanisms of the protection of civilians, including the implementation and appropriate resort to the Genocide Convention. It is through the legal application of the aforementioned principles that the global goal of the general protection of civilians, whether from war crimes or attempted destruction of a group through genocide, becomes commonplace within the global rule of law and violations of such laws liable to recourse. The use of the ad hoc tribunals has set vital legal precedents, especially pertaining to the Genocide Convention, but also for extending the legal application of the rule of law to individuals once deemed immune: political leadership of sovereign states. The creation and utilisation of the ICC has also been beneficial for advancing IHL and the principles of R2P as individuals—citizens to states which failed to prosecute for violations of international law—can now be brought to justice. Yet, developing and implementing IHL is one thing. The actual enforcement and collective political will of

enforcement quite another. This has also become apparent in the case of the current crisis in Gaza alongside other prominent cases of states defying and contravening legal provisions, such as in Syria, Darfur, Myanmar and Ukraine.

The Case of Israel and the Occupied Palestinian Territories

Of the many concurrent armed conflicts taking place across the globe right now, the Israeli assault on Gaza has captured the attention of the world and sharply divided its opinion. The Middle East conflict has always been an intricate and complex one and one that often divided and radicalised different viewpoints. This has - understandably- been even more acute in the atrocities committed both by Hamas and the damaging effects inflicted by Israel's armed forces on the civilian population in Gaza. The societal trauma in Israel after Hamas' attacks in October is deep-seated and reinforces Israel's sense of insecurity. Yet, the disproportionate response and often indiscriminate killings of civilians as well as the use of

overwhelming force aided by new AI technology is neither a proportionate nor a justified response.

Israel's bombardment of Gaza has up to this point damaged or destroyed 50 percent of the buildings in Gaza.²⁴ The Israeli government concurrently implemented a 'siege' of Gaza, cutting off all vital services, including water, electricity, internet, and all but the bare minimum for fuel and humanitarian aid;²⁵ white phosphorus has been fired into urban areas (and southern Lebanon),²⁶ medical facilities and journalists are targeted by the Israel Defence Force (IDF) strikes,²⁷ and there have been increasing reports of extrajudicial killings of civilians by the (IDF) snipers.²⁸ On 13 October 2023, the Israeli government ordered a total evacuation of northern Gaza, about 1.1 million people, to the south of Gaza "for their safety and protection" as the IDF ground invasion of Gaza was commencing.²⁹ On 27 October 2023, the IDF launched their ground invasion of Gaza, the latest stage of the assault which has since been on-going with no immediate end in sight.³⁰ Since the evacuation of northern Gaza, some 25,000 additional Palestinians have been killed by the IDF in the span of three

²⁴ Will Chase, "Over 50% of Gaza buildings damaged or destroyed in Israel's bombardment," [Axios](#), 14 January 2024.

²⁵ Human Rights Watch, "Israel: Starvation Used as Weapon of War in Gaza," [Human Rights Watch](#), 18 December 2023.

²⁶ Human Rights Watch, "Israel: White Phosphorus Used in Gaza, Lebanon," [Human Rights Watch](#), 12 October 2023.

²⁷ For information on Israeli attacks on Palestinian medical facilities see, Human Rights Watch, "Gaza: Israeli Ambulance Strike Apparently Unlawful," [Human Rights Watch](#), 7 November 2023; Human Rights Watch, "Gaza: Unlawful Israeli Hospital Strikes Worsen Health Crisis," [Human Rights Watch](#), 14 November 2023; Forensic Architecture, "Destruction of Medical Infrastructure in Gaza," [Forensic Architecture](#), 20 December 2023. For information on Israeli attacks on journalists see, Human Rights Watch, "Israel: Strikes on Journalists in Lebanon Apparently Deliberate," [Human Rights Watch](#), 7 December 2023; Committee to Protect Journalists,

"Journalist casualties in the Israel-Gaza war," [Committee to Protect Journalists](#), 29 January 2024.

²⁸ Miriam Berger, Kim Bellware and Niha Masih, "Pope Francis condemns killing of two women sheltering at Gaza church," [The Washington Post](#), 18 December 2023; Euro-Med Human Rights Monitor, "Gaza: Israeli army executes two brothers who were following orders to evacuate Khan Yunis," [Euro-Med Human Rights Monitor](#), 26 January 2024; Clarissa War, Brent Swails, Kareem Khadder and Eliza Mackintosh, "She was fleeing with her grandson, who was holding a white flag. Then she was shot." [CNN](#), 26 January 2024.

²⁹ Amnesty International, "Israel/OPT: Appalling Gaza 'evacuation order' must be rescinded by Israel immediately," [Amnesty International](#), 13 October 2023.

³⁰ Ethan Bronner, "Israel Military Sees It Taking All of 2024 to Eliminate Hamas Threat, Or Longer," [Bloomberg](#), 30 January 2024.

months, many of whom had moved to IDF-designated “safe zones”.

The current IDF assault on Gaza has received some condemnation, including accusations of violating international law,³¹ and most recently through South Africa’s application to the ICJ, allegations that the Israeli government is in violation of its obligations to the Genocide Convention. The reasons why this case is also important for the future of global security governance and the credibility of particularly Western nations is that many Western state leaders’ have thus far fallen short of condemning the large-scale violations of IHL more vigorously. This might have consequences for future conflicts and cases of war crimes and suspected acts of genocide. Only most recently Western governments have voiced graver concern over the Israeli leadership’s announced plans to launch an offensive in Rafah where now more than 1.5 million Palestinians have fled to from other war-stricken regions of the Gaza strip.

