



**University of El Oued
Faculty of law and political sciences
Department of law**

**The jurisdiction of the International Court of Justice in
Interpreting and Applying the Convention on the Prevention and
Punishment Of the Crime of Genocide**

**Dissertation Submitted in Partial Fulfilment of the
Requirements for Master's Degree in Judicial law**

Prepared by:

KASMI Rayane

Board of Examiners:

Dr. HOUBA Abd El kader	President	University of El-Oued
Dr. LABIDI Lazhar	Supervisor	University of El-Oued
Dr.ZENATI Mohammed Said	Examiner	University of El-Oued

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Dedication

I dedicate this humble work to:

To my beloved mother,

Your selfless love, sacrifices and untiring support have been the cornerstones on the path of my life.

This work is a modest gift to thank you for everything you have done and continue doing.

Thank you for having faith in me at times when I doubted myself

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List of Abbreviations and Acronyms

ICJ	The International Court of Justice
ICC	International Criminal Court
UN	United Nations
ICTY	The International Criminal Tribunal for the former Yugoslavia
ICTR	The International Criminal Tribunal for Rwanda
UNSC	the United Nations Security Council
IHL	International Humanitarian Law
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

Introduction

Genocide remains the most detested crime against international criminal law that threatens the foundations of the elementary principles of the international legal system. Enshrined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the crime is determined by specific acts done with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. Although the Convention established a clear normative framework, its practical application in complex armed conflicts still presents far-reaching legal and political challenges. The International Court of Justice (ICJ), as the chief judicial organ of the United Nations, plays a central role in interpreting and applying the Convention, particularly in determining state responsibility for acts of genocide.

In the contemporary period, the move made by the Republic of South Africa against the State of Israel before the ICJ in December 2023 marks a milestone in the development of international legal accountability. South Africa has charged Israel's military activities in the Gaza Strip, particularly after the October 7, 2023 "Al-Aqsa Flood" operation, as amounting to genocide against the Palestinian people. This case poses complex questions at the intersection of state self-defense, international humanitarian law, and the international law requirements for the proof of genocide. The essence of this thesis is the question: **To what extent does the legal framework of genocide support international jurisdiction, as seen in South Africa's case against Israel before the ICJ?** The core issue branches out into a series of questions that are represented in:

1. What are the elements of the crime of genocide?
2. How does the International Criminal Court exercise jurisdiction over genocide crimes, and what procedural mechanisms are involved in prosecuting perpetrators?
3. What specific legal requests and provisional measures has South Africa submitted to the ICJ in its case against Israel?
4. What are the possible legal and political outcomes of the *South Africa v. Israel* case, including implications of potential ICC arrest warrants for Israeli leaders?

The significance of this research lies in its contribution to the emerging debate around state responsibility and enforcement of international norms in the context

of mass atrocity. The thesis not only addresses the legal merits of the case of South Africa but also addresses the broader implications for the international legal order, e.g., the efficacy of the ICJ in handling politically sensitive and high-stakes cases involving allegations of genocide.

During the course of this research, several challenges arose that affected both the breadth and intensity of the study. Perhaps the most significant challenge was restricted access to primary legal sources and confidential records relating to the South Africa v. Israel case, considering that the proceedings before the International Court of Justice (ICJ) are still in progress. This restricted the ability to fully review the evidentiary submissions and procedural details, and required use of publicly accessible documents such as ICJ orders, press statements, and government releases. Another key challenge was the highly politicized and sensitive nature of the subject matter itself, which necessitated a sensitive and objective legal treatment to avoid bias and ensure academic objectivity. Besides, the dynamic character of the legal proceedings posed challenges to maintaining analysis in time since continuous developments, submissions, and applications for interim relief continued emerging as the research was being carried out. The research also faced the challenge of scarcity of precedent because of the rarity of genocide cases against democratic states or states with significant geopolitical power, thus posing difficulty in setting direct comparisons from precedent international jurisprudence. Finally, the complexities of the language of international law, especially in exploring the intersection between genocide law and international humanitarian law across different languages and legal traditions, required exact interpretation to guarantee doctrinal consistency. In spite of these limitations, the research was strictly based on legal methodology and aligned with scholarship throughout the thesis.

This study adheres to the descriptive-analytical method as the most appropriate means of examining the crime of genocide in terms of its definition, evolution in law, and constitutive factors, with special reference to the proceedings of prosecuting its perpetrators before international tribunals, especially the International Criminal Court (ICC). The study analyzes the pertinent international law texts, with precedence given to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1998 Rome Statute of the ICC, for the purpose of ascertaining legal loopholes that hinder proper implementation of these texts in achieving global criminal justice. It also investigates the extent to

which states implement their responsibilities under these instruments in line with relevant judicial practice.

The study also relies on the comparative method as an essential component of its methodology, particularly in analyzing the key differences between the crime of genocide and other international crimes, such as crimes against humanity, war crimes, and the crime of aggression. It is this method that is utilized to highlight the particular legal nature of genocide, i.e., the requirement of a special intent, the intent to destroy, in whole or in part, a protected group, which differentiates it from other international crimes. This distinction has resulted in the development of specialized legal treatment of genocide under international criminal law and emphasizes the specific challenges posed in proving genocidal intent and prosecuting the crime before the courts of international jurisdictions.

The selection of this subject was prompted by personal and intellectual motives. Personally, as a Muslim and an Arab, it is my moral and ethical responsibility to highlight the plight of the Palestinian people, and particularly in the Gaza Strip. The existing humanitarian emergency and widespread civilian agony that stem from conflict are very personal issues for me as a student of the law, and as an individual whose own sense of identity is inextricably bound to the area. It is my view that it is both a moral and an academic imperative to seek solutions like these through the instrumentality of the law and to pursue one that supports justice, accountability, and human dignity. This realization forced me to find out how international law responds to allegations of genocide and whether or not the current bodies of law can address such egregious violations. From a subject-matter perspective, the case of *South Africa v. Israel* is an unusual and timely one where it is possible to critically examine the practical application of the Genocide Convention and the jurisdiction of the International Court of Justice to rule on inter-state disputes involving mass atrocities. The case also raises complex questions about the validity of defenses of self-defense, the burden of proof on genocidal intent, and the limits of international legal responsibility in politically volatile circumstances. This topic, thus, not only resonates with my academic interest in international criminal law but also finds expression in my personal interest in promoting the cause of justice for the oppressed masses through scholarship in law.

Through comparative analysis, the study finds areas of convergence and divergence between the worst international crimes and accounts for why there

was a clear international treaty on the crime of genocide. This shows its seriousness in international law and serves as a pointer to the imperative need for more effective legal and judicial tools for the elimination of genocide and bringing about accountability for perpetrators of such crime.

The thesis is divided into two main chapters, each including a number of analytical sections:

- Chapter One lays the foundation by examining the law of the crime of genocide and the jurisdiction of the Court. It discusses the definition of genocide in law, its elements (legal, material, mental, and international), and the procedural mechanisms through which the ICJ addresses claims under the Genocide Convention. The chapter establishes the theoretical and legal basis for a comprehension of the role of the Court in addressing claims of state-perpetrated genocide.
- Chapter Two features a detailed case study of the ICJ's use of South Africa before the court, where Israel is faulted for performing genocide against Palestinians in Gaza. In this chapter, it starts to analyze if the self-defense by Israel is justified enough to meet international law provisions on prerequisites that justify using force. It then analyzes the elements of genocide as contended in South Africa's case, considers the ICJ's orders for provisional measures, and discusses the legal and political dimensions of the case. The chapter concludes with a reflection on the current status of proceedings and potential future developments.

Finally, this thesis endeavours to provide an integrated legal analysis of the South Africa v. Israel case in respect of the crime of genocide. It contributes towards increased knowledge about the way international law comes to define, react to, and seek to deter genocide, and how international courts of justice strive to overcome the legal and political complexities of hearing such charges in real time.

Chapter 1:
**The ICJ's Jurisdiction in Applying the Genocide
Convention**

Section One: The concept of genocide

Polish-Jewish lawyer Raphael Lemkin was the first to introduce the word "genocide" to describe actions that aimed to destroy the entire groups of people. The word is derived from two roots: the Greek word "genos", which means the breed or tribe, and the Latin word "coupus", which means murder. But the words aimed at the words in response to the crimes committed by the Nazi regime during World War II, especially against the Jews and other minorities. His spokesman and scholars work in the work with scholars and adopted a convention from 1948, a significant role in the crime of the genocide, which is often referred to as a mass conference. But Lemkin defined ¹the massacre as the planned destruction of a national, ethnic, racial or religious group, not necessarily only at direct attack, but through coordinated works aimed at the necessary basis for group life. He explained that the massacre includes the work to destroy the group's political, social, cultural, religious and economic structures. The purpose of these tasks is to eliminate security, personal freedom and even the spirit of the physical existence of the members. It is important that Lemkin emphasized that the massacre is not a crime against such individuals, but against individuals as members of a specific group. Therefore, the crime is directed as a collective unit towards the group, making the group a primary victim. Although the definition of Lemkin was closely associated with the atrocities in the Holocaust, learned much is considered a universal definition that applies to all cases of genocide regardless of historical context. Other scholars are built on the basis of Lemkin. For example, Barbara Harf defined the massacre as systematic and bureaucratic ²destruction of innocent population of state structures. Their definition emphasizes the role of state institutions in organizing and performing genocide polic³y. Likewise, Professor Nabil Ahmed Helmy defined genocide as deliberate killing of a group having

¹ United Nations, *Definitions of Genocide and Related Crimes*, United Nations Office on Genocide Prevention and the Responsibility to Protect, accessed June 2, 2025, <https://www.un.org/en/genocide-prevention/definition>.

² McDougall, Carrie. "When Law and Reality Clash—The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression." *International Criminal Law Review* 7, no. 2–3 (January 1, 2007): 277–317.

³ Dar Al-Fikr Al-Arabi. *Encyclopedia of International Criminal Law: International Crimes – Genocide, Crimes Against Humanity, and War Crimes*, 45–185. Beirut, Lebanon: Dar Al-Fikr Al-Arabi, 2008.

recognizable features, including race, religion, physical means or political beliefs . Genocide, he pointed out, is frequently motivated by efforts to eliminate competing ideologies or minority identities. In contrast, international legal instruments such as the 1948 Genocide Convention and the Rome Statute of the International Criminal Court offer more comprehensive frameworks, listing explicit acts (e.g., killing, causing serious harm, preventing births) and linking them to the intent to destroy protected groups in whole or in part.

Subsection One: The Legal Definition and Characteristics of the Crime of Genocide

1. The Legal Definition

Although important contributions have been made by national and regional courts regarding the crime of genocide, it was not until the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the founding statutes of the international criminal tribunals established post–World War II that the crime was internationally codified. What forms the legal development of genocide must study its emergence as a threat to international peace and security up until the establishment of a permanent ICC.⁴

First Branch: The Definition of Genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide

Prior to the 1948 Massacre conference, the massacre was not classified as a⁵ separate international crime. It was considered a form of crime against humanity. However, rising international requirements emphasized the need to emphasize genocide's gravity to submit to a resolution to countries such as Cuba, India and Panama and to counteract it as an independent crime. As a result, the UN General Assembly released the resolution number 96 on December 11, 1946, recognized the massacre as the rights of the entire human groups, which exist and violate universal moral principles and values of the UN. Following this resolution, the

⁴ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*.

⁵ Dar Al-Fikr Al-Arabi. *Encyclopedia of International Criminal Law: International Crimes – Genocide, Crimes Against Humanity, and War Crimes*, 45–185. Beirut, Lebanon: Dar Al-Fikr Al-Arabi, 2008.

Economic and Social Council was awarded to establish a study on the massacre and prepare a legal conference. The Massacre conference was adopted by⁶Resolution 260 in the General Assembly on December 9, 1948. Conference, consisting of 19 articles, gave criminal genocide in article I, and a formal definition in article II. According to Article II:

"In the present Convention, 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.⁷

Second Branch: The Definition of Genocide in the Founding Statutes of International Criminal Tribunals

After World War II, a requirement for criminal law at an international level emerged to punish the war criminals. Tribunals of the military were established, e.g., the Nurnberg and Tokyo Tribunals. The Nurnberg Military Tribunal was created in 1945 under the London Agreement in order to try individuals for atrocities of Hitler committed against Jews as well as minorities. The Board was established in order to tackle these atrocities but they did not classify them as massacres.

The Tokyo War Crimes Tribunal was established in 1946 to prosecute Japanese World War II war criminals. The Tokyo Charter defined crimes over which the Tribunal exercised jurisdiction and, among those, included crimes against peace, war crimes, and crimes against humanity. Persecution on political or national

⁶ Al-Ashaal, Ahmed. *International Criminal Law and Its Applications*. 1st ed., 60–120. Cairo, Egypt: Dar Al-Nahda Al-Arabia, 2012.

⁷ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. December 9, 1948. United Nations Treaty Series, vol. 78, p. 277.

grounds as such was a crime against humanity and was prosecuted as a crime against humanity.

Genocide was not defined or established as an independent international crime aside from in relation to other crimes until the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Ad hoc international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both applied the 1948 Convention definition of genocide.

The 1948 Convention, ICTY and ICTR⁸ laws, and the Rome Statute all characterize genocide as one or more acts done with intent to destroy a national, ethnic, racial, or religious group. However, the 1948 Convention, ICTY and ICTR laws, and the Rome Statute establish genocide as an independent international crime, different from the earlier presumptions that included it in crimes against⁹ humanity. This identification of genocide as a distinct crime from crimes against humanity is a landmark in international humanitarian law.

2. Characteristics of the Crime of Genocide

Given that genocide is one of the most serious crimes against Article 5 of the International Criminal Court Statute, it carries a package of characteristics making it simple to apprehend and extradite suspects, prepare them for trial and appropriate punishment without any means of escape. Given its importance, we will examine the most salient aspects of this crime, including the withholding of immunity privileges for the perpetrators of international crimes , the inapplicability of the statute of limitations, extraditability of the perpetrators of genocide, universal jurisdiction of the crime of genocide , and finally, withholding amnesty for genocide .

a) Exclusion of Immunity Privileges for Perpetrators of International Crimes

⁸ International Criminal Tribunal for Rwanda (ICTR). *Statute of the International Criminal Tribunal for Rwanda*. Adopted by Security Council Resolution 955 (1994), U.N. Doc. S/RES/955 (1994). Accessed June 2, 2025. <https://unictr.irmct.org/en/documents/statute>.

⁹ Schabas, William A. *Genocide in International Law: The Crime of Crimes*. 2nd ed. Cambridge: Cambridge University Press, 2009.

The immunity of presidents and high government officials from prosecution remains a debated issue, particularly when they face charges under internal or international law. The most significant argument concerns whether to respect their immunity for the sake of protecting state sovereignty and international relations or to waive it in order not to resort to impunity and ensure accountability. The International Court of Justice (ICJ) has ruled on the issue in this regard, most recently in the case of *Djibouti v. France*, where the ICJ held summoning a sitting foreign head of state who enjoyed immunity was against international law. However, international criminal justice is inclined towards accountability rather than immunity, especially where serious international crimes are involved. Immunity cannot absolve officials from criminal liability for offenses such as genocide, either in their personal or official capacity. This principle is reasserted in ad hoc international criminal tribunal charters, where the non-recognition doctrine of immunity prohibits its use as a defense or mitigating factor.¹⁰

b) The Non-Applicability of Statutes of Limitations to the Crime of Genocide

The statute of limitations doctrine in domestic law is reasonable and just, as time tends to cloud the elements of a crime, making it harder to prove a suspect's actions. The doctrine is typically founded on the idea of giving the criminal the chance to reform and reintegrate into society. However, in international criminal law, the charters of the International Military Tribunals for Tokyo and Nuremberg did not include any mention of limitation periods, meaning crimes like genocide were not subject to any time limit¹¹. This judicial stance shifted following the UN General Assembly Resolution No. 2391 endorsing the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The Convention emphasized that the gravity of these crimes makes them inappropriate to make subject to national law on statute of limitations applicable to ordinary crime. The Rome Statute of the International Criminal Court made a major advance in this regard by explicitly stating in Article 29 that crimes within the jurisdiction of the Court shall not be subject to any statute of

¹⁰ International Court of Justice (ICJ), *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 3 (2008).

