The "World Court", Armed Conflicts and the "Crime of Crimes". Reflections on the Invocation of Ukraine, Russia, and Israel's Responsibilities for War and Genocide before the International Court of Justice

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Abstract: The International Court of Justice cases related to the conflicts in Gaza and Ukraine underscore the intricate interplay between state accountability for war and genocide. International law deems, both war and genocide, as "odious scourges for humanity". Systematic state violence during armed conflicts can swiftly escalate to acts of genocide. When states use force in self-defense, war can potentially serve as a cover for the perpetration of genocide. Concurrently, genocide amidst warfare may be misinterpreted as mere war casualties or minor war crimes. As such, determining state responsibility for genocide becomes more challenging during conflicts than in peacetime. Moreover, establishing state accountability for breaching the

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rules governing armed conflict under the shadow of genocide allegations is complicated. A broad interpretation of the Genocide Convention is essential to extend the ICJ's jurisdiction over these matters. Furthermore, when genocide occurs during war, it may simultaneously violate the principles of *jus ad bellum*, *jus in bello*, and International Human Rights Law, complicating the determination of applicable legal frameworks.

Keywords: War in Gaza; War in Ukraine; genocide; International Court of Justice; International Criminal Law; *jus ad bellum* (Right to War); *jus in bello* (Law of War); International Human Rights Law.

La "Corte Mundial", los conflictos armados y el "crimen de crímenes". Reflexiones sobre la invocación de las responsabilidades de Ucrania, Rusia e Israel por guerra y genocidio ante la Corte Internacional de Justicia

Resumen: los casos de la Corte Internacional de Justicia sobre Gaza y Ucrania resaltan la compleja relación entre la responsabilidad estatal por guerra y por genocidio. En el derecho internacional, ambos se consideran "flagelos odiosos para la humanidad". La violencia estatal sistemática en conflictos armados puede escalar rápidamente hacia el genocidio; incluso, el uso de la fuerza en legítima defensa puede servir como cobertura para perpetrarlo. Inversamente, el genocidio en contextos bélicos suele malinterpretarse como simples bajas colaterales o crímenes de guerra menores, lo que dificulta determinar la responsabilidad del Estado en comparación con tiempos de paz. Además, establecer la responsabilidad por violar las normas del conflicto bajo la sombra de acusaciones de genocidio resulta complejo. Para que la CIJ pueda ejercer su jurisdicción, es esencial una interpretación amplia de la Convención sobre el Genocidio. Finalmente, cuando el genocidio ocurre durante la guerra, puede vulnerar simultáneamente el *ius ad bellum*, el *ius in bello* y el Derecho Internacional de los Derechos Humanos, complicando la definición del marco legal aplicable.

Palabras clave: guerra en Gaza; guerra en Ucrania; genocidio; Corte Internacional de Justicia; Derecho Penal Internacional; *Ius ad bellum* (Derecho a la guerra); *Ius in bello* (Derecho en la guerra); Derecho Internacional de los Derechos Humanos.

O "Tribunal Mundial", conflitos armados e o "crime dos crimes". Reflexões sobre a invocação das responsabilidades da Ucrânia, da Rússia e de Israel em relação à guerra e ao genocídio perante a Corte Internacional de Justiça

Resumo: Os casos da Corte Internacional de Justiça (CIJ) relacionados aos conflitos em Gaza e na Ucrânia ressaltam a complexa interação entre a responsabilização dos Estados pela guerra e pelo genocídio. No Direito Internacional, tanto a guerra quanto o genocídio são considerados "flagelos odiosos para a humanidade". A violência sistemática do Estado durante conflitos armados pode escalar rapidamente para atos de genocídio. Quando os Estados usam a força em legítima defesa, a guerra pode servir como cobertura para a perpetração de genocídio. Simultaneamente, genocídio em meio à guerra pode ser interpretado erroneamente como meras baixas de guerra ou pequenos crimes de guerra. Assim, determinar a responsabilidade do Estado pelo genocídio torna-se mais desafiador durante conflitos do que em tempos de paz. Além disso, é complicado estabelecer a responsabilização do Estado por violações das normas que regem conflitos armados sob a sombra de alegações de genocídio. Uma interpretação ampla da Convenção sobre Genocídio é essencial para ampliar a jurisdição da CIJ sobre essas questões. Ainda, quando o genocídio ocorre durante a guerra, pode violar simultaneamente os princípios do jus ad bellum, jus in bello e do Direito Internacional dos Direitos Humanos, o que dificulta a determinação dos marcos legais aplicáveis.

Palavras-chave: guerra em Gaza; guerra na Ucrânia; genocídio; Corte Internacional de Justiça; Direito Penal Internacional; *jus ad bellum* (Direito à guerra); jus in bello (Direito da Guerra); Direito Internacional dos Direitos Humanos.

1. Introduction

According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), genocide is classified as a "crime under international law." The treaty's Preamble acknowledges that "genocide has inflicted great losses on humanity throughout history" and stresses the necessity of international cooperation to eradicate this heinous crime. Similarly, the Preamble of the UN Charter affirms the commitment of "We the peoples of the United Nations" to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." These statements establish that both war and genocide are grievous afflictions that cause profound suffering and losses to humanity. The occurrence of genocide during armed conflict can be particularly egregious, violating fundamental principles of humane treatment. Systematic acts of state violence in wartime can quickly escalate into acts of genocide. When a state claims self-defense, this war context might serve as a pretext or disguise for committing genocide. Consequently, genocide perpetrated during a conflict can be easily misinterpreted as mere collateral damage or downplayed as less severe war crimes.

Similarly, genocide occurring during armed conflicts may concurrently breach the principles of *jus ad bellum*, International Humanitarian Law (IHL) or *jus in bello*, and International Human Rights Law (IHRL). Genocide inherently entails fundamental violations of core human rights, such as the right to be free from torture and other cruel, inhuman, or degrading treatment; the right to life without extrajudicial or arbitrary deprivation; freedom from slavery or servitude; and basic fair trial guarantees. Additionally, genocidal actions can contravene *jus in bello* through the destruction of civilian infrastructure and inflicting heavy civilian casualties, including deaths and 'serious bodily harm' events. Moreover, states may violate *jus ad bellum* principles if genocide is committed against a group residing in another country, involving prior acts of aggression. The absence of jurisdictional clauses for the ICJ to address violations of *jus ad bellum*, *jus in bello*, and IHRL principles can make the invocation of allegations under the Genocide Convention a strategic means to bring these issues before the Court.

The attempts to hold Russia, Ukraine, and Israel accountable for genocide during the armed conflicts in Ukraine and Gaza exemplify these complexities.

The Russian invasion of Ukraine was presented as a "special military operation," intended to protect "people who, for 8 years, have suffered abuse and genocide by the Kiev regime."[1] According to the President of the Russian Federation, Vladimir Vladimirovich Putin, the pro-Russian inhabitants of the Ukrainian region of Donbass, including the self-proclaimed separatist Republics of Luhansk and Donetsk, "did not agree with this *coup d'état* (that of Maidan, in 2014). They ("the Kiev regime") immediately organized punitive military operations against them, and not just one. They besieged them and subjected them to artillery fire and systematic attacks. This is called genocide, and saving people from the suffering of this genocide is the main reason, motive, and purpose of the military operation."[2]

At the same time, Russia, and President Putin himself have been directly accused of committing acts of genocide during the Russian military intervention in Ukraine. As stated by the ex-President of the United States, Joseph R. Biden: "It is increasingly clear that Putin is trying to erase the very idea of being able to be Ukrainian. (…) Let the lawyers decide if it qualifies as such (as genocide) or not, but it seems to me so. The evidence accumulates (…). More evidence is coming out of (...) the horrible things that the Russians have done in Ukraine."[3] For his part, the President of Ukraine, Volodymyr Zelensky, declared, after visiting the Ukrainian town of Bucha: "These are war crimes and will be recognized by the world as genocide. We know of thousands of people murdered and tortured, with limbs mutilated, women raped, children murdered. I think it involves much more...This is genocide." [4]

These genocide allegations form the basis of Ukraine's complaint against the Russian Federation filed before the ICJ on February 26, 2022. Ukraine's case rests on two primary claims. First, the Ukrainian government

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[1] El País, "Putin declara la guerra a Ucrania: 'Estamos dispuestos a cualquier resultado'", video de YouTube, 1:58, 24 de febrero de 2022, https://www.youtube.com/watch?v=B7OY61bRa64

[2] Euronews, "Putin justifica la invasión de Ucrania para evitar un 'genocidio' durante un acto patriótico", 18 de marzo de 2022, https://es.euronews.com/2022/03/18/putin-justifica-la-invasion-de-ucrania-para-evitar-un-genocidio-durante-un-acto-patriotico

