

The accusation of the state of Israel of the crime of genocide***Obvinenie štátu Izrael zo zločinu genocídy*****JUDr. Veronika D'Evereux, Ph.D.****Právnická fakulta Karlovej univerzity v Prahe, Katedra medzinárodného práva,
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The aim of this paper is to examine the possibility of fulfilment of the constituent elements of the crime of genocide in war in Gaza in the period from October 2023 to March 2024, and to answer to the research question: Under what circumstances would it be possible to consider the responsibility of the State of Israel for the crime of genocide? In author's opinion this would theoretically be in case there was proven by the ICJ without any doubt the intention of the State of Israel to commit genocide and at the same time there was found a link between the conduct of individuals who committed genocide and the State of Israel. The paper is aimed as exploratory overview and initial analysis of the vivid and ongoing armed conflict between the State of Israel and Hamas from a legal perspective. The first chapter is focused on the definition of the crime of genocide in accordance with the international law. The second chapter is the overview of the main points of the South Africa's Application and the ICJ order on provisional measures from January 26, 2024, and March 28, 2024. The third chapter examines the conduct of the State of Israel in the Gaza strip in the context of the Genocide Convention. This analysis is carried out in connection with the two examined "genocide cases", Bosnia and Ukraine.

Anotácia

Cieľom tohto príspevku je preskúmať možnosť naplnenia skutkových podstát zločinu genocídy vo vojne v Gaze v období od októbra 2023 do marca 2024 a odpovedať na výskumnú otázku: Za akých okolností by je možné zvážiť zodpovednosť štátu Izrael za zločin genocídy? Podľa autorky by to teoreticky bolo v prípade, ak by ICJ bez akýchkoľvek pochybností preukázal úmysel štátu Izrael spáchať genocídu a zároveň by sa zistila súvislosť medzi konaním jednotlivcov, ktorí genocídu spáchali, a štátom Izrael. Príspevok je zameraný ako exploračný prehľad a úvodná analýza živého a prebiehajúceho ozbrojeného konfliktu medzi Štátom Izrael a Hamasom z právneho hľadiska. Prvá kapitola je zameraná na definíciu trestného činu genocídy v súlade s medzinárodným právom. Druhá kapitola je prehľadom hlavných bodov žiadosti Juhoafrickej republiky a rozhodnutí Medzinárodného súdneho dvora o dočasných opatreniach z 26. januára 2024 a 28. marca 2024. Tretia kapitola skúma správanie štátu Izrael v pásme Gazy v pásme Gazy v kontexte Dohovoru o genocíde. Táto analýza sa vykonáva v súvislosti s dvomi skúmanými „prípady genocídy“ v Bosne a na Ukrajine.

Key words

genocide, ICJ, Israel, Hamas, Gaza, South Africa

Klíčové slová

genocída, ICJ, Izrael, Gaza, Hamás, Juhoafrická republika

Introduction

The “accusation” of the State of Israel from committing international crimes against the Palestinians has echoed in reports and statements of several international non-governmental organisations.^[1] The conduct of the State of Israel assessed as a lack of protection of the human rights of the Palestinian population was expressed by the current UN Secretary General, António Guterres,^[2] as well as his predecessors. The UN High Commissioner for Human Rights, Volker Türk, has been similarly critical of Israel’s actions.^[3] International Court of Justice in its advisory opinion from 2004 expressed that Israel has violated the obligations of the occupying state stemming from the Fourth Geneva Convention by constructing a wall around and inside the territory of West Bank.^[4] Israel has also been strongly criticised for the blockade of the Gaza strip since 2005. In the last two years, the opinion that the State of Israel has been committing the crime of apartheid against the Palestinians was expressed in the reports of Human Rights Watch, Amnesty International as well as in the reports of multiple national non-governmental organisations (such as B’Tselem, Badil Resource Center or Adalah).^[5] There was announced opening of the preliminary investigation over alleged international crimes committed in the Occupied Palestinian territory since June 13, 2014 (with no end date) by the prosecutor of the International Criminal Court (ICC).

The opinions that Israel has been violating international law in various ways and the frequency of their expression significantly increased in connection with the Israeli military operations in the Gaza strip. The large-scale air, land as well as sea operation was launched following the attack of Hamas with participation of Palestinian Islamic Jihad on October 07, 2023. There were adopted several resolutions by the UN General Assembly and Security Council referring to many aspects of this war. On December 29, 2023, South Africa filed in the Registry of the International Court of Justice (ICJ) an Application Instituting Proceedings against the State of Israel concerning alleged violations under the Genocide convention in the Gaza Strip (hereinafter “South Africa’s Application”).

