

## INTERNATIONAL LAW IN GAZA: BELLIGERENT INTENT AND PROVISIONAL MEASURES

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On October 7, 2023, Palestinian armed groups, chiefly Hamas's armed wing, breached the fence around the Gaza strip and launched attacks on Israeli territory. Over several hours, Palestinian fighters killed 1,269 people, mostly civilians,<sup>1</sup> engaged in sexual violence and torture,<sup>2</sup> and took 253 hostages.<sup>3</sup> The same day, Israel's Prime Minister Benjamin Netanyahu declared, "Israel is at war," and the Israel Defense Forces (IDF) launched air strikes and later a ground invasion of Gaza.<sup>4</sup> In the eleven months since, Palestinian groups have continued to hold, mistreat, and kill hostages and launched rockets into Israel's population centers.<sup>5</sup> Meanwhile, the IDF has killed an estimated forty-one thousand people in Gaza, mostly civilians,<sup>6</sup> engaged in sexual violence and torture of Palestinian detainees,<sup>7</sup> damaged or destroyed most of the food, water, and medical infrastructure,<sup>8</sup> and restricted humanitarian access, with dire consequences.<sup>9</sup> Civilian casualty experts argue the death toll (which excludes the likely greater number killed "indirectly" through disease and deprivation) far exceeds what we have come to expect from contemporary military

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<sup>1</sup> Tamsin Westlake, *An Analysis of the 7th of October 2023 Casualties in Israel*, ACTION ON ARMED VIOLENCE (Dec. 20, 2023).

<sup>2</sup> UN Press Release, Reasonable Grounds to Believe Conflict-Related Sexual Violence Occurred in Israel During 7 October Attacks, Senior UN Official Tells Security Council (Mar. 11, 2024), at <https://press.un.org/en/2024/sc15621.doc.htm>.

<sup>3</sup> House of Commons, 2023/24 Israel-Hamas Conflict: US, UN, EU and Regional Response (July 25, 2024), at <https://researchbriefings.files.parliament.uk/documents/CBP-10007/CBP-10007.pdf>.

<sup>4</sup> Ibrahim Dahman et al., *Netanyahu Says Israel Is "at War" After Hamas Launches Surprise Air and Ground Attack from Gaza*, CNN (Oct. 7, 2023), at <https://edition.cnn.com/2023/10/07/middleeast/sirens-israel-rocket-attack-gaza-intl-hnk/index.html>.

<sup>5</sup> Albeit with decreasing frequency, see <https://rocketalert.live> (last accessed Sept. 3, 2024).

<sup>6</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), Occupied Palestinian Territories: News and Updates, at <https://www.ochaopt.org> (last accessed Oct. 2, 2024). The number may include some deaths attributable to actors other than the IDF and is also likely a significant undercount.

<sup>7</sup> Diakonika, *Unlawful Incarceration: An International Law Based Assessment of the Legality of the Military Detention Regime That Israel Applies to Palestinians* (Aug. 30, 2024).

<sup>8</sup> See notes 66–67 *infra*.

<sup>9</sup> See notes 65, 68–74 *infra*.

campaigns.<sup>10</sup> Both sides have committed violations of International Humanitarian Law (IHL), too many to list individually.<sup>11</sup>

The prevalence of violations is not unique to this conflict. What is unusual in Gaza is that catastrophic civilian harm coincides with more than a perfunctory claim of legal compliance: Israeli officials consistently and often proactively argue that their military operations adhere to international law,<sup>12</sup> with support from some legal experts.<sup>13</sup> This has put the spotlight on international law. Three proceedings before the International Court of Justice (ICJ)—South Africa’s allegation that Israel is engaged in genocide, Nicaragua’s allegation that Germany is complicit in Israel’s alleged violations of international law, and an Advisory Opinion affirming the illegality of Israel’s continued occupation—as well as the International Criminal Court (ICC) prosecutor’s request for arrest warrants against Hamas and Israeli leaders garner unprecedented public interest. These discursive and judicial processes could repair and solidify international law’s role as the yardstick for normative evaluation of war, including vis-à-vis powerful Western states. Or they could reveal IHL’s incapacity to meaningfully restrain war, catalyzing legal deterioration.

We may not know the net effect of the war on international law’s trajectory for some time. However, from the beginning, the devastating human toll of this conflict has underscored the urgent need for international law to fulfill three distinct functions: *ex ante* action-guidance; concurrent third-party evaluation; and *ex post* accountability. Much commentary on Gaza has prioritized concepts and institutional frames developed for accountability. For critics of a party’s military operations, charging war crimes may express stronger disapproval than “mere” IHL violations. For those defending that conduct, calling attention to law’s accountability function often grounds a demand to suspend legal judgement until after adjudication.<sup>14</sup> Accountability is important. However, IHL is also meant to constrain belligerents’ actions *ex ante* and to help third states evaluate these actions so they can concurrently meet their own obligations. Law must discharge these functions while hostilities are ongoing or not at all.

To be sure, IHL faces challenges in fulfilling its action-guiding and evaluative functions in real time.<sup>15</sup> In war, information is partial, cognitive biases are primed, and propaganda machines operate at full tilt.<sup>16</sup> The resulting epistemic fissures can lead to disagreement on

<sup>10</sup> Mark Lattimer, *Assessing Israel’s Approach to Proportionality in the Conduct of Hostilities in Gaza*, LAWFARE (Nov. 16, 2023); Larry Lewis, *Israeli Civilian Harm Mitigation in Gaza: Gold Standard or Fool’s Gold*, JUST SECURITY (Mar. 12, 2024).

<sup>11</sup> Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, Detailed findings on the Military Operations and Attacks Carried Out in the [OPT] from 7 October to 31 December 2023, UN Doc. A/HRC/56/CRP.4 (June 10, 2024); Diakonia, *Legal Brief: 2023 Hostilities in Israel and Gaza* (Dec. 5, 2023).

<sup>12</sup> Israeli Prime Minister’s Office Press Release, Statement by PM Netanyahu (Oct. 29, 2023), at <https://www.gov.il/en/pages/event-statement281023>; Israeli Ministry of Foreign Affairs Press Release, Hamas-Israel Conflict 2023: Frequently Asked Questions (Dec. 8, 2023), at <https://www.gov.il/en/pages/swords-of-iron-faq-6-dec-2023>.

<sup>13</sup> We cite them as we engage with their arguments.

<sup>14</sup> See, e.g., Benjamin Wittes & Jen Patja, *Lawfare Daily: Benjamin Wittes on Israel, Gaza, and Implications for U.S. Foreign and Domestic Policy*, LAWFARE (May 6, 2024); Andreea Manea, *Too Early to Tell? The (Un)lawfulness of Israeli Attacks: The Case of the Jabalia Refugee Camp*, EJIL:TALK! (Nov. 4, 2023).

<sup>15</sup> Stephen Townley, *Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in IHL*, 50 VAND. J. TRANSNAT’L L. 1223, 1252–55 (2017).

<sup>16</sup> See, e.g., Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18 CHI. J. INT’L L. 83, 102–09 (2017).

basic facts, while out-group bias fuels extreme views of what ought to be permitted in pursuit of a military aim.<sup>17</sup> Still, it would be a mistake to invoke this epistemic environment to defer legal analysis. Instead, international law must provide the doctrinal resources to navigate the uncertainty and contestation that characterizes armed conflict.

The war in Gaza has spotlighted two doctrinal questions that partly underpin polarized evaluations and that go to the heart of law's capacity to discharge its action-guiding and evaluative functions in real time: first, how to conceptualize intent in war, and second, how to evaluate international courts' early-stage engagement with ongoing conflict. We submit that the functional differentiation of law's tasks, in turn, is critical to answering these questions. In Part I, we clarify intent requirements and argue that their meaning and inference may differ across international law's three functions. In Part II, we clarify the doctrinal significance of international courts' provisional engagement with ongoing armed conflict particularly for guiding third states' evaluations in real time.

### I. BELLIGERENT INTENT IN GAZA

In criminal law, “a guilty mind” is generally a precondition for accountability. However, in war, intent also determines action guidance and third-party evaluation. Some strikingly divergent evaluations of Israel's conduct in Gaza hinge on what intent is attributed to Israel or its officials. Are mass civilian casualties unavoidable<sup>18</sup> and potentially proportionate<sup>19</sup> in this operational context? Or do they evince intentional attacks against civilians or civilian objects in violation of distinction?<sup>20</sup> When it comes to hunger in Gaza, some portray the crisis as a “tragic” consequence of civilians being “caught in the midst of intense hostilities,”<sup>21</sup> while others identify intentional starvation of civilians as a method of warfare.<sup>22</sup> And of course, whether we need “to sound the alarm”<sup>23</sup> about genocide or whether the allegation is “morally repugnant”<sup>24</sup> depends on whether the observer entertains the possibility that Israel has the special intent to “destroy in whole or in part” Palestinians as a group.

Some of these divergent judgments relate to contested facts. Others, however, stem from doctrinal confusion about how to conceptualize intent. We identify five dimensions of this

<sup>17</sup> Sophia Hatz, *Israeli Demolition Orders and Palestinian Preferences for Dissent*, 81 J. POL. 1069 (2019); Anna Getmansky & Thomas Zeitzoff, *Terrorism and Voting: The Effect of Rocket Threat on Voting in Israeli Elections*, 3 AM. POL. SCI. REV. 588 (2014).

<sup>18</sup> John Spencer, *Israel Implemented More Measures to Prevent Civilian Casualties Than Any Other Nation in History*, NEWSWEEK (Jan. 31, 2024).

<sup>19</sup> Benjamin Wittes, *On Strategy, Law, and Morality in Israel's Gaza Operation*, LAWFARE (Oct. 17, 2023).

<sup>20</sup> Amnesty International, *Damning Evidence of War Crimes as Israeli Attacks Wipe out Entire Families in Gaza* (Oct. 20, 2023), at <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza>.

<sup>21</sup> Geoff Corn & Emanuela-Chiara Gillard, *The War Crime of Starvation - The Irony of Grasping at Low Hanging Fruit*, ARTICLES OF WAR (May 15, 2024); Amichai Cohen & Yuval Shany, *The Prosecutor's Uphill Legal Battle?: The Netanyahu and Gallant ICC Arrest Warrant Requests*, JUST SECURITY (May 25, 2024).

<sup>22</sup> Tom Dannenbaum, *The Siege of Gaza and the Starvation War Crime*, JUST SECURITY (Oct. 11, 2023); Yousuf Syed Khan, *Gaza Arrest Warrants: Assessing Starvation as a Method of Warfare and Associated Starvation Crimes*, JUST SECURITY (May 31, 2024).

<sup>23</sup> *Public Statement: Scholars Warn of Potential Genocide in Gaza*, THIRD WORLD APPROACHES INT'L L. REV. (Oct. 17, 2023), at <https://twail.com/public-statement-scholars-warn-of-potential-genocide-in-gaza>.