¹¹ Schabas, William A. *Genocide in International Law: The Crime of Crimes*. 2nd ed. Cambridge: Cambridge University Press, 2009.

limitations. This inclusion reflects the seriousness and exceptional nature of genocide and other international crimes, reaffirming the principle that no passage of time can shelter offenders from prosecution.

c) The Possibility of Extradition of Criminals Committing Genocide

Extradition is one of the most significant international legal procedures whereby an accused or convicted individual is handed over by one state to another for trial or to serve a sentence. It is at the heart of international cooperation on crime prevention and suppression. Extradition has been made possible by the United Nations through awareness-raising promotional activities and by organizing Congresses on Crime Prevention and Offender Treatment¹². The principle of extradition is well established in international law, as seen in fundamental treaties such as the Versailles Treaty (1919), the Geneva Conventions (1949), and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It is the UN General Assembly that has made recommendations urging states to extradite individuals who perpetrate international crimes within their jurisdiction, resulting in treaties like the 1948 Genocide Convention and the 1967 Declaration on Regional Refugee Protection. Furthermore, the International Law Commission has reaffirmed the importance of extradition for the prosecution of crimes against peace and security, including genocide, and has encouraged cooperation with the International Criminal Court for the purpose of enabling arrest and extradition under the Rome Statute.

d) Universal Jurisdiction for the Punishment of Genocide Crimes

Genocide, as a serious crime against humanity, goes beyond national boundaries and threatens international security and human rights. The principle of universal jurisdiction under international criminal law is crucial for holding perpetrators accountable, regardless of their nationality or victim identification. This principle¹³ derogates from traditional territoriality and personality principles, which limit a state's jurisdiction to acts committed within its territory. Universal jurisdiction allows any state to prosecute individuals accused of committing genocide, even if the offense took place outside its territorial limits and the accused individuals have no connection to the prosecuting state. This mechanism demonstrates the

¹² International Law Commission. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*. United Nations, 2001.

¹³ Schabas, William A. *Genocide in International Law: The Crime of Crimes*. 2nd ed. Cambridge: Cambridge University Press, 2009.

international community's will to prevent impunity for genocide and ensures victim rights are upheld. Ad hoc international criminal tribunals have vindicated the principle of universal jurisdiction¹⁴, as seen in the Serbian "Ta dić" case. The universal jurisdiction doctrine also contributes to global criminal justice through cooperation among states in tracking suspected criminals and refusing immunity for immunity or incompatibility with their own laws. However, the Rome Statute of the International Criminal Court does not explicitly permit pardon to eliminate penalties for international crimes, including genocide.

e) Excluding Amnesty from Application to the Crime of Genocide

In Algerian law¹⁵, a pardon is a presidential act that exempts a convicted individual from serving all or part of their sentence after a final judgment. However, in cases of genocide, such a pardon is not permissible under international law. Genocide, as a grave international crime, cannot be subject to national pardons or amnesties. Even when national courts exercise jurisdiction, the International Criminal Court (ICC) retains the authority to reduce sentences only under strict conditions outlined in Article 110 of the Rome Statute¹⁶. Allowing pardons for genocide would undermine international justice, promote impunity, and risk encouraging future atrocities due to the seriousness of the crime's impact on humanity.

Subsection Two: Genocide and Its Legal Distinction from Other Crimes in International Criminal Law

Division 1: Distinguishing Elements from Crimes Against Humanity:

1. Definition of crimes against humanity:

¹⁴ International Law Commission. *Draft Code of Crimes Against the Peace and Security of Mankind, with Commentaries*. Yearbook of the International Law Commission, 1996, Vol. II, Part Two. Accessed June 2, 2025.

https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf.

¹⁵ Algeria. *The Algerian Penal Code*. Official Gazette of the People's Democratic Republic of Algeria, 2001.

¹⁶ International Criminal Court. *Rome Statute of the International Criminal Court*. United Nations, 1998.

The term "crime against humanity" is considered a relatively modern concept in international criminal law. This was clearly used in Article 6 of the Charter of Nurnberg Military Tribunal, which defined it:

“Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”¹⁷

Later, Article 5 of the Tokyo Military Tribunal Charter also mentioned crimes in the jurisdiction of the court, including crimes against humanity, and the word was largely in line with Article 6 of the Nurnberg Charter.

These courts were established to prosecute Nazis and their colleagues for crimes committed during World War II.

2.The difference between the crime of genocide and the crime against humanity:

Genocide and crimes against humanity are among the most serious international crimes and tend to overlap, particularly in early definitions such as the Nuremberg Charter. While both crimes target civilian populations, genocide is characterized by intent to destroy a national, ethnic, racial, or religious group since the 1948 Genocide Convention defines it. This convention established genocide as a specific offence in the international law, defined its elements, and obliged states to prevent and punish it under the binding provisions.

Crimes against humanity in Article 7 of the Rome Statute have general intent and knowledge of a systemic or large-scale attack on civilians, typically perpetrated in the pursuit of state policy. Genocide, however, possesses a special intent (*dolus specialis*) to annihilate a protected group, and thus is narrower but more specific in scope.¹⁸

¹⁷ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations Treaty Series, vol. 78, p. 277, 1948.

¹⁸ Shaqir, I. D. *Universal Jurisdiction in Serious International Crimes*. Damascus: Dar Al-Fikr, 2020.

The material act perpetrated under both crimes overlaps in its acts —e.g., killing and inflicting severe harm—but genocide calls for the above acts to be done with intent against a group with an identity that is protected, whereas crimes against humanity do not require a group identity and are more encompassing of inhumane acts. The differentiating factors then lie in the required intent and the character of the target group.¹⁹

Division 2 :Distinguishing Elements from War Crimes:

1.Definition of War Crimes:

War crimes constitute serious breaches of international humanitarian law and are codified in Article 8 of the Statute of the International Criminal Court of 1998. They codify the legal principles codified in the Geneva Conventions of 12 August 1949, which were adopted to regulate the conduct of armed conflict and protect those not engaged in hostilities. Although war crimes are not specifically defined in the Geneva Conventions, they list grave breaches such as willful killing, torture, inhuman treatment, arbitrary detention, hostage-taking, and denial of a fair trial, among others ²⁰.

The Hague Convention²¹ of 1907 was another effort to legalize the war laws and enumerated violations by belligerents on enemy armed forces and civilians. The Rome Statute categorizes war crimes into various categories:

- a) Serious violations of the Geneva Conventions;
- b) Gross breaches of international humanitarian law and custom in international armed conflict;
- c) Breaches of Common Article 3 of the Geneva Conventions in non-international armed conflicts;
- d) Gross breaches of international law in non-international conflicts²².

²⁰ Geneva Conventions of 12 August 1949. International Committee of the Red Cross, 1949.

²¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. International Committee of the Red Cross, 1907.

²² United Nations. *Rome Statute of the International Criminal Court*. UN Doc. A/CONF.183/9, 1998.

The above legal instruments collectively provide the basis for prosecution of war crimes under modern international criminal law.

2.The difference between the crime of genocide and the War Crimes:

By mentioning Article 6 of the Rome Act - relating to the crime of genocide - and Article 8, which deals with war crimes, with convention on the prevention of crime in the massacre in 1948 and the convention of punishment, we can clearly identify the main features of the crimes and highlight the significant differences between them.

In accordance with Article 1 of the Massacred Conference, the massacre is considered an international crime, whether committed in peace or wartime. In contrast, war is a ²³violation of crimes that arise only during armed conflicts, as classified under Article 8, sections (a), (b), (c) and (e).²⁴

The massacre includes a series of specific actions listed in Article 6 of the Rome Act, and these actions should target a national, ethnic, racial or religious group. For the establishment of a genocide, there should be a connection between the members of the group - whether it is religious, ethnic or nationally. The goal of crime is not only to aim to harm individuals as individuals, but to destroy the group an entire or partial. This is a big difference from war crimes, which is done under either fighter jets or citizens under international armed conflicts, and who usually affect the citizens regardless of their identity or membership in the group - just because they are neutral and not involved in enmity.²⁵

For genocide to be recognized, a special intent (also called *specific criminal intent*) must exist. This is clearly expressed in Article 6 of the Rome Statute, which states:

"With intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such..."

²⁴ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. December 9, 1948. United Nations Treaty Series, vol. 78, p. 277.

²⁵ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. International Committee of the Red Cross, 1907.

Conversely, war crimes do not require this level of legal responsibility for legal responsibility.

Finally, massacres and war crimes may appear to be the same, especially when both arise during the war. This can ask whether any actions should be classified as genocide or as war crimes. However, the necessary difference in the presence or absence of specific intentions to destroy a particular group, and in the nature of the target group - lies in the nature of the target group - whether only citizens of an enemy state, or targeted to their ethnicity, religion, nationality or race.²⁶

Division 3 : Distinguishing Elements from Crime of Aggression

1. Definition of Crime of Aggression:

The Rome Statute defines aggression as a crime against the International Criminal Court (ICC), but initially did not offer a precise definition. Legislative amendments and jurisdiction over this offense are subject to the UN Security Council, where they have ample discretion in terms of defining and prosecuting aggressive conduct. This imprecision has been used by major powers to escape culpability for aggression. Although the UN General Assembly endorsed a definition of aggression²⁷ in Resolution 3314, the Security Council never applied it. According to the resolution, aggression is defined as the use of armed force by a state against the sovereignty of another state, echoing Article 2(4) of the UN Charter. To ensure accountability for these crimes, what is needed is to give the ICC a distinct and independent mandate, breaking the Security Council monopoly and reinforcing international criminal justice.

2. The difference between the crime of genocide and the War Crimes:

The crime of the genocide comes under the jurisdiction of the International Criminal Court (ICC) in accordance with Article 5 (1) of the Rome Act. On the other hand, the crime of aggression, despite its international nature, is not yet complete in ICC's jurisdiction. The court may exercise jurisdiction on this offense following amendments to the Roma Act, which will be possible seven years after the admission of the law. This change should be in accordance with the UN

²⁶ United Nations. *Rome Statute of the International Criminal Court*. UN Doc. A/CONF.183/9, 1998.

²⁷ United Nations General Assembly. *Definition of Aggression*, Resolution 3314 (XXIX), 1974.

Charter, given that the UN Security Council in accordance with Chapter VII in the charter has primary rights over the aggression actions.

By investigating Article 6 of the Rome Act, the UN General Assembly resolution with the definition of aggression given in Article 1 of 74/3314, we can see that the genocide may occur in peace or time, while the international peace of the endanger. The massacre is made against ethnic, racial, religious or national groups, while aggression is carried out by a state or group of states, either directly or indirectly, through the use of the armed forces that violate the regional integrity or political freedom of the region to another state or state or thus violate the principles of common nations.²⁸

For the physical elements of both crimes, the actions that form a massacre are fully listed in the Rome Act, while the actions forming aggression are mentioned through an example instead of a special list.

In order to establish a genocide, a specific criminal intention must be - that is, all or partially intended to destroy a national, ethnic, racial or religious group. For offenses of aggression, the intentions of the aggressive state should be established - especially the deliberately targeted state (non) would want to harm sovereignty or freedom. If these elements in intentions are not proven, none of the crime can be established.²⁹

Section Two: the Legal structure of genocide

Genocide as an international crime is not unlike other crimes codified in domestic legal systems in that it consists of discrete elements. Where these elements are fulfilled, the legal basis of the crime is complete and punishment is warranted; if any one of these elements is absent, however, the crime may not be established

In addressing the offence in domestic law, it is generally recognized that there is a deep jurisprudential divide on the elements of crimes generally . Legal scholars are divided into two dominant schools of thought: both agree that a crime possesses a material and a moral element, but they differ with regards to the third

²⁸ El-Awa, Mohamed S. *International Criminal Law: International Crimes – Genocide, Crimes Against Humanity, and War Crimes*. 2nd ed., 85–140. Cairo, Egypt: Dar Al-Shorouk, 2010.

²⁹ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations Treaty Series, vol. 78, p. 277, 1948.

element the legal element. The latter school maintains the necessity of the inclusion of the legal element, whereas the former school is of the material and moral elements only.

Aside from these traditional elements, an international crime such as genocide is grounded on a fourth element: the international element, since such a crime is normally committed in the interest of the state or with its acquiescence.

This chapter examines the legal element (Subsection One), the material element (Subsection Two), the moral element (Subsection Three), and the international element (Subsection Four).

Subsection One :The Legal Element

Jurists have been in conflict for a long time regarding whether or not the legal element should be made one of the components of a crime. In one school of thought, excluding the legal element places individual rights and freedoms in jeopardy, rendering criminalization dependent on the will of the judiciary, which would be dangerous to promoting injustice. In the other school, the legal element is nothing more than the wording of the law that pronounces³⁰ the act a crime. Thus, it is less precise than an element, but it is not included in the offence's constitution. According to the rule "Nullum crimen, nulla poena sine lege" (no crime³¹ and no punishment except on the basis of a law), the judicial element in private law has to be a written clause.

But in international criminal law, it is different. Since international criminal law is largely customary and derives from the greater corpus of international law, the normative rule prescribing what act is an international crime need not be written. It is found in conventions, custom, or other recognised sources of international law.

In the case of genocide, its legal documents criminalizing it date back as far as its recognition as a distinct international crime by the 1948 Convention on the

³⁰ El-Awa, Mohamed S. *International Criminal Law: International Crimes – Genocide, Crimes Against Humanity, and War Crimes*. 2nd ed., 85–140. Cairo, Egypt: Dar Al-Shorouk, 2010.

³¹ *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 3, arts. 5–8, 25, 28.

Prevention and Punishment of the Crime of Genocide and further its inclusion in the Rome Statute of the International Criminal Court.³²

Division 1: The 1948 Genocide Convention³³

The term genocide was introduced for the first time in the 1948 Genocide Convention, following numerous efforts following the world wars to respond legally to atrocities and punish perpetrators. The evolution of the convention was done in two phases:

1. Pre-convention phase (1914–1945):

The world wars brought unprecedented human harm. In the aftermath of WWI, the Allied powers demanded the setting up of an international commission of inquiry at the 1919 Paris Peace Conference to prosecute German and Ottoman war criminals. The commission report of 1920 listed 895 individuals charged, including Ottoman officials who were charged with genocide against Armenians in 1915—though these actions were still referred to as "crimes against the laws of humanity."

2. Convention Adoption (1946–1948):

Atrocities committed during WWII, and especially those committed by Nazi atrocities, inspired further action. Although the Nuremberg Tribunal used the term "genocide," they convicted Nazi authorities under "crimes against humanity".

Panama, India, and Cuba came to the UN General Assembly with a request in 1946 that the crime of genocide be given consideration as an independent international law crime. It was passed unanimously without voting and yielded the 1948 Genocide Convention, which was prepared and accepted.