The humanitarian crisis resulting from the IDF’s on-going assault on Gaza has been described as “apocalyptic,”³² and having reached a “level of human suffering [that] is intolerable.”³³ Roughly 26,750 have been killed and over 65,600 injured; two million have been internally displaced and continue to be targeted despite making it to the designated “safe areas”.³⁴ The

precarious situation Palestinians are forced into are rapidly producing conditions that threaten the lives of hundreds of thousands: clean water is scarce, single toilets are used by hundreds, sewage openly flows through streets, starvation levels are still high, and the risk of famine increases by the day—worsened by the IDF’s desecration of cemeteries across Gaza³⁵—more than 160,000 cases of diarrhoea have been reported, as well as 245,000 cases of upper respiratory infections and increasing cases of jaundice, skin rashes, scabies, lice and chickenpox.³⁶ The Israeli leadership is set on continuing the military operations in Gaza, arguing that a cease-fire would only allow Hamas to regroup and regain in strengths, therefore aiding Israel’s enemies and undermining its security.

The current conflict poses a significant challenge to the legitimacy of international law and the overall recognized goal of protecting civilians during wartime. International law, global security governance and the continuation of a “rules-based international order” is also contingent on the ability to enforce and gain compliance of states and stakeholders. The Israeli government’s repeated violations of international law, and defiance of binding resolutions (e.g., Security Council Resolution 2334) possess significant challenges to international law and most critically to the

³¹ Human Rights Watch, “Israel/Palestine: Unprecedented Killings, Repression,” [Human Rights Watch](#), 11 January 2024.

³² APF, “EU’s top diplomat: Gaza destruction may be worse, proportionally, than WWII Germany,” [Times of Israel](#), 11 December 2023.

³³ Mirjana Spoljaric, “Israel and the occupied territories: President of the ICRC arrives in Gaza, calls for the protection of civilians,” [International Committee of the Red Cross](#), 4 December 2023.

³⁴ Jake Tacchi, “Israel struck some areas it directed civilians to in Gaza, CNN analysis shows,” [CNN](#), 21 December 2023.

³⁵ Jeremy Diamond, Muhammad Darwish, Abeer Salman, Benjamin Brown and Gianluca Mezzofiore, “At least 16 cemeteries in Gaza have been desecrated by Israeli forces, satellite imagery and videos reveal,” [CNN](#), 20 January 2024.

³⁶ Occupied Palestinian Territories Emergency Situation Update Issue 22, [World Health Organization](#), 30 January 2024.

development of norms pertaining to the enforcement of the protection of civilians. The selective enforcement of international law results in doubt over the validity of liberal norms and values that underpin the laws themselves, and also gives occasion for non-state armed groups to seek redress through means of their own choosing.³⁷ The up until now comparatively muted response of Western states and Allies of Israel also further undermine the status and credibility of Western nations as proponents of protection norms and rules.

The International Court of Justice and the 2023 Israeli-Palestine Conflict

On 29 December 2023, South Africa filed their application to the International Court of Justice (ICJ), alleging that the Israeli government is in violation of its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). South Africa specifically argued that the Israeli government is in violation of Articles I, III, IV, V, and VI of the Genocide Convention. It requested the Court, if the application and violations of the Convention are deemed plausible, to adopt nine provisions that would ensure the Israeli government's

compliance with the Genocide Convention and for the prevention of irreparable harm to the Palestinians in Gaza.³⁸ The legal team representing Israel rebutted South Africa's accusations on three grounds: a "dispute" was not adequately established between Israel and South Africa, the statements made by Israeli politicians, military officers, and soldiers does not reflect official military policy towards Gaza, and the Israeli government's actions via the facilitation of humanitarian aid a priori undermines any accusation of genocidal intent.³⁹ Crucially, several Western Allies of Israel argued vehemently that South Africa's legal case was unfounded and that the Genocide Convention was becoming "politically instrumentalised".⁴⁰ This was noteworthy, since such official statements were made even before the ICJ even handed down its decision on the provisional measures.

Initial Decision of the Court

On 26 January 2024, the Court provided its Order on the case thus far. To be clear, at this initial stage of the case the Court did not rule on whether the Israeli government in fact is in breach of the Genocide Convention, but rather whether the Court has jurisdiction, whether there is plausibility related to South Africa's claim and whether the case should thus proceed

³⁷ Al Jazeera, "Yemen's Houthi rebels seize cargo ship in Red Sea," *Al Jazeera*, 19 November 2023.

³⁸ For the full application see, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), "Application instituting proceedings and request for the indication of provisional measures," 29 December 2023, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>.

³⁹ For a summary analysis of the case see, Chimene Keiter, "Understanding South Africa v. Israel at the International Court

of Justice," *Lawfare*, 16 January 2024; Yuval Shany and Amichai Cohen, "South Africa vs. Israel at the International Court of Justice: A Battle Over Issue-Framing and the Request to Suspend the War," *Just Security*, 16 January 2024; Tim Murithi, "South Africa's ICJ Case Against Israel: A Judicial Stress Test for the Multilateral System," *Heinrich Boll Stiftung*, 10 January 2024.