<sup>24</sup> *NSC and Foreign Ministry: Charges of Genocide are False, Outrageous, Morally Repugnant*, ISR. NAT'L NEWS (May 24, 2024).

confusion. First, intent in law has multiple meanings, including acting with purpose (direct intent), but also acting with knowledge (indirect or oblique intent).<sup>25</sup> Which is required for some prohibitions is debated. Second, the object of intent may be contested. Whereas some violations are triggered merely through prohibited conduct (regardless of consequences), the difference between purpose and knowledge matters for prohibitions that include a consequence element or define intent in relation to consequences. Third, when prohibited intent is not limited to purposive acts, the question arises whether it extends to acting with less than perfect foresight—e.g., taking a substantial and unjustified risk. Fourth, when purpose is central to a prohibition, an actor's motives and attitudes (including regret) may cloud legal analysis. Finally, what does *state* intent mean when officials involved in state policy operate with divergent intentions?

The threshold for criminal accountability is often higher than for “mere” legal violation. And yet, most jurisprudence on intent emanates from international criminal law. Intent defined for law's accountability function therefore shapes our understanding of intent for constraining belligerents' actions and evaluating their conduct in real time, producing a “forensic fallacy” that confuses “[the] narrowness and precision in criminal statutes with defining features” of the prohibited act.<sup>26</sup> Due process demands that law discharge its accountability function with a high inferential standard. Moreover, “criminal intent” must track blameworthiness, not only wrongfulness of conduct. However, third-party efforts to ensure compliance through exercising appropriate leverage cannot plausibly be conditioned on operating like a criminal court. Suspending judgment until adjudication subverts IHL's capacity to protect civilians. Rather, prohibited intent must be conceptualized and inferred differently depending on the legal function at stake.

In the following, we clarify the meaning of intent as applied to the conduct of hostilities (I.A), starvation (I.B), and the genocide allegation before the ICJ (I.C). We show where law already differentiates intent for the purpose of law's accountability function from intent appropriate for law's action-guiding and evaluative functions, but also highlight open doctrinal questions. We focus primarily on intent in relation to Israel's conduct since, with two noted exceptions, there is little contestation about intent in evaluating Hamas's actions.

### A. *Conduct of Hostilities in Gaza*

In May 2024, the U.S. State Department reported to Congress that it had found “no direct indication of Israel intentionally targeting civilians,” even though it described several strikes, specifically on humanitarian assistance missions, without a military target and flatly stated that “Israel could do more to avoid civilian harm.”<sup>27</sup> The United States concluded that it did not have to suspend arms transfers to Israel. But does the report really rule out that Israel is violating IHL's “cardinal principle” of distinction? The principle is cast in terms of

<sup>25</sup> Sarah Finnin, *Mental Elements Under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 INT'L & COMP. L. Q. 325 (2012).

<sup>26</sup> David Luban & Henry Shue, *Mental Torture: A Critique of Erasures in U.S. Law*, 100 GEO. L.J. 823, 850 (2011).

<sup>27</sup> Report to Congress Under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20), at 22, at <https://www.justsecurity.org/wp-content/uploads/2024/05/Report-to-Congress-under-Section-2-of-the-National-Security-Memorandum-on-Safeguards-and-Accountability-with-Respect-to-Transferred-Defense.pdf>.

prohibitions on making civilians or the civilian population “the object of attack,” or “directing attacks against” protected civilian(s)/objects—terms commonly understood to implicate intent. Israel argues that “a commander’s *intent* is critical in reviewing the principle of distinction during armed conflict.”<sup>28</sup> But what does intent mean here?

Jens David Ohlin has argued that violations of distinction require direct intent, i.e., acting with purpose, vis-à-vis the attack’s impact on civilians. This, he argues, is because IHL does not prohibit knowingly killing civilians or destroying civilian objects, if compliant with precautions and proportionality.<sup>29</sup> On attaching intent to impact, Michael Bothe seems to agree that “not only the actual conduct (e.g., the dropping of the bomb), but also the consequences (e.g., hitting a civilian object) must be covered by the intent.”<sup>30</sup> The State Department may rely on something like this approach in arguing that a pattern of attacks without identifiable military objectives does not imply violations of distinction without evidence that what the report considers avoidable civilian deaths were brought about with purpose. We proffer three reasons against this interpretation of prohibited intent.

First, Ohlin’s correct observation that “distinction and proportionality must be understood as two normatively distinct prohibitions”<sup>31</sup> does not require that the attacking commander violates distinction only if she seeks to harm civilian(s)/objects. Rather we must disaggregate two questions often merged—“who the attacker wishes to affect [and] who he is aiming his attack at.”<sup>32</sup> Even in relation to war crimes, the ICC’s Elements of Crimes document raises only the latter question: it requires meaning to engage in an attack (purposive intent attached to conduct) that is directed (aimed) against what is known to be a civilian object/person.<sup>33</sup> This knowledge characterizes the prohibited conduct and its circumstances, not its consequences. The key is that the perpetrator “intended” civilian objects/persons “to be the object of the attack,”<sup>34</sup> not that she wished to kill or injure them. Intentionally launching an attack known to be directed against a civilian person/object violates distinction (including criminally). This is clearly distinct from the separate ban on intentionally directing an attack against a military objective that may be foreseen (known) to cause (clearly) excessive incidental civilian harm, thus (criminally) violating proportionality.<sup>35</sup>

<sup>28</sup> State of Israel, *The Operation in Gaza, 27 December 2008–18 January 2009: Factual and Legal Aspects*, para. 10 (July 2009).

<sup>29</sup> Jens David Ohlin, *Targeting and the Concept of Intent*, 35 MICH. J. INT’L L. 79 (2013); see also Townley, *supra* note 15, at 1233.

<sup>30</sup> Michael Bothe, *War Crimes, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOL. 1, at 370, 389 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002).

<sup>31</sup> Jens David Ohlin, *Targeting and the Concept of “Intent,”* OPINIO JURIS (Feb. 8, 2012).

<sup>32</sup> Dapo Akande, *US Drone Strikes in Pakistan: Can It Be Legal to Target Rescuers & Funeralgoers*, EJIL:TALK! (Feb. 12, 2012).

<sup>33</sup> Knut Dörmann, *Article 8. War Crimes, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY* 317, 402 (Kai Ambos ed., 4th ed. 2022); see also *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, para. 180 (Mar. 3, 2000).

<sup>34</sup> ICC, *Elements of Crimes* 12 (2013). Similarly: Dörmann, *supra* note 33; *Prosecutor v. Blaškić*, *supra* note 33, para. 180; Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L & COMP. L. REV. 57, 112 (2004); ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR*, Ch. 5 (2017).

<sup>35</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Art. 51(5)(b), June 8, 1977, 1125 UNTS 3 [hereinafter AP I]; Rome Statute of the ICC, Art. 8(2)(b)(iv), July 17, 1998, 2187 UNTS 90 [hereinafter ICC Statute]; *Elements of Crimes*, *supra* note 34, at 13.

Second, International Criminal Tribunal for the former Yugoslavia (ICTY) case law supports that for the purpose of *violating* distinction, prohibited intent attaches not to the consequences, but to the direction of the attack. Unlike the Rome Statute, ICTY jurisprudence considers harmful consequences—“deaths and/or serious bodily injury within the civilian population or damage to civilian property”<sup>36</sup>—a constituent element of the crime. However, these consequences primarily demarcate whether an attack was “grave enough to bring the offence into the scope of the Tribunal’s jurisdiction.”<sup>37</sup> Moreover, the Appeals Chamber states categorically that in “none of [the] declarations of customary international law . . . is the prohibition of attacks on civilians or civilian objects explicitly combined with statements regarding a finding of actual injury to civilians or damage to civilian objects.”<sup>38</sup> Nodding to functional differentiation, the judges highlight that *ex ante* “the purpose of this prohibition is not only to save lives of civilians, but also to spare them from the risk of being subjected to war atrocities.”<sup>39</sup>

That a violation of distinction hinges at most on knowledge of the target’s status and not the consequences of an attack (sought, foreseen, or realized) explains why an attack that is directed against civilian(s)/objects violates distinction even if the attacker seeks military effects, i.e., has an ultimate military purpose.<sup>40</sup> In Gaza the reported target category “operatives’ homes” illustrates this.<sup>41</sup> Homes are presumptively civilian until it is established that they are used to make an effective contribution to military action.<sup>42</sup> Facts are contested, but attacking homes while the operatives are out would straightforwardly violate distinction. What about the alleged approach “to destroy private residences in order to assassinate a single resident suspected of being a Hamas or Islamic Jihad operative?”<sup>43</sup> Even assuming the operatives are plausibly legitimate targets (for example, on the basis of their continuous combat function), their mere presence would not transform their personal homes into military objectives.<sup>44</sup> If these attacks were directed against the home rather than the person, they would violate the principle of distinction even if the intended *consequence* was the death of the latter.

Differentiating between a person and the surrounding home being the object of attack may seem technical, but it clarifies legal assessments. Using munitions that destroy the home, rather than available alternatives that would target the individual while preserving the

<sup>36</sup> *Prosecutor v. Blaškić*, *supra* note 33, at 180; *see also* AP I, *supra* note 35, Art. 85(3)(a).

<sup>37</sup> *Prosecutor v. Strugar*, IT-01-42-T, Judgment, para. 225 (Jan. 31, 2005).

<sup>38</sup> *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgment, paras. 59, 65 (Dec. 17, 2004).

<sup>39</sup> *Prosecutor v. Strugar*, *supra* note 37, at 221.

<sup>40</sup> *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07 OA 8, Admissibility Appeal, para. 800 (Sept. 25, 2009); *Prosecutor v. Galić*, IT-98-29-A, Judgment, para. 130 (Nov. 30, 2006).

<sup>41</sup> Office of the UN High Commissioner for Human Rights (UNOCHR) Press Release, Gaza: UN Experts Deplore Use of Purported AI to Commit “Domicide” in Gaza, Call for Reparative Approach to Rebuilding (Apr. 15, 2024), at <https://www.ohchr.org/en/press-releases/2024/04/gaza-un-experts-deplore-use-purported-ai-commit-domicide-gaza-call>.

<sup>42</sup> AP I, *supra* note 35, Art. 52(3).

<sup>43</sup> Yuval Abraham, “A Mass Assassination Factory”: Inside Israel’s Calculated Bombing of Gaza, +972 (Nov. 30, 2023).