The aim of this paper is to examine the possibility as well as conditions of fulfilment of the constituent elements of the crime of genocide in the defined events of the war in Gaza (i.e. in the period from October 2023 to March 2024) and to answer to the research question phrased as follows: *Under what circumstances would it be possible to consider the responsibility of the State of Israel for the crime of genocide?* Structure of this paper corresponds with this aim. The first chapter is focused on the definition of the crime of genocide in accordance with the international law. The provisions of the Genocide Convention and the Rome Statute are included. The second chapter is the overview of main points of the South Africa’s Application and the ICJ orders on provisional measures from January 26, 2024, and March 28, 2024. The third chapter is structured into 4 sections. The first section explains how the association of genocide with Israel’s actions evolved. It also identifies two main categories which became ground of the South Africa’s Application. Those are the “alleged intention of the Israeli representatives to commit genocide in Gaza” and “the conduct of the Israeli operations which was interpreted as genocide” by South Africa. In this (as well as in the fourth) section, media sources are used for the purpose of legal analysis. The media sources are used because the detailed reports submitted by the parties to the International Court of Justice were not published at the time this

manuscript was completed. The Court neither issued any official report which included at least part of these documents. The second section is a summary of the assessment of the legal issues of the genocide in Bosnia based on the decision of ICJ of 2007. The third section is a summary of selected insights on alleged genocide in Ukraine based on the Ukrainian submission at ICJ of 2022 and the judgement of the ICJ of 2024. The attention was paid in this matter to two things, the question of abusing the process, and the obligation of the state to prevent genocide from happening. The fourth section strives to examine the conduct of the State of Israel in the Gaza strip in the context of the Genocide Convention. This analysis is made also in connection with the two examined “genocide cases”, Bosnia and Ukraine. This part strives to formulate opinions which are a base for response to the research question. The conclusion summarises the findings of this paper and answers the research question. This paper cannot respond whether there has been committed crime of genocide as a result of Israel’s conduct in the Gaza Strip, and whether Israel is held responsible for breaching the obligations stemming from the Genocide Convention. This answer might be given most probably by the ICJ in the future. Until that happens, it might be possible, as well as desirable to deal with this question at the academic level.

1. Definition of genocide.

The definition of the crime of genocide can be found in two main sources. First, in the UN Convention which was originally adopted as a General Assembly resolution 260 A (III) in 1948 and as multilateral international convention it entered in force in 1951 (hereinafter “Genocide Convention”). Under this convention, in the Article II, the term *“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.”* Under this convention the acts of *“genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide”* shall be punishable.^[6] Second, the genocide is codified as a crime under the international criminal law in the Rome Statute of the International Criminal Court. Under this statute, the term genocide is codified in the Article 6 in the identical way as in the above-mentioned Genocide Convention.^[7]

The author of the term “genocide” was lawyer Raphael Lemkin, who combined the Greek etymon “genos” (γένος, which means birth, race, genus) with a Latin suffix “cidium” (which means to kill) by using the French variant of this word “cide”. Lemkin first suggested “the crime of barbarism” at the session of the League of Nations in 1933 in Madrid. This was the first attempt to criminalise the conduct. Later on, such conduct was addressed as genocide. The later Lemkin’s definition of the crime of genocide, which had the meaning of destruction of a nation or ethnic group was published in 1944 in his monograph *Axis Rule in Occupied Europe*. Genocide was defined as *“a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”*^[8] Lemkin’s idea of genocide was as an

international crime adopted by the international community. Lemkin's ideas were presented in several countries and through the support of the USA, it was included in the draft of the above-mentioned General Assembly resolution, and later in the Genocide Convention.