⁴⁰ Federal Government of Germany, *Erklärung der Bundesregierung zur Verhandlung am Internationalen Gerichtshof*, 12 January 2024.

and the formulation of provisional measures. The 26 January 2024 decision was not about any ruling on the substance of whether the Israeli government in fact has been in breach of the convention or has committed genocide. This will be established in the coming phases of the court case and might take up to two years. In this initial phase the formulation of provisional measures was important, particularly since they had the potential to help galvanise more support for putting pressure on the Israeli government to stop military actions that caused large-scale civilian sufferings.

The Court ruled, in favour of South Africa, that they possess, *prima facie*, the jurisdiction necessary to pursue the case. The specific ruling of the Court, and the evidence and reasoning applied, is worth examining at some detail. The following section will look at how the Court ruled in comparison to the Israeli legal defence, thus shedding a light on the crucial weak points to Israel's defence—not just for the Court, but for the conflict in its totality.

The Israeli legal team on 12 January 2024 spent an uneven amount of time addressing the issue of *prima facie* jurisdiction of the International Court of Justice in relation to the South African application. Professor Malcolm Shaw, an expert on international law, covered the issue of *prima facie* jurisdiction on the grounds that no dispute existed and there existed no plausible intent on behalf of the Israeli government to violate their

obligations to the Genocide Convention. On the issue of the nature of the dispute between South Africa and Israel, Professor Shaw accused South Africa's lawyer, Professor John Dugard, of acting "disingenuous[ly]" and instigating a "'unispute'—a one-sided clapping of hands."⁴¹ The Israeli legal defence hinges on the lack of an "exchange" between the disputing parties. The Court, however, found that the two parties held "clearly opposite views" and the elements present to the Court by South Africa are sufficient to establish *prima facie* jurisdiction on the basis of the existence of a dispute.⁴²

The second critical point raised by Professor Shaw was the lack of genocidal intent, which must be plausibly present for the case to fall under the legal framework of the Genocide Convention. Shaw makes two points. Firstly, the actions of the Israeli government and the Israeli Defence Forces (IDF) demonstrate that genocide intent is not present: the IDF restricts its targeting to strictly military objectives, provides forewarnings to the Palestinians, and facilitates humanitarian aid. Secondly, statements made by Israeli politicians and military officials are "distorted".⁴³ In reality, argues Professor Shaw, the structured and hierarchical nature of the IDF precludes the Israeli politicians that have made inflammatory—arguably genocidal in intent—statements from influencing the military directives. Some of the statements submitted by South Africa, argues Professor Shaw, should be understood as

⁴¹ Malcolm Shaw, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip \(South Africa v. Israel\)](#), Public sitting Verbatim Record, p. 26, para. 19, 12 January 2024.

⁴² [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 Order, No. 192, p. 11, para. 28, 26 January 2024.

⁴³ Malcolm Shaw, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip \(South Africa v. Israel\)](#), Public sitting Verbatim Record, p. 31, para. 38, 12 January 2024.

“clearly rhetorical.”⁴⁴ The Court responded to the Israeli legal defence’s objection to the Genocide Convention being the appropriate legal framework by recalling three successive points. Firstly, the Court recalls the Genocide Convention and finds that the Palestinians appear to constitute a distinct and protected group. Secondly, the Court recalls the military operation being conducted by the Israeli government after the events of 7 October 2023 and the description of the present situation in Gaza. Notably, the Court uses and legitimises the findings of UN bodies, such as the Office for the Coordination of Humanitarian Affairs (OCHA) and Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), and relevant international organisations like the World Health Organization (WHO).⁴⁵ Lastly, the descriptions of the destruction of Gaza are juxtaposed with the “rhetorical” statements made by Israeli politicians and military officials.⁴⁶ The Court finds, therefore, that there exists a plausible claim to the rights of Palestinians whom South Africa seeks to protect under the Genocide Convention, i.e., the existence of genocidal intent is plausible, contrary to the position of the Israeli legal defence.

In addressing the extensively argued issue of ICJ Court prima facie jurisdiction, the

Court, in the first instance, dismissed the first key argument outright, the existence of the dispute; and regarding the second issue of jurisdiction, the Court’s order and argument undermined the Israeli position that the incendiary rhetoric from Israeli officials is just that, rhetoric, and does not impact military directives and operations. The Court dismissed this line of argument, and accepted the plausibility of South Africa’s claims, by simply contrasting these incendiary statements with the reality on the ground in Gaza.

Provisional Measures: A helpful tool for preventing further violence?

The Court found that, given the facts and circumstances of the case, “at least some of the rights claimed by South Africa and for which it is seeking protection are plausible.”⁴⁷ The Court order includes six provisional measures (see Table 1 below). The provisional measures ordered by the Court differ from those requested by South Africa, but have gone relatively far into the broad direction of ordering actions that limit further risks of large-scale harm to civilians.

⁴⁴ Malcolm Shaw, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip \(South Africa v. Israel\)](#), Public sitting Verbatim Record, p. 34, para. 49, 12 January 2024.

⁴⁵ Marko Milanovic, “ICJ Indicates Provisional Measures in South Africa v. Israel,” [EJIL: Talk!](#), 26 January 2024.

⁴⁶ [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 Order, No. 192, p. 14-18, para. 41-55, 26 January 2024.

⁴⁷ [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 Order, No. 192, p.18 para. 54, 26 January 2024.