<sup>44</sup> Homes are different in this respect from the kinds of accommodation that are often thought to qualify as military objectives, namely: barracks which are of a “nature” to make an effective contribution to military action or armed group safe houses which may be “use[d]” to make such a contribution by hiding fighters or facilitating clandestine military activity. *See* AP I, *supra* note 35, Art. 52(2). Operatives’ personal homes are neither military by nature nor military by use.

home, in addition to violating precautionary requirements, would entail directing the attack at the home, regardless of how one might construe the attack's purpose. Similarly, attacking a home without certainty that the combatant is there, again in addition to violating precautions, could only be construed as directing the attack at the home, regardless of whether it would be plausible to construe the (wished for) purpose as killing the person. The difference matters. The widespread destruction of family homes in Gaza has devastating humanitarian consequences.<sup>45</sup>

That "military purpose" of an attack alone cannot render a civilian object a legitimate target of direct attack is relevant also in other contexts. It would for instance rule out directing an attack against a civilian structure wishing to collapse it over, and thereby neutralize, a distinct military objective. On October 25, 2023, a twelve-story residential tower in the Al-Yarmouk neighborhood "was directly hit" by an airstrike which the IDF labeled a "strike on a Hamas terror tunnel."<sup>46</sup> The attack collapsed the tower and killed eighty-one women and children. Distinction would have precluded directing the attack at the building (presumptively a civilian object) as the means to destroying the tunnel.<sup>47</sup> If, on the contrary, the tunnel was targeted, and the residential tower was destroyed incidentally, the legality of the attack would turn on the preventability and the very likely excessiveness of expected civilian harm.

Third, knowledge of the target's civilian status is not necessary to violate distinction. The customary war crimes regime,<sup>48</sup> the International Committee of the Red Cross (ICRC) Commentary to Article 85(3) of the First Additional Protocol,<sup>49</sup> and ICTY jurisprudence envisage criminal accountability for reckless targeting of civilians/objects.<sup>50</sup> Recklessness lies beneath knowledge on an epistemic continuum. The threshold for "mere" illegality is still lower. Target misidentification violates IHL if the attacking party fails to "do everything feasible to verify" the target's status and to take "constant care" to spare civilians.<sup>51</sup> In cases characterized by doubt regarding target status, civilian status must be presumed and attack eschewed (although how much doubt is disputed).<sup>52</sup> Concretely, even if those who directed

<sup>45</sup> UNOCHR Press Release, *supra* note 41.

<sup>46</sup> Commission of Inquiry, *supra* note 11, at 43.

<sup>47</sup> This may seem to be in tension with the common view that certain civilian objects may be booby-trapped without violating Amended Protocol II to the Convention on Certain Conventional Weapons. *See, e.g.*, Michael N. Schmitt, *Russian Booby Traps and the Ukraine Conflict*, ARTICLES OF WAR (Apr. 5, 2022). However, this issue differs in two respects from that of attacking a civilian object to destroy a distinct military objective. First, the relevant provision of Amended Protocol II regulates the weaponization of objects; it does not bear on the distinction between objects against which attacks may be lawfully directed and those against which they may not. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996, Art. 7, 2048 UNTS 93 (1996). Second, the fact that a practice does not violate the weaponization provisions of Amended Protocol II does not entail that it is not prohibited by other rules of IHL, including the principle of distinction. Indeed, the Protocol itself clarifies the applicability of the latter "in all circumstances." *Id.* Art. 3(7).

<sup>48</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), VOL. 1: RULES, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY 574 (2005).

<sup>49</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 4795 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

<sup>50</sup> Prosecutor v. Galić, IT-98-29-T, Judgment, paras. 54 et seq. (Dec. 5, 2003).

<sup>51</sup> AP I, *supra* note 35, Arts. 57(2)(a)(i), 57(1); Janina Dill, *Do Attackers Have a Legal Duty of Care? Limits to the "Individualization of War,"* 11 INT'L THEORY 1 (2019); Oona A. Hathaway & Azmat Khan, "Mistakes" in War, 1 U. PENN. L. REV. 173 (2024).

<sup>52</sup> AP I, *supra* note 35, Arts. 50(1), 52(3); HAQUE, *supra* note 34, at 154 et seq.

the Israeli airstrike that killed seven World Central Kitchen aid workers did not *know* the persons targeted to be civilians, information in the public domain indicates that the latter were likely targeted despite a substantial and unjustifiable risk that they were civilians (i.e., recklessly) and almost certainly in context defined by doubt.<sup>53</sup>

Ultimately, even if the war crimes status of certain strikes cannot be determined in real time, the United States' findings of a pattern of attacks without a plausible military target and the diagnosis that the IDF did not do everything feasible to avoid civilian casualties, possibly including target verification, entail clear IHL violations. For the United States to withhold evaluative judgment here is: (1) to hide behind a (highly deferential) application of the narrowest interpretation of intent developed for war crimes (IHL's strictest accountability function); and (2) to fail to consider IHL as a whole, including its rules on precautions and doubt.

A legal assessment of Hamas's conduct, though significantly less polarized, likewise benefits from differentiating intent by law's functions. We argued above that seeking lawful consequences cannot legitimate the use of unlawful means. Yet, seeking unlawful consequences (for example, killing or destroying civilian(s)/objects) *can* taint what might otherwise be lawful means (such as directing attacks against lawful military objectives). Concretely, even assuming some Hamas rocket fire into Israel has been directed (loosely) against military objectives,<sup>54</sup> if those firing sought also to harm civilians, they violated distinction.<sup>55</sup> Such an attack would be directed at *both* the military objective (as the target) and the civilians (whose harming is one of the attack's animating purposes);<sup>56</sup> neither would be harmed "incidentally." Even in the criminal domain, the ICC has identified combined attacks on both civilian and military targets as attacks directed against both.<sup>57</sup> Purpose is inculpatory but not exculpatory because an unlawful purpose changes the nature of conduct, but a lawful purpose cannot rehabilitate unlawful conduct.

The use of human shields, a charge often laid against Hamas, further illustrates the need to consider IHL as a whole, across legal functions. Here, both war crime and underlying IHL prohibition attach only to intermingling undertaken with the purposive intent to "shield from attack" or "favor or impede military operations."<sup>58</sup> Particularly in densely populated areas, this cannot easily be inferred from context, making violations hard to diagnose in real time.<sup>59</sup> However, where it could be feasibly avoided, Hamas's practice of "locating military objectives within or near densely populated areas" would straightforwardly violate Article 58 of the First Additional Protocol, regardless of intent. This precautionary requirement, even if it does not give rise to criminal accountability, is critical for real-time evaluation of Hamas's conduct.

<sup>53</sup> Douglas Guilfoyle, *The Strike on the World Central Kitchen Convoy as a War Crime*, OPINIO JURIS (Apr. 6, 2024).

<sup>54</sup> Critically reviewing this claim, Arthur van Coller, *Israel-Hamas 2024 Symposium - Qassam Rockets, Weapon Reviews, and Collective Terror as a Targeting Strategy*, ARTICLES OF WAR (Jan. 17, 2024).

<sup>55</sup> Alternatively, these attacks may not be directed against any objective, i.e., indiscriminate. Diakonia, *supra* note 11, at 28.

<sup>56</sup> Relatedly: Luigi Daniele, *A Lethal Misconception, in Gaza and Beyond: Disguising Indiscriminate Attacks as Potentially Proportionate in Discourses on the Laws of War*, EJIL:TALK! (Nov. 7, 2023).

<sup>57</sup> Compare: Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Red, Judgment, paras. 418, 424, 491 (Mar. 30, 2021); Prosecutor v. Katanga, ICC-01/04-01/07-3436-tENG, Judgment, para. 802 (Mar. 7, 2014).

<sup>58</sup> ICC Elements of Crimes, *supra* note 34, at 20; AP I, *supra* note 35, Art. 51(7).

<sup>59</sup> Michael N. Schmitt, *Ukraine Symposium - Weaponizing Civilians: Human Shields in Ukraine*, ARTICLES OF WAR (Apr. 11, 2022).



The use of human shields also highlights a further doctrinal confusion that can be clarified by differentiating among law's functions. Hamas's alleged criminal conduct is often invoked to rebut the alleged disproportionality of Israeli attacks that kill many civilians, based on the argument that the defender's "ultimate responsibility" for civilian casualties modifies the permissibility of an otherwise disproportionate attack.<sup>60</sup> The U.S. *Law of War Manual* also argues that "the responsibility of the defending force is a factor that may be considered in determining whether such harm is excessive."<sup>61</sup> Space does not permit a full discussion of the legal debates about shielding. However, this invocation of the shielding party's responsibility is clearly erroneous in two ways. First, at the accountability stage, Hamas's responsibility for human shielding would not preclude either the state responsibility of Israel or the criminal responsibility of its officials for engaging in attacks with clearly excessive civilian harm. Responsibility is not zero sum. Second, even assuming Israel's *ex post* responsibility for excessive civilian casualties were diminished or excused by Hamas's use of those civilians as shields, this would not affect *ex ante* impermissibility. Excuses are not justifications, and civilians do not forfeit their protection because they have suffered a violation by the adversary. The First Additional Protocol reflects this, specifying that even purposive human shielding by one party does not "release" the other from its legal obligations relating to civilians.<sup>62</sup>

### B. Starvation and the Siege of Gaza

Two days after the October 7 atrocities, Israel's defense minister ordered "a complete siege" on Gaza, specifying "There will be no electricity, no food, no fuel, everything is closed."<sup>63</sup> Charging that "the citizens of Gaza" were celebrating Hamas's crimes, the head of Israel's agency for the Coordination of Government Activities in the Territories promised the encirclement would bring "hell."<sup>64</sup> Credible reports indicate that in the ensuing months, Israel: significantly restricted humanitarian access to Gaza (especially the north);<sup>65</sup> attacked "deconflicted" humanitarian actors, distribution centers, and convoys;<sup>66</sup> destroyed

<sup>60</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT*, para. 626 (4th ed. 2022).

<sup>61</sup> U.S. DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL*, para. 5.12.1.4 (June 2015, updated July 2023). The Manual refers here to *voluntary* human shields. However, given the argued difficulty of establishing purposive intent to shield in belligerents, relaxing protection based on inferring this intent in civilians would undermine the functionality of law.

<sup>62</sup> AP I, *supra* note 35, Art. 51(8).

<sup>63</sup> Although most translations relay a siege on "the Gaza Strip" (e.g., Emanuel Fabian, *Defense Minister Announces "Complete Siege" of Gaza: No Power, Food or Fuel*, *TIMES OF ISRAEL* (Oct. 9, 2023)), Gallant spoke of a siege on "Gaza City": B'Tselem, *Manufacturing Famine: Israel is Committing the War Crime of Starvation in the Gaza Strip* 9 (Apr. 2024). Others, however, described a siege on "Gaza" (*id.*; note 64 *infra*), consistent with the closure of all Israeli crossings for over seventy days. UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), *Gaza Supplies and Dispatch Tracking*, at <https://www.unrwa.org/what-we-do/gaza-supplies-and-dispatch-tracking>.

<sup>64</sup> COGAT head, Maj Gen Ghassan Alian, @COGAT-MOD, YOUTUBE (Oct. 10, 2023), at <https://www.youtube.com/shorts/5a0EWv-o7mE>.

<sup>65</sup> Oxfam, *Inflicting Unprecedented Suffering and Destruction* (Mar. 15, 2024); Refugees International, *Siege and Starvation: How Israel Obstructs Aid to Gaza* (Mar. 2024); UNRWA, *supra* note 63.