Division 2: The Rome Statute of the International Criminal Court

³² Hijazi, A. F. B. *International Criminal Law: An Analytical Study of the Sources of International Criminal Law and the Crimes of International Humanitarian Law*, 119–140. Dar Al-Nahda Al-Arabia, 2020.

³³ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, arts. I–IX.

International law has written and unwritten sources, yet due to the gravity of such a crime as genocide, it must be appropriately codified. Therefore, there have been several ad hoc tribunals:

The ICTY , established under UN³⁴ Security Council Resolution 827 to prosecute crimes in the former Yugoslavia, including genocide under Article 4 of its statute.

The ICTR , established by Resolution 955 to prosecute crimes committed in Rwanda³⁵—largely the genocide of the Tutsi—between January and December 1994.

These tribunals strengthened international consensus on the need for an independent permanent international criminal court, independent of the Security Council's political volition. This move was promoted by the Red Cross and the majority of international players.

Following extensive preparatory work, the Rome Statute was adopted in July 1998 by 120 states, thus establishing the International Criminal Court. Genocide was criminalized as one of the core crimes under Article 6.

It should be noted that the 1948 Convention and the Rome Statute, the two treaty-based legal instruments, constitute the legal basis of genocide in international law. However, unlike in domestic law, international criminal law permits reliance on customary law as a valid source of law. Hence, the legal provision criminalizing genocide need not always be written; it may also be founded on custom or general principles of law, widening the scope of application of the principle of legality.

Subsection Two: The Material Element :

The material element of the crime of genocide is a very important component of the crime that comprises a series of acts whose objective is the destruction of a protected group. In accordance with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the Rome Statute, the material element entails specified acts which are committed against

³⁴ United Nations Security Council. Resolution 827 (Establishing the International Criminal Tribunal for the former Yugoslavia), U.N. Doc. S/RES/827, 1993, paras. 1–6.

³⁵ United Nations Security Council. Resolution 955 (Establishing the International Criminal Tribunal for Rwanda), U.N. Doc. S/RES/955, 1994, paras. 1–5.

members of a group. These acts should be done with the intent to annihilate the group, as such, in whole or in part, which is genocidal.

Acts of Genocide

Both Article 6 of the Rome Statute and the 1948 Genocide Convention enumerate specific acts that constitute genocide. These acts are set out exhaustively, not exemplarily. Although additional acts have significant genocidal consequences, they were excluded during the drafting of the legal instruments due to specific reasons. Accordingly, this section addresses the acts that were agreed upon as amounting to genocide:

- A. Killing members of the group
- B. Inflicting serious bodily or mental injury
- C. Inflicting conditions aimed at destroying the group
- D. Compulsory policies to avoid births
- E. Forcing children from one group to another

A. Killing members of the group

The killing of individuals in a protected group is the material element of genocide for both the Genocide Convention and Article 6³⁶ of the Rome Statute. In comparison to ordinary murder, genocidal murder is defined by the requisite intent to annihilate the group, in whole or in part. The International Criminal Tribunal for Rwanda (ICTR) elucidated this in *Prosecutor v. Akayesu*³⁷, and it ruled that a single killing can constitute genocide if carried out with genocidal intent. The case set out that intent, and not extent of killing, is the decisive factor. The court emphasized that the murder of the Tutsis, even intermittent, was genocide because it was with a definite intention to eradicate the group.

B. Inflicting serious bodily or mental injury

The second material element of genocide is inflicting serious bodily or mental harm on members of a protected group under international law. These acts include torture, abuse, and other violence directed at severe physical or psychological

³⁶ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. U.N. Treaty Series, vol. 78, p. 277, 1948.

³⁷ International Criminal Tribunal for Rwanda (ICTR). *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, September 2, 1998.

suffering, though not necessarily life-threatening, that lead to the destruction of the group by impairing its members and general identity. Genocide Convention and Rome Statute have defined "serious bodily harm" as grievous physical harm and "mental harm" as psychological or emotional harm which seriously impacts the well-being of victims. In *Prosecutor v. Jelisić*³⁸, the International Criminal Tribunal for the former Yugoslavia held that systematic violence, threats, and forced evictions inflicted upon the Bosnian Muslim group constituted genocidal acts, hence affirming that harm short of physical destruction with a view to destroying the group constitutes the crime of genocide.³⁹

C. Inflicting conditions aimed at destroying the group

The third component of the crime is the intentional imposition of conditions aimed at physical destruction of the group. This encompasses acts of denying food, shelter, or medical care that can cause the slow death or destruction of members of a group. These acts are perhaps less conspicuous than killings or physical violence but no less lethal in intent.

Both the Rome Statute and the Genocide Convention recognize these conditions are to be created with the intent to destroy the group. Such things as systematic deprivation of resources, policies designed to starve people, or moving people to desolate climates forcefully are all genocide under this statute.

Example from Jurisprudence: In the case of *Prosecutor v. Krstić* (2001), the ICTY ruled that the imposition of conditions leading to the death of Bosnian Muslims in Srebrenica through forced displacement, starvation, and denial of access to medical care, as well as systematic mistreatment—amounted to an act of genocide. The court clarified that these conditions were intentionally created to bring about the physical destruction of the group.

D. Compulsory policies to avoid births

The fourth material act of genocide involves the application to a protected group of measures intended to prevent births within the group. These are forced abortion, coerced sterilization, and forbidden marriage, all aimed at preventing

³⁸ International Criminal Tribunal for the former Yugoslavia (ICTY). *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment, December 14, 1999.

³⁹ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. U.N. Treaty Series, vol. 78, p. 277, 1948.

the natural increase of the group and thus ensuring its physical destruction in the long term. These acts are criminalized by the Genocide Convention and the Rome Statute as they demonstrate the intent to eliminate the ability of the group to reproduce itself. In *Prosecutor v. Kunarac*⁴⁰, the International Criminal Tribunal for the former Yugoslavia ruled that forced abortions and sterilizations perpetrated against Bosnian Muslim women are genocidal acts due to their systematic intent to destroy the future presence of the group.

E. Forcing children from one group to another:

The fifth element of material destruction is the forced transfer of children from one group to another, which interferes with the continuity of the group as far as its identity and cultural heritage are concerned. It aims at the younger generation and attempts to annihilate the group's cultural and social ties by uprooting children from their communities and families.

The Genocide Convention and the Rome Statute⁴¹ consider this a genocidal act since it seeks the long-term destruction of a group by cutting its generational continuity and undermining its social cohesion.

Example from Jurisprudence: The ICTY in the *Prosecutor v. Krstić* (2001) case noted that there were instances of Bosnian Muslim children being forcibly transferred to Serb-controlled areas during the Srebrenica massacre. This forced displacement of children from their ethnic group was viewed as a contribution to the destruction of the Bosnian Muslim population.⁴²

F. Criminal contribution to the commission of genocide

Criminal participation, whether in domestic law or international criminal law, is the commission of a single crime by several perpetrators.

In order for criminal participation to be proven, two essential requirements must be fulfilled:

⁴⁰ International Criminal Tribunal for the former Yugoslavia (ICTY). *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1, Judgment, February 22, 2001.

⁴¹ International Criminal Court. *Rome Statute of the International Criminal Court*. 1998.

⁴² Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws, Analysis, and Proposals*. Attention Carnegie for a Pia International, 1944.

- a) Multiple Perpetrators: The international crime must be committed by more than one perpetrator.
- b) Unity of the Crime: This is achieved by the unity of the material and mental components of the crime by all offenders.
- c) Material Element: The offender aids the criminal result by performing a particular criminal act, with the conduct having a causal connection to the criminal outcome.
- d) Mental Element: A common intention must exist between the parties, where each works together with the others to bring about the criminal result.
- e) Article 25(d) of the Rome Statute reaffirms this consensus of intent in requiring participants to act "with a common purpose to commit such a crime or its attempt."

As soon as both these conditions are fulfilled, criminal participation is proved. As for special rules of criminal participation in genocide, we will study them in the given sequence:

- A. Complicity in Genocide
- B. Incitement to Commit Genocide
- C. Conspiracy to Commit Genocide

A. Complicity in Genocide

Article 25(a) of the Rome Statute⁴³ addresses complicity in international crimes and renders an individual criminally responsible if he/she acts⁴⁴ with another in committing the crime, regardless of the latter's degree of responsibility. Similarly, Article III(e) of the 1948 Genocide Convention criminalizes complicity in genocide.

⁴³ Rome Statute of the International Criminal Court, July 17, 1998, art. 25(3), 2187 U.N.T.S.

⁴⁴ Lemkin, Raphael. *Axis Rule in Occupied Europe: Laws, Analysis, and Proposals*. Attention Carnegie for a Pia International, 1944.

Under Article 42 of the Algerian Penal Code⁴⁵, an accomplice is that person who does not directly commit the offense but aids the offender(s) through preparatory acts, facilitation, or execution with complete awareness of what they are doing.

Complicity in genocide involves the assistance of a person, group, or state in committing genocide against a racial, ethnic, national, or religious group. It involves providing logistical support, arms, killing sites, or other support that contributes to the crime.

B. Incitement to Commit Genocide

Article 25(c) of the Rome Statute makes people criminally responsible for inciting crimes within the jurisdiction of the Court. In the case of genocide, Article 25(3)(e) includes direct and public incitement, as in Article III(c) of the Genocide Convention.

Definition of Incitement:

- Influencing a mentally normal and legally competent individual to commit a crime by affecting their will.
- Forming the notion of the crime in the mind of the perpetrator and compelling him to carry it out.

The Algerian Penal Code⁴⁶ (Articles 41 and 46) codifies the modes of incitation, such as bribery, threats, abuse of a position of authority, fraud and deceit.

Public and Direct Incitement involves media propaganda (newspaper, radio, television, posters) to spread hatred against specific groups. During the preparation of the Genocide Convention, some states proposed the listing of specific methods of propaganda, but it was not agreed upon in not wanting to narrow the scope since the character of media is evolving (e.g., multimedia today).

The Rome Statute directly and openly criminalizes incitement to genocide (Article 25(e)), emphasizing its seriousness in the context of free speech issues.

⁴⁶ *Algerian Penal Code*, arts. 41, 42, 46, 77–83, Official Gazette of the People’s Democratic Republic of Algeria, 2001.

This implies that the media cannot justify incitement under freedom of expression when it leads to genocide.

C. Conspiracy to Commit Genocide

While the Algerian Penal Code⁴⁷ (Articles 77–83) criminalizes conspiracy (i.e., plots against state authority), it doesn't define it as such. Article 78(3) states that conspiracy is when two or more people agree to commit a crime, even if the criminal result is not achieved.

In international law, conspiracy was first dealt with in the Nuremberg Trials because of the insistence of U.S. Justice Robert Jackson that planners of international crimes be prosecuted. The Nuremberg Charter criminalized conspiracy as a distinct crime, leading to convictions of WWII officials for conspiracy in crimes against humanity.

The Genocide Convention (Article III(b)) specifically criminalizes conspiracy to commit genocide, following Nuremberg's lead.

The Rome Statute (Article 25(3)(d)) indirectly criminalizes conspiracy by punishing contributions to a group acting with a common purpose to commit a crime, if only attempted. It requires intent, pre-arrangement, and awareness of the intended offence.

Example⁴⁸: The Rohingya genocide in Myanmar involved Buddhist extremists and military leaders conspiring to perpetrate massacres, with security forces supplying arms to execute the conspiracy.

Subsection Three: The Mental Element :

For there to be an international crime, physical acts are insufficient. There has to be a psychological or moral connection between the material conduct and the state of mind of the perpetrator. Such a connection is referred to as the mental

⁴⁸ United Nations Human Rights Council. *Case Study: Rohingya Persecution in Myanmar*. Geneva: United Nations, 2018.

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23824&LangID=E>.

element (mens rea), the internal awareness of the act within the mind of the perpetrator. It is the connection between the criminal act and the intention.⁴⁹

The mental aspect consists of the internal factors which correspond to material conduct. Genocide is an offense committed consciously in which the mental aspect consists of criminal intent. Genocide is one of the international offenses that requires both general and specific intent. Both of these components will be analyzed as follows: general intent (Section One) and specific intent (Section Two).

⁴⁹ Cryer, R., Friman, H., Robinson, D., & Wilmshurst, E. (2019). *An Introduction to International Criminal Law and Procedure* (4th ed.). Cambridge University Press.

1. General intent

In genocide, the mental element is constituted by general and specific intent. General intent is the awareness on the part of the perpetrator that his conduct—like killing, or inflicting serious bodily or mental harm—is directed against a group characterized by national, ethnic, racial, or religious characteristics. It also involves the intention on the part of the perpetrator to commit such acts⁵⁰. Thus, general intent has two components: knowledge, will .

a) The Element of Knowledge

Foreign and domestic crimes are both characterized by the criminal intent element of knowledge, that is, the actor being aware of the facts of the crime. For genocide, it is having knowledge that one's actions—killing or causing serious bodily harm to individuals—target a group by religion, ethnicity, nationality, or race and with the knowledge that such action results in the extermination of the group.⁵¹

Article 30⁵² of the Rome Statute provides that both will and knowledge are required in criminal responsibility. "Knowledge" means being aware of circumstances or likely consequences of behavior. The ICC is likely to infer knowledge from conduct, especially where it systematically attacks a group. Genocidal intent remains difficult to establish because it is intangible.

Article 32 allows exclusion of criminal responsibility in mistake of fact, provided it excludes the required mental element. Mistake of law is not generally a defense, but there are exceptions if the mistake prevents the formation of criminal intent or if the actor was performing an act in obedience to an order which he believed was lawful. Despite that, exceptions are limited in the case of genocide, because the crime is considered inherent in its illegality and ignorance regarding its illegality cannot justify the perpetrator.

⁵⁰ Gaeta, Paola, ed. *The UN Genocide Convention: A Commentary*. Oxford: Oxford University Press, 2009.

⁵¹ Al-Sarhan, Mohammad. *The Mental Element in International Crimes*. Amman: Dar Al-Thaqafa, 2016.

⁵² International Criminal Court. *Rome Statute of the International Criminal Court*. 1998. <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

b) The Will

For genocide to be committed, the perpetrator's will should be oriented towards executing the criminal act. That is, the perpetrator ought to have the will to execute acts that are illegal, for instance, killing people who belong to a group, inflicting physical or mental suffering, or subjecting the group to inhumane treatment of life. Genocide, being a crime of intent, requires that the will of the perpetrator be not only directed at the material acts (e.g., killing or wounding persons) but also directed at the outcome of the group's destruction.

This will is important for establishing culpability in international criminal law, so that perpetrators cannot escape responsibility by asserting that they were acting under duress. Since genocide is an intentional offense, the intent to destroy the group of the perpetrator must be unambiguous and devoid of coercion, since this would move the act out of the realm of criminality and into one of acceptable behavior.⁵³

2. Specific intent

Specific intent in genocide is hard to establish, as it requires proof of the conscious and deliberate intent of the perpetrator to destroy a specific group, in whole or in part. The intent typically needs to be inferred from the circumstances and context of the crime, along with the accused's actions. Unlike general intent, which can be inferred from the act itself, specific intent must be directly linked to the perpetrator's state of mind. International criminal tribunals, such as the International Criminal Court (ICC), employ evidence of patterns of conduct, words of the perpetrator, and the systematic nature of the attacks in order to prove specific intent. Direct evidence of the perpetrator's intentions may be scarce, and thus, circumstantial evidence becomes crucial in proving genocidal intent.⁵⁴ In addition, the prosecution must establish that the act was carried out with the specific intent to destroy the group. This can include, but is not necessarily limited to, acts of mass killing, causing serious bodily harm, or imposing conditions of life calculated to bring about the group's destruction. Even when the perpetrator does not express their intent, their actions—such as choosing a specific group for

⁵³ Lemkin, Raphael. *The Trial of Genocide: Origins and Development*. Translated by Ahmed Abdelsalam. Cairo: Dar Al-Shorouk, 2005.

destruction—provide crucial evidence. The issue of proving specific intent is more difficult where the acts done appear to be motivated by other reasons, for instance, political or economic gain. However, when the acts are committed on a widespread scale against a group characterized by national, ethnic, racial, or religious features and with intent to destroy or cause serious harm to that group, it becomes easier to establish the specific genocidal intent. To ascertain specific intent, the courts use most frequently the application of combined documentary evidence, testimony, and background under which the crime had been committed. Broad context concerning the war itself, who held the role within the chain of events involving the accused individual, as well as instructions issued to foster genocidal crimes are primarily among what guides establishment of intent.