Table 1: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) – Provisional Measures Requested v. Ordered*

Provisional Measures Requested by South Africa:	Provisional Measures Ordered:
(1) The State of Israel shall immediately suspend its military operations in and against Gaza.	(1) Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention
(2) The State of Israel shall ensure that any military or irregular armed units, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to point (1) above.	(2) Israel shall ensure its military does not commit acts described in point 1.
(3) The Republic of South Africa and the State of Israel shall each take all reasonable measures within their power to prevent genocide.	(3) The Court is also of the view that Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.
(4) The State of Israel shall desist from the commission of any and all acts within the scope of Article II of the Convention.	(4) The Court further considers that Israel must take immediate and effective measures to enable the provisions of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.

<p>(5) The State of Israel shall take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent: the expulsion and forced displacement from their homes; the deprivation of access to adequate food and water, humanitarian assistance (including access to adequate fuel, shelter, clothes, hygiene and sanitation), medical supplies and assistance; and the destruction of Palestinian life in Gaza.</p>	<p>(5) Israel must also take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of article II and Article III of the Genocide Convention against members of the Palestinian group in the Gaza Strip.</p>
<p>(6) The State of Israel shall engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and that steps are taken towards their punishment.</p>	<p>(6) Regarding the provisional measure requested by South Africa that Israel must submit a report to the Court on all measures taken to give effect to its Order. The report so provided shall then be communicated to South Africa, which shall be given opportunity to submit to the Court its comments thereon.</p>
<p>(7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence.</p>	
<p>(8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court.</p>	
<p>(9) The State of Israel shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.</p>	

Whether or not these provisional measures can serve an important practical purpose on the ground will also depend on the close monitoring, reporting and political pressure or adopting these measures.

Some commentators expressed disappointment that the ICJ did not order a cease-fire. Indeed, the Court did not adopt South Africa's request for a ceasefire, instead ordering Israel to prevent the commission of acts that fall within the scope of Article II of the Genocide Convention. However, as argued by former president of the International Criminal Court, Chile Eboe-Osuji, the likelihood of the ICJ ruling on this particular point was relatively low from the outset. As argued by Eboe-Osuji, by not bringing (impleading) Hamas into the lawsuit against the Israeli government, the request for a ceasefire was unlikely to be successful since it could be argued that Hamas, by not being part of the lawsuit, would not be required to follow the Courts orders.⁴⁸ This provisional measure will, therefore, not bring about any halt to the conflict, but will hopefully cause the Israeli leadership to rethink their present strategy and methods used up to this point. As noted above, the Court did not dismiss the plausibility of Israeli officials' statements as being inciting to genocide, and provisional measure 3 orders Israel to prevent and punish any public incitement to genocide.

The Court's ordering of this provisional measure should give pause to Israeli officials who seem undeterred when making public statements demonising Palestinians and calling for collective

punishment of the whole group. Recent Knesset member attendance and support of a Gaza-resettlement conference just days after the ICJ hearing immediately cast doubt on how the Israeli government will treat the orders of the Court.⁴⁹ The Court's order regarding provisional measure 4 illustrates the urgent nature of what is unfolding in Gaza. The picture painted by the Israeli legal defence team on 12 January 2024 gives the impression that humanitarian aid is continuous and sufficient. On the contrary, the humanitarian aid coming into Gaza is not enough and the Court's order, by granting provisional measures, lends credence to the assertion that the situation in Gaza is urgent and therefore the global concern surrounding the crisis in Gaza is grounded in reality. The Court's order reaffirms that the Israeli government is responsible for and must take immediate action to facilitate humanitarian assistance to Gaza. The ability of aid workers, particularly those from the UN have been routinely hindered by the refusal of access to northern Gaza and restrictions on critical goods from entering Gaza. There have been 51 humanitarian missions planned for January 2024 and only eight were facilitated by the Israeli government, while 29 were denied access. New humanitarian missions were planned but the route ordered to them by the Israeli military were impassable for the type of vehicles or subject to delays from checkpoints.⁵⁰ The ability to distribute critical humanitarian aid ranging from food to medical equipment only worsens the continuously

⁴⁸ Chile Eboe-Osuji, "International Courts as the Last Hope for Humanity," *Just Security*, 24 January 2024.

⁴⁹ Haaretz, "Israel's Education Minister: Calls to Resettle Gaza Are 'Super Legitimate'," *Haaretz*, 29 January 2024.

⁵⁰ "Hostilities in the Gaza Strip and Israel – Flash Update #105," *UN Office for the Coordination of Humanitarian Affairs*, 29 January 2024.

deteriorating humanitarian crisis in Gaza.⁵¹ The recent decision by Western donor countries to suspend further funding to UNRWA will only make matters even worse (see below).

Court's Near-Unanimous Ruling

Prior to the delivering of the Court's ruling, there existed concern that due to the contentious nature of the case the Court may fall victim to national politics and interests. Several states had shared their view on the merits (or lack thereof) of South Africa's case. The near-unanimous voting of the Court's judges is a strong indication of seriousness and plausibility of the charges brought against the Israeli government. In four of six provisional measures, the voting was fifteen to two. For provisional measures 3 and 4 (public incitement and humanitarian assistance) the voting was sixteen to one, with Judge Sebutinde of Uganda being the only one against. It is noteworthy that this also means that Israel's *ad hoc* judge on the Court concurred with the majority of the judges.