<sup>66</sup> Human Rights Watch, *Gaza: Israelis Attacking Known Aid Worker Locations* (May 14, 2024); Léopold Salzenstein, *Behind the Numbers: Gaza's Unprecedented Air Worker Death Toll*, *NEW HUMANITARIAN* (Mar. 21, 2024).

agricultural areas and water systems;<sup>67</sup> and restricted fuel, electricity, and the entry of mobile desalination units.<sup>68</sup> In December, an Integrated Food Security Phase Classification report estimated that 25 percent of civilians in northern Gaza were suffering catastrophic levels of acute food insecurity.<sup>69</sup> By March 2024, that estimate was 55 percent, with 69 percent of all Gazans suffering emergency (39 percent) or catastrophe (30 percent) levels of food insecurity.<sup>70</sup> In March and April, access was expanded, particularly to northern Gaza,<sup>71</sup> improving the numbers.<sup>72</sup> However, even then, the Famine Review Committee warned of an enduring “high and sustained risk of Famine across the whole Gaza Strip.”<sup>73</sup> The Rafah offensive and expanded Israeli operations around purported humanitarian zones brought further significant declines in humanitarian access and resurgent malnutrition.<sup>74</sup>

The ICJ recently affirmed that notwithstanding its military withdrawal in 2005, Israel retained law of occupation obligations in Gaza “commensurate” with its enduring control—“even more so” since October 7, 2023.<sup>75</sup> One of the clearest “commensurate” obligations, given Israel’s relevant control is to “ensur[e] the food and medical suppl[y]” (including water) of the civilian population in Gaza to “the fullest extent of the means available to it,” including by “bring[ing] in” those supplies “if the resources of the occupied territory are inadequate.”<sup>76</sup> It is hard to see how Israel’s aforementioned practices could be reconciled with these duties. Given the siege, however, most commentary has focused instead on the starvation war crime, often revealing confusion about proscribed intent.

IHL does not prohibit sieges per se. A belligerent may besiege to fix, hold, and deny military supply, and may inspect humanitarian consignments, while controlling their times and

<sup>67</sup> UN Satellite Centre (UNOSAT) Gaza Strip Agricultural Damage Assessment (Jan. 2024), at <https://unosat.org/products/3792>; Insecurity Insight, *Flash Analysis Report: Over Five Months of Attacks on Food Security in Gaza* (Mar. 2024); B’Tselem, *supra* note 63, at 5; Oxfam, *Water War Crimes: How Israel Has Weaponized Water in Its Military Campaign in Gaza*, 13–28 (July 18, 2024), at <https://www.oxfamamerica.org/explore/research-publications/water-war-crimes-how-israel-has-weaponized-water-in-its-military-campaign-in-gaza>.

<sup>68</sup> Oxfam, *supra* note 65, at 19–20, 28–29; Natasha Hall, Anita Kirschenbaum & David Michel, *The Siege of Gaza’s Water*, CTR. STRATEGIC & INT’L STUD. (Jan. 12, 2024).

<sup>69</sup> IPC Global Initiative, *Special Brief—Gaza Strip* (Dec. 21, 2023); see also Alex de Waal, *Starvation as a Method of Warfare*, LONDON REV. BOOKS (Jan. 11, 2024).

<sup>70</sup> IPC Global Initiative, *Special Brief—Gaza Strip* (Mar. 18, 2024); IPC Global Initiative, *Special Snapshot—Gaza Strip* (Mar. 18, 2024); see also Bar Peleg, *Citing “Extreme” Hunger in Gaza, Israel’s Top Food Security Official Calls for Cease Fire*, HAARETZ (Mar. 3, 2024).

<sup>71</sup> Famine Early Warning Systems Network, *Gaza Strip Food Supply Report* (Apr. 2024); IPC Famine Review Committee, *Gaza Strip, June 2024: Conclusions and Recommendations*, at 9 (June 25, 2024) [hereinafter IPC FRC June].

<sup>72</sup> IPC Global Initiative, *Gaza Strip: IPC Acute Food Insecurity Special Snapshot* (June 25, 2024).

<sup>73</sup> IPC FRC June, *supra* note 71, at 3.

<sup>74</sup> UNRWA, *supra* note 63; OCHA, Humanitarian Situation Update #196 (July 26, 2024); OCHA, Humanitarian Situation Update #203 (Aug. 12, 2024); OCHA, Humanitarian Situation Update #208 (Aug. 23, 2024); OCHA, Humanitarian Situation Update #211 (Aug. 30, 2024); Jeremy Konyndyk & Jesse Marks, *Untangling the Reality of Famine in Gaza*, REFUGEES INT’L, at 19–23 (Sept. 2024). Rebutting arguments that seek to deny this reality or absolve Israel of responsibility for it, see *id.* at 24–28.

<sup>75</sup> Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Judgment, paras. 93–94 (ICJ July 19, 2024); see also *id.*, para. 78; Orna Ben-Naftali et al., *Israel’s Status in the North of the Gaza Strip* (Apr. 1, 2024), at <https://static.gisha.org/uploads/2024/04/Legal-Opinion-on-the-status-of-Israel-in-the-north-of-Gaza-EN.pdf>.

<sup>76</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Art. 55, 75 UNTS 287. On water: *Policies and Practices of Israel in the OPT*, *supra* note 75, paras. 124, 133. Citing this as a likely “commensurate” obligation, *id.*, para. 24 (sep. op., Cleveland, J.).

routes.<sup>77</sup> Furthermore, genuinely incidental deprivation, such as when food is the collateral damage of a strike on a military objective, implicates proportionality, not the starvation ban. But when is starvation intentional and therefore prohibited?

Some observers argue that the war crime obtains only when “the individual acted with the *conscious objective* of producing the prohibited *result*, in this context starvation of civilians,” a purpose they decline to attribute to Israeli officials.<sup>78</sup> On this view, prohibiting belligerents from knowingly causing civilian starvation “without an actuating illicit purpose would impose an unrealistic demand on war fighters.”<sup>79</sup> Sean Watts has warned that limiting “intentional” starvation to acting with the purpose of causing civilians to suffer fatal or near-fatal malnutrition, “reduces the rule’s humanitarian effect, perhaps to the vanishing point.”<sup>80</sup> He nevertheless argues that military necessity precludes an interpretation that would ban siege starvation in contexts of civilian-populated encirclements.<sup>81</sup> We disagree.

To insist that military necessity demands permitting siege deprivation, even if it implies knowingly starving the civilian population, is to turn three foundational principles on their heads. First, per IHL’s “basic rule,” belligerents must distinguish “in all military operations” between combatants and the civilian population, directing military operations solely at the former.<sup>82</sup> A starvation siege is plainly a “military operation.” Second, a predominantly civilian population does not lose its civilian character due to the presence of combatants within it.<sup>83</sup> Third, a besieging party cannot recharacterize an operation directed against such a population as lawful simply by warning or allowing civilians to leave (e.g., from northern to southern Gaza). Those who eschew, or cannot take, that chance do not thereby “participate directly in hostilities”—the only threshold for losing IHL’s civilian protection.

Over 98 percent civilian, Gaza’s population is a civilian population by any measure.<sup>84</sup> So is the population of northern Gaza, site of the most severe deprivation.<sup>85</sup> Denying sustenance to either of these areas entails directing sustenance denial against a civilian population, even if the goal is to squeeze militants within that population. When the (only) means to starve militants is deliberately starving the civilian population, the lawful ultimate goal cannot authorize the unlawful means any more than a kinetic attack against a civilian population can be justified with reference to the ultimate goal of eliminating combatants embedded within that

<sup>77</sup> AP I, *supra* note 35, Art. 70(3); DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT 28–29 (2016).

<sup>78</sup> Corn & Gillard, *supra* note 21 [emphasis added].

<sup>79</sup> *Id.*; Similarly: Cohen & Shany, *supra* note 21; Sean Watts, *Humanitarian Logic and The Law of Siege: A Study of the Oxford Guidance on Relief Actions*, 95 INT’L L. STUD. 1, 19 (2019).

<sup>80</sup> Sean Watts, *Siege War*, ARTICLES OF WAR (Mar. 4, 2022).

<sup>81</sup> Watts, *supra* note 79.

<sup>82</sup> AP I, *supra* note 35, Art. 48.

<sup>83</sup> *Id.* Art. 50(3); *Prosecutor v. Kordić & Čerkez*, *supra* note 38, paras. 95–97; *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, paras. 474, 4610 n. 5510 (Mar. 24, 2016).

<sup>84</sup> U.S. estimates suggest that of over two million people, approximately 20,000–25,000 are combatants with Hamas, *Hamas Overview*, COUNTER TERRORISM GUIDE (Sept. 2022), at [https://www.dni.gov/nctc/ftos/hamas\\_fto.html](https://www.dni.gov/nctc/ftos/hamas_fto.html), and 1,000 with Palestinian Islamic Jihad, *Palestine Islamic Jihad (PIJ) Overview*, COUNTER TERRORISM GUIDE (Feb. 2023), at [https://www.dni.gov/nctc/ftos/pij\\_fto.html](https://www.dni.gov/nctc/ftos/pij_fto.html).

<sup>85</sup> After mass displacement, 300,000 people remained there. *At Least 300,000 at Risk from Lack of Food in North, Central Gaza: UN*, FRANCE 24 (Feb. 8, 2024), at <https://www.france24.com/en/live-news/20240208-at-least-300-000-at-risk-from-lack-of-food-in-north-central-gaza-un>.

population.<sup>86</sup> The latter bombardment would constitute a clear war crime and likely crime against humanity.<sup>87</sup> Mass deprivation is no more permissible.

Moreover, the starvation prohibition is underpinned by a specialized IHL framework on objects indispensable to survival (OIS). Unlike dual-use objects generally, which are widely thought to be military objectives, OIS are protected against being the object of attack, destruction, removal, or rendering useless: (1) for their sustenance value, including their sustenance value to combatants, unless *only* combatants draw sustenance from them; and (2) for any other military reason, if such deprivation “may be expected” to leave civilians starving or forced to move.<sup>88</sup> As explained elsewhere, these safeguards are best understood as constitutive of the IHL starvation ban, which applies to all modalities of deprivation, including deprivation by impeding humanitarian relief.<sup>89</sup> Complementary rules preclude arbitrarily denying humanitarian access to populations in need.<sup>90</sup> Thus understood, the IHL starvation ban covers the intentional (“methodical”) deprivation of OIS either: (1) with the purpose of denying their sustenance value to a population that qualifies as a civilian population in aggregate (including denying sustenance to the civilian population as the predicate purpose to squeezing embedded enemy forces); or (2) for any other military reason when that deprivation may be expected to leave civilians starving.

