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THE ICJ'S POWER TO ISSUE INTERIM MEASURES ACCORDING TO ARTICLE 41 OF THE ICJ STATUTE AT THE TEST: *SOUTH AFRICA V. ISRAEL* BEFORE THE ICJ

1. INTRODUCTION

There can be no doubt that the Gaza conflict of 2023/2024 with tens of thousands of deaths was unleashed by the murderous Hamas attacks of 7 October 2023 (and of other terrorist groups) against mostly civilians in Israel. The subsequent extremely strong reaction by Israel had some military success but tested the limits of international humanitarian law, with many signs that these borders had been transgressed. The ensuing situation became a matter of public discussion and contention at a global scale that few other issues see. These controversies unfolded along political and ideological dividing lines: they pit East against West and the Global South against Western Israeli allies.

Ultimately, it became a test case for the suitability of the international judiciary contributing workable solutions to deeply entangled political conflicts to which international law has so far not been able to provide solutions. At its core stands the Palestine conflict, which has been virulent since the very beginnings of the UN era and which remains unresolved. While ICJ jurisdiction is still limited in scope and dependent on state consent, various attempts have been made recently to overcome these hurdles, especially if *erga omnes* obligations, "obligations of a State towards the international community as a whole",[1] are at issue. As shown below, such attempts can also be encountered in the present case. Here, the attempt was made to use the Genocide Convention of 1948 to bring immediate relief to the Palestine population in Gaza presently under enormous strain by the Israeli counter-attack, on the one hand, and to start a sort of public interest litigation whereby the Palestine cause should be advanced in more general terms, on the other hand. In the following, the

[1] *See* ICJ, *The Barcelona Traction, Light and Power Company, limited (Belgium v. Spain)*, Judgement, 5 February 1970, ICJ Rep 1970, p. 32.

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potential and the limits of such an approach is outlined, with particular reference to the instrument of interim measures according to Article 41 of the ICJ Statute.[2]

2. THE UNFOLDING OF THE CONFLICT

On 7 October 2023, about 3,000 fighters from Hamas and other terrorists groups entered Israeli territory – mainly from Gaza – and killed more than 1,200 people, predominantly civilians, and not sparing the elderly, women and children. The most cruel and gruesome acts were committed in the murder spree. Attacks against the Israeli civilian population included unspeakable sexual violence against women and girls, "perpetrated with shocking brutality".[3] The scale of this massacre would not have been possible if not for a dramatic failure of Israel intelligence and security, which largely remained inactive for hours after the attacks began. The aggressors were also able to abduct about 250 hostages before the borders were closed, whilst the terrorists remaining on Israeli territory were arrested or killed, and a bombing campaign started against Gaza. Nearly three weeks later, on 27 October, an Israeli ground offensive began.

At the time of writing, this campaign was still ongoing. It has caused more than 30,000 deaths, primarily civilians. The blockade of Gaza and subsequent military campaign, with the widespread destruction of homes, infrastructure and hospitals, caused a public health disaster and spread infectious diseases, malnutrition and hunger.[4] Investigations by the UN and other international institutions are underway as to possible war crimes committed both by Israeli and Palestinian armed groups, including Hamas.[5] There is consistent evidence that Israeli hostages continue to be victims of sexual abuse, even in captivity.[6]

Although Israel was able to inflict heavy casualties to the terrorist network, at the time of writing (April 2024), Israeli forces have not been able to uproot Hamas nor to liberate a significant number of the hostages. The reach, the limits and the contradictions of international humanitarian law are being tested like never before

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2 This contribution builds on P. Hilpold, *South Africa v. Israel: A Solomonic Decision as "Constructive Ambiguity"*, https://verfassungsblog.de/south-africa-v-israel-a-solomonic-decision-as-constructive-ambiguity (accessed 8 April 2024).