Subsection Four: The International Element

International and domestic crimes share elements in common—legal, material, and mental—but the international element uniquely distinguishes international crimes, like genocide, from domestic crimes. Since both can be committed by individuals, identifying the law to apply hinges on understanding this international element.

1. Definition and the importance of the International Element

Definition: International element refers to a crime committed on the basis of the premeditated intent of a state, using its special means and capabilities. Even when carried out by individuals, if the act is done in the name of or with the consent of the state, it's regarded as international.⁵⁵ Importance: This element is essential in order to qualify an act as an international crime. Lack of this, despite the presence of other elements, renders the crime domestic. In the case of genocide, where this element exists, the act falls under ⁵⁶international jurisdiction, particularly that of the International Criminal Court (ICC).

2. Conditions for Assuming International Character

- a) State Participation or Approval: Genocide must be committed as part of a state plan or with its approval. This would include cases like those of

⁵⁵ Al-Qahwaji, Ahmad A. *International Criminal Law*. Beirut: The University Institution for Studies, 2004.

⁵⁶ Damgaard, Ciara. *Individual Criminal Responsibility for Core International Crimes: Selected Aspects*. Dordrecht: Springer, 2008.

Darfur, Myanmar, or against Palestinians, whether conducted by state officials or ordinary citizens.

- The ICC makes states accountable even if the perpetrators of genocide are not high-ranking officials.
 - Uniquely, genocide does not require the victims to be of another state; attacking a domestic group on the basis of ethnicity, religion, etc., still qualifies.
- b) Impact on Internationally Protected Interests: International crimes harm fundamental interests of the international community, i.e., human life and dignity.
- Genocide threatens humanity by attempting to destroy entire groups, violating the international right to life and existence.

The international dimension of genocide captures a wider legal reality that crosses national boundaries. It is defined by the scale of state involvement and the assault on groups of humans safeguarded by international law, warranting international criminal jurisdiction and responsibility.

Section three : International Court of Justice and its jurisdiction in international disputes

Subsection one : The Jurisdiction of the International Court of Justice

The state is the only international legal person entitled to be a party in proceedings before the International Court of Justice (ICJ). The above rule is specifically embodied in Article 34(1) of the ICJ Statute, where it is provided that "Only states may be parties in cases before the Court"⁵⁷. This exception is further determined by Articles 62 and 63 of the Statute, under which the power of intervention or interpretation is reserved exclusively for states, but no other international entities are mentioned.⁵⁸

Thus, the jurisdiction of the ICJ extends only to states and not to other subjects of international law, even when such subjects are expressly and directly referred

⁵⁷ **United Nations.** *Statute of the International Court of Justice*. San Francisco: United Nations, 1945.

⁵⁸ Damgaard, Ciara. *Individual Criminal Responsibility for Core International Crimes: Selected Aspects*. Dordrecht: Springer, 2008.

to by international law rules. The Court is given wide latitude to ascertain the legal status of parties to a case so as to make them conform to the internationally accepted criteria of "statehood," including full internal sovereignty and absolute independence in foreign affairs. This test excludes constituent units of federal states because they cannot exercise external powers of law, like the capacity to sue in international courts of justice ⁵⁹.

The same limitation applies to trusteeship systems' regions, which have no right individually to bring action against the ICJ. This is reserved to the administering state, and its duty by Article 76 of the UN Charter is to protect the peoples' interests under such regions⁶⁰.

According to Article 35 of the ICJ Statute, there are three kinds of states which may be parties in cases before the Court:

- United Nations Member States (under Article 93(1) of the Charter);
- States that are not UN members;
- States that are not UN members and not parties to the ICJ Statute, which may be allowed to take part on terms to be laid down by the Security Council .

1. Voluntary Jurisdiction

Generally, the ICJ exercises voluntary jurisdiction, where the Court can only adjudicate a dispute if all the parties agree. In the absence of such mutual agreement, the Court cannot adjudicate the case. This is reaffirmed in Article 95 of the UN Charter, where it is stated that UN members can refer their disputes to other tribunals by mutual agreement.

Article 36(1) of the Statute of the ICJ broadens the jurisdiction of the Court to include:

- All cases presented to it by the parties,
- Apart from issues of a juridical nature defined generally in the UN Charter or in international treaties and agreements.

2. Compulsory Jurisdiction

⁵⁹ Shaw, Malcolm N. *International Law*. 8th ed. Cambridge: Cambridge University Press, 2017.

⁶⁰ United Nations. *Charter of the United Nations*. San Francisco: United Nations, 1945.

Although voluntary consent remains the general principle, compulsory jurisdiction is also accepted on precise grounds. The Statute under Article 36(2) allows for states to deposit declarations accepting the Court's jurisdiction as compulsory in future legal disputes, without requiring consent from the other party. Such declarations are made on a reciprocal basis between states.

Such compulsory jurisdiction may be founded on:

- Treaty provisions specifically granting to the Court jurisdiction to resolve differences concerning the interpretation or application of that treaty;
- Unilateral declarations by disputing states under the optional clause, accepting beforehand the jurisdiction of the Court ⁶¹.

Subsection Two : Advisory Jurisdiction

Apart from its judicial function, the ICJ can provide advisory opinions on matters of law submitted to it by UN organs and agencies that are authorized to do so.

An advisory opinion involves interpreting uncertain or unclear legal texts without modifying or creating new principles. The role of the Court is simply to interpret the law based on general principles of law and the context in which the controversial provision was made ⁶².

The advisory function is guided by Article 96 of the UN Charter according to which the General Assembly and the Security Council can call for advisory opinions. All other UN organs may also do so on the authority of the General Assembly . This is repeated by the Statute in Article 65, where it declares: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" .

⁶¹ Brownlie, Ian, and James Crawford. *Brownlie's Principles of Public International Law*. 9th ed. Oxford: Oxford University Press, 2019.

⁶² Pellet, Alain. "International Law and the Role of the International Court of Justice." In *The Oxford Handbook of International Law*, edited by [Editor's Name if available], [page range if available]. Oxford: Oxford University Press, 2021.

Subsection three : The Jurisdiction of the ICJ over Genocide Cases

The International Court of Justice (ICJ) has jurisdiction to hear cases of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article IX of the Convention specifically states that any dispute between contracting parties concerning the interpretation, application, or implementation of the Convention including those concerning state responsibility for genocide may be referred to the ICJ for judgment.⁶³

This article is an explicit legal basis for the Court's jurisdiction over genocide cases, empowering it not only to determine whether occurrences of genocide have occurred, but also to hold states accountable for violations of the Convention. It thus reinforces the international judicial system in dealing with such a grave offense.

The ICJ has exercised this jurisdiction in several milestone cases, most notably the case of *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), which was a judicial precedent in finding a state liable for having failed to prevent genocide or punish its perpetrators, though it was not held guilty directly of having perpetrated the act itself.⁶⁴

Section Four: The Exercise of the International Criminal Court's Jurisdiction Over Perpetrators of Genocide and Its Obstacles

Subsection one: Procedures for the Criminal Prosecution of Genocide Perpetrators Before the International Criminal Court

The international criminal case is the central legal tool through which the International Criminal Court (ICC) exercises jurisdiction over individuals alleged to have committed international crimes. The Rome Statute establishes the procedural procedures for such cases, from their initiation to the issuance of a final judgment. This section is therefore divided into three main subsections, each covering a specific procedural step in prosecuting genocide cases at the ICC:

⁶³ Brownlie, Ian, and James Crawford. *Brownlie's Principles of Public International Law*. 9th ed. Oxford: Oxford University Press, 2019.

⁶⁴ Pellet, Alain. "International Law and the Role of the International Court of Justice." In *The Oxford Handbook of International Law*, edited by [Editor's Name if available], [page range if available]. Oxford: Oxford University Press, 2021.

1. Methods for Initiating Criminal Proceedings for Genocide before the ICC
 2. Investigation Procedures before the ICC
 3. Judicial Procedures in the Trial Stage
- 1. Methods for Initiating Criminal Proceedings for Genocide before the ICC**

The ICC exercises jurisdiction over international crimes of genocide on terms specifically stipulated in the Rome Statute⁶⁵. A necessary preliminary step before the collection of evidence is the opening of proceedings, which may occur in the form of one of the following mechanisms:

1. Legal Initiation: Either through referral by a State Party to the Prosecutor or proprio motu (on the Prosecutor's initiative).
2. Political Initiation: Initiated by the United Nations Security Council (UNSC) owing to its mandate to maintain international peace and security.

Article 13⁶⁶ of the Rome Statute governs such procedures by defining the terms that are ⁶⁷vested with power to bring proceedings. The methods of bringing such proceedings are explained below in the order as follows:

- a. Referral by a State Party
- b. Referral by the Security Council
- c. Bringing by the Prosecutor

a) Referral by a State Party

According to Article 13⁶⁸(a) of the Rome Statute, a State Party can refer a situation to the International Criminal Court (ICC) if there are crimes that fall within the jurisdiction of the Court, such as genocide, crimes against humanity, or war crimes. The requesting state shall be obliged to submit a written request outlining the concerned crimes and provide supporting evidence, as specified under Article 14. When a referral is made, the Prosecutor shall have to carry out

⁶⁵ International Criminal Court. *Rome Statute of the International Criminal Court*. U.N. Doc. A/CONF.183/9, 1998, arts. 53–84.

⁶⁶ International Criminal Court. *Rome Statute of the International Criminal Court*. U.N. Doc. A/CONF.183/9, 1998, art. 13.

⁶⁷ Safferling, Christoph J. M. *International Criminal Procedure*. Oxford: Oxford University Press, 2012.

⁶⁸ International Criminal Court. *Rome Statute of the International Criminal Court*. U.N. Doc. A/CONF.183/9, 1998, art. 13.

a preliminary examination to determine if the ICC has jurisdiction temporally, territorially, and personally, and whether there is a reasonable basis for an investigation. Remarkably, the ICC may investigate offenses only perpetrated on or after July 1, 2002 (the entry into force date of the Rome Statute) or after the referring state's ratification of the Statute. Even though non-State Parties cannot refer situations directly, they can voluntarily assume the ICC's jurisdiction over specified crimes through the declaration under Article 12. This referral mechanism plays an essential role in guaranteeing accountability in that it allows states—even indirectly responsible states—not directly under attack by the crimes to initiate ICC investigations. Through this way, it fills accountability gaps and reinforces the resolve of the international community towards prosecuting serious violations of international law.

b) Referral by the Security Council

The United Nations (UN) played a significant part in the establishment of the International Criminal Court (ICC), development of the legal framework, and recognition of international justice. The UN General Assembly approved an agreement granting autonomy to the ICC from the UN on September 13, 2004, recognizing it as an independent permanent judicial institution with international legal personality. But the relationship between the UN Security⁶⁹ Council and the ICC remains a point of concern, particularly in relation to the powers conferred on the Security Council under the Rome Statute. Such powers, like the capacity to initiate criminal proceedings, suspend investigation, and define the crime of aggression, are troublesome because they pose a risk to the autonomy and impartiality of the Court on political grounds. Under the Rome Statute, the mandate of the ICC is to try crimes listed in Article 5, including genocide. Article 13(b) of the Statute allows the UN Security Council to refer Article 5 cases to the ICC Prosecutor under Chapter VII of the UN Charter. It entitles the Security Council to refer international crimes to the ICC, even though they may not be before Rome Statute parties. The Security Council may also establish an international committee of inquiry to examine information and evidence of potential breaches of international humanitarian law and human rights law. Based

⁶⁹ Bassiouni, M. Cherif. *Introduction to International Criminal Law*. New York: Transnational Publishers, 2003.

on the information in view, the Security Council can refer these cases to the ICC Prosecutor for investigation.⁷⁰

c) Bringing by the Prosecutor

The third means of triggering proceedings against the ICC—is independent of State Party or UN Security Council referrals pursuant to Article 13 of the Rome Statute—is the *proprio motu* (on their own initiative) action of the Prosecutor. The special procedure gives the Prosecutor the authority to trigger investigations of crimes specified in Article 5 of the Rome Statute, i.e., genocide, without referral by an external entity.⁷¹ This prosecutorial authority is particularly significant when State Parties or the Security Council do not make referrals, either due to political motives or lack of will. The Prosecutor thus has a central and autonomous role in triggering international criminal proceedings, and it becomes possible for the mandate of the Court to still be achieved in the absence of international will. Pursuant to Article 15 of the Rome Statute, the Prosecutor may initiate an investigation if the information indicates that genocide or other serious crimes were committed in a particular territory. Pursuant to Article 15, the Prosecutor must then assess the gravity of the information, which may include seeking further information from states, UN bodies, intergovernmental or non-governmental organizations, or any other source. They may also collect oral or written testimonies in the seat of the Court. If, after the preliminary analysis, the Prosecutor concludes that there is a reasonable basis to go forward, they must make a request for authorization of the initiation of an investigation to the Pre-Trial Chamber, and include all the evidence and information pertaining to the case. Or, in case the evidence is not substantial enough, the Prosecutor may decide against pursuing it and is obligated to notify the person who supplied the information.

The Pre-Trial Chamber, having considered the application, may:

⁷⁰ Schabas, William A. *The International Criminal Court: A Commentary on the Rome Statute*. Oxford: Oxford University Press, 2010.

⁷¹ Cryer, Robert, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. 4th ed. Cambridge: Cambridge University Press, 2019.

- Authorize the investigation if it finds there is a reasonable basis to believe an ICC crime has been committed or Refuse the request if the requirements in law are not fulfilled.⁷²
- If new facts are later discovered, the Prosecutor may resubmit the request.
- This independent mandate of the Prosecutor enhances the autonomy of the ICC and broadens its jurisdiction, such that the perpetrators of the gravest international crimes are brought to justice—whether there are political obstructions or no cooperation from another country.

2. Investigation Procedures in Criminal Cases before the International Criminal Court

The procedures for investigation, correctly defined in the Rome Statute, are perhaps the most important guarantee to provide for international criminal justice. They serve two purposes: combating impunity and protecting people from unfounded accusations. These procedures seek to render the judicial process transparent and prevent any abuse of prosecuting authority by exerting strict investigative safeguards. Examination, in general, is described as "the pursuit for evidence and information tending to establish the fact that an offense has been committed and the degree of the guilt of the persons responsible, and the collection thereof in conformity with the adopted legal procedure." It is also the term applied to describe the pre-trial period, during which government authorities conduct a series of procedures aimed at establishing and assessing the admissibility and quality of evidence possibly warranting referring the accused to trial.⁷³ As important as this stage is to the progression of international criminal cases—being a turning point that may lead to the continuance or cessation of the case—the Rome Statute has explicitly established a chain of rules and standards regulating the conduct of investigation by the Prosecutor. Amongst these are enumerated powers and legal responsibilities for the Prosecutor and protection of certain rights of concerned parties during the investigation.