Political Implications: Initial International Reaction

The initial international reaction to the *South Africa v. Israel* case has been divisive and indicative of the splintered global response to the rapidly unfolding humanitarian crisis in Gaza. Notably, the United States,⁵² the United Kingdom,⁵³ Germany,⁵⁴ Czechia, France, and Austria have vocalised their support for Israel and condemnation for South Africa's case. Support for South Africa has come from most of the BRICS, the Organization for Islamic Cooperation (composed of 57 member states, including 48 Muslim-majority states), and from within Europe, Belgium and Slovenia.⁵⁵ Western media outlets been accused of unevenly covering the Court testimony,⁵⁶ and more generally employing an anti-Palestinian bias in media coverage of the conflict.⁵⁷

Israeli officials have expressed their discontent with the Court's decision. Israeli Prime Minister Benjamin Netanyahu stated, "The vile attempt to deny Israel this fundamental right [to self-defence] is blatant discrimination against the Jewish state, and it was justly rejected. The charge of genocide levelled against Israel is not only false, it's outrageous, and decent people everywhere should reject it."⁵⁸ Israeli President Isaac Herzog stated he was "disgusted by the way they twisted my words..." and referred to the Court

⁵¹ "Hostilities in the Gaza Strip and Israel – Flash Update #102," [UN Office for the Coordination of Humanitarian Affairs](#), 25 January 2024.

⁵² Ellen Mitchell, "Blinken calls genocide case against Israel 'meritless'," [The Hill](#), 9 January 2024.

⁵³ Laura Pollock, "David Cameron brands South Africa ICJ case as 'wrong' and 'unhelpful'," [The National](#), 14 January 2024.

⁵⁴ Rachell Fink, "Germany Announces Decision to Intervene on Israel's Behalf in ICJ Case," [Haaretz](#), 14 January 2024.

⁵⁵ Priyanka Shankar, "Why has Belgium vowed to back the ICJ's verdict on Gaza 'genocide'?" [Al Jazeera](#), 23 January 2024.

⁵⁶ James Walker, "Top journalist calls out BBC and Sky News over ICJ case coverage," [The National](#), 11 January 2024.

⁵⁷ Adam Johnson and Othman Ali, "Coverage of Gaza War in the New York Times and other major newspapers heavily favored Israel, analysis shows," [The Intercept](#), 9 January 2024.

⁵⁸ Reuters, "Reactions to World Court ruling on Israel's war in Gaza," [Reuters](#), 26 January 2024.

proceedings as being a “blood libel.”⁵⁹ South Africa shared their initial thoughts of the ruling and stated: “Today [26 January] marks a decisive victory for the international rule of law and a significant milestone in the search for justice for the Palestinian people.”⁶⁰

Aside from the immediate parties to the case, the United States’ position remains unchanged: “It’s difficult to see how this alone is going to change the approach,” says National Security Council spokesperson John Kirby.⁶¹ Spokespersons for Canada and the United Kingdom have expressed their concerns over the finding of the Court, while France, Ireland, Scotland, and Spain have vocalised their support for the decision and commitment to upholding the findings of the Court.⁶² Each member state has of course the right to agree or disagree with the Court’s ruling or whether bringing a case on genocide will be helpful to resolve the crisis and prevent more civilian deaths. However, states must be careful not to undermine the standing and legitimacy of the ICJ itself, as it risks undermining even further the rules and institutions we all rely on for upholding hard-won advances in the global governance of protecting civilians.

UNRWA Once Again Under the Spotlight

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) was established in December 1949 by United Nations General Assembly Resolution 302. UNRWA provides assistance and protection to Palestinian refugees following the 1948 Palestine War. UNRWA itself is one of the longest lasting UN programmes, having its mandate renewed consistently every three years. UNRWA serves roughly 5.9 million Palestinian refugees, with all of the funding being contingent on voluntary contributions from UN Member States; the programme employs over 30,000 personnel, many of whom are Palestinian refugees.⁶³ UNRWA has been subject to controversies and past accusations of abuses of power; however, UNRWA plays a fundamental role in establishing stability and humanitarian necessities in the occupied Palestinian territories, including, but not limited to, providing education for about 250,000 children across 420 schools, and providing food assistance to nearly one million Palestinians.⁶⁴

The decision of the ICJ ruling, and future of UNRWA, may be effectively undermined by the new claims that twelve UNRWA personnel (of the 13,000 in Gaza and of 30,000 in total) were active participants in the October 7th attacks on Israel.⁶⁵ These claims, made public by the Israeli government the same day of the ICJ ruling, has resulted in hectic activism and already

⁵⁹ TOI Staff, “‘A blood libel’: Herzog says ICJ ‘twisted my words’ to support ‘unfounded’ contention,” [The Times of Israel](#), 29 January 2024.

⁶⁰ Reuters, “Reactions to World Court rulings on Israel’s war in Gaza,” [Reuters](#), 26 January 2024.

⁶¹ Alexander Ward and Matt Berg, “World Court ruling tests a core Biden claim,” [Politico](#), 26 January 2024.

⁶² Al Jazeera, “World reacts to ICJ interim ruling in Gaza genocide case against Israel,” [Al Jazeera](#), 26 January 2024.

⁶³ Information taken from the official site. See “Who We Are,” [United Nations Relief and Works Agency for Palestine Refugees in the Near East](#).

⁶⁴ Josep Borrell, “Defunding UNRWA would be both disproportionate and dangerous,” [European External Action Service](#), 4 February 2024.