3 *See* Security Council Meetings Coverage, Reasonable Grounds to Believe Conflict-Related Sexual Violence Occurred in Israel During 7 October Attacks, Senior UN Official Tells Security Council, SC/15621, 11 March 2024, https://press.un.org/en/2024/sc15621.doc.htm (accessed 8 April 2024).

4 *See* ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order, 26 January 2024, ICJ Rep 2024, para. 47, which cites a series of independent and reliable sources.

5 AOAV, *Alleged Violations of International Humanitarian Law in the Israel-Palestine Conflict: A Simple Explainer*, https://aoav.org.uk/2023/alleged-violations-of-international-humanitarian-law-in-the-israel-palestine-conflict-a-simple-explainer/ (accessed 8 April 2024).

6 P. Kingsley, R. Bergman, *Israeli Hostage Says She Was Sexually Assaulted and Tortured in Gaza*, https://www.nytimes.com/2024/03/26/world/middleeast/hamas-hostage-sexual-assault.html (accessed 8 April 2024).

in modern history. As Hamas and other terrorist groups are hiding behind the civilian population, and even in tunnels beneath hospital complexes, innocent civilians are in the crossfire. The attempt to cut Hamas terrorists' supply of food and water prompted the risk of starvation for large parts of the Palestine population.

It may be true that protected civilian sites can become legitimate targets of warfare once they are abused by combatants,[7] but there is the evident risk that a civil war can thereby fully escalate, with the total elimination of any limits and restraints set by international humanitarian law. The principles of distinction (between combatants and civilians)[8] and proportionality[9] have to be respected to the utmost possible extent.[10]

The related questions are not new and are not even specific to the Gaza conflict: It cannot be ignored that the "human shields tactic" used especially in asymmetric warfare harbours the risk of decisively altering the symmetry in the legal position of the belligerents if the protection of civilians should remain absolute.[11] Although this raises the question of how a balance should be struck between these contending values, goals and interests,[12] there can be no doubt that the very existence of the broad body of international humanitarian law proves the need to prioritise the protection of civilians as much as possible.[13]

With the UN Security Council blocked by juxtaposed allegiances and different visions about right and wrong in the present conflict, it was understandable that international judicial organs, in particular the ICJ, were looked to for relief. Alas, the ICJ holds no jurisdiction to act as an arbiter in a contentious case regarding allegations of international humanitarian law violations in the Gaza conflict.

South Africa instituting proceedings against Israel on the basis of the Genocide Convention can be seen in different lights: as an act stemming from the true belief that genocide has been committed, is ongoing and must be stopped and that Israel has to be sanctioned for this crime; as an act intended to deflect the attention of South Africa's own population from a dismal internal situation and to posit South Africa

7 "A hospital or school may become a legitimate military target if it contributes to specific military operations of the enemy and if its destruction offers a definite military advantage for the attacking side" – ICRC, *Frequently Asked Questions on the Rule of Law*, https://www.icrc.org/en/document/ihl-rules-of-war-faq-geneva-conventions (accessed 8 April 2024).

8 *See* Art. 52 para. 2 of the Additional Protocol I of 1977 to the Geneva Conventions 1977, 1125 UNTS 17512.

9 *See Ibidem*, Art. 57 para. 2. As to the problem of properly measuring proportionality, *see e.g.* R. Kolb, *International Humanitarian Law*, Edward Elgar Publishing, Cheltenham: 2014, p. 152 ss. and N. Ronzitti, *Diritto internazionale dei conflitti armati*, Giappichelli, Turin: 2017, p. 209 et f.

10 In case of "dual-use objects", i.e. objects which are actually or potentially used both for civilian and military objectives, it is said that "special care and precautions in attack will need to be taken when targeting them". *See* D. Turn, *Military Objectives*, in: R. Livoja, T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Oxon: 2016, p. 139–156 (n. 152).

11 *See* E. Cannizzaro, *Proportionality in the Law of Armed Conflict*, in: A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford: 2014, p. 332–352.