[3] DW, "Biden acusa a Putin de cometer un 'genocidio' en Ucrania", 13 de abril de 2022, https://www.dw.com/es/biden-acusa-a-putin-de-cometer-un-genocidio-en-ucrania/a-61457702

[4] El País, "Ucrania | Zelenski visita Bucha y denuncia a Rusia por genocidio", video de YouTube, 3:00, 4 de abril de 2022, https://www.youtube.com/watch?v=YNNjLdy6FV0

asserts that Russia falsely accused Ukraine of committing genocide in the regions of Luhansk and Donetsk. Using these unfounded allegations, Russia recognized the independence of the Donetsk and Luhansk Republics and initiated its 'special military operation' in Ukraine as a response to alleged genocide. Ukrainian authorities contend that Russia lacked a legal justification for military action against Ukraine under the pretense of preventing and punishing genocide. Additionally, Ukraine argues that Russia itself is committing acts of genocide on Ukrainian soil, intentionally killing and seriously injuring Ukrainian citizens. This accusation is bolstered by President Putin's derogatory rhetoric, which denies the very existence of a distinct Ukrainian people.[5]

Genocide allegations against Palestinians in Gaza were formally presented on December 29, 2023, when South Africa filed a complaint against Israel before the ICJ, citing Article IX of the Genocide Convention. This marks the second instance in the Court's history, following Gambia's case against Myanmar, where a State Party to the Convention has charged another state with genocide against a foreign population. The South African government claims that Israel is violating two treaty obligations: the prohibition against committing genocide and the duty to prevent it. The complaint asserts that 'acts and omissions by Israel are genocidal in nature, carried out with the specific intent to destroy Palestinians in Gaza as part of the broader Palestinian national, racial, and ethnic group.[6]

This research aims to delve into the intricate relationships and challenges associated with states' responsibilities when faced with genocide accusations purportedly occurring amid armed conflicts, as adjudicated by the ICJ, particularly focusing on the conflicts in Gaza and Ukraine. In the first part, the article investigates the inherent difficulties in proving genocide within the chaotic context of armed conflicts. This includes assessing the elements of *actus reus* and *mens rea* under the Genocide Convention, alongside practical challenges such as gathering evidence and distinguishing genocidal acts from breaches of IHL and IHRL. The second part examines the complexities of ascertaining state responsibility for violations of armed

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[5] International Court of Justice, *Dispute Relating to the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine vs. Russian Federation),* Application Instituting Proceedings, 26 February 2022, 7.

[6] 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),* Application Instituting Proceedings, 29 December 2023, 1.

conflict rules, particularly under *jus ad bellum*, *jus in bello* and IHRL principles, amidst genocide allegations. This section addresses how the overlap and intersection of legal frameworks pose hurdles in adjudicating state actions, especially when military necessity may conflict with the obligations to prevent and punish genocide. Throughout these analyses, the study aims to shed light on the intricate legal nuances within existing international legal frameworks when addressing serious allegations of genocide during wartime.

This research will use a comprehensive methodology, integrating qualitative legal analysis with case study examination, to explore state responsibilities in genocide allegations during armed conflicts, particularly focusing on the ICJ's role in the Gaza and Ukraine conflicts. It will employ doctrinal research to analyze pertinent international legal frameworks and conduct a comparative analysis of their application in these two specific contexts.

2. The difficult task of the ICJ in determining states' responsibility for genocide during war

2.1 Criteria for establishing states' international responsibility for genocide in armed conflicts

In his book "Axis Rule in Occupied Europe" (1943), the Polish and Jewish lawyer Raphael Lemkin proposed for the first time the term "genocide" using the combination of the Ancient Greek words "*genos*" (race, people, clan) and "*cide*" (to kill).[7] During the negotiation of a treaty against genocide at the United Nations (UN) in 1945, Lemkin defined it as follows: "The crime of genocide should be recognized therein as a conspiracy to exterminate national, religious, or racial groups. The overt acts of such a conspiracy may consist of attacks against life, liberty, or property of members of such groups merely because of their affiliation with such groups."[8] Once adopted in 1948, the Genocide Convention defined it as: "any of the following acts committed with intent to destroy, in whole or in part, a

[7] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), 79.

[8] Raphael Lemkin, "Genocide", *The American Scholar*, 15, no. 2 (1946): 228.

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; (e) Forcibly transferring children of the group to another group."

Committing genocide can entail the international responsibility of states and individuals. In this sense, Articles 4[9] and 2[10] of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, respectively, encompass the provisions of Articles 1 and 2 of the Genocide Convention regarding individual criminal responsibility for genocide. Additionally, Article 6 of the 2003 Rome Statute that created the International Criminal Court literally transcribes Article 2 of the Genocide Convention. Additionally, in the case "*Convention on the Prevention and Punishment of the Crime of Genocide*" (Bosnia v. Serbia), the International Court of Justice stated that the obligations recognized in the Genocide Convention have an *erga omnes* binding nature for states.[11]

The recognition of the *erga omnes* nature of the obligations under the Genocide Convention has significantly altered the landscape regarding states' capacities to initiate genocide cases at the International Court of Justice (ICJ). This shift was prominently shown in the case The Gambia v. Myanmar. In this instance, the Gambia, a signatory to the Genocide

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[9] According to this provision: "2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: 5 (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group."

[10] This articles states: "2. Genocide means any of 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; (e) Forcibly transferring children of the group to another group."

[11] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, 11 de julio de 1996, *ICJ Reports 1996*, 595.

Convention, brought a suit against Myanmar, alleging acts of genocide against the Muslim Rohingya minority. The ICJ acknowledged the collective interest shared by all State parties to the Genocide Convention in preventing and punishing genocide. As a result, the Court affirmed that any State party has the standing to initiate proceedings against another State party at the ICJ in order to enforce compliance with the Convention's *erga omnes* obligations. This decision underscores the principle that the prevention and punishment of genocide are responsibilities held by the international community as a whole, reinforcing the universal commitment to uphold these crucial legal obligations.[12]

The crime of genocide consists of three elements: 1) the identification of a national, ethnic, racial, or religious group; 2) the intention to destroy, totally or partially, this group (*mens rea*) and 3) the commission of any of the acts mentioned in Article II of the Genocide Convention against this group (the prohibited act, *actus reus*). Under Article III of the Genocide Convention, not only the act of genocide itself is punishable, but also the "conspiracy to commit genocide", the "direct and public instigation to commit genocide", the "attempt to commit genocide" and the "complicity in genocide."

States' express obligations under the Genocide Convention are as follows: obligation to punish genocide (Article I); obligation to enact the necessary legislation to give effect to the provisions of the Convention (Article V); obligation to ensure that effective penalties are provided for persons found guilty of criminal conduct according to the Convention (Article V); obligation to try persons charged with genocide in a competent tribunal of the state in the territory of which the act was committed, or by an international penal tribunal with accepted jurisdiction (Article VI); obligation to grant extradition when genocide charges are involved, in accordance with laws and treaties in force (Article VII). The Genocide Convention does not expressly impose on states themselves the duty to prevent genocide and/or not to commit genocide.[13] Both obligations result from the interpretation of Article I by the ICJ in the case *Application of the Convention on the Prevention*

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[12] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Preliminary Objections, Judgment, *ICJ Reports 2022*, vol. 2, 516-517, 107-108 and 112.

[13] Marco Milanović, "State Responsibility for Genocide", *European Journal of International Law* 17, no. 3 (2006): 554; William Shabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), 14-50.

and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).[14]

The violation of the obligations incumbent to states according to the Genocide Convention constitutes an internationally wrongful act[15] that can trigger their international responsibility before the ICJ. Article 36, Paragraph 1, of the ICJ Statute stipulates that the Court's jurisdiction encompasses all matters specifically outlined in treaties and conventions currently in force. Article IX of the Genocide Convention serves as a standard compromissory clause, granting the ICJ the authority to adjudicate disputes between parties concerning the treaty's interpretation and application. This provision states: "Disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the present Convention, including those concerning a state's responsibility for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice upon the request of any party to the dispute." Article IX has consistently been used as the legal basis for establishing the Court's jurisdiction in all its "genocide cases."

Although genocide allegations have consistently emerged in the context of armed conflict since the Second World War, the assessment of states' compliance with obligations under the Genocide Convention varies between peacetime and periods of armed conflict. Firstly, during armed conflicts, differentiating the *actus reus* of genocide from acts that constitute gross violations of international humanitarian law (*jus in bello*) is challenging. In fact, during armed conflicts, systematic acts of state violence often blur the lines between the *actus reus* of genocide and the constitutive elements of other international crimes, which a state might attempt to portray as less severe than genocide. Both genocidal acts and war crimes during armed conflicts can be viewed as gross violations of the Geneva Conventions of 1949. According to Article 8 of the Rome Statute, "war crimes" include grave breaches of the Geneva Conventions, such as willful killing and willfully causing great suffering or serious injury to body or health. They

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[14] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 de febrero de 2007,* 165.