⁷² Cassese, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003.

⁷³ Thirlway, Hugh. "The Law and Procedure of the International Court of Justice 1960–1989." *British Yearbook of International Law* 65, no. 1 (1995): 1–102.

Thereafter, the procedure of investigations shall be addressed under the following structure:

1. Search safety measures for international criminal offense
2. The prosecutor's duties and powers in the investigation phase

1. Search safety measures for international criminal offense

The International Criminal Court (ICC) Prosecutor is mandated to investigate and gather evidence of international crimes, determine the criminal responsibility of suspects, and ensure the principle of complementarity. The Rome Statute empowers the Prosecutor with investigative and prosecutorial powers, with an emphasis on their independence from the other organs of the Court to ensure impartiality and the pursuit of justice. The Prosecutor may initiate an investigation via three channels: a referral from a State Party, a referral from the United Nations Security Council, or proprio motu when they receive reliable information from various sources. The Prosecutor may also refuse to investigate if it appears that the referral was made in bad faith or for political reasons.

Article 53(1) of the Rome Statute allows the Prosecutor to initiate an investigation after ⁷⁴considering available information, allowing them to consider preliminary information, request additional data, receive testimonies, and evaluate seriousness of allegations without limitation. However, the phrase "reasonable basis" has caused controversy due to its subjective and imprecise nature, which may maybe susceptible to political influence or external interference. If the Prosecutor is satisfied that there is a sufficient ground to proceed, they must request the Pre-Trial Chamber, which will approve the investigation or reject the application. The Prosecutor must notify relevant State Parties to the case and decide on what information to disclose while preserving persons, evidence preservation, and preventing flight of suspects. When the Prosecutor finds that there is no sufficient legal or factual basis for prosecution following the investigation, they may decide not to apply for an arrest warrant or summons. The Prosecutor's decision not to pursue may be reconsidered by the Pre-Trial Chamber upon the referring entity's application, who can also ask the Prosecutor

⁷⁴ Ambos, Kai. *Treatise on International Criminal Law: Volume III: International Criminal Procedure*. Oxford: Oxford University Press, 2016.

to reconsider. In the course of investigation, the Prosecutor performs pivotal roles such as fact and evidence analysis from sources, examination of crime scenes, efficient investigation through protective measures, and covering up sensitive information where required for justice.

2. The prosecutor's duties and powers in the investigation phase

The International Criminal Court (ICC) Prosecutor initiates investigations based on a reasonable basis and authorization by the Pre-Trial Chamber. Investigations can be initiated by referrals by State Parties, the UN Security Council, or the Prosecutor's initiative under Article 15 of the Rome Statute. The Prosecutor establishes criminal responsibility by gathering and analyzing evidence from various sources, including State Parties, UN agencies, and government and non-governmental organizations. They are obliged to record testimonies in the ICC headquarters and are able to collect evidence on the ground within the state where the offense was committed, subject to the state or Pre-Trial Chamber approval. The Prosecutor is responsible to make the investigation equitable and effective, withholding evidence or information, and protecting the confidentiality of victims and witnesses. The ultimate aim is to determine the truth, seek accountability for serious international crimes, and establish justice for victims. The mandate of the Prosecutor is to ensure the integrity of the investigation and its effectiveness.

3. Judicial Procedures in the Trial Stage

The trial stage is the final phase in an international criminal case. After the Prosecutor finishes the initial investigation under the supervision of the Pre-Trial Chamber (Articles 56–59 of the Rome Statute), and the chamber determines that there is sufficient evidence to charge the accused, the case is referred to the Trial Chamber for trial in line with Article 61 of the Statute.⁷⁵

This stage is characterized by the below trial procedures and guarantees:

I. Trial Procedures before the Trial Chamber

1. Place of the Sessions:

⁷⁵ Hall, Christopher K. "The Powers and Role of the Prosecutor at the International Criminal Court." In *Essays on the Rome Statute of the International Criminal Court*, Vol. II, edited by Flavia Lattanzi and William A. Schabas, 171–201. Rende: Il Sirente, 2005.

Sessions of trial are conducted at the seat of the Court at The Hague except when there is a decision to relocate them.

2. Defendant's Attendance:

The Court does not issue judgments in absentia, and the accused is required to be present during the trial. In exceptional cases, when the presence of the accused would be prejudicial to justice⁷⁶, the Trial Chamber may allow the trial to be held remotely through the representation of the accused's counsel.

3. Public and Private Sessions:

- a) General Rule: Trial proceedings are public.
- b) Exception: Private proceedings may be held in order to protect victims, witnesses, or confidential information.

4. Notification of Parties and Constitution of the Chamber:

After the charges have been confirmed, the Pre-Trial Chamber notifies the Prosecutor, the accused, and his or her counsel of the referral to the Trial Chamber. The Trial Chamber will either constitute a new panel or refer the case to a pre-constituted panel.⁷⁷

A preparatory session is called to set a trial date, and notice is served on all parties with the possibility of postponement by the Chamber or on the motion of any party.

5. Records of Proceedings and Document Archives:

A record is kept of all proceedings before the Trial Chamber, including minutes and documents received from the Pre-Trial Chamber. These records are consulted by the Prosecutor, the defense, legal representatives of victims, and participating entities, on a confidential basis as needed.⁷⁸

⁷⁶ Hall, Christopher K. "The Powers and Role of the Prosecutor at the International Criminal Court." In *Essays on the Rome Statute of the International Criminal Court*, Vol. II, edited by Flavia Lattanzi and William A. Schabas, 171–201. Rende: Il Sirente, 2005.

⁷⁷ Stahn, Carsten, and Göran Sluiter, eds. *The Emerging Practice of the International Criminal Court*. Leiden: Martinus Nijhoff Publishers, 2009.

⁷⁸ El Zeidy, Mohamed M. *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice*. Leiden: Martinus Nijhoff Publishers, 2008.

6. Requests Relating to the Progress of the Case:

Before the trial starts, any party, the Chamber, Prosecutor, or defense, may file written requests relating to procedural matters, and inform concerned parties if the request is regarding them.

7. Reading of Charges and Defendant's Plea:

During the first session, the charges already confirmed by the Pre-Trial Chamber are read out. The defendant is then permitted to either plead guilty or enter a denial of the accusation. In pleading guilty, stringent conditions are fulfilled (e.g., full understanding, voluntariness, and advice of counsel).

8. Defendant's Right to a Defense:

- a) Presumption of Innocence: The defendant continues to be presumed innocent until and unless found guilty beyond reasonable doubt.
- b) The obligation to appear at the trial, access to confidential legal advice, and presenting a defense are the responsibility of the defendant.
- c) The defendant also has a right not to provide evidence concerning themselves.

9. Presentation of Evidence:

- a) Instructions to provide orderly proceedings are given by the judge. Either there is the potential for mutual consent to present evidence, or this will be decided by the Trial Chamber.
- b) Evidence obtained in violation of the Statute or human rights is not admissible.
- c) Witnesses are sworn to tell the truth and can be cross-examined by both the Prosecutor and the defense. The Trial Chamber may end the evidence phase before hearing the final arguments.

10. Final Arguments and Judgment:

- A. After the evidence phase closes, the closing arguments are presented in writing or orally.
- B. The Chamber deliberates in chambers and then delivers its ruling in a public hearing, which includes:
 - a) The confirmation of the case and the jurisdiction of the Court,
 - b) The criminal culpability of the defendant,
 - c) The sentence and reparations to victims, where applicable,
 - d) The Prosecutor, the defendant, and the victims' representatives or their lawyers.

II. Appeals Against the Decision of the Trial Chamber

The Rome Statute provides for two main options for appealing the decisions of the Trial Chamber:

Part 1: Appeal

1. Decisions and Judgments Subject to Appeal:

Judgments of conviction, acquittal, or sentencing (Article 81).

Other decisions, such as:

- a) Jurisdiction or admissibility of the case,
- b) Granting or denial of release,
- c) Protection measures for evidence.

2. Entitled Parties to Appeal:⁷⁹

- a) The Prosecutor.
- b) The convicted person or his/her representative.
- c) A concerned state (with the authorization of the Pre-Trial Chamber).
- d) Victim representatives in connection with reparation orders.

3. Procedures and Time Limits:

- a) Criminal judgments: Appeal within 30 days from notice, with possible extension for good cause.
- b) Pre-trial decisions: Appeal within 5 days, especially regarding release or jurisdictional questions, by filing a written application with the Registrar.

4. Decision of the Appeals Chamber:

- a) May annul, amend the decision, order a retrial, or reduce the sentence if disproportionate.
- b) Issued by a majority of the judges and delivered with written and public grounds.

⁷⁹ Powderly, James. "Appeals and Revision." In *The Law and Practice of the International Criminal Court*, edited by Carsten Stahn, 1239–1272. Oxford: Oxford University Press, 2015.

Part 2: Revision

1. Right to Request Revision:

An exceptional remedy called upon where:

- a) New evidence is discovered which was not available at the trial,
- b) Manipulation of crucial evidence by fraud is revealed,
- c) Serious misconduct of a judge in relation to the case is shown (Article 84).

2. Requesters of Revision:

- a) The convicted person during their lifetime or, after death, their nearest living relatives on the basis of a written undertaking.
- b) The Prosecutor in the interest of the convicted person.

3. Procedure for Submitting a Request for Revision:

- a) The request must be in writing, accompanied by documents constituting the basis under Article 84.

4. Consequence of Granting the Revision:

- a) The Appeals Chamber remands the case to the Trial Chamber (either the original or a reconstituted one) for reconsideration on the merits on the grounds of the new or manufactured evidence.⁸⁰

Subsection Two: The Obstacles Hindering the Exercise of the International Criminal Court's Jurisdiction over Genocide Crimes

Despite State Party ratification in the preamble of the Rome Statute to criminalize and prosecute perpetrators of the most egregious crimes threatening international peace and security, the ICC has faced numerous obstacles arising from provisions of the Statute itself. The challenges arose as a result of a collision between two prevailing paradigms:⁸¹

⁸⁰ deGuzman, Margaret M. "Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law." In *Principles of International Criminal Law*, 125–143. Oxford: Oxford University Press, 2012.

⁸¹ International Criminal Court. *Rome Statute of the International Criminal Court*. The Hague: International Criminal Court, 1998. <https://www.icc-cpi.int/resource-library>.

The First Approach:

This method supports the autonomy and increased efficiency of the ICC and has been supported by human rights and humanitarian groups, including the International Committee of the Red Cross and Amnesty International.

The Second Approach:

This school of thought promotes limiting the power of the Court by ushering in respect for state sovereignty, particularly that of non-party states to the Rome Statute. The school has been led by influential countries, the United States of America being the most prominent among them.

It is on this premise that we will proceed to discuss the major impediments to the Court prior to establishing its jurisdiction over genocide offenses through the following subsections:

1. National Sovereignty of States.
2. Abuse of Power by State Party and Prosecutor
3. Refusal by Non-Party States to Recognize Jurisdiction of the International Criminal Court
4. Security Council Restriction of the International Criminal Court's Jurisdiction

1. National Sovereignty of States

National sovereignty is the supreme authority of a state over its territory, including the protection of its citizens and the administration of justice. Initially, the establishment of the International Criminal Court (ICC) was seen as an invasion of national sovereignty. However, this hurdle has been overcome since the jurisdiction of the Court is not seen to be in interference with national courts.

The sovereignty barrier arises in two situations:

The First Situation: If a state chooses to prosecute domestic crimes locally within its national courts, this will not affect the ICC's jurisdiction unless certain conditions are met.

The Second Situation: In case a state exercises its discretion to investigate or prosecute in such a way as to obstruct international justice, then the ICC may intervene if it is found that the proceedings were unfair.

Where non-party states to the Rome Statute are concerned, sovereignty is the hindrance to the jurisdiction of the Court. However, the hindrance can be overcome if the state invites its jurisdiction or the Security Council refers the case to the ICC.

2. Abuse of Power by State Party and Prosecutor

The Rome Statute establishes three ways of initiating proceedings: referral by a State Party, referral by the Security Council, or initiation proprio motu by the Prosecutor.

State Party referrals are the main avenue but are rare (only eight between 2002 and 2018) due to political delay and national interests.

The Prosecutor is granted broad powers to initiate investigations based on information or referrals, with guarantees of independence through election by the Assembly of States Parties and a prohibition against taking up any conflicting outside activity.

The Pre-Trial Chamber has been granted a supervisory role over the Prosecutor's decisions (accepting or rejecting investigations), aimed at ensuring objectivity. In practice, however, this mechanism can be used by political actors to exert pressure over the Prosecutor.⁸²

As such, the abuse of power by governments or political pressure on the Prosecutor prevents or delays the initiation of serious cases, undermining the effectiveness of the ICC in prosecuting genocide offenses.

3. Refusal by Non-Party States to Recognize Jurisdiction of the International Criminal Court

The Rome Statute establishes the International Criminal Court, whose provisions are, for the most part, only enforceable within State Parties. The relative effect principle of treaties (Article 34 of the Vienna Convention on 1969) is based on the principle that "a treaty does not bind a state without its consent."

⁸² United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. New York: United Nations, 1948.

The Court's jurisdiction does not cover non-party states unless they have made a declaration of acceptance under Article 12(3) of the Rome Statute, or unless their case has been referred to it by the Security Council under Chapter VII of the UN Charter.

The Security Council's refusal to refer a case, and non-party states' reluctance to accept declaration, give a significant loophole for impunity and limit the universality of international criminal justice.

Practical Example: Syria is not a signatory to the Rome Statute, and therefore the Court has no territorial jurisdiction over crimes committed in its territory unless referred by the Security Council or unless the Court voluntarily accepts the jurisdiction of the Court.

Conclusion: Despite the Court's independence and permanence as an institution to prosecute the most serious crimes, the relative effect of international treaties limits its jurisdictional scope, diverting its ability to dispense international criminal justice to all the victims of genocide in a non-discriminatory manner.

4. Security Council Restriction of the International Criminal Court's Jurisdiction

The Rome Conference of 1998 considered the Security Council-International Criminal Court relationship, and the outcome was that there were three prominent positions: the first eliminated any link to preserve the independence of the Court, the second was in favor of giving power to the Security Council, and the third middle line position persuaded the Rome Conference to incorporate two major powers of the Security Council in the Statute:

Referral (Article 13(b))⁸³

- The Security Council, under Chapter VII of the UN Charter, may refer a "situation" in which international crimes (genocide, war crimes, crimes against humanity, or aggression) are suspected to the ICC Prosecutor.
- A referral is not a judicial inquiry but a procedural notice to trigger an inquiry by the Prosecutor's office. It thus allows the jurisdiction of the Court to extend even to the territory of non-party states.

⁸³ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. New York: United Nations, 1948.

Request for Delay in Investigation or Prosecution (Article 16)

- The Security Council can request a deferment of any investigation or prosecution for a period of up to 12 months, renewable under Chapter VII.
- Such a right remains in the hands of the five permanent Security Council members and can be used politically to avoid evidence gathering and trials at the ICC, which will be at the disposal of these states and against justice for victims of international crimes.

Conclusion:

Although there are some benefits—such as ensuring the role of the Security Council in referring cases to the Court and forcing non-party states to comply—the powers of referral and deferral enable the great powers (permanent members of the Security Council) to exercise political pressure and hold up cases. This undermines the independence and efficiency of the Court in prosecuting crimes of genocide.