Building on this IHL foundation and the ICC Statute’s inclusion of both direct and oblique intent, the war crime of intentionally starving civilians as a method of warfare is best understood to entail the deliberate deprivation of OIS, either with the direct intent of denying sustenance to a civilian population, or with the oblique intent of knowing that civilians will starve.<sup>91</sup> At writing, the ICC chief prosecutor is seeking arrest warrants for Defense Minister Gallant and Prime Minister Netanyahu for starvation and related war crimes and crimes against humanity.<sup>92</sup> In this case, the Court has the opportunity to set a precedent in which the criminal intent threshold is communicated definitively. Critically, the ICC threshold should not be inaptly transposed to *ex ante* and concurrent legal assessments, which must incorporate prohibitions on acts of deprivation that *may be expected* to cause starvation or forced movement, *arbitrary denials* of humanitarian access, and the law-of-occupation duty to *ensure* food and medical supply.<sup>93</sup> As elaborated below, ICJ provisional measures offer essential resources for third states evaluating compliance with these rules.

<sup>86</sup> *Prosecutor v. Ntaganda*, *supra* note 57, para. 424.

<sup>87</sup> *Prosecutor v. Karadžić*, *supra* note 83, paras. 474, 4610 n. 5510; *Prosecutor v. Ntaganda*, *supra* note 57, paras. 418, 424, 491.

<sup>88</sup> AP I, *supra* note 35, Arts. 54(2), 54(3)(a–b); Tom Dannenbaum, *Criminalizing Starvation in an Age of Mass Deprivation in War: Intent, Method, Form, and Consequence*, 55 VAND. J. TRANSNAT’L L. 681, 729–32 (2022).

<sup>89</sup> *Id.* at 732–38, 741–54 (also discussing the relationship to rules on humanitarian access, e.g., AP I, *supra* note 35, Arts. 69–70).

<sup>90</sup> AP I, *supra* note 35, Arts. 69–70; AKANDE & GILLARD, *supra* note 77.

<sup>91</sup> Dannenbaum, *supra* note 88, at 716–26; 734–38; *see also* Wayne Jordash, Catriona Murdoch & Joe Holmes, *Strategies for Prosecuting Mass Starvation*, 17 J. INT’L CRIM. JUST. 849, 854–60 (2019).

<sup>92</sup> ICC, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine (May 20, 2024).

<sup>93</sup> *See* notes 75–76, 88–90 *supra*.

### C. *The Genocide Allegation and Three Questions of Intent*

It is uncontested that genocide, both as an individual criminal act and as a state act, hinges on the special intent to destroy in whole or in part a protected group. Yet, three doctrinal questions about intent underpin polarized reactions to South Africa's allegation that Israel is violating the Genocide Convention in Gaza.

First, what is the legal significance of committing acts enumerated in the Convention in the knowledge that they substantially risk (partial) group destruction? The special intent that characterizes genocide is generally understood as direct.<sup>94</sup> International Criminal Tribunal for Rwanda (ICTR)<sup>95</sup> and ICTY<sup>96</sup> jurisprudence, as well as the drafting history of the Genocide Convention, confirm that prohibited acts must be carried out “with the aim, purpose or desire to destroy a group” in whole or in part.<sup>97</sup> Knowledge of the genocidal intent and actions of others may suffice for secondary liability, but the underlying genocide must be perpetrated with special purposive intent.<sup>98</sup> The notion that knowing or reckless group destruction could ground *principal* individual criminal responsibility for genocide remains a minority scholarly position.<sup>99</sup> But does the prevailing consensus regarding intent as defined for accountability entail that the Genocide Convention neither bears on conduct that poses a substantial risk of (partial) group destruction, nor informs third-party evaluation of such conduct, unless (partial) group destruction is also evidently its purpose?

In Gaza, the question looms large. Responding to South Africa's application under the Genocide Convention, the ICJ has, to date, thrice indicated provisional measures. In January 2024, the Court determined that “there [was] a real and imminent risk that irreparable prejudice [would] be caused to the rights [of the Palestinians in Gaza].”<sup>100</sup> What rights? “[T]he right[s] . . . to be protected from acts of genocide and related prohibited acts mentioned in Article III [of the Genocide Convention].”<sup>101</sup> The Court then ordered Israel to prevent violations of the Convention, punish incitement, and “enable the provision of urgently needed basic services and humanitarian assistance.”<sup>102</sup> It did not, as South Africa requested, order Israel to halt hostilities. In March, the Court ordered Israel to “ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned

<sup>94</sup> Van der Vyver, *supra* note 34, at 85; William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1033 (2002).

<sup>95</sup> Prosecutor v. Akayesu, ICTR-96-4-T, Judgment, paras. 497, 544–47 (Sept. 2, 1998); Prosecutor v. Kayishema & Ruzindana, ICTR-95-1-T, Judgment, para. 91 (May 21, 1999); Prosecutor v. Rutaganda, ICTR-96-3-T, Judgment, para. 59 (Dec. 6, 1999); Prosecutor v. Musema, ICTR-96-13-T, Judgment, para. 164 (Jan. 27, 2000); Prosecutor v. Kambanda, ICTR 97-23-S, Judgment, para. 16 (Sept. 4, 1998).

<sup>96</sup> Prosecutor v. Krstić, IT-98-33-A, Judgment, para. 134 (Apr. 19, 2004); Prosecutor v. Goran Jelišić, IT-95-10-A, Judgment, paras. 46, 50 et seq. (July 5, 2001); Rutaganda v. Prosecutor, ICTR-96-3-A, Judgment, para. 524 (May 26, 2003).

<sup>97</sup> Florian Jessberger, *The Definition and the Elements of the Crime of Genocide*, in THE UN GENOCIDE CONVENTION - A COMMENTARY (Paola Gaeta ed., 2009).

<sup>98</sup> *Prosecutor v. Krstić*, *supra* note 96, paras. 134, 144.

<sup>99</sup> Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259, 2288 (1999).

<sup>100</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures Order, para. 74 (ICJ Jan. 26, 2024) [hereinafter ICJ, Gaza PM I].

<sup>101</sup> *Id.*, para. 59.

<sup>102</sup> *Id.*, para. 4.

of urgently needed basic services and humanitarian assistance.”<sup>103</sup> Two months later, the Court demanded that Israel “[i]mmediately halt its military offensive, and any other action in the Rafah governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.”<sup>104</sup>

Although the first order recalled statements by Israeli officials that may be probative of intent,<sup>105</sup> the Court has not explicitly grappled with whether Israel’s conduct can plausibly be seen as *purposively* bringing about the destruction of Palestinians in Gaza. This has led some to demand “not to read any substantive conclusions”<sup>106</sup> regarding genocide into its orders.<sup>107</sup> Others, including one of us,<sup>108</sup> have pointed out that ordering provisional measures means finding that Israel’s actions in Gaza pose “a real and imminent risk”<sup>109</sup> of whole or partial group destruction. For instance, in the third order, the “Court finds that the current situation arising from Israel’s military offensive in Rafah entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa,” namely the Palestinians’ rights under the Genocide Convention.<sup>110</sup> As the orders have become more demanding, the Court appears to have tightened the link between its demands and Israel’s primary obligations relating to genocide.<sup>111</sup>

One way to read the orders assumes that the Convention rights that the Court seeks to safeguard are rights to be protected from prohibited acts carried out with special intent. On this reading, the Court deemed, for instance, Israel’s offensive operations in Rafah to pose a real and imminent risk of genocide (with purposive intent). An alternative reading is that the Court put Israeli officials on notice that continuing with the identified conduct amounts to recklessly, and potentially knowingly, destroying a protected group in whole or in part because a “real and imminent risk” is an objective and substantial risk. On this view, although accountability under the Genocide Convention turns on purposive intent, the Convention (and the framework for provisional measures) should be understood *ex ante* as guiding states not to engage in enumerated acts that pose a substantial risk to the survival of a protected group because doing so carries a risk of genocide. Supporting the second interpretation, in *The Gambia v. Myanmar*, the ICJ did “not consider that the exceptional gravity of the allegations is a decisive factor warranting . . . the determination,

<sup>103</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr), Provisional Measures Order, para. 51(2)(a) (ICJ Mar. 28, 2024) (emphasis added) [hereinafter ICJ Gaza PM II].

<sup>104</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr), Provisional Measures Order, paras. 50, 57(2)(a) (ICJ May 24, 2024) [hereinafter ICJ, Gaza PM III].

<sup>105</sup> ICJ, Gaza PM I, *supra* note 100, paras. 51–52.

<sup>106</sup> Roy Schondorf, *Implausible Confusion: The Meaning of “Plausibility” in the ICJ’s Provisional Measures*, EJIL: TALK! (May 6, 2024).

<sup>107</sup> Brian L. Cox, *Evaluating Security Assistance to Israel Following ICJ Provisional Measures Order*, EJIL: TALK! (Mar. 7, 2024).

<sup>108</sup> Janina Dill in *Top Experts’ Views of International Court of Justice Ruling on Israel Gaza Operations*, JUST SECURITY (Jan. 26, 2024).

<sup>109</sup> ICJ, Gaza PM I, *supra* note 100, para. 27.

<sup>110</sup> ICJ, Gaza PM III, *supra* note 104, para. 47.

<sup>111</sup> Compare ICJ, Gaza PM I, *supra* note 100, paras. 27, 78, 86(1) with ICJ, Gaza PM II, *supra* note 103, paras. 45, 51(2); and ICJ, Gaza PM III, *supra* note 104, paras. 50, 57(2).

at the present stage of the proceedings [provisional measures], of the existence of a genocidal intent.”<sup>112</sup>

To be clear, this interpretation implies that the Court bracketed intent in inferring a risk that genocide is or will be occurring, not in the substantive definition of genocide. This approach arguably secures international law’s functionality *ex ante* and in real time. Purposive intent is held in the first instance by individuals, is exceedingly difficult to detect, and can often only be established, if at all, *ex post*. Meanwhile, states generally have a duty to prevent genocide when there is a “serious risk” it will be committed.<sup>113</sup> When individual officials adopt a plan or carry out acts that pose a substantial risk of whole or partial group destruction, an *ex ante* functional law might therefore guide the state in whose name these officials act to put a stop to their conduct even while their intent remains obscure (thus requiring a form of auto-prevention). At the accountability stage, the ICJ will only find Israel responsible for violations of the Genocide Convention (preventive or direct) if it establishes that relevant acts were committed with special purposive intent.

For concurrent third-party evaluation, such a functionally differentiated interpretation is more established: any state conduct that poses a risk of group-destruction (regardless of intent) logically poses “a serious risk that genocide will be committed,” which incontestably triggers third states’ prevention duties.<sup>114</sup> And yet, a state that has violated this prevention duty *ex ante* will not incur responsibility if the genocide risk does not materialize.<sup>115</sup> This opens a response to the concern that South Africa used the Convention’s compromissory clause to litigate IHL violations in a court without IHL jurisdiction in this conflict.<sup>116</sup> If IHL violations are so widespread as to pose a risk of group destruction, then even if South Africa were unsure of the attributability of genocidal intent to Israel, its request that the Court consider a genocide allegation would be appropriate to genocide prevention.