[15] According to the UN Draft Articles on the Responsibility of States for Internationally Wrongful Acts: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."

also encompass other serious violations of the laws and customs applicable in international armed conflict, like intentionally using starvation of civilians as a method of warfare by depriving them of essential survival items, including willfully impeding relief supplies as described in the Geneva Conventions. These acts are essentially identical to the *actus reus* of genocide. Consequently, during armed conflicts, the only distinguishing feature of genocide, when compared to war crimes, is the specific intent, or *mens rea*, to destroy a "protected group" in whole or in part.

However, establishing a state's *mens rea*, or intent, to commit genocide during armed conflicts is particularly challenging for several reasons.

In the *Acayesu* case[16], the ICTR noted that *mens rea* can be inferred from the following factors: 1) the general context of the commission of other acts systematically directed against members of the same group; 2) the scale of the atrocities committed; 3) the general nature of the atrocities committed in a region or in a state; 4) the targeting of victims, based on their membership in a certain group, while excluding members of other groups; 5) the general political doctrine supporting such acts; 6) the repetition of destructive or discriminatory acts; 7) the perpetration of acts that violate, or that the perpetrators believe violate, the very foundation of the group. Similarly, in the *Kayishema and Ruzindana case*[17], the ICTR considered that the following factors are relevant to proving the *mens rea* for the genocide: 1) the number of members of the group affected; 2) targeting attacks against group members and their property; 3) the use of degrading language towards group members; 4) the weapons used and the degree of physical injuries; 5) methodical planning of events; 6) the systematic way of killing; 7) the scale of the group's current or planned destruction.

In applying the concept of genocidal *mens rea* during armed conflicts, there is a critical challenge in differentiating violence inflicted as part of military objectives from violence that constitutes genocide. For an act to be qualified as genocide under international law, the state's actions must specifically target individuals due to their membership in a distinct national, religious, or racial group, rather than as incidental casualties of

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[16] International Criminal Tribunal for Rwanda, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998, 523-524.

[17] International Criminal Tribunal for Rwanda, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment (Trial Chamber II), 21 May 1999, 93, 527.

war. Therefore, genocidal *mens rea* is starkly different from actions driven by legitimate military objectives such as self-defense or counterterrorism. These acts could result in civilian casualties but do not inherently carry the intent to eradicate a particular group. Consequently, distinguishing genocidal acts from atrocities derived from military operations requires clear evidence that violence was only aimed at the extermination of a group based on their identity, not just the prosecution of war efforts, thereby making the legal attribution of genocide difficult during armed conflicts.

In this context, the ICJ has adopted a stringent standard for establishing genocidal intent through indirect "pattern-of-conduct" evidence. The *mens rea* must be conclusively proven either by reference to particular circumstances or by clear evidence of a general plan designed to achieve that end. For a pattern of conduct to be valid evidence of genocidal intent, it must unequivocally point towards such intent as the sole reasonable inference. In the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ('Croatia v. Serbia'), the ICJ emphasized that genocidal intent must be "the only inference that could reasonably be drawn" from the evidence provided. This stringent standard permits respondent states to rebut genocide accusations by presenting alternative explanations for their conduct during armed conflicts, such as self-defense, national security, or counterterrorism objectives. In *Croatia v. Serbia*, the Court observed that while forced displacement, in conjunction with other acts enumerated in Article II of the Genocide Convention, could theoretically suggest genocidal intent, it ultimately determined that the ethnic cleansing of Croats was aimed at creating an ethnically homogeneous Serb state, rather than systematically destroying the Croat population. This conclusion underscores the challenge of proving genocidal intent, particularly when alternative explanations for the states' actions during armed conflicts exist.[18]

The *mens rea*, or intent, is a psychological element similar to the *opinio iuris* required to establish the existence of international custom. Given that a state is a legal person—a construct of legal fiction—it becomes more challenging to establish *mens rea* for a state compared to cases involving individual criminal responsibility for genocide. This complexity arises because individual criminal responsibility allows for direct assessment of

[18] Michael A. Becker, "Crisis in Gaza: South Africa v Israel at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)", *Melbourne Journal of International Law* 25, no. 2 (2024): 182.

personal intent, whereas determining a state's intent requires interpreting actions and policies that reflect the collective intent of its governing authorities. Consequently, attributing *mens rea* to a state involves analyzing patterns of conduct, policy declarations, and other indirect evidence that indicate a deliberate intention to commit genocide, making it a more complex and nuanced process than assessing individual intent.

The *mens rea* of a state committing genocide is, obviously, highly related to the *mens rea* of the individual actors of the crime.[19] Even if in the case *Serbia vs. Bosnia*, the Court considered that proving state agents' international criminal responsibility for genocide is not a requirement before invoking state's own international responsibility for "the crime of all crimes", it is impossible to take both responsibilities separately.[20] The material authors of genocide are always individuals, and it is possible to assume that state's *mens rea* depends on the *mens rea* of individuals (state agents or not) acting under its direct control. That is why the determination of state's control over the genocidal acts committed by individuals during armed conflicts is essential to establish state's *mens rea* and, consequently, state's own responsibility for the crime.[21] These issues were discussed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro). Bosnia alleged that Serbia and Montenegro violated its obligation not to commit genocide under Article I of the Genocide Convention[22] and the

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[19] Devrim Aydin, "The Interpretation of Genocidal Intent Under the Genocide Convention and the Jurisprudence of International Courts", *Journal of Criminal Law* 78, no. 5 (2014): 441.

[20] André Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52, no. 3 (2003): 615-640.

[21] In making its decision, the ICJ adhered to the traditional "effective control" test, established in its earlier ruling in the Armed Activities in Nicaragua case, to determine state responsibility. The Court explicitly chose not to apply the "overall control" test, which had been developed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in assessing the involvement of state actors in international crimes. Rafael Leme, "Individual Criminal Liability and State Responsibility for Genocide: Boundaries and Intersections", *American University International Law Review* 34, no. 1 (2018): 2.

[22] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 de febrero de 2007, 237.

ICJ determined that the crime committed in Srebrenica was a genocide. In assessing Serbia's international responsibility for genocide, the ICJ concluded that the acts perpetrated by the *Army of Republika Srpska* could not be directly attributed to the Serbian state. The Court determined that Serbia did not exercise "effective control" over the actions of these private individuals.[23] However, the Court did not clarify how the *mens rea* of the state itself can be distinguished from the *mens rea* of the individual authors of genocide, even if the state did not effectively control their acts.

These challenges show why, to date, no state has been deemed internationally responsible by the ICJ for committing genocide in the context of armed conflicts. Given this backdrop, the complexities surrounding the invocation of responsibility for the "crime of crimes" of Ukraine, Russia, and Israel before the "World Court" become more comprehensible.

3. Obstacles in attributing genocide responsibility to Russia, Ukraine and Israel

As previously mentioned, there are two distinct allegations concerning the commission of genocide on Ukrainian territory. The first allegation posits that Ukraine, along with individuals of Ukrainian nationality, is accused of committing genocide against ethnic Russians in the Ukrainian regions of Donetsk and Luhansk. The second allegation involves claims of genocide committed by Russia and individuals of Russian nationality against Ukrainians, targeting them solely based on their Ukrainian identity.

The allegations of genocide committed by Ukraine are founded on evidence collected by the Russian Government. In response to the escalation of the Russian-Ukrainian conflict and the 2014 declarations of independence by the Donetsk and Luhansk Republics, Russia established a Special Committee to investigate acts of genocide purportedly undertaken by the Kiev regime against 'Russian-speaking residents' of these regions.[24] In particular, it has been alleged that Kiev authorities used heavy weapons to murder around 2500 "Russian-speaking" people in the Donbass region.

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[23] Antonio Cassese, "The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law* 18, no. 4 (2007): 646-648.

[24] Reuters, "Russia opens criminal case on Kiev for 'genocide' in east", 29 september 2014, https://www.reuters.com/article/us-ukraine-crisis-genocide-probe/russia-opens-criminal-case-on-kiev-for-genocide-in-east-idUSKCN0HO1V520140929

According to data from the report, "unidentified representatives of the political and military leadership of Ukraine, the National Guard and the Right Sector (a nationalist organization), have given orders aimed at the extermination of Russian-speaking citizens."[25] The Committee referenced the Genocide Convention as the legal framework for its investigation. In the Russian allegation against Ukraine regarding the commission of genocide, the purported victimized ethnic group is clearly identified as Russian-speaking individuals in eastern Ukraine. The use of the Russian language is considered an objective criterion for belonging to this group. In contrast, within the Ukrainian allegation of genocide by Russia on Ukrainian territory, the identified victim is a national group—the Ukrainians—rather than an ethnic group. Ukraine's complaint to the ICJ[26] clearly states that Russia is committing genocidal acts against "individuals of Ukrainian nationality."