⁶⁵ Ronan Bergman and Patrick Kingsley, “Details Emerge on U.N. Workers Accused of Aiding Hamas Raid,” [The New York Times](#), 28 January 2024.

in a major reputational loss for UNRWA and has precipitated a pause on funding from at least eighteen contributing Member States and institutions, including the United States, the European Union,⁶⁶ Germany, Switzerland, Canada, Netherlands, United Kingdom, Italy, Australia, and Finland.⁶⁷ UNRWA has responded to these allegations by terminating the contracts of those alleged to have participated in the October 7th attacks and to conduct an investigation.⁶⁸ However, as recently stated by UNRWA's Commissioner General Philippe Lazzarini at a press conference, UNRWA followed "reverse due process" by dismissing 7 employees without considering (or indeed having access to) evidence and before concluding an internal investigation. Intense public pressure and further reputational pressure as well as the decisions by various Western governments to suspend further funding precipitated the decision.⁶⁹ Vitaly, the freezing of nearly eighty-percent of UNRWA's funding will put a substantial, and perhaps even existential, burden on the Palestinians in Gaza, most of whom rely on support from UNRWA for daily subsistence. Joint statements have been released by human rights NGOs denouncing the rescinding of funds to UNRWA,⁷⁰ including the Lemkin Institute for Genocide Prevention stating that withholding funds from UNRWA puts

states and institutions in "direct involvement in [an] engineered famine."⁷¹ More worryingly, cutting funds from UNRWA will in all likelihood also directly undermine ICJ's provisional measure 4: i.e., asking the Israeli government to "take immediate and effective measures to enable the provisions of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip". States that cut funding to the only functioning humanitarian agency capable of delivering large-scale humanitarian aid in Gaza are thus also contributing to the undermining of this provisional measure. Noteworthy, Spain and Portugal decided to actually increase their share of funding for UNRWA in reaction to the announced funding freeze of some of their EU partners.⁷²

That said, the immediate need for continuing to fund UNRWA and even increase its funding and ability to operate should not distract from the fact that a comprehensive review of UNRWA and past instances of antisemitism and anti-Israel propaganda must also take place. It is not the first time UNRWA employees are accused of anti-Israeli sentiment and there must be a zero-tolerance policy to such instances where the evidence is clear.

⁶⁶ Reuters, "EU reviews funding for UN Palestinian agency after Israeli allegations," [Reuters](#), 29 January 2024.

⁶⁷ Dennis Romero and Beatrice Guzzardi, "U.S., U.K. among 9 countries pausing funding to UNRWA amid allegations 12 employees were part of Oct. 7 attack," [NBC News](#), 28 January 2024.

⁶⁸ Philippe Lazzarini, "Serious Allegations Against UNRWA Staff in the Gaza Strip," [United Nations Relief and Works Agency for Palestine Refugees in the Near East](#), 26 January 2024.

⁶⁹ See Emine Sinmaz, "UNRWA staff accused by Israel sacked without evidence, chief admits," [The Guardian](#), 9 February 2024.

⁷⁰ "Joint Statement by 28 NGOs: UNRWA Cuts Threaten Palestinian Lives in Gaza and Region," [United Nations Relief and Works Agency for Palestine Refugees in the Near East](#), 31 January 2024.

⁷¹ "Statement on Recent Threats to UNRWA and the Shift between Potential Complicity and Direct Involvement in the Crime of Genocide against Palestinians by Several Nations," [Lemkin Institute for Genocide Prevention](#), 31 January 2024.

⁷² "Spain to give UNRWA extra 3.8 million after key donors suspend aid," [Reuters](#), 5 February 2024.

The ICJ and the Genocide Convention

South Africa v. Israel, while being a highly contentious case, is not without some precedence. There have been several similar cases, some finalised while others on-going, that can provide some insight into the impact the Court's ruling may have. Each case can give insight into the long-term implications of the Court's ruling, but most importantly these cases illustrate the limitations the ICJ has for the protection of civilians, especially when intervention is immediately required.

The 1993 *Bosnia and Herzegovina v. Serbia and Montenegro* was a case wherein the applicant, Bosnia and Herzegovina, alleged that Yugoslavia (Serbia and Montenegro) were in violation of the Genocide Convention. After the initial proceedings, the Court found Bosnia and Herzegovina's case plausible and adopted certain provisional measures, specifically those directing Serbia and Montenegro to ensure their armed forces do not commit or engage in conspiracy to commit genocide.⁷³ The final judgement finally came from the Court in March 2007 and was a significant ruling regarding the genocide in Bosnia and Herzegovina and was a positive development regarding cooperation between international courts and the ad hoc tribunals.⁷⁴

The Gambia v. Myanmar (2019) serves as a more relevant example, as the applicant was not a party to the conflict, but acting on behalf of the persecuted group and in accordance with their obligation as a party to the Genocide Convention and therefore has a common interest to uphold the Convention. As with the Bosnia case, provisional measures were adopted on an interim basis.⁷⁵ The final judgment on the Gambia case is still years out, but this case has already set an important precedent for future applications relating to violations of the Genocide Convention and especially the role of a non-injured state to invoke the Genocide Convention on behalf of the injured party, due to the common interest and obligations under international law.⁷⁶

Ukraine v. Russian Federation (2022) is the last case ICJ case relating to alleged violations of the Genocide Convention. In response to Russia's invasion and accusation that Ukraine was committing genocide against Russian speakers in eastern Ukraine, Ukraine filed an application to the ICJ contesting Russia's accusation and at the same time accused Russia of violating the Genocide Convention as the result of the invasion. On 16 March 2022 the Court released their ruling on the provisional measures requested by Ukraine. The Court adopted the Ukrainian measures, including the suspension of all military activities undertaken by the Russian Federation in Ukraine—beyond the initial requested

⁷³ International Court of Justice, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide \(Bosnia and Herzegovina v. Yugoslavia \(Serbia and Montenegro\)\); Order of the Court on Provisional Measures](#), 13 September 1993.