Subsection three: Challenges Facing the International Criminal Court after Acquiring Jurisdiction over Genocide Crimes

Having settled jurisdiction over the crime of genocide, the ICC has a few barriers to navigate. Some are emanating directly from the Rome Statute itself, but by far the more important challenges emerge as a consequence of the behaviors of states, and particularly the behavior of the non-party states of the Rome Statute like the United States, which strives purposefully to constrict the Court's jurisdiction.

I. The Judicial Immunity Factor for Officials to Prevent the Jurisdiction of the ICC

Previously, leaders were considered symbols of state sovereignty and were not held accountable for their actions. Any assault on them was considered an assault on the state itself. This was the norm until the evolution of human rights concepts, which reached a peak in calls for the prosecution of officials for international crimes, such as in the 1919 Versailles Treaty⁸⁴, which placed individual criminal

⁸⁴ Treaty of Versailles. *Treaty of Peace between the Allied and Associated Powers and Germany*, June 28, 1919, arts. 227–228, 284–287.

responsibility on the German Emperor "William II" for having committed international morality crimes.

Although the norms established at the Versailles Treaty remained of limited efficacy, world wars subsequently introduced the Tokyo and Nuremberg Tribunals, which prosecuted war criminals, in another shift in attitude towards rulers' accountability.

When the ICC was established in 1998, the Rome Statute reaffirmed criminal responsibility for persons and, under Article 27, refused to recognize immunity for officials. However, Article 98 of the same Statute negates this by prohibiting the Court from seeking surrender of suspects by non-party states to the Rome Statute in case it violates international immunity undertakings. This presents an opportunity for non-party states to avoid the jurisdiction of the Court by entering into bilateral agreements with other states, which the United States has done by signing up to agreements with numerous countries to pre-empt the extradition of its nationals to the ICC.

II. Refusal of States to Extradite Genocide Perpetrators for Trial

1. Definition of Extradition and Its Types:

Extradition is the surrender of an individual by one state to another, either for trial of a crime prosecutable under international law or for the enforcement of a sentence imposed upon them.

a) Extradition entails:

- **Defendants:** Individuals who have fled from the state where the crime has been perpetrated, and whose home state requests their extradition for trial.
- **Convicted Persons:** Individuals who were tried in absentia and subsequently fled, and the home state has requested their extradition to carry out the sentence.

b) Legal Basis for Extradition in the Rome Statute

- **Article 102(b):** "Extradition" is the surrender of an individual from one state to another on the basis of a treaty, agreement, or national law.

- Article 86: States Parties shall provide "full cooperation" to the Court in investigation and prosecution.

Articles 87(5) and 87(7): These articles formalize cooperation but fail to include enforcement mechanisms to compel states to act on extradition requests.

2. Inadequacy of Coercive Mechanisms and Enforceability of Extradition Requests

a) Assembly of States Parties (Article 112):

- The Assembly has merely "moral pressure" or symbolic sanctions (e.g., suspension of membership) against non-compliant states.

b) Security Council (Chapter VII):

- The Security Council is authorized to impose binding measures for the maintenance of peace and security (Articles 39-42), which can be used to force non-party states to comply with extradition requests.

3. Other Sources of Binding Extradition Obligations

a) Regional Conventions:

- European Convention⁸⁵(1957), Arab Convention⁸⁶ (1952), Caribbean Convention (1981), etc.

b) Global Conventions:⁸⁷

- Convention on the Suppression of Maritime Piracy (1998),
- International Drug Control (1988),⁸⁸
- Convention Against Torture (1984)
- Genocide Convention (1948)
- Geneva Conventions (1949)
- Additional Protocol I (1977)

⁸⁵ Council of Europe. *European Convention on Extradition*. Paris, December 13, 1957.

⁸⁶ League of Arab States. *Arab Convention on Extradition*. Cairo, September 14, 1952.

⁸⁷ Organization of American States. *Inter-American Convention on Extradition (Caracas Convention)*. Caracas, February 25, 1981.

⁸⁸ United Nations Office on Drugs and Crime (UNODC). *Model Treaty on Extradition*. Vienna: UNODC, n.d.

c) National Legislation:

- Some countries have provisions or specific chapters on criminal extradition in their laws.⁸⁹

Real-Life Examples of Refusal to Extradite

- South Africa (2015): Refused to extradite Omar al-Bashir to Sudan.⁹⁰
- Ivory Coast: The President declared refusal of any impending extradition requests.
- Kenya and Namibia: Threatened to withdraw from the Rome Statute if they were forced to extradite their nationals.

Abstract

This chapter presents a detailed legal examination of the international crime of genocide and the international apparatus established to prosecute its perpetrators. It begins with the definition of genocide under international law, tracing its development from Raphael Lemkin's initial formulation of the concept to its codification in the 1948 Genocide Convention and subsequent inclusion in the statutes of international criminal courts. The chapter distinguishes genocide from the other fundamental international crimes of crimes against humanity, war crimes, and the crime of aggression, highlighting its unique requirement of specific intent to destroy a protected group.

The chapter goes on to consider the structural components of the crime—the legal, material, mental, and international components—and explores how their overlap is necessary in order to establish criminal liability. It also discusses the

⁸⁹ International Court of Justice. *Statute of the International Court of Justice*, Article 38. San Francisco: United Nations, 1945.

⁹⁰ Amnesty International. *South Africa: Failure to Arrest Sudan's President a Betrayal of Victims of Mass Atrocities*. London: Amnesty International, 2015.

jurisdiction of the International Court of Justice (ICJ) in inter-state genocide cases, and the jurisdiction of the International Criminal Court (ICC) over individuals suspected of such offenses. The procedural mechanisms through which these courts acquire and exercise jurisdiction are also covered, including state referrals, UN Security Council referrals, and the ICC Prosecutor's proprio motu powers.

Finally, the chapter addresses general challenges for international courts in prosecuting genocide, such as state sovereignty concerns, political intervention, lack of cooperation by non-member states, and the politicization of international justice. These challenges are critically analyzed to reveal the boundaries and possibilities of international legal regimes in enforcing accountability for the crime of genocide.

Chapter two :
**South Africa's Genocide Allegation Against the
occupying power before the ICJ**

Section one : Self-Defense as Israel's Justification for the War on Gaza

Calling upon the right of self-defense provided in the United Nations Charter, Israel reacted to the "Al-Aqsa Flood" operation with the legal authority to engage in military action against the Gaza Strip. In accordance with Article 51 of the Charter, member states have the right to resort to measures of self-defense when attacked by force, provided that action is taken by the Security Council for the maintenance of international peace and security (subsection one).

The worried article provides: "Nothing in the present Charter shall affect the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security...".

It is apparent from this provision that the Charter allows self-defense as a valid ⁹¹exception to the overall prohibition against the use of force, as provided in Article 2(4) of the same instrument. This shift of self-defense from an unlawful act to a legal-authorized measure is, however, bound under stringent conditions and limitations.

The most salient question consequently raised is whether Israel has complied with the requirements of law under international law, which would validly justify its plea of self-defense in proceeding to declare war against Gaza during the "Al-Aqsa Flood" operation (subsection two).

⁹¹ Brownlie, Ian. *International Law and the Use of Force by States*. Oxford: Oxford University Press, 1963.

Subsection One: Conditions for the Exercise of the Right of Self-Defense under International Law

The exercise of the right of self-defense, which enables states to use armed force⁹² against an armed attack, is governed by a specific set of conditions, which can be delineated as follows:

1. Immediacy of the Armed Attack:

Right of self-defense should be invoked in response to an actual and real armed attack. This means the response must match the attack and should not be delayed for strategic or military mobilization. Delayed response denies the immediacy requirement and can render the act illegal in international law.

2. Armed Attack:

Under Article 51 of the UN Charter, only in the context of an armed attack can self-defense be claimed. Hence, the attacker should be either a state or armed group with which a state has jurisdiction or who is present within a state.

3. Need of the Response:

The response must be necessary so as to act against the armed threat. Necessity requires that the application of force has to be the only means capable of deterring or to refrain from continuing with the attack. A response against a minor or non-serious threat does not pass this test.⁹³

4. Proportionality of the Reaction:

The reaction or force used in self-defense must be proportionate to the magnitude and level of the armed attack. Excessive or indiscriminate use of force, especially where it causes massive civilian or material harm, goes beyond the boundaries of legal self-defense and can amount to aggression or violation of humanitarian law.

⁹² Dinstein, Yoram. *War, Aggression and Self-Defence*. 6th ed. Cambridge: Cambridge University Press, 2017.

⁹³ International Committee of the Red Cross (ICRC). *Geneva Conventions of 1949*. Switzerland, 1949. Accessed June 12, 2025. <https://ihl-databases.icrc.org/>.

5. Temporal Limitation:

Self-defense must be temporary and of limited duration. Article 51 requires any application of force in self-defense to be conditional pending the taking of measures necessary under the Security Council to maintain international peace and security. Force must not extend to the point of achieving political or military goals other than the immediate defense.

6. Illegality of the Armed Attack:

The attacking itself has to be illegal according to international law—e.g., for constituting an act of aggression in the sense now defined by UN General Assembly Resolution 3314 (1974). The attacking state has no right to rely on self-defense against a legitimate use of force.⁹⁴

7. Compliance with International Humanitarian Law (IHL):

This act of self-defense must be done solely in adherence to the norms of international humanitarian law. This calls for compliance with the obligation to discriminate between fighters and non-combatants, avoiding the targeting of civilian infrastructure, and providing protection to enumerated groups as stipulated in the four 1949 Geneva Conventions. Any violence involving retaliation or proportionality leading to excessive suffering or harm is a violation of IHL regardless of whether such violence is veiled under the guise of self-defense.⁹⁵

⁹⁴ Cassese, Antonio. *International Law*. 2nd ed. Oxford: Oxford University Press, 2005.

⁹⁵ Sassòli, Marco. *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. Cheltenham, UK: Edward Elgar Publishing, 2021.

Subsection Two: Assessing Israel’s Fulfillment of the Conditions for Self-Defense in Its War on the Gaza Strip

According to the legal requirements applicable to the exercise of the right of self-defense, described above, the present analysis considers the extent to which Israel met these conditions in its military operations in the Gaza Strip to conclude whether the war can be characterized as a lawful action of self-defense or as an illegal use of force.

Firstly, as far as the immediacy of the response to an armed attack, the condition was not met. Operation "Al-Aqsa Flood" was conducted on October 7, 2023, while Israel started its military campaign on October 27, 2023—20 days later. That delay indicates the absence of immediacy, making the response a legitimate act of defense and not an act of retaliation.

Secondly, regarding the provision that an armed attack must be by an armed force, Article 51 of the UN Charter categorically states that the right of self-defense can only be invoked in response to an armed attack by a state or an armed force operating in the territory of a state. The "Al-Aqsa Flood" operation was carried out by Palestinian organizations⁹⁶, including the Al-Qassam Brigades, rather than by a recognized state entity. The organizations, despite their use of weapons, are not deemed a state actor or official armed group under international law. Therefore, their actions fall within the broader scope of a legitimate resistance movement in conflict with occupation, a right accorded under international law and customary practice, including the right of self-determination. The attack does not satisfy the benchmarks provided by Article 51 as it was not carried out by a state or its military.

Thirdly, the requirement of necessity, a key condition for the lawful exercise of self-defense, is also not met. For self-defense to be legally justified, there must be an immediate and unavoidable necessity to use force. In this case, Israel’s military campaign seems to lack such necessity. As an occupying power in Palestinian territories, Israel’s response cannot be construed as a dire, unavoidable necessity. Instead, it appears to be a continuation of Israel’s longstanding occupation and military domination of Gaza, which includes

⁹⁶ Mann, F. A. *The Rights of States in International Law*. Oxford: Clarendon Press, 1991.

blockades, restrictions on movement, and regular military incursions. Israel's use of force appears more as a strategic extension of its ongoing occupation rather than a response to an immediate and unlawful act of aggression. The military campaign was not based on an urgent need to defend against further harm but rather on broader political and military goals, suggesting the absence of necessity in this context.

Fourth, the proportionality doctrine⁹⁷, a cornerstone of both self-defense and international humanitarian law (IHL), was grossly violated in Israel's retaliation. Israel's use of mass and advanced firepower, including aerial bombing and artillery bombardment, was very disproportionate to the extent of the actual attack by the Palestinian factions themselves, who themselves had primarily relied on rudimentary infantry-type weapons like rockets and small arms. Israel's military assaults involved the shelling of more than 60,000 tons of explosives upon Gaza, which is a highly populated region measuring only 365 km⁹⁸. This excessive and disproportionate use of force resulted in extensive destruction of civilian infrastructure such as homes, schools, hospitals, and utilities. The principle of proportionality, that resort to the use of force in defense must never be disproportionate to the threat being faced, was held in contempt. The scale of Israel's retaliation not only resulted in an disproportionate civilian casualty toll but also caused extensive destruction to non-military targets, which was a violation of international law and proportionality.⁹⁹

Fifthly, the necessity of an ad interim use of force was also neglected in Israel's war. Article 51 of the UN Charter stipulates that self-defense is permissible only until the UN Security Council takes appropriate action to address the situation. But Israel's military operation did not end for over four months, and Israeli leaders publicly declared that the operation would be continued until specific military and political objectives were achieved. This prolonged exercise of force, in order to secure both military superiority and political goals, is not in

⁹⁷ United Nations. *Charter of the United Nations*. New York: United Nations, 1945.

⁹⁸ United Nations Security Council. *Report on the Situation in Gaza*. New York: United Nations, 2023.

⁹⁹ International Court of Justice. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion*. The Hague: International Court of Justice, 2004.

accordance with the temporary nature required by international law to be employed in actions of self-defense. The continuous military action far exceeded the temporal limits commonly accepted under the right of self-defense, and they prove that Israel's campaign wasn't an instantaneous response to an immediate threat, but as part of a larger, ongoing military campaign.¹⁰⁰

Sixth, the legality of the initial Palestinian faction attack is controversial under the law. The campaign targeted military installations and settlements in Palestinian occupied territories, which, under international law, could be considered a just act of resistance by an occupied people. International law grants peoples the right to resist occupation, including armed resistance, as established in various UN resolutions and conventions. On the other hand, Israel's subsequent response to the attack is not based on law under the law of self-defense since it was not instant, necessary, or proportionate. Rather than responding in self-defense to an armed attack by a state-sponsored one, Israel's response constitutes an illegal use of force against a non-state actor that is engaged in resistance and therefore negates any argument regarding legal self-defense. UN General Assembly Resolution 3314 also maintains that its definition of aggression is not prejudicial to the right of peoples to self-determination and independence, especially in colonial or foreign occupation.

Finally, Israel's behavior in the campaign of war violated core principles of international humanitarian law (IHL)¹⁰¹. IHL prohibits the attacks against civilians and civilian objects as well as collective punishment, and that is what exactly Israel's campaign consisted of. The massive shelling of Gaza, where the civilian facilities and installations were attacked, caused the deaths of thousands of civilians and mass suffering for the civilian population. These actions not only contravene the protections afforded to civilians under IHL but also amount to war crimes, crimes against humanity, and indeed genocide or ethnic cleansing¹⁰², especially in light of the scale and the discriminate character of the destruction. These acts by Israel, such as indiscriminate and disproportionate

¹⁰⁰ Dinstein, Yoram. *War, Aggression and Self-Defense*. 3rd ed. Cambridge: Cambridge University Press, 2001.

¹⁰¹ United Nations. *Geneva Conventions of 12 August 1949: Relative to the Protection of Civilian Persons in Time of War*. Geneva: International Committee of the Red Cross, 1949.