As for the *actus reus*, in the case of the alleged genocide against Russian-speaking Ukrainians in the Donbas region, it would consist of the killing of members of the group and inflicting serious harms to their physical or mental integrity.[27] The *actus reus* of the genocide allegedly committed by Russia on the territory of Ukraine is essentially the same. Ukraine's complaint before the ICJ states that "Russia is intentionally killing and inflicting serious injury on individuals of Ukrainian nationality – the *actus reus* of genocide under Article II of the Convention."[28] According to the Ukrainian Government, the *mens rea* or intent to commit genocide would

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[25] Reuters, "Russia opens criminal case".

[26] According to this provision: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

[27] The report of the Special Investigative Commission of the Russian Federation on the commission of genocide in that region points to evidence of large-scale massacres of Russian-speaking people by agents and sympathizers of the Kiev regime, such as mass graves, testimonies, etc. It has been argued that the massacres of Russian-speaking citizens have been carried out with Grad and Uragan missiles, using missiles with cluster munition warheads, Tochka-U missiles, and other types of heavy weapons of indiscriminate effect. Interfax, "Markin: Russian Investigative Committee to probe genocide concealment in Donbas", 24 de agosto 2015, https://interfax.com/newsroom/top-stories/40349/)

[28] International Court of Justice, *Dispute Relating to the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine vs. Russian Federation),* Application Instituting Proceedings, 26 February 2022, 7.

stem from President Putin's "vile rhetoric of denying the very existence of Ukrainian people." [29]

Before the ICJ, Ukraine asked the Court to declare that it has not committed genocide in the Donetsk and Luhansk oblast. Even when the Ukrainian demand clearly included statements about the commission of genocide by Russia against the Ukrainians, Ukraine did not ask the Court to determine Russia's international responsibility for the commission of the crime.

If the scale of the atrocities committed or the number of victims of massacres perpetrated by the Russia and/or Ukraine is compared with the last two situations legally classified as genocide by international tribunals - Rwanda and Srebrenica - perhaps the threshold for large-scaled acts could not be met. It is estimated that between 500 000 and 100 000 000 Tutsis were exterminated during the genocide in Rwanda. Eight thousand Bosnian Muslim men and boys died during the genocide in Srebrenica. As stated above, the approximate number of Russian-speaking Ukrainian citizens allegedly killed at the hands of the Kiev regime in the Donbass region could amount to approximately 2500. According to the Office of the UN High Commissioner for Human Rights, the number of civilian victims of Ukrainian nationality in the conflict in Ukraine is around 5000. Around 400 people died during the so-called "Bucha massacre". In this sense, through investigations by competent bodies, the exact number of victims during the conflict in Ukraine, from 2014, would have to be

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[29] International Court of Justice, *Allegations of Genocide (Ukraine v. Russian Federation),* 7. Furthermore, a significant illustration of this ideology was presented on April 3, 2022, when an editorial by the Russian state-owned news agency RIA Novosti advocated for the mass killing of Ukrainians, labeling them as Nazis. The article equated "denazification" with "de-Ukrainianization," suggesting a campaign not just against a government or regime, but against the Ukrainian population and identity itself. This rhetoric points to an alarming endorsement of extreme measures targeting the Ukrainian people, reflective of genocidal inclinations. "The Nazis who took up arms should be destroyed to the maximum on the battlefield. There should be no significant differences between the Armed Forces of Ukraine and the so-called national battalions, as well as the territorial defense that joined these two types of military formations. All of them are equally involved in extreme cruelty against the civilian population, equally guilty of the genocide of the Russian people, and do not comply with the laws and customs of war. War criminals and active Nazis should be exemplarily and exponentially punished. There must be a total lustration. Any organizations that have associated themselves with the practice of Nazism should be liquidated and banned. RIA Novosti, "What Russia should do with Ukraine?", 3 de abril de 2022, https://ria.ru/20220403/ukraina-1781469605.html

determined and whether the scale of the massacres could be seen as a mass extermination. It will also be very difficult to prove that the willful killing of Ukrainians by Russia is due to their membership in these national and ethnic groups, that these acts are destructive or discriminatory in their nature and are aimed to violate the very foundation of the groups. Additionally, the only mention by President Putin of the non-existence of Ukrainian people would be difficult to classify as dehumanizing language to characterize a genocidal *mens rea.*

As previously discussed, proving that Ukraine committed genocide against Russian-speaking Ukrainians in the Donbass region is particularly challenging. The Court has, to some extent, 'pre-judged' the merits of the case by noting that, during the preliminary phase, it lacks 'evidence of genocide committed on Ukrainian territory.' This suggests that the final decision on the merits is unlikely to be surprising. The atrocities, human losses, and humanitarian catastrophe resulting from the Ukrainian war are to be viewed as deplorable and inhumane war casualties, with the international responsibility of both states being addressed according to the rules governing armed conflicts, rather than under the Genocide Convention. In essence, the Ukrainian conflict should be considered a war, not a genocide.

As noted above, South Africa instituted proceedings against Israel before the ICJ, claiming that Israel has violated its obligations to prevent and not to commit genocide during its war against Hamas in Gaza. According to South Africa, the *actus reus* of the genocide consists in: killing Palestinians in Gaza[30], causing serious bodily and mental harm to Palestinians in Gaza[31], mass expulsion from homes and displacement of Palestinians in Gaza[32], deprivation of access to adequate food and water to Palestinians in Gaza[33], deprivation of access to adequate shelter, clothes, hygiene and sanitation

[30] 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),* Application Instituting Proceedings, 29 December 2023, 45-50.

[31] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 51-55.

[32] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 55-60.

[33] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 61-70

to Palestinians in Gaza[34], deprivation of adequate medical assistance to Palestinians in Gaza[35], destruction of Palestinian life in Gaza[36], and imposing measures intended to prevent Palestinian births[37]. The *mens rea* of the genocide is inferred from public statements by Israeli high officials, such as the Israeli Prime Minister, the President of Israel, and Israeli Minister of Defense. The cited statements refer to Palestinians as "monsters, monsters who murdered children in front of their parents (…)",[38] and "human animals"[39]. According to South Africa, this category would include all Palestinians, Hamas militants and civilians in Gaza. In this sense, the application cited Israeli President Isaac Herzog stating: "It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware, not involved. It's absolutely not true. … and we will fight until we break their backbone."

As in the case of the war in Ukraine, the acts that South Africa described as constitutive of the *actus reus* of the alleged genocide in Gaza may easily be considered as gross violations of the Geneva Conventions of international humanitarian law. The willful killing of Palestinians, causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, such as the deprivation of food, water and sanitation as catastrophic as they might be, could be seen as war crimes or casualties of the "scourge of war" but not necessarily as a part of the "odious scourge" of genocide. Thus, the decisive element to establish a genocide against the Palestinians in Gaza would not be the *actus reus*, but the *mens rea*.

Not surprisingly, Israeli's defense arguments went precisely in that direction. According to Israel: "the acts complained of by South Africa are not capable of falling within the provisions of the Genocide

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[34] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 71-75.

[35] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 76-86.

[36] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 88-94.

[37] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 95-100.

[38] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 101.

[39] International Court of Justice, *Application of the Convention (South Africa v. Israel),* 101.

Convention because the necessary specific intent to destroy, in whole or in part, the Palestinian people as such has not been proved, even on a *prima facie* basis." [40] Additionally, the Israeli Government considered "that the appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention. It argues that, in situations of urban warfare, civilian casualties may be an unintended consequence of lawful use of force against military objects, and do not constitute genocidal acts." [41] These arguments were supported by two of the ICJ judges that voted against the order of interim measures sought by South Africa- the *ad hoc* judge Barak,[42] named by Israel, and the first African female judge to the ICJ, the Ugandan Julia Sebutinde.[43]

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[40] 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),* Order of 26 January 2024, 12.

[41] ICJ, *Application of the Convention (South Africa v. Israel),* Order of 26 January 2024, 40.

[42] Sebutinde is a specialist in International Criminal Law and a former judge of the *ad hoc* criminal tribunal for Sierra Leona. She assessed, in her separate opinion, that: "South Africa has not demonstrated, even on a *prima facie* basis, that the acts allegedly committed by Israel (…), were committed with the necessary genocidal intent (…)." In the opinion of Judge Sebutinde: "Thus, while it is not inconceivable that grave violations of international humanitarian law amounting to war crimes or crimes against humanity could have been committed against the civilian populations both in Israel and in Gaza (a matter over which the Court has no jurisdiction in the present case), such grave violations do not, in and of themselves, constitute "acts of genocide" as defined in Article II of the Genocide Convention, unless it can be demonstrated that they were committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". ICJ, *Application of the Convention (South Africa v. Israel),* Order of 26 January 2024, Separate opinion of judge Julia Sebutinde, 34.