The South Africa's Application at the ICJ against the State of Israel from December 29, 2023, is based on the Genocide Convention which in Article IX. establishes the jurisdiction of the Court in case of any *"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."* This provision of the Genocide Convention constitutes the jurisdiction of the ICJ in this matter, regardless of the fact that the contracting state did not declare the recognition of the jurisdiction of the ICJ.^[9]

2. Summary of the up-to-date development concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).

In the South Africa's Application to the ICJ, there were indicated all the variants of the conduct which was considered as a crime of genocide under the Article II of the Genocide convention with the exception of letter e), (which refers to the forcible transfers of children from one group to another). South Africa in its Application in relation to the Palestinian inhabitants of Gaza stated, *"the expulsion and forced displacement from their homes; the deprivation of access to adequate food and water, access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation, medical supplies and assistance; and the destruction of Palestinian life in Gaza"* fulfilled the definition of genocide.^[10] South Africa requested that the State of Israel should immediately suspend its military operations in and against Gaza. South Africa also requested that the State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Genocide Convention and that Israel should not deny or restrict access to relevant parties which have the mandate, or which fulfil the mission assisting in ensuring the preservation and retention of the evidence. South Africa also requested that the State of Israel should submit Court the report in which the implementation of the measures ordered by the Court is described.

The State of Israel dismissed any accusation of genocide in the context of the conflict in Gaza. It stated there is no legal ground for such accusation, which is legally and factually incoherent and obscene. Israel also found the South Africa's Application morally repugnant.^[11]

The ICJ did not dismiss the South Africa's Application because in its preliminary finding, *"at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention."* In the opinion of the Court, the Palestinians constitute a distinct national, ethnical, racial or religious group, and therefore are a protected group within the meaning of Article II of the Genocide Convention.^[12] The Court noted *"the discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials"* as well as *"the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October 2023."* The Court observed that the Israeli military operation initiated as a response to the attack of 7 October 2023 resulted in *"a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive*

damage to civilian infrastructure.” Court noted that following data cannot be independently verified, however at the end of January 2024, there were reported 25,700 casualties, 63,000 injuries, over 360,000 housing units destroyed or damaged, and approximately 1.7 million persons internally displaced. The Palestinian civilians were deprived from access to water, food, fuel, electricity, and other essentials of life including medical care and medical supplies. In the Court’s opinion, the Palestinians in Gaza became and remained extremely vulnerable.^[13]

The Court issued the first Order on January 26, 2024, requesting the provisional measures being taken in Gaza. The Court did not order Israel to immediately suspend the military operations as South Africa requested.^[14] However, in the Court’s view *“Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.”* The State of Israel also must enable the supplies of urgently needed basic services and humanitarian assistance. Israel also must make sure the evidence related to the alleged acts under the scope of the Genocide Convention will be preserved. And finally, Israel must provide the Court the report of all measures taken based on this Order.^[15]

Due to the fact that the humanitarian situation in Gaza worsened, and there was also raised concern of the imminent outbreak of famine in Gaza in May 2024, the Court issued the second Order on March 28, 2024. Under this second Order the Israel must *“take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary; and ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.”*^[16] Court also confirmed the need for immediate and effective implementation of the measures indicated in its first Order, which were applicable to the whole territory of the Gaza strip, including city Rafah. As in the case of the first Order, Israel must submit a report describing implementation of the measures requested by the Court.

The first report which the State of Israel was ordered to submit within a month following issuing the first Order of the Court was not published. As in this first case, it can be assumed that the same will apply also to the second report, which the State of Israel was due to submit at the end of April 2024. Because of this fact, it is only possible to theoretically assess the conduct of the State of Israel based on the available news and various other available sources of information. It is also possible to examine the reports of the UN humanitarian organisation UNRWA, which was nevertheless accused by the State of Israel from direct involvement with the activities of Hamas, and due to this fact Israel strives to make sure this organisation will be substituted by a different humanitarian organisation providing the necessary aid in Gaza.^[17] Because these sources cannot be independently verified, and therefore one cannot be sure whether and to what extent the information is credible, the author focused on the issues in Gaza rather from a general perspective. The author also strove to focus on “most significant problems” which she finds very likely be relevant for the situation in Gaza. The approach to this examination is taken from a theoretical point of view.

3. Some insights on the Israeli military operations in Gaza focused on examining the question of alleged genocide of the Palestinian population.

This chapter is structured into 4 sections. The first section is focused on the Israeli military operations in the war in Gaza, which are the ground for accusation of the State of Israel from committing genocide in Gaza. There is explained how the association of genocide with Israel's actions evolved. There are identified two main categories which became ground of the South Africa's Application. Those are the "alleged intention of the Israeli representatives to commit genocide in Gaza" and "the conduct of the Israeli military operations which was interpreted as genocide" by South Africa. The second section is focused on a brief legal assessment focused on findings of the ICJ dealing with the genocide in Bosnia. This example was included because the Court dealt with the question of whether the state was responsible for committing the crime of genocide. The third section is focused on the allegations of genocide as a pretext for launching the armed attack against Ukraine by Russian federation. This example was chosen because of the opinions stating that the purpose of this submission to ICJ might have been, among other things, to create pressure on the Russian Federation to end the war in Ukraine. The fourth and final section is aimed at the assessment of compliance or contradiction of the Israeli conduct with the obligations of states stemming from the Genocide convention. It is examined whether and to what extent there could be found some similarity with the cases of Bosnia and Ukraine. This allows to formulate opinions, which will subsequently allow to answer the research question in the conclusion.