¹⁰² International Criminal Court. (2011). *Elements of crimes under the Rome Statute* (pp. 15–18).

attacks, thus fail to live up to expectations of legitimate action by the military and further serve to weaken the argument that it acted in self-defense under international law.¹⁰³

Section two: South Africa's Accusation of Israel for Committing Genocide in the Gaza Strip

This section discusses the extent to which the elements of genocide are fulfilled in the case filed by South Africa accusing Israel of committing genocide in the Gaza Strip (First Section). It also examines the content of the requests submitted by South Africa to the Court (Second Section).

Subsection one: The Fulfillment of the Elements of Genocide in South Africa's Case Against Israel

South Africa based its case against Israel before the International Court of Justice on the 1948 Genocide Convention. The country submitted a document in excess of 84 pages of the breach by Israel in the Gaza Strip and its default in fulfilling its obligation under the said convention. South Africa restated that the conduct of Israel constituted a completed genocide. The question involved is as follows:¹⁰⁴

1. The Legal Element of Genocide:

The basis in law to regard the committed acts as acts of genocide can be traced back to the Genocide Convention. The Convention of 1948 defines in its Article II what is meant by genocide, any of the following acts committed with intent to destroy the national, ethnical, racial, or religious group, as such:

- a) The killing of members of the group.
- b) Serious bodily or mental harm to members of the group.
- c) Deliberately inflicting living conditions intended to destroy the group, in whole or in part.
- d) Imposing conditions preventative of births within the group.

¹⁰³ Koh, Harold Hongju. *The Right to Resist Occupation: A Legal Theory of Self-Determination*. Oxford: Oxford University Press, 2006.

¹⁰⁴ 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)*. 2023. <https://www.icj-cij.org/case/192>.

- e) Transferring children of the group to another group against their will.

Article III of the Convention further stipulates that the following acts shall be penalized:

Genocide.

- a) Conspiracy to commit genocide.
- b) Public and direct incitement to commit genocide.
- c) Attempt to commit genocide.
- d) Complicity in genocide.

2. The Material Element of Genocide:

Drawing from the case of South Africa, the material element of genocide is reflected in the war that Israel waged on Gaza, 20 days after the "Al-Aqsa Flood" operation. Israel responded to the operation with bombing and attacked by land on the night of October 27, 2023, with excessive and disproportionate use of lethal and destructive force by air, land, and sea. Over 60,000 tons of bombs and explosives were dropped on an area of only 365 square kilometers inhabited by more than 2.3 million individuals.¹⁰⁵

The military operations resulted in more than 21,000 deaths, and more than 55,000 civilians were injured. Additionally, more than 1.9 million individuals were forced to leave their homes and were denied basic necessities such as water, food, medicine, electricity, and fuel. It saw widespread demolition of residential buildings, infrastructure, hospitals, schools, religious institutions, and facilities of international organizations, particularly those of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

3. The Mental Element of the Crime of Genocide:

The mental element of the crime of genocide is represented by criminal intent, that is, the intent to commit genocide. In South Africa's case against Israel in the

¹⁰⁵ 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)*. 2023. <https://www.icj-cij.org/case/192>.

International Court of Justice, the country filed a file containing documents¹⁰⁶ and facts that verify Israel's violation of its obligations as a state party to the Convention on the Prevention and Punishment of the Crime of Genocide. Among these evidences are statements made by several ministers in the Israeli government, including Defense Minister Yoav Gallant¹⁰⁷, in which he stated: "We imposed a comprehensive siege, no electricity, no water, no food, no fuel, all of them were cut off." There were also statements made by other ministers in the government¹⁰⁸ in which they discussed the necessity of dropping an atomic bomb on the Gaza Strip and forcibly displacing its population to the Sinai Peninsula.

Israel, in its reply to the International Court of Justice on January 12, 2024, pointed out that its actions fell under its right to use force in self-defense. It argued that the charge of genocide advanced by South Africa assumes the existence of intent to commit genocide, which Israel asserted was not proven by South Africa. Further, Israel contended that if there was any genocide, it was by Hamas and requested the Court to reject South Africa's request for interim protective measures, stating that these would deprive it of its right of self-defense.

Subsection two : South Africa's Requests to the International Court of Justice

Before examining the individual requests submitted by South Africa, it is imperative to keep in mind that Israel and South Africa are State Parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹⁰⁹. Israel acceded to the Convention¹⁰⁹ on 9 March 1950, and South Africa acceded to it on 10 December 1998. Neither country deposited any reservations to the Convention provisions, such as Article IX, which clearly gives the International Court of Justice jurisdiction over Contracting Parties'

¹⁰⁶ South African Government. *Documents Presented in the Case against Israel Regarding the Gaza Conflict*. 2023.

¹⁰⁷ Gallant, Yoav. *Minister of Defense of Israel's Statement on Gaza Siege*. 2023.

¹⁰⁸ Israeli Government. *Statements by Israeli Ministers on Gaza and the Use of Force*. 2023.

¹⁰⁹ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*. Adopted 9 December 1948, entered into force 12 January 1951, United Nations Treaty Series, vol. 78, p. 277.

disputes regarding the interpretation, application, or compliance with the Convention. This lack of reservations supports the Court's jurisdiction to decide the present dispute.

In the case of *South Africa v. Israel*, in which South Africa complained of breaches which can be tantamount to acts of genocide against the Palestinian people, South Africa submitted a series of urgent applications for provisional measures. These are under Article 41¹¹⁰ of the ICJ Statute, where the Court can indicate provisional measures as it sees fit in order to preserve the rights of either party. The key features of South Africa's applications are set out below:

1. **Immediate Stop of Genocidal Actions:** South Africa requested the Court to order Israel to immediately stop all actions that amount to genocide, directly or indirectly, against the Palestinian people, who are a protected group under the 1948 Convention. These encompass acts such as mass killings, inflicting serious bodily or mental harm, and placing people in conditions of life aimed at destroying the group as such in whole or in part. South Africa argued that Israel's Gaza closure and military campaign demonstrate a persistent pattern of conduct that may amount to genocide.
2. **Prevention of Incitement to Genocide:** South Africa asked the Court to order Israel to refrain from any direct and public incitement to commit genocide, as well as from conspiracy to commit genocide or attempting to do the same. It referred to some statements by Israeli leaders that, according to South Africa, may constitute incitement or result in the commission of genocidal acts.
3. **Evidence Preservation:** The Court was asked to order Israel to do everything in its power to maintain evidence of the alleged acts of genocide, like not destroying infrastructure, altering possible crime scenes, or interfering with documentation efforts by international or media bodies.

¹¹⁰ International Court of Justice. (1945). *Statute of the International Court of Justice*. Article 41. "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

4. **Unrestricted Access for International Investigation Agencies:** South Africa requested the Court to guarantee that Israel does not ban or hinder fact-finding missions, humanitarian agencies, and international investigation agencies from entering the Gaza Strip. This is to enable evidence collection and preservation and enable humanitarian access to affected communities.¹¹¹
5. **Avoidance of Future Escalation:** The filing included a call on Israel to refrain from any action that may worsen or extend the dispute before the Court or make its resolution more difficult. This involves cessation of political or military actions that can thwart the judicial process or worsen civilian suffering.
6. **Periodic Reporting on Compliance Regularly:** South Africa asked the Court to require Israel to report a week after the provisional measures were granted, reporting on measures taken towards fulfilling the Court's orders. Besides, Israel must submit periodic reports afterwards until the Court renders its final judgment.¹¹²

It should be appreciated that the requests of South Africa are not only intended to protect Palestinian rights under the Convention¹¹³ but also to prevent irreparable harm and preserve the integrity of the judicial process. These measures are a measured application of the available legal tools in the scenario of international law, in particular international humanitarian law and human rights law.

Section three : The ICJ's Proceedings and orders in the Case of South Africa v. Israel

¹¹¹ Schabas, William A. *Genocide in International Law: The Crime of Crimes*. 2nd ed. Cambridge: Cambridge University Press, 2009.

¹¹² Cassese, Antonio. *International Criminal Law*. 2nd ed. Oxford: Oxford University Press, 2008.

¹¹³ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. Adopted December 9, 1948, entered into force January 12, 1951. United Nations Treaty Series, vol. 78, p. 277.

Subsection one : The Proceedings Before the ICJ

1.Filing of the Application and Jurisdictional Basis:

On 29 December 2023¹¹⁴, the Republic of South Africa lodged an application with the International Court of Justice (ICJ), commencing proceedings against the State of Israel for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), subsequently the Genocide Convention. The request was made pursuant to Article IX of the Convention, which provides that disputes between contracting parties about the interpretation, application, or implementation of the Convention — including those concerning the responsibility of a state for genocide — may be submitted to the ICJ by any of the parties to the dispute.

South Africa had accused that the conduct of Israel during its military operations in Gaza since October 2023¹¹⁵ was one that would constitute genocide. These included intentional murders of Palestinians, creating conditions of life intended to destroy them, and incitement by officials of higher rank. South Africa further stated that Israel had not prevented acts of genocide, punished perpetrators, or obstructed humanitarian assistance to the civilian population in Gaza.

2.Request for Provisional Measures:

Apart from its principal application, South Africa made a Request for the Indication of Provisional Measures under Article 41 of the ICJ Statute. In its view, there existed an urgent need for measures to prevent irreparable damage to Palestinian people's rights and for Israel's alleged genocidal acts to immediately cease.

¹¹⁴ International Court of Justice (ICJ). (2023a). *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*. <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231229-APP-01-00-EN.pdf>

¹¹⁵ International Court of Justice (ICJ). (2024a). *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the indication of provisional measures*. <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231229-REQ-01-00-EN.pdf>

The demand for interim steps was supported with evidence including Israeli authorities' public declarations, testimonies of wide-ranging destructions, and diplomatic correspondence from the United Nations entities, humanitarian personnel, and other material sources on the situation pertaining to the Gaza humanitarian crisis.

The ICJ scheduled oral hearings on the request for 11 and 12 January 2024¹¹⁶ and requested both sides to file legal and factual presentations.

3.Oral Proceedings and Arguments Presented:

During the oral hearings, South Africa adduced what it characterized as a pattern of behavior by Israel demonstrating genocidal intent and conduct. The legal team of South Africa underscored:

- The scale of civilian damage and casualties;
- The blockade of Gaza as creating conditions not conducive to life;
- Statements by Israeli leaders allegedly calling for genocidal action;
- The prevention of humanitarian aid;
- The destruction of civilian infrastructure such as hospitals, water works, and shelters.

South Africa contended that these acts and omissions, collectively, brought credible allegations of genocide and therefore triggered the ICJ's jurisdiction to act preventively under Article 41.

Israel, in reply, dismissed the allegations outright, arguing that its actions were a legitimate exercise of self-defense against Hamas in retaliation for the 7 October 2023 attacks. Israel denied any genocidal intent and maintained that its military operations were against combatants and consistent with international humanitarian law (IHL). Israel also opposed the imposition of provisional measures on the grounds that South Africa had not demonstrated the probability of its genocide claims or the need for such intervention.

4.The Legal Threshold for Provisional Measures:

¹¹⁶ International Court of Justice (ICJ). (2024e). *Verbatim record: Public sitting held on Thursday 11 January 2024, at 10 a.m., at the Peace Palace, The Hague — South Africa's oral arguments.*

For the Court¹¹⁷ to indicate interim measures, it has to have been persuaded that:

- a. Prima facie jurisdiction pursuant to Article IX of the Genocide Convention¹¹⁸;
- b. The rights in question of South Africa are at least arguable;
- c. There exists a real and imminent danger of irreparable harm to such rights;
- d. The measures are needed urgently to prevent such harm.

The ICJ stressed that to indicate provisional measures does not necessarily involve a determination on the merits of the case. Instead, the Court considers whether the legal rights relied on are well-established enough to warrant interim protection.

5.Procedural Developments Following the Initial Order:

On 26 January 2024¹¹⁹, following examination of the filings, the ICJ issued an Order on Provisional Measures ordering Israel to immediately take measures to avert acts in breach of Article II of the Genocide Convention and to guarantee the delivery of humanitarian aid.

Israel was provided with a one-month timeframe for reporting on its compliance with the Order. The report of compliance, though not publicly disclosed, is part of the ongoing monitoring by the Court.

Then, on March 6, 2024¹²⁰, South Africa submitted a Second Request for Further Measures, noting severe deterioration of the humanitarian situation in Gaza, most notably indicators of mass starvation. The ICJ reacted by imposing

¹¹⁷ International Court of Justice (ICJ). (2024g). *Press release No. 2024/22: The Court issues order on additional provisional measures requested by South Africa*.

¹¹⁸ United Nations. (1948). *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations Treaty .

¹¹⁹ International Court of Justice (ICJ). (2024b). *Order of 26 January 2024 on the request for the indication of provisional measures*. <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ORD-01-00-EN.pdf>

¹²⁰ International Court of Justice (ICJ). (2024c). *Request for the modification of provisional measures of 6 March 2024*. <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240306-REQ-01-00-EN.pdf>

additional provisional measures on March 28, 2024¹²¹, directing Israel to permit unrestricted passage for humanitarian relief and once more to provide a report on compliance.

A third¹²² petition was filed in May 2024, regarding the escalation of military operations in Rafah. Public hearings were held on 16 and 17 May 2024, where South Africa brought that Israel's activities now constituted a "last stage of genocide" and had to be halted immediately. Israel contested these assertions as well.

The Court's ruling on this third application is yet to come, but it shows the ongoing procedural engagement and activist judicial supervision against the backdrop of the facts on the ground.

Subsection Two: ICJ Orders in South Africa v. Israel

1. Order of 26 January 2024: Initial Provisional Measures

In its first substantive judicial response, the International Court of Justice (ICJ) on 26 January 2024¹²³ issued an order granting several interim measures as requested by South Africa pursuant to Article 41 of the ICJ Statute. The Court concluded that it had prima facie jurisdiction to try the case pursuant to Article IX of the Genocide Convention since South Africa and Israel are parties to the Convention and disagreement regarding its interpretation falls within the jurisdiction of the Court .

Content of the Order:

The ICJ emphasized that it was not at this stage to determine whether or not genocide had occurred, but to rule on whether the rights invoked by South Africa for the Palestinian people under the Genocide Convention were

¹²¹ International Court of Justice (ICJ). (2024d). *Order of 28 March 2024 on the request for the modification of provisional measures*. <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ORD-01-00-EN.pdf>

¹²² International Court of Justice (ICJ). (2024h). *Press release No. 2024/29: The Court holds hearings on South Africa's third request for provisional measures*.

¹²³ International Court of Justice (ICJ). (2024a). *Order of 26 January 2024: Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

reasonable and whether there was a threat of irreparable harm to those rights prior to the case being finally heard.

Thus, the Court instructed Israel to:

1. Take all necessary steps within its power to prevent the commission of any act specified in Article II of the Genocide Convention¹²⁴, including:
 - Killing members of the group;
 - Causing serious bodily or mental harm;
 - Causing conditions intended to lead to the destruction of the group;
 - Imposing measures designed to prevent births;
 - Forcibly transferring children of the group to another group.
2. Make sure that its armed forces do not commit any act of genocide.
3. Prevent and punish public and direct incitement to commit genocide against Palestinians in Gaza.
4. Ensure the preservation of evidence of alleged genocidal acts.
5. Provide humanitarian assistance to civilians in the Gaza Strip.
6. Report to the Court within one month on the measures taken to comply with these steps.