[43] In its separate opinion, Judge Barak, supported the same arguments. He cited the *travaux préparatoires* of the Genocide Convention and emphasized that: "The drafters of the Genocide Convention clarified in their discussions that "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war, belligerents normally destroy factories, means of communication, public buildings, etc., and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide." ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel),* Separate opinion of judge Julia Sebutinde, 26 de enero 2024, 3.

The same position was hold by states, such as Germany, that support Israeli's position before the ICJ.[44] In contrast, states that endorse the position of South Africa, such as Brazil, have stated exactly the opposite.[45]

Proving Israel's *mens rea* in the merits stage of the dispute will be complicated by the application of the ICJ "pattern of conduct". As mentioned before, the ICJ must disregard any inference of Israel's genocidal intent if another motive, such as self-defense or counterterrorism, can reasonably be deduced from the evidence. The only way to overcome this obstacle would be to consider that genocidal intent can coexist with military objectives in situations of armed conflict; and that the "only reasonable inference" standard does not require genocidal intent to be the sole intent inferred from a pattern of conduct. In other words, the Court could consider that, because Israel is acting in the context of an armed conflict, it necessarily pursues military goals as well, which may coexist with genocidal intent or serve for the destruction of Palestinians.[46]

To establish *mens rea*, the Court would examine the broader context surrounding Israel's actions during the conflict in Gaza. In particular, the ICJ would investigate the systematic acts of discrimination committed against Palestinians during the armed conflict in Gaza, considering the background of its advisory opinions *Legality of the Construction of a Wall in the Palestinian Occupied Territories*[47] *and Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including*

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[44] Stefan Salmon, "Germany Rushes to Declare Intention to Intervene in the Genocide Case brought by South Africa Against Israel Before the International Court of Justice", *German Practice in International Law* (blog), 20 de enero de 2024, https://gpil.jura.uni-bonn.de/2024/01/germany-rushes-to-declare-intention-to-intervene-in-the-genocide-case-brought-by-south-africa-against-israel-before-the-international-court-of-justice/

[45] Al Aljazeera, "Brazil's Lula compares Israel's war on Gaza with the Holocaust", 18 de febrero de 2024, https://www.aljazeera.com/news/2024/2/18/brazils-lula-compares-israels-war-on-gaza-with-the-holocaust

[46] Amnesty International, "*You feel like you are subhuman": Israel's genocide against Palestinians in Gaza* (Londres: Amnesty International, 2024), 24, https://www.amnesty.org/en/wp-content/uploads/2024/12/MDE1586682024ENGLISH.pdf

[47] In that case, the UN General Assembly asked the Court what the consequences of the construction of a wall by Israel are in the occupied Palestinian territories in accordance with the rules of international humanitarian law and the relevant resolutions of the General Assembly and the UN Security Council. The Court considered that Israel had violated the principle of free self-determination of peoples and several norms and principles of international humanitarian law. Consequently, the Court ordered Israel to

East Jerusalem.[48] In this second opinion, the ICJ concluded that Israel has implemented a broad array of legislation and measures that systematically discriminate against Palestinians on race, religion, or ethnic origin, in violation of international legal instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[49] The ICJ's findings of systemic discrimination may be instrumental in proving genocidal intent against Palestinians, as they exemplify targeted discriminatory policies based on group identity.

The demonstration of the *mens rea* of the alleged genocide will also have to take into consideration the scale of the atrocities committed against the Palestinians. In its demand before the ICJ, South Africa stated that: "Israel has now killed in excess of 21 110 named Palestinians, including over 7729 children — with over 7,780 others missing, presumed dead under the rubble — and has injured over 55 243 other Palestinians, causing them severe bodily and mental harm." [50] The total Palestinian population is 5 449 322 (thus, the killed Palestinians during the War in Gaza would amount to less than 1 % of the members of the group).[51] The scale of atrocities committed against the Palestinians could be compared to the 800 000 victims (about 75 % of the total members of the Tutsi population) of the Rwandan Genocide, or the 8000 victims of the Srebrenica Genocide (about 20 % of the Group of the Bosnian Muslims) and Israel could probably invoke the number of 5 750 000 victims of the Shoah.

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immediately stop the construction of the wall, dismantle the sections already built and repair the damages suffered by the victims of its internationally illicit actions.

[48] ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 de julio de 2024, https://www.icj-cij.org/case/186

[49] ICJ, *Policies and Practices of Israel (Advisory Opinion),* Summary of the Advisory Opinion of 19 July 2024, 14.

[50] ICJ, *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, 29 December 2023, 4.

[51] State of Palestine Population (20 February 2024), https://www.worldometers.info/world-population/state-of-palestine-population/

The Court will also have to take into consideration "the general nature of the atrocities" committed by Israel in Gaza. These atrocities must be inhumane in nature and character (e.g., rapes, smashing babies to the wall, dismembering, and mutilating victims during and/or after death, intentional dissemination of VIH during the Rwandan Genocide or, using victims for medical experiments during the Shoah). In the case of the War in Gaza, mass killings of Palestinians are inhumane in nature. However, the inhumanity of genocide not only affects its victims, for the crime of genocide to have occurred, the acts must have been of such gravity as to shock the conscience of humanity as a whole and offend fundamental moral standards of society.[52] In addition, to prove the *mens rea* of the genocide, the inhumane acts must be committed as part of widespread and systematic attacks on Palestinians, due to their membership of that group. A "random inhumane act" is insufficient to establish the commission of genocide.[53] In the case of the Genocide in Srebrenica, the ICTY determined that "the killings did not occur in a moment of passion, but were the product of a well-planned and coordinated operation".[54] In the *Akayesu* judgment "widespread" was defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,"[55] and systematic as "thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources."[56] In this sense, the ICJ must determine if Israeli genocidal intent has to be assessed only regarding its attacks on Gaza after the terrorist act of October 2023 or in relation to the general policy that Israel has followed during its occupation of the Palestinian Territories.

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[52] Raneisha Blair, "Can an Omission Fulfill the *Actus Reus* Requirement for Complicity in Genocide, and to What Degree Does Article 6(3) Of the ICTR Statute Impute Criminal Liability for The Crime to A Superior Officer?", *War Crimes Memoranda* 202 (2014): 10-15, https://scholarlycommons.law.case.edu/war_crimes_memos/202

[53] Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon Press, 1997), 45-60.

[54] ICTY, *Facts about Srebrenica*, 8, https://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf

[55] ICTR, *Prosecutor v. Akeyesu,* Case No. ICTR 96-4-T, Judgment, 2 September 1998.

[56] ICTR, *Prosecutor v. Akeyesu*.

To prove genocide, it will also be necessary to establish that the alleged *actus reus* of genocide by South Africa aims to violate or is believed by Israel to violate, the very foundation of the Palestinian group. During the Srebrenica Genocide, the ICTY found that "the evidence disproved the Defence's claims. Bosnian Serb forces systematically massacred between 7000 and 8000 Bosnian Muslim men from Srebrenica during a period of no more than seven days. At the same time, they forcibly transferred the rest of the Bosnian Muslim population from Srebrenica, some 25 000 people. The Trial Chamber stated that it could not have escaped the Bosnian Serb forces that killing two or three generations of men would have a lasting and devastating impact on the survival of the Bosnian Muslim community from Srebrenica. Bosnian Serb forces knew that killing the men, and forcibly transferring the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica."[57] Thus, to prove the genocidal intent of the alleged genocide against Palestinians, it would be necessary to show that the *actus reus* of the genocide, as stated in the South African demand, would have a lasting and devastating effect on the survival of the Palestinians in Gaza and that the acts are aimed to destroy the very foundation of the group.

It is worth mentioning that the demand of South Africa focuses the *mens rea* of the genocide on the use of degrading language towards Palestinians. Dehumanization often precedes genocide. The Rwandan genocide was particularly significant in terms of the use of dehumanizing language towards the victims. A national radio station had been inciting Hutus against the Tutsi minority, repeatedly describing the latter as animals, *inyenzi*, or "cockroaches," and as *inzoka*, or "snakes" that need to be exterminated. In the Ottoman Empire, dehumanizing language was also used during the Armenian Genocide, where Armenians were considered "dangerous microbes." We must never forget that during the Shoah, Germans described Jews as "*Untermenschen*," or subhumans. Thus, the description by Israeli officials, Israeli media, soldiers of the IDF and the Israeli society, in general, of Palestinians as "animals" or "human animals" (a term close to "subhuman") constitutes dehumanizing language and might be taken as an important element for inferring the *mens rea*, alongside with the other necessary elements

[57] ICTY, *Facts about Srebrenica*, 8, https://www.icty.org/x/file/Outreach/view_from_hague/jit_srebrenica_en.pdf

of a genocidal intent against the Palestinian Population of Gaza. They can also constitute a clear sign of a public incitement to commit genocide.