3.1 Some issues of the Israeli military operations in Gaza concerning the civilian population

When it comes to matching genocide with the Israeli military operations in Gaza, there could be quoted several sources and opinions summarised below in a chronological order. This brief summary is aimed at explaining how the association of genocide with Israel's conduct has evolved.

The Office of the United Nations High Commissioner for Human Rights issued a press release on October 14, 2023, stating that Palestinians are in **grave danger of mass ethnic cleansing** and called on the international community to urgently mediate a ceasefire between warring Hamas and Israeli occupation forces.^[18]

The director of the New York office of the UN High Commissioner for Human Rights, Craig Mokhiber, has resigned from his post on October 28, 2023, protesting that the UN is **"failing" in its duty to prevent genocide** of the Palestinian civilians in Gaza, which was under the Israeli bombardment. Mokhiber stated that *"once again we are seeing a genocide unfolding before our eyes and the organization, we serve appears powerless to stop it."*^[19]

The Office of the United Nations High Commissioner for Human Rights issued a press release on November 16, 2023, stating that there was an **imminent genocide** of the Palestinian people in Gaza and in order to prevent it from happening, there was requested immediate ceasefire, which would allow unimpeded delivery of the humanitarian aid to the people of Gaza. It also suggested creating humanitarian corridors towards West Bank, east Jerusalem and Israel for the civilians who have been most affected by this war, the sick, persons with disabilities, older persons, pregnant women and children.^[20]

The Prosecutor of the ICC, Karim A.A. Khan KC, who took over the investigation of crimes that allegedly happened in the Palestinian territories since 2014 with no end date, published on November 17, 2023, a statement. He announced that he would continue the engagement with all relevant actors, whether national authorities, civil society, survivor groups or international partners, to **advance the investigation** concerning the Action of Palestine at ICC.^[21] Because the crime of genocide also falls under the Rome Statute of the ICC and because there was confirmed the jurisdiction of ICC based on the Action of Palestine, it cannot be ruled out, that the Prosecutor might bring up the issue of genocide potentially committed by individuals to the attention of the ICC.

Prior the ICJ's first order concerning the provisional measures, there can be noted the opinion of Stanislav Pavlovski, former judge of the European Court of Human Rights and Arsen Ostrovsky, Israeli human rights attorney and a CEO of The International Legal Forum (which is an international non-governmental organisation). In their opinion, published on January 4, 2024, they stated the necessity to understand that the crime of genocide has nothing to do with the number of civilian casualties. **The key element of the crime of genocide is the need to possess relevant "intent."** They stated that it is possible to raise criticism towards the expressions of leading Israeli politicians in this matter, as well as towards the course and manner of the Israeli military operations in Gaza. However, this should not be confused with the crime of genocide because Israel did not seek to destroy the Palestinian people, whether in whole, in part, or in any manner.^[22]

The chronological order illustrating the development of the association of the crime of genocide with the State of Israel would at this point continue by including the statements of South Africa, Israel and the two preliminary findings of the ICJ. Because these issues were explained in the chapter two, the author continued by clarification of the main issues stemming from the Israeli military operations in Gaza. The attention is paid to two main things. First, the "hate speech" of the senior Israeli officials which was challenged as the "intention to commit genocide" by South Africa. Second, the summary of the hardship of the Palestinian civilians in Gaza which developed due to the Israeli military operations.

In accordance with South Africa, the "**genocidal intent**" was presented in the section D of the South Africa's Application.^[23] A few of these statements were cited for illustration. There were selected some statements of the senior politicians and representatives of Israel as well as the persons who were actively in charge of departments involved with pursuing the military operations.