12 "If the defenders are using the presence of movement of civilians "in attempts to shield military objectives from attacks", as was done by the Iraqis during the First Gulf war, how (if at all) is that factored in to the proportionality equation?" *See* D. Turn, *supra* note 10.

13 *See* E. Cannizzaro, *supra* note 11, p. 343.

as a standard bearer of the Global South; as an astute move to exploit an instrument designed for quite different purposes in order to judicialise an otherwise intractable conflict exacting an intolerable humanitarian toll; or as a combination of all these motives and considerations.

3. *SOUTH AFRICA V. ISRAEL* ("GENOCIDE IN THE GAZA STRIP")

On 29 December 2023, the Republic of South Africa filed an application at the ICJ in The Hague against the State of Israel alleging violations in the Gaza Strip of obligations under the Genocide Convention.[14] In this application, South Africa maintained that Israel had breached and continued to breach its obligations under the Genocide Convention and requested *inter alia* that Israel ensure the persons committing genocide or directly and publicly inciting genocide are punished; collect and conserve evidence in furtherance of these obligations; and perform the obligations of reparation in the interest of Palestinians. Furthermore, South Africa requested a series of provisional measures with reference to Article 41 of the ICJ Statute. It petitioned the Court to request Israel to suspend its military operations, take all reasonable measures within their power to prevent genocide and desist from committing any and all acts within the scope of Article II of the Convention.

In its Order of 26 January 2026, following a detailed analysis of allegations concerning widespread violations of international humanitarian law in Gaza, the ICJ came to the conclusion

> that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.[15]

With regard to the consequent need to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings, the ICJ emphasised that its task was not to determine the existence of breaches of obligations under the Genocide Convention, "but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument".[16] On this basis, deviating to a considerable extent from the requests made by South Africa, in both their material content and their wording, the Court considered that Israel must take all measures in relation to Palestinians

[14] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order, ICJ Rep 2024, para. 2.

[15] *Ibidem*, para. 56.

[16] *Ibidem*, para. 62.

in Gaza to prevent the commission of all acts within the scope of Article II of the Genocide Convention.[17]

Israel was furthermore required "to take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip",[18] "to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip"[19] and to "take effective measures to prevent the destruction and ensure the preservation of evidence" related to allegations of genocide.[20] Israel was then obliged to report, within one month, on the measures taken to implement the Order, whilst South Africa was granted the right to comment thereon.[21]

4. A FIRST ASSESSMENT OF THE ORDER OF 26 JANUARY 2024

In a partisan approach, the ICJ Order of 26 January 2024 could have been, and in fact it was, celebrated as a victory for South Africa. Genocide, as "the crime of crimes", is a violative act that casts extreme blame on the perpetrating state. Symbolically, it could be equated to a "mark of Cain", an indelible sign of the most heinous wrongdoing a state could be accused of. This being so, the drafters of the Genocide Convention were well aware of the need to craft extremely demanding requisites for such a crime to be committed. As is well known, Article 2 of the Genocide Convention 1948 defines genocide as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group[22].

It is this particular volitive element, the "intent to destroy", which is required in addition to the will to commit any of the five acts enumerated in (a) to (e) that is so hard to prove and which ensures that the charge of genocide should be reserved for the most outrageous manifestations of the crimes mentioned above.

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17 *Ibidem*, para. 78.
18 *Ibidem*, para. 79.
19 *Ibidem*, para. 80.
20 *Ibidem*, para. 81.
21 *Ibidem*, para. 82.
22 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 27.

An order of provisional measures does not require that breaches of obligations under the Genocide Convention be determined previously, but, according to Article 41 of the ICJ Statute, emphasis is put on the preservation of "the respective rights of either party".