4. Challenges faced by the ICJ in evaluating states' responsibility for violations of the rules governing war under the shadow of genocide allegations

4.1 The invocation of the Genocide Convention as a strategy to bring war cases under the jurisdiction of the ICJ

Recently, concerns have emerged in the form of jurisdictional objections, arguing that the Court is unduly extending its jurisdiction over armed conflicts by broadly interpreting the Genocide Convention.[58] In her dissenting opinion on the Gazan Genocide case, Judge Sebutinde highlighted that the actions of the belligerent parties in the Israel-Hamas conflict are governed by IHL and IHRL, areas over which the Court has no jurisdiction.[59] In the same sense, the first objection of the Russian Federation in the Ukrainian Genocide case is directly related to the relationship between states' obligation according to the Genocide Convention and states' obligation not to use armed force against the territorial integrity of other states as established in the *jus ad bellum* rules.[60]

One of the paradoxes of international law lies in the fact that the UN Charter—the treaty responsible for establishing the ICJ—does not include a compromissory clause granting the Court jurisdiction over disputes related to violations of its Article 2(4), the foundational norm of the *jus ad bellum* rules. Similarly, only five human rights treaties within the UN's universal human rights protection system confer contentious jurisdiction to the ICJ for disputes between state parties: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1952

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[58] Helen Duffy and Julia Pinzauti, "Genocide and armed conflict before the International Court of Justice", *Questions of International Law* 112 (2025): 5-22.

[59] 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)*, Dissenting Opinion of Judge Sebutinde, 26 de enero de 2024, 1-2.

[60] International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Document of the Russian Federation Setting Out Its Position Regarding the Jurisdiction of the Court, 7 de marzo de 2022, 2-3.

Convention on the Political Rights of Women, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. This limitation clarifies why the Court is generally unable to adjudicate disputes arising from violations of most IHRL provisions during armed conflicts. In contrast, no IHL treaty includes a clause granting the ICJ jurisdiction. This omission has significantly restricted the Court's ability to address issues related to IHL. Without treaty-based jurisdiction, optional clause declarations could potentially serve as a basis for the ICJ to adjudicate IHL violations in conflicts. However, only a limited number of states—74 in total, with the United Kingdom being the sole permanent member of the UN Security Council—have made optional clause declarations that are still active. Some states expressly exclude claims arising from armed conflict, either broadly excluding any disputes related to hostilities or specifically concerning the use of nuclear weapons, self-defense, occupation, military use of state territory, deployment of armed forces abroad, or collective military operations under the UN Security Council or other organizations. Furthermore, since acceptance of ICJ jurisdiction via optional clause declarations must be reciprocal, these exclusions greatly restrict the Court's capacity to resolve disputes in this manner. Consequently, there have only been two instances in the Court's history where jurisdiction over IHL matters was established based on the parties' optional clause declarations, with a third case (Nicaragua v. Germany, regarding Israeli actions in Gaza) currently pending.[61]

Therefore, invoking Article IX of the Genocide Convention has increasingly become a strategic approach to place the application and interpretation of *jus ad bellum*, *jus in bello*, and IHRL norms governing the initiation and conduct of hostilities during armed conflicts before the ICJ. To date, there have been 17 cases arising from armed conflict situations in which the applicant state has appealed to the Court's jurisdiction to resolve disputes over the interpretation and application of the Genocide Convention as outlined in Article IX.[62]

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[61] Helen Duffy and Julia Pinzauti, "Genocide and armed conflict", 12.

[62] These are: *Trial of Pakistani Prisoners of War (Pakistan v. India)* [1973] ICJ Rep 347; *Bosnian Genocide*; *Croatian Genocide*; the 10 cases on the *Legality of the Use of Force* (n 10); *The Gambia v. Myanmar*; *Ukraine v. Russia*; *Gazan Genocide*; *Nicaragua v. Germany*. Helen Duffy and Julia Pinzauti, "Genocide and armed conflict".

In the case of the war in Ukraine, Ukraine supported its acceptance of the contentious jurisdiction of the ICJ in Article IX of the Genocide Convention. According to Ukraine, there is a dispute between the parties regarding the interpretation and application of Article I of the agreement. This provision establishes the duty of the State parties to prevent and punish the crime of genocide. For the Government of Ukraine, this duty is exercised in good faith, and its fulfillment could not, in any case, be carried out through an armed attack, based on false allegations of the commission of genocide by Ukraine. Consequently, Russian actions against Ukraine would violate the central obligation imposed by Article I of the Convention and would deprive it of its essential object and purpose. [63] The Russian Government presented six objections to the jurisdiction of the ICJ to consider the merits of the Ukrainian demand.[64] The first objection is directly related to the relationship between states' obligation according to the Genocide Convention and states' obligation not to use armed force against the territorial integrity of other states as established in the *jus ad bellum* rules. In the opinion of the Russian Government, neither the regulation of the use of force nor the recognition of states would fall within the *ratione materiae* scope of application of the Genocide Convention, as these problems are regulated in the UN Charter and customary international law. Article IX of the Convention would not be a general clause for the settlement of all types of disputes before the ICJ.[65] According to the Russian Government, its military operation in Ukraine is based on Article 51 of the

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[63] International Court of Justice, *Dispute Relating to the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 26 de febrero de 2022, 8.

[64] Firstly, according to Russia, the Court lacks jurisdiction since there is no dispute between the Parties in relation to the Genocide Convention. Secondly, the ICJ would not have material jurisdiction (*ratione materiae*) to hear the case. Third, Ukraine would have submitted new claims at an inopportune procedural time. Fourth, the Ukrainian claim would be inadmissible since the possible ruling of the ICJ would have no practical effect. Fifth, Ukraine's request for a declaration that it has not breached its obligations under the Genocide Convention would also be inadmissible. Finally, Ukraine's request would be inadmissible as an abuse of process. ICJ, *Dispute Relating to the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, 2nd February 2024, 37.

[65] International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Document of the Russian Federation Setting Out Its Position Regarding the Jurisdiction of the

UN Charter, that is, on Russia's exercise of its inherent right of individual self-defense. Therefore, it would not be possible to base the contentious jurisdiction of the ICJ on Article IX of the Genocide Convention.[66] In other words, according to Russia, Ukraine would be seeking from the Court a declaration of the illegality of its military operation in Ukraine according to the rules of *jus ad bellum* (e.g., to show that it constitutes an act of aggression contrary to article 2-4 of the UN Charter) on a wrong jurisdictional basis.

Ukraine was likely aware of the legal challenges in holding Russia internationally accountable for violations of the *jus ad bellum* rules on the jurisdictional basis of Article IX of the Genocide Convention. Nevertheless, Ukraine appeared to anticipate that the Court would consider Russia's responsibility for violations of these rules. The interim measures Ukraine sought were aimed not at preventing genocide, but at compelling Russia to cease its military actions in Ukraine. This scenario is reminiscent of the *Legality of the Use of Force* cases[67], where the former Yugoslavia filed suits against thirteen NATO member states over the organization's military campaign on its territory beginning in 1997. The jurisdictional basis cited was Article IX of the Genocide Convention, although Yugoslavia argued for breaches of Article 2-4 of the UN Charter. In its judgments, dated December 15, 2004, the Court determined that it manifestly lacked jurisdiction to hear the case, overlooking the invocation of Article IX as a compromissory clause for claims tied to *jus ad bellum* infractions. Instead, the ICJ held that Serbia and Montenegro were not State parties to the Court's Statute at the commencement of proceedings and failed to meet the criteria set out in Article 35, paragraph 2, of the Statute. Concerning the War in Ukraine, no treaty grants the ICJ jurisdiction over disputes between Russia and Ukraine regarding the interpretation and application of Article 2-4 of the UN Charter. Nevertheless, both nations are signatories to the ICJ Statute, thus, the Court's consideration of Ukraine's argument regarding the use of the compromissory clause of the Genocide Convention requires to assess the legality of Russia's use of force against Ukraine's territorial integrity.

Court, 7 de marzo de 2022, 2-3, https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf.