The Prime Minister B. Netanyahu on October 07, 2023, "*promised to operate forcefully everywhere.*" On October 15, 2023, he called Hamas "*bloodthirsty monsters*". On October 16, 2023, he addressed the statement at the Israeli Parliament in which he mentioned that this war is between "*the children of light and the children of darkness, between humanity and the law of jungle*". On October 28, 2023 (right before there was launched the ground operation in Gaza) he reminded the soldiers the Biblical story of Amalek who was destroyed by the Israelites and quoted the Biblical verses "*spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses*". In his Christmas message, he mentioned that "*this is a battle of civilisation against barbarism*".

The President of Israel I. Herzog on October 12, 2023, stated that "*it is the entire nation out there that is responsible, ... we will fight until we'll break their backbone*" and denied the Palestinian civilians were unaware and uninvolved. On October 15, 2023, he stated that Israel would "*uproot the evil*".

The Israeli Minister of Defense Y. Gallant on October 09, 2023, stated that Israel was *“imposing a complete siege on Gaza”* and said that Israel was fighting *“human animals.”* He also stated that *“Gaza won’t return to what it was before”* and that Israel would *“eliminate everything”*.

The Israeli Minister for National Security, I. Ben-Gvir on November 10, 2023, stated that not only *“ Hamas should be destroyed”* but also the civilians *“who celebrate, who support and who hand out candy.”* (note: celebration by sharing pastries and candies among Palestinians in Gaza as well as West Bank is a usual way of how they react when there is a terrorist attack completed)

The Deputy Speaker of the Israeli Parliament and the Member of the Foreign Affairs and Security Committee, N. Vaturi on October 07, 2023, stated that Israel has a goal of *“erasing the Gaza Strip from the face of the earth”*.

The Israeli Army Coordinator of Government Activities in the Territories, Major General G. Alian on October 09, 2023, stated that *“ Hamas became ISIS”* and because the citizens of Gaza were celebrating, instead of being horrified, the IDF would deal with the *“human animals”* accordingly.

This section is concluded by the summary of hardship of the Palestinian inhabitants of Gaza which was referred to by South Africa as a ground of the accusation of the State of Israel from committing the crime of genocide.

The United Nations Secretary General, A. Guterres stated in his letter dated from December 06, 2023, addressed to the President of the UN Security Council, that the civilians in Gaza faced **grave danger**. He also noted the number of **civilian casualties** and the ratio of **children casualties**.^[24] Due to the passage of time, the author preferred not to quote the data reported in December 2023, but rather the up-to-date data of the Hamas controlled Palestinian Ministry of Health for Gaza, which was cited by UNRWA. As of 27 March, at least 32,470 Palestinians were killed in the Gaza Strip since 7 October. About 70 % of those killed are reported to be women and children. Another 74,889 Palestinians were reportedly injured.^[25] As stated in the section III of the South Africa’s Application, about 80% of the civilian population evacuated to the South of Gaza Strip. They sought refuge in the UNRWA facilities in which they live in **overcrowded, undignified and unhygienic conditions**. Many civilians do not have anywhere to go, so they live on the streets. The **health system** in Gaza has been **collapsing**, hospitals were not spared from pursuing the military operations. Only less than half of the medical facilities in Gaza have been continuing, at least partially, to provide the healthcare. The hospitals have been overcrowded, civilians do not have enough medical care, or are treated in undignified and inadequate conditions. Hospitals also have repeatedly faced a lack of fuel for operating the generators providing the electricity. Last but not least, there have been problems with the supply of medicines and other medical supplies. There have been reported the **risk of spread of several contagious epidemic diseases** in Gaza, such as meningitis, cholera, and other outbreaks. The entire population of Gaza has been facing **imminent famine**, there were reported many cases of **extremely malnourished children, some children died from malnutrition and dehydration**. Due to the **worsening humanitarian situation** and significant complications in the ground delivery of aid, there was organised the maritime humanitarian corridor as well as air drops of humanitarian aid.^[26] Even these solutions were not without problems, as many Palestinians trampled or drowned trying to get to help. Thus, even these alternative aid delivery routes proved to be similarly problematic as land deliveries, which were allegedly repeatedly attacked either by Hamas fighters or civilians in an attempt to spontaneously seize aid.