In order to lend more substance and authority to its decisions based on Article 41, the ICJ introduced, rather recently, the "plausibility" criterion that should guide its decision to grant or reject requests for preliminary measures.[23] As a result, the Court thereby seemingly created a test that would at least incidentally allow for a prima facie review of the merits, to ascertain whether, according to the Roman Law tradition, a "*fumus boni iuris*" was given. In reality, however, considerable doubts regarding this test remained.[24] Whilst there has been some confidence that this "plausibility test" has consolidated somewhat in the meantime, in reality the warning expressed by Judge Cancade Trindade in *Ukraine v. Russia* of 2017 very pertinently pinpoints the basic problems with this test. In fact, as Judge Trindade remarked, there are two aspects to this test: It can refer to the plausibility of rights or to a "factual plausibility".[25]

In its Order of 26 January 2024 the ICJ did not specify this issue further, but in the discussion and the interpretation of this Order the confusion seems pervasive. The ICJ reformulated the need to "preserve the rights of either party" as a need "to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument". In the first analyses some assumed that "the International Court of Justice has said already that it is plausible that Israel harbored [an intent to destroy]".[26]

Whether such an assumption is justified is open to debate. It is true that in abstract theory the "protection of rights under the Genocide Convention" is needed and possible if an "intent to destroy" can at least to a some extent be assumed. But how can such an extremely demanding requisite be determined – even to a purely rudimentary degree – in a provisional proceeding if it is so hard to prove its existence in the merits, with its fully-fledged probatory guarantees? No further hints can be found in the Order of 26 January 2024 that the ICJ had identified and ascertained elements of this kind to a degree that could warrant a somewhat robust, albeit purely anticipatory, statement about the "plausibility" that this volitive element was given.

These considerations may sound like sophism, but upon closer inspection they point not only to a possible, far-reaching misunderstanding, but also to a conundrum that had to be solved in some ways by the ICJ. How to engage, even provisionally,

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[23] *See* ICJ, *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, 19 February 2009, ICJ Rep 2009, p. 139 and 151.

[24] *See* C. Miles, *Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice*, 87 British Yearbook of International Law 1 (2018), p. 41.

[25] *See* ICJ, *Ukraine v. Russia*, ICJ General List No. 166 (38); Judge C. Trindade, cited according to C. Miles, *supra* note 24, p. 45.

[26] *See* J.B. Quigley, *Legal Standard for Genocide Intent: An Uphill Climb for Israel in Gaza Suit,* https://www.ejiltalk.org/legal-standard-for-genocide-intent-an-uphill-climb-for-israel-in-gaza-suit/ (accessed 8 April 2024).

in such a demanding assessment when thousands of civilians are dying? Prompt reaction was needed, and to deny jurisdiction in the face of such an extreme humanitarian challenge could have been interpreted as a miserable failure of one of the most prominent international institutions when most hope had been pinned on it. The ICJ took recourse to a Solomonic approach: With no trace of even ephemeral proof for Israel's "intent to destroy" being delivered, the ICJ seemed to concentrate on the material consequences of warfare in Gaza, where innocent people were dying in droves.

The way Israel conducted – and at the time of writing, still conducts – its military operations in Gaza has been met with sharp reproach even by its closest allies, notwithstanding the ever more horrifying facts about the Hamas massacres that have become public or the fact that Hamas (and related terrorist groups) constituted and still constitute an existential threat for Israel. That Israel should have a right to self-defence when confronted with such an attack can hardly be denied. Nonetheless, the challenge to humanitarian law resulting from the Israeli counter-attack was deemed unbearable by an ever-growing number of governments and by an increasingly impatient international civil society.