A second doctrinal question underlying polarized assessments of the genocide allegation is how to distinguish direct (purposive) intent from desire, ultimate goal, and motive.<sup>117</sup> Judge Nolte, on occasion of the first order, declared himself “not persuaded”<sup>118</sup> that South Africa had established genocidal intent, pointing instead to “the stated purpose of [Israel’s] operation, namely to ‘destroy Hamas’ and to liberate the hostages.”<sup>119</sup> Yet, those aims are not dispositive. If the destruction of Palestinians in Gaza as a protected group in whole or in part were the means by which Israel sought to achieve its ultimate goal of security, group destruction would be the predicate purpose, pursued with direct intent.<sup>120</sup> This construction also exemplifies the possibility that one can act purposively in relation to conduct or an outcome despite lamenting it. Whether in relation to targeting, starvation, or genocide, neither the fact

<sup>112</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.) Provisional Measures Order, 2020 ICJ Rep. 3, paras. 53–56 (Jan. 23).

<sup>113</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 ICJ Rep. 43, para. 341 (Feb. 26) [hereinafter ICJ], Bosnian Genocide]

<sup>114</sup> *Id.*, para. 431.

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., Rebecca Ingber in *Top Experts’ Views*, *supra* note 108.

<sup>117</sup> See, e.g., Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT’L L. 553, 558–59 (2006).

<sup>118</sup> ICJ, Gaza PM I, *supra* note 100, para. 13 (dec., Nolte, J.).

<sup>119</sup> *Id.*, para. 14.

<sup>120</sup> A. DIRK MOSES, *THE PROBLEMS OF GENOCIDE: PERMANENT SECURITY AND THE LANGUAGE OF TRANSGRESSION* (2021).

of a permissible ultimate goal nor the lamentation of what was deemed necessary to achieve it would warrant recharacterizing that predicate action as anything other than directly intended.<sup>121</sup> Ultimately, the ICJ will need to evaluate whether total or partial group destruction was a purpose of an enumerated act, not whether it was pursued enthusiastically or as an end in itself.

A third question is what it means for a *state* to act with genocidal intent, as distinct from failing to prevent or punish individuals who perpetrate genocide.<sup>122</sup> The least contestable basis for “genocidal” state intent would be a “concerted plan” among government leaders.<sup>123</sup> In the current context, this would have to be a policy developed by Israel’s Security Cabinet or some other leadership group. However, even if such a plan existed, proving it would be very difficult. Often, intent must instead be inferred from a consistent pattern of state conduct, either as evidence of the plan, or as the manifestation of a form of collective intent, whether or not defined centrally.<sup>124</sup> Absent a concerted plan or a pattern of state conduct leaving no reasonable inference other than the presence of genocidal intent, is it possible to speak of “the intent of a state?”

Uncontroversially, when a state official acts (even *ultra vires*) in their official capacity, that act is attributable to the state.<sup>125</sup> The individual’s conduct is, legally speaking, state conduct. But when a composite act involves the conduct of multiple state officials, each acting in their official capacity, but with different intentions, which of those intentions is properly understood to be the state’s? Can the state be said to hold each official’s intent simultaneously, such that the unlawful intent of any entails the unlawful intent of the state vis-à-vis the collective act? In extremis, that could mean attributing genocidal intent to Israel based on the group-destructive intent of an IDF soldier engaged in criminal killings (an enumerated genocidal act).<sup>126</sup> That strikes us as implausible.<sup>127</sup> Alternatively, does the individual’s control over the collective action determine the attributability of *their* intent to the state as it relates to that action, such that leaders’ statements are uniquely important?<sup>128</sup> It warrants mention that state responsibility generally does not require establishing state intent, which may explain why these issues have yet to be fully resolved.<sup>129</sup>

<sup>121</sup> See Sections II.A, II.B *infra*.

<sup>122</sup> WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 444 (1st ed. 2000).

<sup>123</sup> ICJ, *Bosnian Genocide*, *supra* note 113, paras. 373, 376; see also Robin M. Smith, *State Responsibility and Genocidal Intent: A Three Test Approach*, 34 *AUST. Y.B. INT’L L.* 87, 97–112 (2017).

<sup>124</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serb.*) 2015 ICJ Rep. 3, para. 145 (Feb. 3). Comparing the plan and pattern of conduct tests, see Smith, *supra* note 123, at 112.

<sup>125</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Art. 4, UN Doc. A/56/10 (2001) [hereinafter ARSIWA]; ICJ, *Bosnian Genocide*, *supra* note 113, para. 379.

<sup>126</sup> Milanović argues that the commission of genocide can be attributed to the state in this context, without entailing state genocidal *intent*. Milanović, *supra* note 117, at 568.

<sup>127</sup> The ICC’s requirement of either a pattern of collective conduct or individual destructive capability would anyway preclude criminal liability for genocide in this context. ICC, *Elements*, *supra* note 34, at 2. Whether that is generally required is contested. Antonio Cassese, *Is Genocidal Policy a Requirement for the Crime of Genocide*, in *THE UN GENOCIDE CONVENTION - A COMMENTARY*, *supra* note 97, 128 at 134–36. Our focus here is instead on state intent.

<sup>128</sup> See, e.g., ICJ, *Gaza PM I*, *supra* note 100, South Africa, Application Instituting Proceedings, para. 101.

<sup>129</sup> James Crawford argues that state responsibility does not hinge on intent (*STATE RESPONSIBILITY: THE GENERAL PART* 61–62 (2013)), but genocide is the exception (James Crawford & Simon Olleson, *State Responsibility*, in *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 904, 909 (Dinah L. Shelton, ed., 2005)).



## II. COURTS' PROVISIONAL PRODUCTS AND REAL-TIME EVALUATION

In Gaza, international courts' profile as focal points for public engagement with international law is striking. What does this mean for law's capacity to discharge its three functions?

Courts operate primarily as institutions of accountability.<sup>130</sup> Applying law to established facts, they are meant to determine with finality whether a subject violated its obligations in a particular case. In addition to resolving disputes and endeavoring to dispense justice,<sup>131</sup> their decisions contribute to international law's development, as "subsidiary means" for its ascertainment,<sup>132</sup> including in ways that ultimately guide action and third-party evaluation. However, the latter process occurs ordinarily through the jurisprudential impact of courts' final judgments. Whether those entail declaratory, reparative, or punitive accountability, the procedural ideal of the rule of law demands a process that is measured in years. The two previous genocide cases to reach full merits judgments at the ICJ took well over a decade from initiation to judgment. Plainly, courts' capacity to contribute directly through these judgements to *ex ante* action-guidance (e.g., via specific deterrence) or to concurrent third-party evaluation is limited.

Issued on a shorter time horizon, courts' provisional products may offer a more direct mechanism through which to discharge law's functions during armed conflict. Although the ICJ's "real-time" involvement is not unique to this conflict,<sup>133</sup> its provisional products relating to Gaza have received more attention than most of its *final* judgments elsewhere, adding urgency to clarifying their significance for action-guidance and third-party evaluation.

Uncontroversially, the ICJ's provisional measures orders bind the litigating parties,<sup>134</sup> though compliance is generally "unsatisfactory,"<sup>135</sup> including, observers argue, in the case at hand.<sup>136</sup> However, a potentially consequential (yet untested) question in a system of decentralized enforcement, is what courts' provisional products mean for third states. Below, we discuss both the possibility of third states' complicity in provisional measures violations (II.A), and provisional measures' potential significance for third states' discharging their pre-existing obligations regarding genocide (II.B) and IHL (II.C).

<sup>130</sup> Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI J. INT'L L. 537 (2009); David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERK. J. INT'L L. 401, 402 (2006).

<sup>131</sup> Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L. 195 (2006).

<sup>132</sup> *Id.*; Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013); DECISIONS OF THE ICJ AS SOURCES OF INTERNATIONAL LAW? (Enzo Cannizzaro, Emanuele Cimiotta, Nicola Napolitano & Paola Palchetti eds., 2018).

<sup>133</sup> The Court has granted requested provisional measures in roughly 50% of cases. See Gentian Zyberi, *Provisional Measures of the International Court of Justice in Armed Conflict Situations*, 23 LEIDEN J. INT'L L. 571 (2010).

<sup>134</sup> LaGrand (Ger. v. U.S.), Judgment, 2001 ICJ Rep. 466, 498–508, para. (June 27, 2001); Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, 2005 ICJ Rep 168, 258, 263 (Dec. 19, 2005); Maurice Mendelson, *State Responsibility for Breach of Interim Protection Orders of the International Court of Justice*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 35 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

<sup>135</sup> Erlend M. Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures When Non-compliance Is to Be Expected*, 5 J. INT'L DISPUTE SETTLEMENT 306, 309 (2014).

<sup>136</sup> International Commission of Jurists, *Gaza: One Month on, Israel Fails to Comply with the Order of the International Court of Justice* (Feb. 26, 2024), at <https://www.icj.org/gaza-one-month-on-israel-fails-to-comply-with-the-order-of-the-international-court-of-justice>.

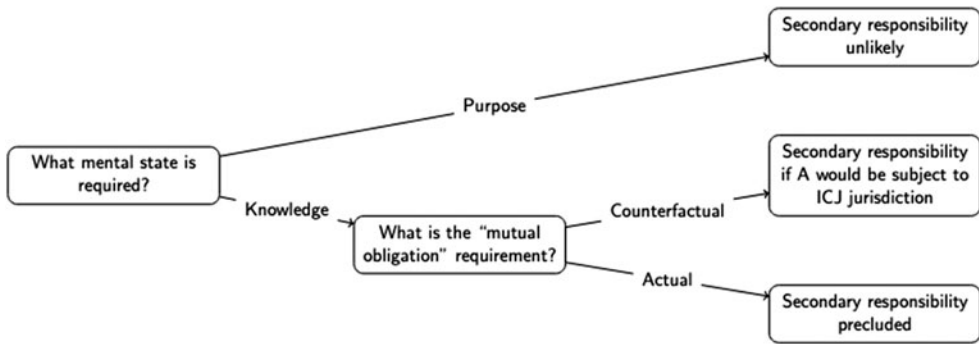


FIGURE 1: ICJ Provisional Measures Orders & Secondary ARSIWA Responsibility

*Example:* State A assists Israel in breaching an ICJ Provisional Measures Order, for instance, by sending weapons to be used in a Rafah offensive that threatens Palestinians’ rights under the Genocide Convention. Does State A incur secondary responsibility for assisting in an internationally wrongful act under Article 16 ARSIWA?

### A. Provisional Measures and ARSIWA Complicity

When the addressee of a provisional measures order does not comply (hereinafter PM-breach), it incurs state responsibility for an internationally wrongful act.<sup>137</sup> There is reason to believe that Israel has failed that obligation.<sup>138</sup> If it has, per Article 16 of the International Law Commission’s (ILC’s) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), it would seem to follow that third states could be complicit if they contribute significantly to that breach, “with knowledge of the circumstances of the internationally wrongful act.”<sup>139</sup> However, before drawing that conclusion, two doctrinal questions must be addressed (see Figure 1).