⁷⁴ Theodor Meron, "Breaking Developments in International Law: A Conversation on the ICJ's Opinion in Bosnia and Herzegovina v. Serbia and Montenegro," Proceedings of the

Annual Meeting (American Society of International Law), 101 (2007): 215-228.

⁷⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar); Request for the Indication of Provisional Measures, [International Court of Justice](#), 23 January 2020.

⁷⁶ Priya Pillai, "The Gambia v. Myanmar – International Court of Justice Judgement on Preliminary Objections," [Opinio Juris](#), 22 July 2022.

preliminary measure to suspend military operations that would violate the Genocide Convention.⁷⁷

While all these cases have their own unique aspects and positive developments, there exists in each a matter of immediate concern: the ineffectiveness of enforcing the provisional measures adopted by the Court. The orders of the ICJ are legally binding, yet the sole enforcement mechanism rests upon the Security Council. If decided, the Security Council could vote on a resolution and utilise the power vested in the Council to enforce the provisional measures. The Security Council is, unfortunately, not free from politics and the veto power of permanent Member States can derail attempts to bring accountability for the orders of the Court. This is not to say, however, that provisional measures from the ICJ are wholly without value: around 50 percent of provisional measures ordered by the ICJ since 2001 have been followed, but many of these cases were regarding relatively minor, non-violent disputes.⁷⁸ Furthermore, the ‘soft power’ of the Court rulings can be helpful for bringing the orders to effect. As mentioned above, the Court’s ruling closer associates the State of Israel with the Genocide Convention—an association that most states would seek to distance themselves from.

Israel and the International Criminal Court

The on-going International Criminal Court (ICC) investigation into Israeli and Hamas war crimes and crimes against humanity, primarily covering the 2014 Gaza War, the Israeli settlement policy, the 2018-2019 Gaza border protests, and the present armed conflict in Gaza and settler violence in the West Bank, is another opportunity for upholding international law and providing an avenue of recourse for crimes committed by both parties to the conflict. As stated by ICC Prosecutor Karim A. A. Khan KC: “The laws that we have, the Rome Statute that I operate under, requires that innocent lives are particularly protected. And what is most important is that the application of the law is not theoretical. People have heard promises for a long time.”⁷⁹ Only time will tell whether the statement by Khan will be met with both material and normative advancements in the global goal of the protection of civilians and enforcement of international law. But the sentiment put forth in these remarks summarises the pressing need to reinforce the well-intentioned aspirations of international law and values of basic human rights with consistent and coherent practice.

⁷⁷ Jaime Lopez and Brady Worthington, “What’s the Status of Ukraine’s Case Against Russia at the ICJ?” [Lawfare](#), 11 April 2022.

⁷⁸ Matei Alexianu, “Provisional, but Not (Always) Pointless: Compliance with ICJ Provisional Measures,” [EJIL: Talk!](#), 3 November 2023.

⁷⁹ Karim A. A. Khan KC, “Statement of ICC Prosecutor Karim A. A. Khan KC from Cairo on the situation in the State of Palestine and Israel,” [International Criminal Court](#), 30 October 2023.

The Global Governance of Protecting Civilians: Where Do We Go From Here?

Looking beyond the issue of enforcement, the decision made by the ICJ to grant provisional measures should be taken as a major step forward in the broader global initiative to lessen to the greatest extent possible any unnecessary suffering and victimisation of civilians during armed conflict. Specifically, this preliminary ruling and granting of provisional measures undermines the excuse commonly used by states violating international law, namely: civilian casualties are simply the unavoidable and unfortunate side effect of armed conflict. This dictum, repeated to the point of banality, is undermined by the fact that as military technology advances—and therefore our ability to exact terrible casualty rates—so too does the ability to mitigate unnecessary death and destruction.

Israel, in the present analysis, presents a unique contradiction between being the most advanced regional military power that receives unparalleled material and diplomatic support from the United States and European allies,⁸⁰ and invests 5 percent of its GDP into research and development. As a result, this support and investment has created a technological sector that provides the Israeli government

with an unrivalled qualitative military advantage, especially over its regional rivals.⁸¹ The extent of this qualitative advantage is demonstrated in the Israeli government's use of artificial intelligence (AI) for the rigorous surveillance and enforcement of its occupation of the Palestinian territories.⁸² In the last years the Israeli government has begun using AI for conducting warfare, including the use of the Habsora, or "Gospel" AI system, which is currently used to "generate" non-military targets at a rate never before seen.⁸³ The 'qualitative edge' that the Israeli government has developed through the last decades has paradoxically culminated in the widespread use of "dumb bombs," wherein roughly fifty-percent of air-to-ground munitions fired into Gaza—a small parcel of densely populated by hundreds of thousands of internally displaced persons—are unguided.⁸⁴ Similarly, the air-to-surface 'precision strikes' carried out by the IDF continue to violate the fundamental principles of international humanitarian law, as indiscriminate and disproportionate attacks on Palestinians are carried out daily.