5. THE SHAKY JURISDICTIONAL BASIS FOR A GENOCIDE PROCEEDING BEFORE THE ICJ AGAINST ISRAEL

The ICJ's finding that "at least some of the rights claimed by South Africa and for which it is seeking protection are plausible"[27] has been celebrated, in particular by Israel's enemies. The way the ICJ came to this conclusion and the legal reasoning behind it, raises many questions. The following warning by Professor Hugh Thirlway, one of the most prominent experts on the ICJ procedure, comes to mind:

> The provisional measures procedure has always offered a temptation to States to commence proceedings on a shaky jurisdictional foundation in the hope of getting at least the short-term benefit of an order of provisional measures, and this is all the more attractive when the order is recognized to be immediately binding, even if unenforceable.[28]

In political comments, allegations were consistently made that South Africa acted out of (internal) political motives and in line with a historical consistent pattern of pro-Palestine alignment.[29]

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[27] *See* ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order, ICJ Rep 2024, para. 54.

[28] *See* H. Thirlway, *The International Court of Justice*, in: M.D. Evans (ed.), *International Law*, Oxford University Press, Oxford: 2018, p. 598.

[29] *See e.g.* A. Lubotzky, *Israel-Palestine Conflict Divides South African Politicians – What Their Responses Reveal About Historical Alliances,* https://theconversation.com/israel-palestine-conflict-divides-south-african-pol-

Even more so, the "sister proceeding" initiated by Nicaragua against Germany on 1 March 2024 concerning Germany's alleged violations of the Genocide Convention 1948 and the Geneva Conventions 1949 and their Additional Protocols by continuing to aid and assist Israel is legally untenable and apparently designed to muster political support for Nicaragua's government, itself accused of widespread human rights abuses.[30]

The granting of standing to all parties to the Genocide Convention in case of an alleged genocide is not a problem as such and legally correct in any case (where no reservations were made), in view of the clear provision in Article IX of the Genocide Convention.[31] Thus, there is nothing to object to the fact that Gambia filed an application against Myanmar in view of the horrific massacres carried out by the Myanmar military junta against the Rohingya people.[32] The situation is different, however, when this provision is blatantly abused, as in the case of *Nicaragua v. Germany*, where all the substantive elements for action are missing: Not only is there, as shown, no proof at all of a genocide unfolding or having happened according to the Genocide Convention, but it is even less demonstrable that Germany lent aid and assistance to such a crime (or to the violation of humanitarian law of any sort). Theoretically, the plaintiffs could rely on both Article 16 of the ILC draft articles on state responsibility (ASR) (giving aid and assistance when there is a breach of international law) and on Article 41 para. 2 ASR (rendering aid and assistance in maintaining a situation created by a serious breach of peremptory norms – at least some of the alleged violations, primarily those concerning the Genocide Convention, surely relate to peremptory norms). In reality, however, such an attempt must fail on both material and procedural grounds. In fact, whilst it is true that Germany is cooperating closely with Israel and provides aid and assistance, even military aid, there is no evidence that this help is used to carry out an internationally wrongful act and surely no such knowledge can be attributed to Germany.[33] On procedural grounds, the so-called

iticians-what-their-responses-reveal-about-historical-alliances-215349 (accessed 8 April 2024); C. McGreal, *How Apartheid History Shaped South Africa's Genocide Case Against Israel,* https://www.theguardian.com/world/2024/jan/08/south-africa-genocide-case-israel-apartheid-history (accessed 8 April 2024); P. Fabricius, *The Complex Politics of South Africa's Genocide Case Against Israel,* https://www.thenation.com/article/world/the-complex-politics-of-south-africas-genocide-case-against-israel/ (accessed 8 April 2024).

30 See M. Simons, *Nicaragua Takes Germany to Court Over Supplying Arms to Israel,* https://www.nytimes.com/2024/04/08/world/middleeast/nicaragua-germany-world-court-israel-arms.html (accessed 8 April 2024). ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order, 30 April 2024, ICJ Rep 2024, by which the ICJ rejected Nicaragua's request for provisional measures, deserves unconditional approval.

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

32 See for a critical standpoint in this regard Post by Stefan Talmon (Lecture at the Twitter in 3 March 2024), https://twitter.com/StefanTalmon/status/1764250387869999275?s=20 (accessed 8 April 2024).