66 International Court of Justice, *Russian Federation Position on Jurisdiction*, 6.

67 International Court of Justice, *Russian Federation Position on Jurisdiction*, 6.

In its order for preliminary measures, the Court tacitly showed that Russia has in fact violated *jus ad bellum* rules during an international armed conflict, as it began by recalling that one of its main purposes as an organ of the United Nations is to maintain international peace and security and to guarantee the peaceful settlement of international disputes. Likewise, it emphasized the duty of all states to respect the obligations they have acquired under the UN Charter. Bound by the rules governing its jurisdiction, subsequently, the ICJ stated that the controversy submitted to its forum is limited in its scope because Ukraine has invoked the Genocide Convention as the sole legal basis for its claim. [68] On this preliminary stage, according to the ICJ, the acts committed by Russia fell within the scope of application of the Genocide Convention, and, consequently, the Court considered itself *prima facie* competent to resolve the merits of the dispute and to order precautionary measures.[69] However, the Ukrainian claims on the illegality of the Russian war in Ukraine on the basis of Article IX of the Genocide Convention were considered inadmissible by the ICJ's ruling on the preliminary objections of the 2nd of February 2024. In that ruling, the Court concluded that it has jurisdiction under Article IX of the Genocide Convention to consider the merits of only one of the claims raised in Ukraine's application, namely that requesting the Court to "declare that there is no evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk provinces of Ukraine".[70] Consequently, the Court opted for a more limited interpretation of Article IX of the Genocide Convention as a jurisdictional foundation for addressing *jus ad bellum* violations. Even if Judges Robinson and Sebutinde, in their joint opinion, argued that the Court indeed had jurisdiction to adjudicate the *jus ad bellum* subject matter of the case,[71] this

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[68] International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, 18-19.

[69] International Court of Justice, *Ukraine v. Russian Federation*, Provisional Measures, 47.

[70] International Court of Justice, "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)", comunicado de prensa no. 2023/31, 9 de junio de 2023, 1.

[71] 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)*, Joint Dissenting Opinion of Judges Sebutinde and Robinson, 30 de abril de 2024, https://www.icj-cij.org/node/203510.

choice may restrict future attempts to utilize this compromissory clause for bringing war-related cases before the Court.

The conflict in Gaza has highlighted the invocation of Article IX of the Genocide Convention as a jurisdictional clause linked to claims involving violations of both *jus in bello* and IHRL rules. The Court's rulings in the South Africa vs. Israel case have potentially set a precedent, enabling Nicaragua to file a separate lawsuit against Germany. Nicaragua accuses Germany of breaching the Genocide Convention, IHL and IHRL by providing military assistance to Israel. In its application, Nicaragua relied on both Article IX of the Genocide Convention and Germany's acceptance of the ICJ's compulsory jurisdiction under Article 36(2), for presenting a dispute concerning, but not limited to, the interpretation and application of the Genocide Convention, the Geneva Conventions of 1949—particularly Convention IV relative to the Protection of Civilian Persons in Time of War—and their Additional Protocols of 1977. It also involves principles and customary rules of international law, including intransgressible principles of IHL, IHRL and peremptory norms of general international law, which encompass prohibitions against racial discrimination and apartheid, arising from Germany's conduct.[72] Germany's declaration under Article 36 (2) expressly excludes ICJ's jurisdiction to interpret and apply IHL in cases that "(a) relate to, arise from or are connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon (…)". However, Nicaragua argued that this reservation does not apply to the provision of military aid to Israel, as Germany has not deployed armed forces in Gaza and is a third party to the military conflict. In its order on preliminary measures, the Court considered that it is *prima facie* competent to consider violations of IHL and IHRL, as well as claims under the Genocide Convention in the following terms: "The Court recalls that, pursuant to common Article 1 of the Geneva Conventions, all States parties are under an obligation "to respect and to ensure respect" for the Conventions "in all circumstances". It follows from that provision that every State party to these Conventions, "whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with". Such an obligation

[72] International Court of Justice, *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Request for the Indication of Provisional Measures, 1 de marzo de 2024, 16.

"does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. With regard to the Genocide Convention, the Court has had the opportunity to observe that the obligation to prevent the commission of the crime of genocide, pursuant to Article I, requires State parties that are aware, or that should normally have been aware, of a serious risk that acts of genocide may be committed, to employ all means reasonably available to them to prevent genocide so far as possible. Further, State parties are bound by the Genocide Convention not to commit any other acts enumerated in Article III. Moreover, the Court considers it particularly important to remind all states of their international obligations relating to the transfer of arms to parties involved in an armed conflict, in order to avoid the risk that such arms might be used to violate the above-mentioned Conventions. All these obligations are incumbent upon Germany as a State party to the said Conventions in its supply of arms to Israel."[73] In confirming this, the Court effectively linked the invocation of Article IX of the Genocide Convention, used to demonstrate violations within the genocide legal framework, with the jurisdictional basis for establishing infringements of IHL and IHRL when genocide is committed during armed conflict.

The material application of the norms governing war in genocide cases

The ICJ cases concerning the War in Gaza and the War in Ukraine highlight the complex relationship between the perpetration of genocide and violations of the principles of *jus ad bellum*, *jus in bello*, and IHRL. Indeed, when genocide occurs during armed conflicts, it can simultaneously constitute a breach of these legal norms.

In the first place, genocide entails fundamental breaches of core human rights. Essential human rights fall within this category, including the right to be free from torture or other cruel, inhumane, or degrading treatment; the right not to be deprived of life extrajudicially or arbitrarily; the right to be free from slavery or servitude; and a range of fundamental fair trial

[73] International Court of Justice, *Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Provisional Measures, Order of 30 April 2024, *ICJ Reports* 2024, 568.

guarantees. This list is derived from key international and regional human rights treaties, including the International Covenant on Civil and Political Rights (Article 4.2), the American Convention on Human Rights (Article 27), and the European Convention on Human Rights (Article 15.2) and Article 3 common to the Geneva Conventions of 1949.[74]

Second, although the ICJ acknowledged in *Croatia v. Serbia* that IHL and genocide constitute separate legal frameworks, with violations of one not inherently equating to violations of the other, it is important to recognize that, as explained in the first part of this article, the *actus reus* of genocide can also represent an element of war crimes, and, by definition, war crimes are serious breaches of the Geneva Conventions of IHL. Genocidal actions can lead to the destruction of civilian infrastructure and a significant number of civilian casualties, including deaths and instances of "serious bodily harm." If a military campaign causes shortages of food, water, and electricity in areas where surviving civilians reside, these adverse "conditions of life" are likely to result in death or injury and may fulfill the *actus reus* of genocide, particularly if the affected civilians belong to a "national" or "ethnical" group. Therefore, even in the absence of the genocidal *mens rea*, the state would be accountable for violations of IHL.

Third, states may breach *jus ad bellum* rules when committing genocide, if the targeted group resides in another country and the genocidal intent involves a preceding act of aggression. Similarly, the Responsibility to Protect (R2P) commitment suggests that a state might lawfully violate Article 2(4) of the UN Charter when acting on its obligation to prevent genocide under the Genocide Convention. R2P is based on three pillars: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.[75] However, in practice, only its second pillar—intervening militarily in a state's territory contrary to *jus ad bellum* rules to

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[74] Juan Pablo Pérez-León Acevedo, "The Close Relationship between Serious Human Rights Violations and Crimes against Humanity: International Criminalization of Serious Abuses", *Anuario Mexicano de Derecho Internacional* 17 (2016): 145-186.

[75] Ramesh Thakur and Thomas G. Weiss, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics* (Londres: Routledge, 2011), 45-52. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution Press, 2008), 112. Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009), 74.

prevent international crimes, including genocide,—has been invoked.[76] The application of R2P's second pillar during armed conflicts in Kosovo, Iraq, and Libya has shown that justifying unilateral military interventions for the protection of civilian populations from massive atrocities, such as genocide, can sometimes serve as a mere pretext for externally imposing a regime change.[77]

The allegations of genocides during the War in Ukraine and the War in Gaza shed new lights on the interplay between the material application of the Genocide Convention and the rules of *jus ad bellum*, *jus in bello* and IHRL.

In its order for preliminary measures in the case of the War in Ukraine, the Court noted that "it is doubtful" that the Genocide Convention authorizes the unilateral use of force on the territory of a state to prevent and punish the alleged commission of a crime of genocide. According to the Court, it is the right of Ukraine not to be subjected to military operations for these purposes.[78] Therefore, the Court clarified the relationship between states obligation to prevent genocide and their responsibility to observe the *jus ad bellum* rules. The Court determined that the obligation to prevent genocide does not constitute an exception to the prohibition against committing acts of aggression. In other words, the Court declined to endorse the legality of R2P's second pillar—military intervention—in cases of genocide. This might be due to the dangers of political instrumentation of R2P in the case of the conflict between Russia and Ukraine. As Russia has not provided reliable evidence regarding the commission of genocide by Ukraine in the Donbass region, its R2P arguments could feed interventionist instincts. It can be argued that it is for this reason, that the ICJ considered that "it is doubtful" that unilateral military action by Russia can be justified by the need to protect the citizens of Ukraine from barbaric acts committed against them. In the case of the armed conflict between Russia and Ukraine, where no genocide has been committed by either of the belligerent states, this could bring a positive outcome. However, it could be problematic to

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[76] J. H. Sabine and M. W. Jennifer, eds., *The Responsibility to Protect and International Law* (Leiden: Brill Nijhoff, 2012), 85-90.