This ruling was approved by a 15–2 vote, with the Israeli and Ugandan judges disagreeing on everything except one point. The Court went as far as to state that the Gaza crisis constituted an "exceptionally grave" humanitarian crisis and that Palestinians in Gaza were a protected group under the Genocide Convention

2. Order of 28 March 2024: Additional Provisional Measures

On 6 March 2024¹²⁵, South Africa sought the modification or enlargement of the existing provisional measures in light of radically worsening conditions in Gaza, primarily the impending famine, epidemics, and deterioration of infrastructure. The ICJ reacted by issuing a second order on 28 March 2024,

¹²⁴ United Nations. *Convention on the Prevention and Punishment of the Crime of Genocide*. Adopted December 9, 1948, entered into force January 12, 1951. United Nations Treaty Series, vol. 78, p. 277.

¹²⁵ International Court of Justice (ICJ). (2024b). *Order of 28 March 2024: Additional provisional measures*.

highlighting that it was entitled to modify provisional measures when there are new facts which effectively alter the circumstances.

Content of the Order:

In this second order, the ICJ reaffirmed the validity of South Africa's submissions and the actual and present danger to Palestinian life in Gaza. It directed the following additional steps:

1. Israel should take all necessary and effective measures to ensure the "unhindered provision at scale" of:
 - Food,
 - Water,
 - Fuel,
 - Shelter,
 - Clothing,
 - Hygiene,
 - Sanitation,
 - Medical supplies.
2. Israel should increase the capacity and number of entry points for humanitarian aid and cooperate fully with the United Nations and other international actors.
3. Israel has to submit a new report within one month stating actions taken to enact such measures.

The Court justified new measures in relation to credible evidence, including the reports by the United Nations and humanitarian organizations, of colossal civilian hardship and the danger of starvation . ICJ had the opinion that Israel's responsibility under the Genocide Convention includes positive obligations against causing harm and not merely refrain from direct evil.

This was also ordered with a 15–1 majority, and all the judges apart from the Israeli judge concurred.

3. Ongoing Request of 10 May 2024: Public Hearings

At the start of May 2024, South Africa had made a third¹²⁶ urgent request for further provisional measures, prompted by increasing Israeli military activity in Rafah, southern Gaza, an area that had become a sanctuary for over one million displaced Palestinians.

The ICJ held public hearings on 16 and 17 May 2024 to respond to South Africa's new submission. South Africa had argued that the situation had evolved into a new phase of the conflict, and that Israel was not enforcing the steps mandated earlier. It requested further actions, which might include a ceasefire, or restraint on military activity in civilian populations. To this date, the ICJ has not yet passed a judgment on this third application.

Section four: Legal and Political Challenges Faced by South Africa in Filing a Genocide Case Against Israel Before the ICJ

subsection one: Legal Obstacles in South Africa's Case

1. Legal Status and Jurisdictional Barriers

One of the major legal hurdles South Africa had to overcome was to define its status before the ICJ as it was indirectly affected by the acts of Israel. This hurdle was surmounted by applying the doctrine of *erga omnes partes* obligations enunciated under the Genocide Convention, according to which every state party to the Convention has a legitimate interest in seeing to the enforcement of the Convention. The ICJ has reaffirmed this principle in earlier jurisprudence, as in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*¹²⁷.

Besides, South Africa needed to establish that the ICJ had jurisdiction pursuant to Article IX of the Genocide Convention. The article confers jurisdiction on the Court in respect of disputes arising between parties concerning the interpretation, application, or fulfillment of the Convention. In its provisional

¹²⁶ International Court of Justice (ICJ). (2024c). *Press Release No. 2024/29: Public hearings on South Africa's third request for the indication of provisional measures.*

¹²⁷ International Court of Justice (ICJ). (2007). *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment of 26 February 2007.

measures order, the ICJ reaffirmed its prima facie jurisdiction to hear the case¹²⁸.

2. Burden of Proof and Genocidal Intent

Perhaps the most significant legal concern relates to the quantum of proof that should be applied in proceedings for genocide. Genocide is an international crime of special gravity that requires evidence of a particular intent to exterminate, in whole or in part, a protected group. To prove this mental element, clear and convincing evidence is necessary, which is seldom available in ongoing armed conflicts¹²⁹. The challenge is increased when the genocide is committed in the course of a broader military campaign, for South Africa has not only to establish the actus reus (the physical acts) but also that they were perpetrated with the intention to destroy the Palestinian people as such.

3. The Gaza Conflict Complexity

The asymmetry in the Israel-Hamas conflict serves to complicate South Africa's case even more. Israel would argue that it is acting on a response of removing threats issued by Hamas, not the Palestinian people as such. This would be an effort to refute the possibility of a genocidal intent and characterize the situation instead as a justified exercise of the right of self-defense under international law. Thus, South Africa's lawyers must disentangle military necessity from intentional acts of group destruction¹³⁰.

Subsection two: Political and Diplomatic Constraints

1. Geopolitical Pressures and Diplomatic Isolation

The move by South Africa to sue Israel exposed it to severe political condemnation by powerful Western governments, most of which are Israel's closest friends. Such pressures included attempts to blacken the reputation of South Africa by painting the case as politically rather than legally justified.

¹²⁸ International Court of Justice (ICJ). (2024b). *Order on Provisional Measures*. South Africa v. Israel.

¹²⁹ Schabas, W. A. (2009). *Genocide in International Law: The Crime of Crimes* (2nd ed.). Cambridge University Press.

¹³⁰ Cryer, Robert, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. 4th ed. Cambridge: Cambridge University Press, 2019.

Such responses are a testimony to the broader geopolitical stakes involved in global litigation for genocide and present evidence of how politics and law are typically muddled in global dispute resolution¹³¹.

2. Israel's Argument and Delegitimization Tactics

Israel's response to the case also included official objections to the admissibility and jurisdiction of South Africa's arguments, as well as generalized attempts at delegitimizing the proceedings by depicting them as biased and unfounded. These are not uncommon moves in international litigation, particularly when reputational and political interests are at stake. While the ICJ has attempted to maintain judicial impartiality, such challenges can delay or complicate proceedings.

3. Institutional Delay and Procedural Constraints

Another problem arises in the ICJ's own structural restraints. Trials before the Court are often prolonged, with judgments years in coming to fruition. The Court is able to provide interim measures in an effort not to cause irreparable harm but orders that are difficult to enforce immediately and are without coercive impact. Such delay between remedy by law and actual consequence depreciates the salience of remedies under law for mass atrocities¹³².

Section five: The Current State and Future of the Case South Africa v. Israel

Subsection one: Procedural Status and Current Developments

As of May 2025, the South Africa v. Israel case before the International Court of Justice (ICJ) is still at its beginning stage, and no final judgment on the merits has been issued. The Court has thus far dealt with provisional measures, which are binding and interim orders to prevent irreparable harm pending litigation. Two such orders were issued—on 26 January and 28 March 2024—acting in response to South Africa's contention that Israel was violating its obligations

¹³¹ Akande, Dapo. "Geopolitics and Accountability at the ICJ: The *South Africa v. Israel* Case." *Oxford Journal of International Law* 32, no. 1 (2024): 45–68.

¹³² International Court of Justice (ICJ). *Order on Provisional Measures: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel)*. The Hague: ICJ, 2024.

under the 1948 Genocide Convention through its military operations in the Gaza Strip.

These actions, echoed in part by the ICJ's reasoning, recognized the validity of genocidal risk to Palestinians and reasserted Israel's obligation not only to avoid genocidal action but actively to prevent and punish it. The Court also emphasized the obligation to preserve evidence and allow humanitarian access to the Gaza civilian population¹³³.

In May 2024, South Africa submitted a third urgent request for additional provisional measures as a result of intensified military actions, particularly in Rafah. Public hearings were held on 16–17 May 2024. The ICJ has not yet issued an order on this most recent application¹³⁴. The proceedings remain dynamic, as Israel's compliance with prior orders continues to be questioned by South Africa and international humanitarian observers.

Subsection two: ICC Arrest Warrant for Prime Minister Netanyahu

The International Criminal Court (ICC)¹³⁵ has issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant on 21 November 2024. The ICC criminally holds the two officials responsible for war crimes and crimes against humanity committed during the Gaza conflict, including the use of starvation as a method of warfare, murder, persecution, and other inhuman acts.

These are the first arrest warrants the ICC has ever issued for the heads of a West-aligned democracy. The warrants obligate all 124 Rome Statute member nations to detain Netanyahu and Gallant if they visit their borders. The ICC

¹³³ International Court of Justice (ICJ). (2024a). *Order of 26 January 2024: Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

¹³⁴ International Court of Justice (ICJ). (2024c). *Press Release No. 2024/29: Public hearings on South Africa's third request for the indication of provisional measures*.

¹³⁵ International Criminal Court (ICC). *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine*. The Hague: ICC, 2024.

decision has met mixed reactions globally. Israel has rejected the court's jurisdiction and decried the warrants as politically motivated. Some countries, such as Hungary, have withdrawn from the ICC in protest, while others have ratified their commitment to the enforcement of international law.¹³⁶

subsection three: Possible Future Scenarios and Legal Outcomes

The merits stage of the case will consider whether Israel has violated the Genocide Convention, such as by examining the intent (*mens rea*) of its military operations, the degree and character of civilian harm, and whether acts of genocide, as established in Article II of the Convention, have occurred. This phase will reportedly involve extensive filing of written and oral evidence, including from third-state countries, UN agencies, and expert witnesses.

The future of the case has several potential paths:

1. **Final Judgment:** The ICJ may, after years of hearings and deliberations, issue a final judgment on the merits.

This can range from:

- Finding Israel not guilty of genocide;
 - Finding Israel guilty of committing or omitting to prevent acts of genocide;
 - Finding Israel partially responsible, for example, for incitement or for not preventing.
2. **Binding Consequences**¹³⁷: If the ICJ finds a breach of the Genocide Convention, it can order reparations, such as cessation of unlawful acts, guarantees of non-repetition, and compensation. The ICJ has no enforcement mechanism, but such a ruling would carry significant legal and diplomatic weight.
 3. **UN General Assembly and Security Council Implications:** While the ICJ is unable to enforce its decisions, its judgments can be referred to the

¹³⁶ Reuters. "What the ICC Said on the Arrest Warrants against Gallant, Netanyahu and Hamas Leader Deif." *Reuters*, November 21, 2024. <https://www.reuters.com/>.

¹³⁷ Talmon, Stefan. "Provisional Measures and the ICJ: Binding Force and Compliance in Practice." *Journal of International Dispute Settlement* 15, no. 2 (2024): 220–245.

UN General Assembly or the Security Council, potentially resulting in further pressure on Israel or even broader international action.

4. **Parallel Proceedings at the ICC:** In case the International Criminal Court (ICC) were to issue arrest warrants or open formal investigations with respect to related conduct, parallel tracks of accountability could emerge. While the ICJ addresses state responsibility, the ICC addresses individual criminal responsibility, including that of high-ranking officials.
5. **Admissibility of Third-Party Interventions:** The other states party to the Genocide Convention may also intervene in the proceedings under Article 63¹³⁸ of the ICJ Statute, submitting legal arguments on behalf of either party.¹³⁹

Abstract

This chapter is a critical analysis of the claim made by South Africa against Israel before the International Court of Justice (ICJ) concerning alleged acts of genocide committed during the Israeli military campaign in the Gaza Strip following the "Al-Aqsa Flood" operation in October 2023. The argument begins with the evaluation of Israel's invocation of self-defense under Article 51 of the Charter of the United Nations and critically evaluates its applicability to legal standards of necessity, proportionality, immediacy, and compliance with international humanitarian law. The chapter subsequently looks into whether or not Israel's actions fulfill the legal, material, and mental prerequisites of genocide in the 1948

¹³⁸ International Court of Justice. *Statute of the International Court of Justice*. San Francisco: United Nations, 1945.

¹³⁹ Cryer, Robert, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. 4th ed. Cambridge: Cambridge University Press, 2019.

Genocide Convention on evidence presented by South Africa, including public statements from Israeli leaders and the magnitude of civilian destruction. It further examines South Africa's requests for provisional measures and the ICJ's orders afterward, noting the Court's recognition of the severity and urgency of the Gaza humanitarian crisis. Finally, the chapter addresses the legal and political hurdles facing South Africa, such as jurisdictional barriers, proof burdens, and global diplomatic threats, and makes some comments on International Criminal Court (ICC) progress, such as Israeli officials receiving arrest warrants. This multidimensional question provides a legal framework in which to understand the ongoing proceedings and their implications for international responsibility and the law of genocide.

Conclusion

This study examined the ICJ jurisdiction with regard to interpreting and applying the 1948 Genocide Convention, the case of South Africa vs. Israel. It established that the judicial norm for the crime of genocide is specifically outlined in international treaties, notably the 1948 Convention and the Rome Statute, which detail its constituent factors: the legal, material, mental, and international factors. Nevertheless, the research did identify persistent challenges in applying this framework in practice, most notably the challenge of establishing the requisite "specific intent" to commit genocide and surmounting political barriers that often lie in the way of the enforcement of international judicial decisions, most notably those against powerful states.

The research discovers that the ICJ possesses full juridical capacity to adjudicate state parties' cases in terms of the Convention. However, such exercise of jurisdiction finally depends upon the states' political will and cooperation. The *South Africa v. Israel* case demonstrates how the Court could intervene on serious allegations of genocide amidst a human rights crisis marked by dire political repercussions.

In my considered opinion, and based on an impartial assessment of the evidence that is available—attack on civilians, destruction of vital infrastructure, denial of the basic necessities of life, and official statements by Israeli officials—it is evident that Israel's operations in Gaza fulfill all the legal requirements of genocide. The direction and scope of such actions reflect a deliberate intent to partially or totally destroy a religious and national community, thereby fulfilling the *mens rea* and *actus reus* elements of the crime.

The study suggests enhancing the International Criminal Court's (ICC) autonomy and making it more enforceable through legally binding mechanisms. It calls for updated evidence requirements, increased cooperation between the ICJ and the International Criminal Court, and protection of international justice from political manipulation.

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المخلص

تتناول هذه الرسالة الإطار القانوني لجريمة الإبادة الجماعية في القانون الدولي، وتُحلل القضية التي رفعتها جمهورية جنوب إفريقيا ضد دولة إسرائيل أمام محكمة العدل الدولية، والتي لا تزال قيد النظر. يتناول الفصل الأول تحليلاً نظرياً لأركان جريمة الإبادة الجماعية كما وردت في اتفاقية عام 1948، وهي: الركن الشرعي، الركن المادي، الركن المعنوي، والركن الدولي. كما يُناقش اختصاص محكمة العدل الدولية للنظر في هذا النوع من القضايا، والمعايير القانونية المطلوبة لإثبات مسؤولية الدولة عن ارتكاب جريمة الإبادة الجماعية. أما الفصل الثاني، فيطبّق هذا الإطار القانوني على الأفعال العسكرية التي ارتكبتها إسرائيل في قطاع غزة بعد أحداث 7 أكتوبر 2023، وذلك في ضوء قواعد القانون الدولي، ولا سيما قانون الدفاع الشرعي والقانون الدولي الإنساني. وتُقيّم الدراسة ما إذا كانت تصرفات إسرائيل، كما زعمت جنوب إفريقيا، تُحقّق أركان جريمة الإبادة الجماعية، كما تتابع ردود محكمة العدل الدولية من خلال التدابير المؤقتة والإجراءات القضائية المستمرة. وتلخص الرسالة إلى أن هذه القضية تمثل اختباراً حاسماً لفعالية ومصداقية المؤسسات القانونية الدولية في مواجهة الجرائم الجماعية. وتسهم هذه الدراسة في

إثراء البحث القانوني، وتعزيز مسار العدالة الدولية من خلال تحليل أحد أبرز التحديات القانونية في العلاقات الدولية المعاصرة.

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