3.2 Summarized assessment of the legal issues of the genocide in Bosnia

In this conflict participated Bosnian Muslims (the inhabitants of Bosnia and Herzegovina), Bosnian Serbs with the involvement of the Serbian government of Belgrad, and Bosnian Croats supported by the Croatian army. Since World War II this conflict became the bloodiest and it brought suffering mainly to the civilian population. It included ethnic cleansing, which featured extraordinary cruelty and brutality. It involved the massacre of civilians in Srebrenica in July 1995, which was not prevented even by the presence of UN soldiers. There were claimed over one hundred thousand victims and more than 1,8 million of the inhabitants of Bosnia and Herzegovina had to leave their homes. In order to prosecute and publish these crimes under the Genocide Convention, this case was brought up to the ICJ, which delivered the decision in this matter in 2007.

The ICJ in its decision in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)[27] stated that if a state is to be held responsible for breaching its obligation not to commit genocide, it must be proven that genocide as defined in the convention has been committed. The same applies to the conspiracy, complicity to commit genocide and the commitment to prevent genocide from happening.[28] The Court stated that the state can be held responsible for genocide as well as for conspiracy to genocide, regardless of whether the individual was sentenced for this or related crime.[29] The Court emphasised that it requires **mental element**, which is **proving the intention** to destroy the national, ethnical, racial or religious group completely or partially. It is referred to as *dolus specialis*. In contrary, it is not sufficient, if members of the group were attacked, because they were members of this group.[30] The Court also dealt with the prosecution of the persons (Krstic and Blagojevic) who were found responsible of the crime of genocide by the International Criminal Tribunal for former Yugoslavia (ICTY).[31] The Court dealt with the question, whether the state was found responsible for the conduct of individuals, who were found guilty of genocide by ICTY.[32] The court did not find any **link between the state and the persons who committed genocide** in Srebrenica, because there was not any evidence that these persons were in position of the state authorities of Yugoslavia, or that the politicians of Yugoslavia participated in the massacres or their planning.[33] Similarly to the decision of the *Court in case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*[34] the Court also in case of Srebrenica stated that it must be proven, that the individuals acted in accordance with the instructions of the state, or were controlled by the state. Court emphasised that **it must be proven**, that the state carried out the **effective control**, or that the state **issued the instructions relevant to every single operation**, during which the law was violated.[35] It was not proven that the massacre in Srebrenica was carried out based on the orders issued by Yugoslavia or by the federal authorities in Belgrade. And it was also not proven that the **special intent** (*dolus specialis*) of this massacre was to commit the crime of genocide. In the Court's view, there were indications that the decision to kill adult men from the Muslim community in Srebrenica was taken by some members of the General Staff of the Yugoslavian armed forces, but without instructions or effective control by the Federal Republic of Yugoslavia.[36] On the other hand, the Court found Yugoslavia responsible for not fulfilling the obligation of the state to **prevent genocide**. Yugoslavia did not take any steps to prevent the massacres in Srebrenica, regardless of the fact that the representatives of the state were well aware of the deeply rooted animosity among Bosnian Serbs and Muslims in the area of Srebrenica.[37]

3.3 Summarized assessment of selected insights on alleged genocide in Ukraine

On February 26, 2022, Ukraine filed in the Registry of the Court an Application Instituting Proceedings against the Russian Federation concerning a dispute relating to the interpretation, application and fulfilment of the Genocide Convention.^[38] There erupted an armed conflict in the Donbas region in the eastern part of Ukraine in the spring of 2014. The conflict was between Ukrainian armed forces and forces linked to two entities that refer to themselves as the “Donetsk People’s Republic” (DPR) and the “Luhansk People’s Republic” (LPR). The armed conflict continued between 2014 and 2022. On February 21, 2022, the Russian Federation formally recognized the DPR and LPR as independent States and as a part of reasoning it was stated that *“this decision was taken in light of continuing attacks against the Donbas communities and the genocide, which almost 4 million people were facing”*. On February 22, 2022, the Russian Federation concluded two Treaties on Friendship, Cooperation and Mutual Assistance, one with the DPR and the other with the LPR. On the same date, the DPR and LPR requested military assistance from the Russian Federation pursuant to these treaties. On February 24, 2022, the President of the Russian Federation declared that he had decided to conduct a “special military operation” in Ukraine, stating in particular that *“its purpose was to protect people who had been subjected to abuse and genocide by the Kiev regime for eight years”*. On February 26, 2022, the Ministry of Foreign Affairs of Ukraine issued a statement denouncing *“Russia’s false and offensive allegations of genocide as a pretext for its unlawful military aggression against Ukraine.”* After the issuance of this statement, Ukraine filed its Application at the ICJ.