First, must a state assist purposively in a PM-breach or does knowledge suffice for complicity? Confusing the otherwise straightforward use of “knowledge” in Article 16, the ILC Commentary indicates that the contribution must have been made “with a view to facilitating the commission” of the wrongful act.<sup>140</sup> The latter implies a purpose element that would be difficult to establish, and would exceed the parallel criminal intent standard for complicity.<sup>141</sup> Meanwhile, the Commentary’s separate discussion of *jus cogens* violations is framed in terms of the Article 16 threshold with reference only to knowledge, not purpose.<sup>142</sup> In assessing complicity in the Bosnian genocide case, the ICJ focused exclusively on knowledge, albeit

<sup>137</sup> Karin Oellers-Frahm & Andreas Zimmerman, *Article 41*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1026, 1068 (Andreas Zimmermann et al. eds., 3rd ed. 2012); Robert Kolb, *Note on New International Case-Law Concerning the Binding Character of Provisional Measures*, 74 *NORDIC J. INT’L L.* 117 (2005).

<sup>138</sup> See ICJ, *Gaza PM II*, *supra* note 103, para. 4 (sep. op., Nolte, J.) (“This terrible situation would most probably not exist if the Order of 26 January 2024 had been fully implemented.”)

<sup>139</sup> ARSIWA, *supra* note 125, Art. 16(a), p. 66.

<sup>140</sup> Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE, at 30–31, 60–64 (2016).

<sup>141</sup> On the complexity of purposive state intent, see Section I.C *supra*.

<sup>142</sup> ARSIWA, *supra* note 125, at 115; HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 236 (2011); Moynihan, *supra* note 140, paras. 65–76, 79–83.

without ruling out that purpose may also have been necessary.<sup>143</sup> Notably, the Arms Trade Treaty (ATT) absolutely prohibits authorizing arms transfers in the “knowledge” that they would be used to commit genocide, crimes against humanity, or war crimes.<sup>144</sup>

Second, is a PM-breach the kind of wrongful act that can underpin ARSIWA complicity? Article 16 responsibility attaches only to acts that “would be internationally wrongful if committed by [the assisting] State”—hereinafter the “mutual obligation” requirement. There are two ways of reading this qualification, one contingent on the primary rule’s actual reach and one counterfactual.

On the more restrictive interpretation of Article 16, complicity would depend on the actual reach of the underlying primary obligation. In support, the Commentary describes third-party responsibility as turning on whether the assisted act breaches “obligations by which the aiding or assisting State *is itself bound*.”<sup>145</sup> That would not include assisting a PM-breach *as such*, as ICJ decisions bind only the litigating parties.<sup>146</sup> As a general matter, this interpretation could create potentially dangerous gaps. For instance, the territoriality of many human rights obligations risks implausibly precluding complicity in their violation, even across parties to the same treaty, as only the principal (territorial) state would bear the relevant obligations to those whose rights are violated.<sup>147</sup>

The counterfactual approach meanwhile asks whether the assisting state would bear those obligations if it were engaged in the conduct of the principal state, in the latter’s circumstances, but given its own legal commitments. In support, the Commentary states that third party responsibility obtains if “the conduct in question, *if attributable to the assisting State*, would have constituted a breach of its own international obligations.”<sup>148</sup> In addition to grounding third-party complicity in human rights violations, this approach arguably entails that complicity in a PM-breach—for instance through weapons transfers supporting offensive operations in Rafah that threaten Palestinians’ rights under the Genocide Convention—would hinge on whether the assisting state, if it were in Israel’s position in terms of conduct and circumstances, would be bound by the relevant orders. For states that have accepted the ICJ’s Genocide Convention jurisdiction, this counterfactual approach could imply that materially and knowingly assisting a PM-breach would implicate Article 16.<sup>149</sup>

If the counterfactual approach prevails, states may incur secondary ARSIWA responsibility for assisting a PM-breach *as such*. Even if the more restrictive interpretation prevails, an assisting third state could still incur responsibility if the order relayed an underlying obligation

<sup>143</sup> ICJ, *Bosnian Genocide*, *supra* note 113, paras. 420–21.

<sup>144</sup> GA Res. 67/234, Arms Trade Treaty, Art. 6(3), at <https://ihl-databases.icrc.org/en/ihl-treaties/att-2013> [hereinafter ATT]. As discussed below, the ATT includes further responsibilities to mitigate the risk of violations when they “could” occur and to avoid contributing when the remaining risk is “overriding.”

<sup>145</sup> ARSIWA, *supra* note 125.

<sup>146</sup> ICJ Statute, Art. 59.

<sup>147</sup> The ILC, Articles on State Responsibility Commentary includes “material aid to a State that uses the aid to commit human rights violations” under Article 16. ARSIWA, *supra* note 125, at 67. On human rights territoriality, see MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2011).

<sup>148</sup> ARSIWA, *supra* note 125, at 66, para. 6 (emphasis added).

<sup>149</sup> The analogy to human rights complicity and the issue of territoriality warrants caution since the commitment to comply with provisional measures might be argued to be contingent on having the opportunity to participate as a litigating party in the obligation-generating process (the PM hearing).

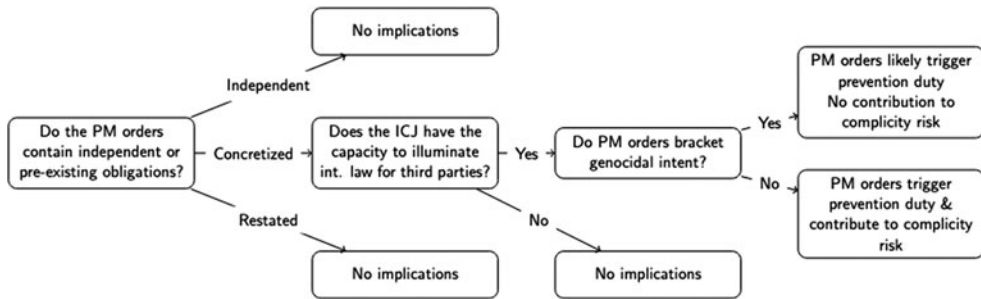


FIGURE 2: ICJ Provisional Measures Orders & Genocide Complicity/Prevention

Note: Do the ICJ orders in *South Africa v. Israel* affect the epistemic environment in which third states discharge their obligations under the Genocide Convention?

shared by both states and the PM-breach would, by implication, also breach that underlying obligation.<sup>150</sup> We turn to that possibility next.

### B. Provisional Measures and Genocide Complicity and Prevention

Ordering provisional measures, the ICJ can either create new independent obligations, or relate pre-existing obligations (see Figure 2).<sup>151</sup> In the latter case, PM orders could inform how states that share these pre-existing obligations must discharge them. Do the Gaza PM orders for instance bear on third states' risk of complicity in genocide (rather than complicity in any PM-breach)? The ICJ's third order demanded, among other things, that Israel: "Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part."<sup>152</sup> As an independent obligation to halt a specific military operation in a specific context, this demand would not bear on how third states discharge their obligations under the Genocide Convention. But that the order created an independent obligation is debatable.

Judge ad hoc Barak in his Dissenting Opinion interpreted the "halt" order as merely "reaffirming" Israel's prior obligation not to violate the Genocide Convention. The order indeed demands several times that Israel must act "in conformity with its obligations under the Convention."<sup>153</sup> Barak states that "even without an order issued by the Court, a military offensive that may result in a violation of a State's obligations under the Genocide Convention would have to stop."<sup>154</sup> By attaching the order's "halt" requirement to pre-

<sup>150</sup> Analogously, State A would ordinarily not be complicit for aiding State B breach a bilateral treaty to which A is not party. However, complicity might obtain if that bilateral treaty codified pre-existing *erga omnes* obligations.

<sup>151</sup> The ICJ has affirmed that provisional measures orders "bind the parties *independently* of the factual or legal situation which the provisional measure in question aims to preserve." Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 391 (ICJ Jan. 31, 2024); see also Dai Tamada, *Still Valid: Provisional Measures in Ukraine v. Russia (Allegations of Genocide)*, EJIL:TALK! (Mar. 15, 2024); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 159, para. 8 (Apr. 20).

<sup>152</sup> ICJ, Gaza PM III, *supra* note 104, para. 50.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*, para. 1 (diss. op., Barak, J.).

existing obligations, Barak's interpretation supports the notion that the order could in principle have implications for third states assisting Israel in offensive operations in Rafah. However, for him, the Court's order amounted to a redundant restatement of the law—the “halt” requirement conditional on whether the offensive in fact would violate the Genocide Convention, which third states would have to determine for themselves when assessing their complicity risk.

A third interpretation of the order is that the Court concretized a pre-existing obligation not to engage in military operations “which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part,” and identified the Rafah offensive as such an operation.<sup>155</sup> If this is correct, then, actualizing law's *ex ante* function, the ICJ's order arguably specified Israel's pre-existing obligations into an action-guiding demand to halt offensive operations in Rafah. That demand would not *itself bind* third states. However, might the concretization of Israel's duties *inform* third states that share the obligation under the Genocide Convention?

Here the question arises whether the ICJ has the capacity to illuminate how states not directly bound by its pronouncements must discharge their existing international obligations in a specific context. We believe so. Although not a specialized factfinder, the ICJ has distinct epistemic advantages that warrant presumptive deference, most obviously because it is presented with available evidence by competing litigants, including the evidence most favorable to the party against which a decision is issued. Moreover, as manifest in its advisory opinions, the ICJ has a general competence to apply and concretize international law in an authoritative, if non-binding, way.<sup>156</sup>

Of course, to the extent that an order's relevance for third-party evaluation and response hinges on its role in concretizing pre-existing obligations, its usefulness depends on its determinacy. Ambiguity, while “constructive” in building consensus, weakens action-guidance and epistemic value for third-party evaluation.<sup>157</sup> Recall here the contestability of whether the Court identified a risk to Palestinians' rights not to be harmed by Israel with genocidal intent or whether it diagnosed a risk of group destruction, while bracketing intent. At the *accountability* stage, where Article 16 operates, the Court has identified knowledge of genocidal intent as a condition of complicity.<sup>158</sup> If the ICJ's provisional measures orders have bracketed intent, their epistemic value to third states to assess their complicity-risk is limited. Conversely, if the Court has identified a real risk of genocidal intent through its orders, this would be an important, though not sufficient, contribution to third states' *knowledge* of that intent.

A state's duty to *prevent* genocide, meanwhile, is implicated when it “was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”<sup>159</sup> If the Court's orders implied a risk that Israel is acting with special intent (because Palestinians' rights under the Genocide Convention are rights not to be harmed with special

<sup>155</sup> Surveying interpretations of this clause, see Juliette McIntyre, *Consensus, at What Cost?*, VERFASSUNGSBLOG (May 25, 2024).

<sup>156</sup> Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean, Case No. 28, paras. 202–06 (ITLOS Jan. 28, 2021).

<sup>157</sup> McIntyre, *supra* note 155.

<sup>158</sup> ICJ, *Bosnian Genocide*, *supra* note 113, paras. 419, 421, 432.