33 *See* ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), p. 66, para. 4.

Monetary Gold principle applies here: Because the wrongfulness of aid and assistance by the assisting state depends on the wrongfulness of the acts by the assisted state, the ICJ could decide on the allegations against Germany without Israel being a party to the proceeding.[34] The fact that a parallel proceeding is underway between South Africa and Israel is of no relevance here, let alone the fact that Nicaragua's accusation against Germany is far broader than that of South Africa against Israel, as they extend well beyond the Genocide Convention and generally concern international humanitarian law.

This intermingling of allegations relating to different norms endowed with different natures and protection instruments is also characteristic of the whole proceedings of *South Africa v. Israel*, and therefore most likely also a major hindrance for the ICJ to side with South Africa on the merits: The very substance of the allegations concerns violations of international humanitarian law. In this area violations by Israel might be plausible, but no jurisdiction is given to the ICJ in this regard and in this situation.

Although the ICJ in its Order of 26 January 2024 managed to avoid any clear positioning as to the exact dividing line between the reach of the Genocide Convention (on which South Africa's claim was based) and that of international humanitarian law (not providing any standing to the plaintiff to act in this case), when deliberating on the third Order of 28 March 2024, four judges (Xue, Brant, Gómez Robledo and Tladi) relied explicitly on international humanitarian law (Articles 55 and 56 of the Fourth Geneva Convention of 1949) when they deplored the unacceptable humanitarian situation in the Gaza Strip.[35] There can be no doubt that this situation cries out for action, even though the Genocide Convention is hardly the right basis for judicial proceedings on this extreme crisis before the ICJ.

6. CONCLUSIONS – A NEW LOOK AT THE ROLE OF PRELIMINARY PROCEEDINGS

As evidenced, the present case might provide a further impetus to reassess the prerequisites of interim measures according to Article 41 of the ICJ Statute. It has been shown that in recent years much attention has been paid by both the ICJ and academic writers to the so-called "plausibility test", which seemed to introduce at least some elements of an assessment of the merits for when a request should be advanced to "preserve the rights of the parties" in a preliminary way. A closer look at this test, however, reveals that it is not able to provide greater authority to the respective decision by the Court because much uncertainty and confusion are still associated with the related assessment. These uncertainties become even greater if

[34] *Ibidem*, p. 67, para. 11.

[35] *See also* T. Mimran, *Reflections on the Right to be Heard and on Substantive Justice*, in: *Third Provisional Measures in South Africa v. Israel: Reflections on the Right to be Heard and on Substantive Justice*, https://verfassungsblog.de/third-provisional-measures/ (accessed 8 April 2024).

erga omnes obligations are at issue in the face of radical challenges to basic human rights insufficiently protected by international law.

As was convincingly shown a long time ago,[36] the Court's power to indicate interim measures resides in the State's consent to be bound by the whole ICJ Statute, including Article 41; this consent is not to be equated with that which establishes the substantive jurisdiction of the Court.[37] There is no denial that a plausibility test taken seriously and anticipating some decisive elements of the merits could further "objectivise" decisions about interim measures. It is not clear, however, whether such an approach would always make sense, and in any case, in *South Africa v. Israel*, the ICJ seems to have primarily paid lip service to any plausibility test of substance.

The impression is that the ICJ has attributed a rather extensive reach to this "consent to be bound by the whole ICJ Statute" in the case at hand, obviously also in view of the "magnitude of the interests at stake"[38] concerning pivotal *erga omnes* obligations. Whilst there can be no doubt that eventually this power is also consent-bound, it appears that the ICJ is assuming here an authority that is fed by a growing State consent, in view of a broadening conviction that the most glaring lacunae in international law have to be overcome if basic humanitarian values are at stake.