The focus is paid to the question of the **abuse of the process** (6th preliminary objection of Russian federation). In other words, to the intention to create pressure on the state to end war by taking benefit of the Genocide convention, which enables the contracting parties to submit the application instituting proceedings at ICJ. In its decision,^[39] the ICJ stated that *“only in exceptional circumstances the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. There has to be clear evidence that the Applicant’s conduct amounts to an abuse of process.”* The Court stated that it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose the judicial settlement at ICJ. The Court has not adduced any evidence regarding Ukraine’s alleged abuse of process.^[40]

The attention is also paid to examining the **development of interpretation of the obligation of the state to prevent genocide**. The ICJ recalled the above-mentioned case of Bosnia in which it dealt with this issue. The Court stated in the obligation to prevent genocide requires States parties to *“employ all means reasonably available to them, so as to prevent genocide so far as possible”*, while adding that *“it is clear that every State may only act within the limits permitted by international law.”* The Court noted that *“if a State seeks to fulfil its obligation of prevention under the Convention through an act that is in breach of international law, such action by itself constitutes a violation of the Convention. The Court did not intend, by its 2007 ruling (Bosnian case), to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force. It sought to clarify that a State is not required, under the Convention, to act in disregard of other rules of international law. Nor can a State avail itself of the obligation of prevention under the Convention to act beyond the limits permitted elsewhere by international law. Those limits are not defined by the Convention itself but by other rules of international law.”*^[41]

3.4 Assessment of the compliance or contradiction of the conduct of the State of Israel with the obligations of states stemming from the Genocide convention

The final section of this chapter, which also concludes this research, is aimed at examining the compliance or contradiction of the conduct of the State of Israel in the war in Gaza with the obligations of states stemming from the Genocide convention. The attention is paid to three areas. First, the question of whether there can be found intention of the State of Israel to commit genocide. Second, whether the worsening humanitarian situation in Gaza due to the ongoing military operation can be considered as a reason to consider Israel responsible from breaching its obligations under the Genocide Convention. Third, whether the worsening humanitarian situation in Gaza could have been associated with the intention to create pressure on Israel to conduct the military operations much more in accordance with the international humanitarian law (which could qualify as abuse of the process).

The first area is aimed at **examination of whether there can be found the special intent (*dolus specialis*) of Israel to commit the genocide in Gaza**. There were listed several quotes of the senior representatives of the State of Israel in the section 3.1. In the section 3.2 there was explained that the ICJ previously emphasised on the necessity to prove the intention of the state to destroy the national, ethnical, racial or religious group completely or partially. The ICJ stressed in the Bosnian case the necessity to prove the link between the conduct of the individuals, who were held responsible for committing the crime and the state, which issued the orders to commit the crime, or had effective control over the individuals.

How can the statements of the Israeli senior representatives be understood? One way is certainly the intent to commit genocide. But there are many other ways of interpretation. In author's opinion it is necessary to understand the context of those statements. Most of them were uttered shortly after the October 07, 2023, which was a massive terrorist attack which had the largest number of the Jewish casualties since World War II. It is also necessary to understand that these statements were uttered under the influence of strong emotions of the speakers. So, it can be interpreted as an exaggerated statement. For instance, the statement about human animals can be understood either as highly offensive, or as an intended oxymoron (because it is not in the nature of any animal to carry out a terrorist attack and celebrate the completion of it). It can also be interpreted as a rather unfortunately worded message to the Israeli society, the intention of which was to assure the families and friends of approximately 250 hostages, that Israel would seek the return of the hostages. It could also have been meant as a way to raise the spirit of Israeli society and as well as an assurance that the state of Israel would defend the safety and security of the Israeli inhabitants, so that such a massacre would not happen again. Some statements (the citations of the Biblical quotes) could also be clearly perceived as a metaphor. At the beginning of the ground operation, Israeli soldiers knew that many of them would die in Gaza. Perhaps that's why the political leaders chose those quotes with the intention to support them. The statements could be also interpreted as Israel's interest in not allowing Hamas to continue exercising public power in Gaza after the end of this war, and that Israel would strive to find another way for a future arrangement in this Palestinian territory.