<sup>159</sup> *Id.*, para. 432.

intent), the orders incontestably implicate third states' prevention duties. The latter "arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed,"<sup>160</sup> so by January 26, 2024.<sup>161</sup> On the alternative interpretation, the Court bracketed special intent and declared that Israel's actions, specifically continued deprivation (second and third order) and the military offensive in Rafah (third order), risk group destruction. Here, although the implications for third states' duties are, in principle, more contestable, we suggest they remain significant. Why?

The intent-bracketing reading of the orders indicates that the Court deemed it appropriate to cast an objective risk of group destruction (possibly without genocidal intent) as a risk of irreparable prejudice to the Palestinians' rights under the Genocide Convention. As argued above, this could itself be framed in terms of functional differentiation, with the Court—at the provisional measures stage—acting in the paradigm of action guidance, not accountability. Third states' obligation to prevent genocide arguably operates in a similar paradigm, geared toward the same purpose of preventing irreparable prejudice to the right not to be subjected to group destruction through violations of the Genocide Convention. A teleological interpretation might therefore indicate that facts that trigger provisional measures also trigger third states' preventive obligations. Just as provisional measures orders do not prejudice the merits, a third state may fail to act preventively as required by the Genocide Convention, and yet, by chance, avoid a violation at the accountability stage, where state responsibility even for a preventive failure would materialize only if the principal "actually committed" genocide, with the requisite intent.<sup>162</sup>

Of course, genocide lends itself to "bracketing" intent in real-time evaluation. As the underlying conduct would ordinarily be illegal (likely criminal) absent genocidal intent, the risk that low-threshold third-state prevention duties (or PM orders) would undermine *lawful* action is minimal. Whether a similar bracketing of intent in service of functional differentiation could work in shaping third-state duties vis-à-vis principal-state conduct that is closer to the line of legality may be contested. And yet third-state duties to avoid the risk of contributing to violations *are* more broadly applicable in war. We next turn to another set of obligations for which the ICJ's provisional measures could modify third states' epistemic environment.

### C. *Provisional Measures and Third States' Obligations Under IHL*

States have an obligation "to ensure respect" for IHL under Common Article 1 of the Geneva Conventions and customary law. Per the updated ICRC Commentary, this requires states "to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions."<sup>163</sup> In a similar vein, parties to the Arms Trade Treaty may not transfer weapons that "could facilitate"

<sup>160</sup> *Id.*, para. 431.

<sup>161</sup> Yussef Al Tamimi, *Implications of the ICJ Order (South Africa v. Israel) for Third States*, EJIL:TALK! (Feb. 6, 2024); Jinan Bastaki, *The ICJ's Provisional Orders Measures and the Responsibility of Third States*, OPINIO JURIS (Feb. 5, 2024).

<sup>162</sup> ICJ, *Bosnian Genocide*, *supra* note 113, para. 431.

<sup>163</sup> ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK ARMED IN FORCES IN THE FIELD, para. 162 (Jean-Marie Henckaerts et al. eds., 2016).

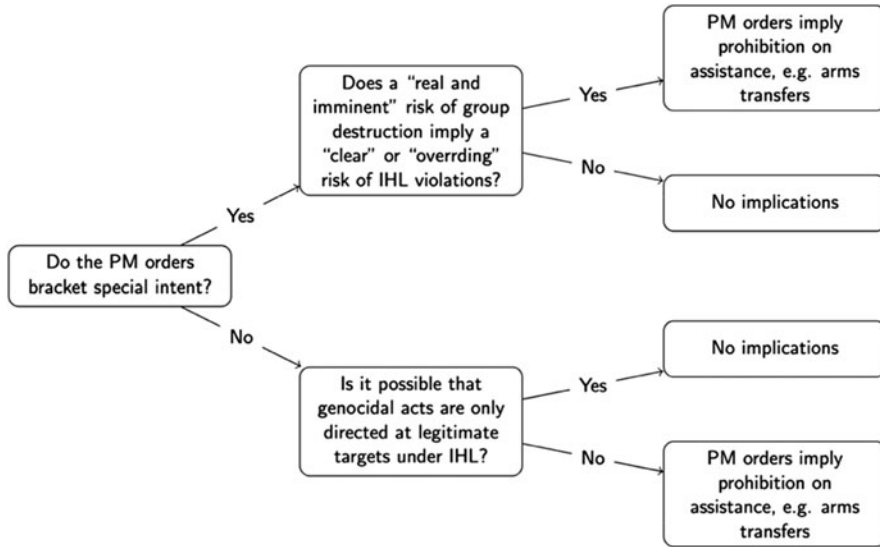


FIGURE 3: ICJ Provisional Measures Orders & Third States' Obligations Under IHL

*Note:* Provided the ICJ has the capacity to illuminate international law for third parties, do the ICJ orders in *South Africa v. Israel* affect the epistemic environment in which third states discharge their primary obligation to ensure respect for IHL and obligations under the Arms Trade Treaty?

a serious IHL or human rights violation if, following mitigating measures (or the consideration thereof), an “overriding risk” of such violation remains.<sup>164</sup> The question in relation to the ICJ’s orders is whether “a real and imminent risk” to rights protected under the Genocide Convention (the provisional measures threshold) implies a “clear” or “overriding” risk of IHL violations (see Figure 3).<sup>165</sup> The rules are primarily action-guiding and have been invoked in multiple tranches of ongoing litigation across several states not for the purpose of accountability, but to stop arms transfers.<sup>166</sup>

Is it possible that IHL-compliant acts may pose a real and imminent risk of genocide or group destruction? This claim may be likely to be invoked in conjunction with a charge that the adversary inflates that risk through the systematic use of human shields. Although it is conceivable in theory that perpetrators act with the purpose to destroy a group but (1) direct their efforts only against group members who are targetable under IHL, or (2) pursue that end through IHL-compliant conduct in densely populated areas,<sup>167</sup> an IHL-compliant genocide, including the genocidal intent implied in the first interpretation of the orders, is difficult to credit as a practical possibility. In Gaza, ICJ orders related not anomalous scenarios of genocidal purpose with little impact on the protected group. Instead, the Court diagnosed a risk to Palestinians’ rights under the Genocide Convention due to “famine and starvation,”<sup>168</sup> “the

<sup>164</sup> ATT, *supra* note 144, Art. 7(1–3).

<sup>165</sup> ICRC, ARMS TRANSFER DECISIONS: APPLYING INTERNATIONAL HUMANITARIAN LAW CRITERIA 3, at 8–9 (2007).

<sup>166</sup> Vladyslav Lanovoy, *Arms Transfers to Israel: Knowledge and Risk of Violations of International Law*, JUST SECURITY (Apr. 17, 2024).

<sup>167</sup> Linking genocide, torture, and mass killing to the same individual level variables, see Ervin Staub, *Moral Exclusion, Personal Goal Theory, And Extreme Destructiveness*, 46 J. SOC. ISSUES 47 (1990).

<sup>168</sup> ICJ, Gaza PM II, *supra* note 103, para. 11.

forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure.”<sup>169</sup>

Even on the second interpretation, according to which the ICJ bracketed intent and “merely” diagnosed a real and imminent risk of partial or whole group destruction, the orders have clear implications for third states’ duties under Common Article 1 and the Arms Trade Treaty: grave IHL violations, such as starvation, indiscriminate attacks, and forcible displacement, are the non-contingent reality of threats to the survival of protected groups in war.<sup>170</sup> As states grapple with how to evaluate an armed conflict in real time, it would violate their due diligence duties to ignore the systematic connections between group destruction, genocide, and violations of IHL for the sake of honoring either (1) the doctrinal possibility that violations of the Genocide Convention do not also violate the Geneva Conventions or (2) the empirical possibility that Israel poses “a real and imminent risk” of (partial) destruction to the Palestinians in Gaza without violating IHL. In this overtly action-guiding aspect of international law, the ICJ’s orders provide a key focal point for third-state evaluation and response.

#### CONCLUSION

Current developments in Gaza, where Israel’s systematic compliance claim collides with catastrophic civilian harm, create doctrinal pressure on concepts and frameworks that permit international law to discharge its *ex ante* action-guiding and concurrent evaluative functions. Establishing belligerent intent is a critical, but misunderstood, challenge. Where available, courts’ provisional products can provide a key epistemic resource in real-time legal assessments of war.

Concretely, we argued that doctrinal confusion obscures prohibited intent in Israel’s conduct of hostilities and siege. The relevant violations do not require purposively bringing about prohibited consequences such as dead or starved civilians. When not unduly shaped by standards developed for law’s accountability function, an application of *lex lata* in real time demands that Israel change course and third states suspend material assistance. Notably, UK Foreign Secretary David Lammy recently distinguished his government’s decision to suspend the licensing of certain arms exports to Israel from the future accountability work of international courts.<sup>171</sup> Meanwhile, the ICJ’s provisional orders contribute critically to third states’ awareness of risks sufficient to trigger their IHL obligation to act now rather than defer to law’s accountability function.

Regarding the allegation of genocide, developments in Gaza spotlight doctrinal questions that should be resolved with due regard to differentiating accountability from action-guidance and concurrent evaluation. Specifically, we argued that before and during a risk of (partial) group destruction, bracketing genocidal intent in the inference of a genocide risk may be appropriate when the ICJ issues provisional measures, the primary state evaluates its own officials’ conduct, and third states discharge their prevention duty. Direct intent is exceedingly difficult to infer in real time. Law’s functionality in inhibiting wrongful conduct must not be

<sup>169</sup> ICJ, Gaza PM I, *supra* note 100, para. 46.

<sup>170</sup> Martin Shaw has shown that “a very fine line” separates mass destruction of civilian populations and genocide, see MARTIN SHAW, *WAR AND GENOCIDE: ORGANISED KILLING IN MODERN SOCIETY* (2003).

<sup>171</sup> UK policy on arms export licenses to Israel: Foreign Secretary’s Statement, House of Commons (Sept. 2, 2024).



sacrificed for standards developed to safeguard due process and track blameworthiness in law's accountability function. In some legal contexts, lowering inferential (or substantive) intent standards *ex ante* may carry the risk that an agent is inhibited or unsupported in what would be legally permissible (morally desirable) conduct. This is not the case when conduct poses a real and imminent risk of group destruction.

Finally, we argued that ICJ provisional measures can in principle clarify the *ex ante* and concurrent obligations of parties not directly bound by them. However, several open doctrinal and interpretive questions condition the third-party implications of the *South Africa v. Israel* orders. One pervasive danger is that third parties—rather than drawing on provisional court orders as epistemic resources or seeking to undertake rigorous IHL risk assessments themselves—will rely instead on the perceived or imputed character of the belligerent. Current developments in Gaza show that this guarantees contradictory inferences and the functional infirmity of international law as a restraining force in real time. To presume that a party complies with international law, for instance because it is a democracy,<sup>172</sup> is not only to ignore the empirical record. It is also inimical to the idea of law and thus an existential threat to the primary mechanism available to limit the horrors of war and mass violence.

<sup>172</sup> Chancellor Olaf Scholz quoted in Stefan Talmond, *Germany Takes Ostrich Approach to Israel's IHL Violations in the Gaza War*, GER. PRAC. INT'L L. (Apr. 7, 2024).