[77] Virdzhiniya Petrova Georgieva, reseña de *The UN, Peace and Security: From Collective Security to R2P*, de Ramesh Thakur, *Anuario Mexicano de Derecho Internacional* 19 (2019): 645-652.

[78] International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, 60.

close the door to an invocation of the R2P during armed conflicts that do suppose the commission or a high risk of commission of genocide. In the light of the R2P, the legacy of the Rwandan genocide shows the risks of being simple "spectators" of the perpetration of the "crime of all crimes", while obeying the *jus ad bellum* rules.

The interaction between genocide, IHL and IHRL was examined in the ICJ's interim measures orders in the South Africa vs. Israel case, and it will need to be further addressed in its decision on the merits. First, in its presentation to the ICJ on January 12, 2024, Israel countered South Africa's genocide allegations by emphasizing its adherence to IHL. Israel argued that its compliance with the mandates of IHL precludes the possibility of committing genocide.[79] The Court will need to answer to this argument in the merits stage of the case, and it might consider that compliance with IHL does not necessarily preclude the commission of genocide. One might question how it is possible for hostilities conducted in accordance with IHL to still result in genocide. The explanation lies in the fact that IHL is not entirely absolute in its protection of civilians, who are often the targets of genocidal acts. While IHL affords protection to civilians, it does not render all civilian harm or fatalities automatically unlawful. Rather, such harm is considered permissible when it is an unintended consequence of attacks that adhere to IHL. These attacks must comply with the IHL principles of military necessity, distinction, proportionality, and precaution. Nonetheless, even in adherence to these principles, a state's lawful military campaign under these principles can lead to the destruction of civilian infrastructure and result in significant civilian casualties, encompassing both fatalities and 'serious bodily harm.' Furthermore, a state's military campaign might create severe shortages of food, water, and electricity in areas where surviving civilians reside. These adverse 'conditions of life' are likely to cause further death or injury. If the civilians belong to a 'national' or 'ethnical' group, then they could be considered a victim of genocide.[80]

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[79] International Court of Justice, "Conclusion of the Public Hearings Held on Thursday 11 and Friday 12 January 2024", comunicado de prensa no. 2024/4, 12 de enero de 2024, https://www.icj-cij.org/node/203425.

[80] Gabor Rona, "Can Armed Attacks That Comply With IHL Nonetheless Constitute Genocide?", *Lawfare* (blog), 22 de enero de 2024, https://www.lawfaremedia.org/article/can-armed-attacks-that-comply-with-ihl-nonetheless-constitute-genocide.

On the opposite, as mentioned before, the commission of genocide can include concomitant violations of IHL. While the ICJ's jurisdiction in *South Africa v. Israel* is confined to determining Israel's responsibility for purported violations of the Genocide Convention, this does not preclude consideration of Israel's adherence to IHL in resolving the merits of the genocide dispute. In Croatia v. Serbia, the Court acknowledged that IHL rules "might be relevant" in judging whether conduct constitutes genocidal acts under Article II of the Genocide Convention. However, that case primarily focused on the relationship between systematic IHL violations and the *actus reus* of genocide. In South Africa v. Israel, the emphasis will be on whether systematic IHL violations imply the *mens rea* of genocide. Although similar arguments were unsuccessful in ICJ cases involving the former Yugoslavia, it is likely that South Africa will urge the Court to link Israel's alleged IHL noncompliance with genocidal intent. This argument could face opposition, as some judges might perceive the Genocide Convention and IHL as distinct legal frameworks and believe that evaluating Israel's IHL compliance extends beyond the Court's mandate under Article IX of the Genocide Convention. Nonetheless, dismissing the relevance of a consistent pattern of IHL violations to genocidal intent would be misguided, as it falsely assumes that a government's policies cannot simultaneously be genocidal and counterinsurgent.[81] Therefore, the Court might be led to materially apply IHL rules to demonstrate Israel's *mens rea*.

This is the position defended by Amnesty International in its recent report on the commission of genocide in Gaza. According to the NGO, during the nine-month review period, from October 7, 2023, to early July 2024, Israel's military operations in Gaza, many of which were unlawful, resulted in significant Palestinian casualties and widespread destruction of homes, essential infrastructure, and cultural and religious sites—all on an unprecedented scale and pace. Israel has defended many of its actions by citing the presence of tunnels, Hamas members, and other military objectives within residential areas. However, Amnesty International identified a pattern of direct attacks on civilians without evident military targets, indiscriminate attacks, and intentional damage to cultural and religious sites without apparent military necessity. Therefore, according to Amnesty

[81] Michael A. Becker, "Crisis in Gaza: South Africa v. Israel at the International Court of Justice (or the Unbearable Lightness of Provisional Measures)", *Melbourne Journal of International Law* 25, no. 2 (2024): 182, [2024] MelbJlIntLaw 9.

International, Israel deliberately imposed living conditions on Palestinians in Gaza aimed at their physical destruction. Additionally, Israel committed other unlawful acts, such as incommunicado detention, torture, and other forms of ill-treatment. The scale and scope of the attacks, the broad range of civilian victims spanning all ages and family structures, the repeated destructive actions, and the systematic commission of other culpable acts targeting the same group collectively suggest genocidal intent when viewed in conjunction with other factors.[82]

5. Concluding remarks

Genocide, as a grave crime, does not occur in isolation but within environments marked by intense political polarization that often coincide with armed conflicts. To suggest that the ICJ should ignore genocide allegations during wartime would fundamentally undermine its mandate under the 1948 Genocide Convention. Similarly, arguing that the Court should refrain from examining violations of *jus ad bellum*, *jus in bello*, and IHRL within armed conflicts, merely because they arise alongside genocide allegations, would further weaken its duty to prevent and sanction wartime atrocities. Were the Court to reject cases addressing state responsibility for genocide during war or vice versa, it would not only damage its credibility and universal role but also exacerbate concerns regarding the selective application of international law.

Even amidst challenges in distinguishing between state responsibilities for war and genocide, and navigating the related legal frameworks, the Court cannot shirk its judicial duties concerning both war and genocide. While the Court's judicial function may have limited power over halting genocide or addressing widespread human rights violations amid armed conflicts, its symbolic and normative influence is profound.

In conflicts such as those in Gaza and Ukraine, expecting that a judicial body composed of 15 individuals could compel major powers such as Russia or the U.S., Israel's key ally, to cease war or genocide is politically unrealistic. Despite this limitation, the ICJ remains pivotal in shaping international legal norms. Its rulings extend beyond individual

[82] Amnesty International, *'You feel like you are subhuman': Israel's genocide against Palestinians in Gaza* (Londres: Amnesty International, 2024), 205, https://www.amnesty.org/en/wp-content/uploads/2024/12/MDE1586682024ENGLISH.pdf , p. 205

disputes, contributing to the development of international law that can constrain sovereign state actions globally. The ICJ, as the United Nations' main judicial body, upholds the supremacy of international law and promotes fundamental principles of the international legal order, playing a crucial role in the "humanization" of international law.

Thus, the ICJ's involvement in cases of genocide during war underscores the law's relevance amid widespread human rights violations. Its decisions carry symbolic weight, fostering global opposition to war and genocide while increasing political pressure on governments to uphold international community values. Third-party interventions in ICJ cases concerning the conflicts in Ukraine and Gaza highlight the symbolic power of its decisions, potentially shifting perceptions of justice as rendered by the ICJ in conflict cases involving genocide. Historically rare, these interventions have increased significantly, indicating a shift towards viewing the ICJ as a "World Court" rather than merely an arbiter of state disputes whenever the commission of genocide during armed conflicts is at issue. For instance, the unprecedented admission of interventions from 33 third-party states in the Ukraine-Russia dispute highlights this evolution. By January 2026, at least 13 states had filed formal interventions in the Gaza conflict case, underscoring a global consciousness compelled by these issues.

> Hence, upcoming resolutions on the merits of disputes between Ukraine and Russia, and South Africa and Israel, offer crucial opportunities to clarify the interplay between state responsibilities in war and genocide. This clarity would enable the Court to affirm its neutrality in political power dynamics and its commitment to its deeply humanistic judicial role. The Court is expected to protect innocent civilians from mass atrocities, especially with compelling evidence of such risks. International law exists to prevent these atrocities, as they fundamentally contravene civilization itself. No war can morally justify genocide, nor vice versa, as both have inflicted "untold sorrow to mankind".

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