The foregoing analysis might seem to offer a dire picture of not only the ongoing conflict in Gaza, but also of the pertinent international law. Nonetheless, a closer look at the basic circumstances of this struggle could be seen to reveal that at least an attempt is underway to overcome far-reaching lacunae in international law in general, and international humanitarian law in particular. Israel is faced with brutal aggression by terrorist groups which show no respect whatsoever for principles of international humanitarian law. This country has reacted in a way that tested the outer limits of international humanitarian law and in many cases may also have gone beyond what this branch of international law permits. From a strictly legal perspective the Genocide Convention is hardly the right legal basis to discuss this situation before the ICJ, although reference to this instrument has nonetheless permitted the extraordinary challenge unfolding after 7 October 2023 to be addressed before this highly respected Court. The words pronounced by the Court call for moderation and restraint, and it is remarkable that the ICJ did not neglect the lot of the abducted hostages. Further evidence is thus given to the fact that the accusation of genocide, whatever the political motives behind it might have been, has opened the door for the ICJ to rule on a conflict which has reached an intolerable dimension.

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[36] *See* M. Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 36 British Yearbook of International Law (1973), p. 308, 320.

[37] *Ibidem*, p. 278, which also cites Sir Hersh Lauterpacht voicing a similar view, very early in the ICJ's existence: "The Court may properly act under the terms of Article 41 provided there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court" (H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge University Press, Cambridge: 1958, p. 112).

[38] *See* M. Mendelson, *supra* note 36, p. 318.

It would have been preferable to address this situation on a more appropriate legal basis, but this conflict has once again revealed the glaring deficits of international humanitarian law,[39] particularly with regard to implementation instruments and their reach and relevance in asymmetrical conflicts with the involvement of a non-state party not prepared to respect the minimum rules of international humanitarian law from the very outset. The preliminary procedure, a still somewhat alien element in the ICJ procedural system,[40] has revealed here astonishing potential. With all the conflicting goals and aims at play in the seemingly unsolvable Israel–Palestine conflict, it opened up a forum where at least a minimum of a dialogue, indirect as it may be, could be established.[41] Irreconcilable as the conflicting goals and ambitions appear in this case – there is surely no mathematical, logical solution that international law could offer to solve the fundamental conflicts at issue – the formalism of (preliminary) justice can offer a voice to the oppressed and persecuted,[42] precisely because preliminary proceedings are so detached from the need to prove the soundness of the claims on the merits. Whilst the consent rule in international jurisdiction might often constitute an unsurmountable obstacle for discussing challenges in dire need to be brought before an international court, the specifics of preliminary proceedings might provide relief, despite the uncertainties still associated with them and perhaps exactly because of them. *South Africa v. Israel* is therefore an important test case for the role of preliminary proceedings in the ICJ system and, even more importantly, for the function of State consent in an international order in which *erga omnes* obligations acquire ever more importance[43] and where central institutions are challenged to attribute ever greater importance to the underlying fundamental values.

[39] As to the shortcomings of international humanitarian law, *see* F. Mégret, *The Limits of the Laws of War*, in: B. Fassbender,K. Traisbach (eds.), *The Limits of Human Rights*, Oxford University Press, Oxford: 2019, p. 283–295.

[40] For more details on this procedure *see* K. Oellers-Frahm, *Article 41*, in: A. Zimmermann, C.J. Tams, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary,* Oxford University Press, Oxford: 2012, p. 1026–1077.

[41] For more on the difficulties reconciling the different conflicting interests and goals at issue, *see also* M. Arcari, *Quali misure cautelari della Corte internazionale di giustizia per il caso Sud Africa c. Israele?*, 18(1) Diritti Umani e Diritto Internazionale 147 (2024), p. 147–164.

[42] As to this function of justice in international law in general, see M. Koskenniemi, *What is International Law For?*, in: M. Evans (ed.), *International Law*, Oxford University Press, Oxford: 2019, p. 42.

[43] However, this is not to ignore that regarding the merits we are not yet there as long as the findings in ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, ICJ Rep 2009, p. 165–200 are still relevant.