While support for a ceasefire to alleviate the suffering of the Palestinians had been lacking from most Western leaders, the recurring mass civil demonstrations across the world gives indication towards a shift away from the acceptance of the recurring, yet "regrettable," large number

⁸⁰ Jonathan Masters and Will Mero, "U.S. Aid to Israel in Four Charts," [Council on Foreign Relations](#), 23 January 2024.

⁸¹ Nir Reuven, "Is Israel the 'Start-Up Nation' Because of Its Unique Security Situation?" [The Begin-Sadat Center for Strategic Studies](#), 28 December 2023.

⁸² Sophia Goodfriend, "How the Occupation Fuels Tel Aviv's Booming AI Sector," [Foreign Policy](#), 21 February 2022; Sophia Goodfriend, "Israel's High-Tech Surveillance Was Never Going to Bring Peace," [Foreign Policy](#), 30 October 2023.

⁸³ Yuval Abraham, "'A mass assassination factory': Inside Israel's calculated bombing of Gaza," [+972 Magazine](#), 30 November 2023; see also, Anwar Mhajne, "Israel's AI Revolution: From Innovation to Occupation," [Carnegie Endowment for International Peace](#), 2 November 2023.

⁸⁴ Natasha Bertrand and Katie Bo Lillis, "Exclusive: Nearly half of the Israeli munitions dropped on Gaza are imprecise 'dumb bombs,' US intelligence assessment finds," [CNN](#), 14 December 2023.

of daily civilian casualties in Gaza, especially by states like Israel who have the capability to mitigate such extreme levels of civilian victimisation but lack the willingness to operationalize such practices.⁸⁵ These “traged[ies] of war” are a thing of the past and defy the progress the global community has made towards the protection of civilians.⁸⁶

It is too early to tell whether the decision of the Court will manifest in the Israeli government taking seriously its obligation to take all measures possible to ensure the protection of civilians in Gaza. If the past developments are anything to go by - including the planned offensive in Rafah - then it is more likely that the Israeli government will not comply with the ICJ’s orders. Instead, the Israeli government seems to continue to operate in Gaza without any significant alterations to its military strategy, thus continuing to endanger the lives of hundreds of thousands of Palestinians. At the time of publishing (14 February 2024), South Africa has made an urgent request to the ICJ “to consider whether the decision announced by Israel to extend its military operations in Rafah, which is the last refuge for surviving people in Gaza, requires that the court uses its power to prevent further imminent breach of the rights of Palestinians in Gaza”.⁸⁷ Furthermore, the South African government stated that “it was gravely concerned that the unprecedented military offensive against Rafah, as announced by

the State of Israel, has already led to and will result in further large scale killing, harm and destruction. This would be in serious and irreparable breach both of the Genocide Convention and of the Court’s Order of 26 January 2024.”⁸⁸ The Court has demonstrated that it is willing to uphold the global values and commitment to the protection of civilians. The Court cannot, however, compel Israel to follow its orders. What is needed now is a more determined shift in the policies of powerful states to apply more diplomatic and political pressure to the Netanyahu government and draw a clear red line that no further violations and human rights breaches will be tolerated. Recent statements coming from Western capitals on the Israeli government’s planned operation in Rafah have moved more into this direction. Will Rafah finally become a red line? As Josep Borrell, the High Representative of the European Union for Foreign Affairs and Security Policy stated on 12 February, “how many killed civilians are too many?”.⁸⁹ As EU member states move towards more forceful criticism and actions, including the ruling of a court in the Netherlands that prohibited the government to export spare parts for F-35 fighter jets to Israel,⁹⁰ concerted efforts must be taken to prevent another assault on civilians and to enable UN institutions to continue to provide the maximum possible support to the civilian population, including UNRWA’s delivery of humanitarian aid.

⁸⁵ TOI Staff, “Improper munition said cause of high death toll in strike on Gaza’s Maghazi,” [The Times of Israel](#), 28 December 2023.

⁸⁶ Kareem Khadder, Abeer Salman, and Tara John, “Catastrophic damage after second Israeli airstrike hits Gaza refugee camp,” [CNN](#), 1 November 2023.

⁸⁷ See [The Presidency Republic of South Africa](#), “South Africa Makes Urgent Request to International Court of Justice on Rafah Offensive,” 13 February 2024.

⁸⁸ *Ibid.*

⁸⁹ Andrew Gray, “EU’s Borrell suggests US cut military aid to Israel,” [Reuters](#), 12 February 2024.

⁹⁰ [Appeal Court of The Hague](#), “The Netherlands has to stop the export of F-35 fighter jet parts to Israel,” 12 February 2024.

Israel's Western Allies must hold the Netanyahu government responsible and take all measures necessary to enact the Court's orders, and to make the protection of civilians an unambiguous priority. This will not only be vital for addressing the current untenable situation in the Middle East, but also for the future of protecting civilians, upholding IHL and for reinforcing the UN system in an era of acute crisis. The onus is also on Western states who are currently finding themselves in a wide-ranging geopolitical struggle where credibility and legitimacy matters as much

as sincerity in effectively enforcing the rules that have taken centuries to build up and that must be applied equally to any state breaching them. The ICJ's initial decision, if supported and taken up by a variety of international actors, can turn out to be an important impetus and tool for the protection of civilians. But it is up to powerful states and -above all- the current Israeli government and military leaders to ensure that they do not become a footnote in a rapid erosion and decline of the global governance of effective protection.