Either way, it is clear that these statements can be interpreted in various ways. From the perspective of application the Genocide Convention, the intent of genocide would be proven in case of orders being issued for the IDF as whole, or for some of its units, or addressed to particular individuals to proceed

according to these statements. In the opinion of the author, these statements were extremely inappropriate, but it **did not constitute a legal basis for the intention to commit genocide**, for which the State of Israel would be held responsible. Nevertheless, these statements can be harmful and potentially dangerous. By their interpretation, the soldiers might be hypothetically inspired to mistreat detained Hamas fighters. Various inappropriate as well as illegal behaviours (i.e. humiliation of detainees) of IDF members was shared on social media. In regard to some of these cases it was reported by media that the soldiers were investigated, prosecuted, and punished by the relevant Israeli authorities.^[42]

This first area is concluded by following consideration. Just like the inappropriate statements of Israeli politicians cannot be interpreted as an intention to commit genocide, neither can the statement of M. Abbas in reaction to the October 07, 2023 massacre be interpreted as attribution of the conduct of Hamas to the Palestinian Authority. M. Abbas stated that *“the Palestinian people have the right to defend themselves against the terror of settlers and occupation forces”* and issued the instructions to the Palestinian Authority to provide everything necessary *“to strengthen the steadfastness of the Palestinians in the face of crimes committed by the Israeli occupation and settler gangs.”*^[43] Therefore his statement does not have the comparable legal effects to the Ayatollah Khomeini’s approval of the conduct of Iranian radicals, who attacked the U.S. embassy in 1979. In this case, the militants became representatives of the Iranian state, for whose actions Iran itself became responsible.^[44] This does not change the fact that the quoted statements were inappropriately worded, and that it would be possible to recommend that the Israeli politicians refrain from such statements in the future, and possibly consult with legal experts in advance of their speeches.

The second area is focused on **examination of whether the worsening humanitarian situation in Gaza can be considered as a reason to consider Israel responsible from breaching its obligations under the Genocide Convention**. There is no doubt that the Palestinians suffer due to the ongoing military operations as summarised in section 3.1. In the author’s opinion it is possible to debate about following questions. To what extent this can be interpreted as a genocide? To what extent this rather might be considered a violation of the Fourth Geneva Convention?

One of the main reasons for suffering the civilians are the problems with supplies of the humanitarian aid. There was only one checkpoint open, in Rafah, which is in the south of Gaza. The delivery of the aid further to north of Gaza was not in many cases possible for various reasons.^[45] It might be reasonable to consider opening one more checkpoint in the north of Gaza to facilitate the delivery of the humanitarian aid. Another hypothetical solution to improve the humanitarian situation in Gaza might be, that the militant wing of Hamas shared its supplies with the civilians. This is rather unrealistic. What (is) more, there reported cases of Hamas allegedly selling humanitarian aid to civilians.^[46] The aid is otherwise completely free of charge.

Another aspect, which could lead to imminent worsening of the humanitarian situation in Gaza might be the efforts of Israel to limit the activities of UNRWA. If this would hypothetically be the case, Israel should first ensure the implementation of an alternative solution. I.e., it could create its own humanitarian organization or agency that would take over the agenda and activities of UNRWA. Israel should safeguard that there are no shortages of humanitarian aid due to the potential transition of UNRWA agenda to some other agency, besides making sure that the reliable people, who would not

support Hamas, would work in this potentially newly established organisation. At the same time, Israel should effectively control whether the workers have enough sympathy with the Palestinians, so the aid is provided accordingly. Therefore the State of Israel should secure the civilians being treated fully in accordance with the standard stipulated by the international humanitarian law. It might be appropriate that such solution should be only of an interim or partial nature. Gaza should ideally strive for being more self-sufficient and much less dependent on humanitarian aid. This could be after all, one of the goals of the new Gaza's government, after Hamas eventually ends its mandate. It might be desirable that the State of Israel provided support in this matter. It might become part of a post-conflict assessment.

To conclude this area of consideration, in author's opinion it is necessary not to confuse non-compliance of the state with the Fourth Geneva Convention with the violation of the obligations stemming from the Genocide Convention. Based on the author's understanding of the humanitarian situation in Gaza, she is rather inclined to doubt whether and to what extent the State of Israel carries out the military operations in accordance with the obligations stemming from international humanitarian law. Because she does not find the intention of Israel to commit genocide (as explained above), it is also not possible to interpret the conduct of the State of Israel as fulfillment of the letter a), b), c) and d) of the Article II of the Genocide Convention.

The third and last area is aimed at **finding whether the worsening humanitarian situation in Gaza could have been associated with the intention to create pressure on Israel to conduct the military operations much more in accordance with the international humanitarian law (which could qualify as abuse of the process)**. There could be raised several questions in this matter. Is it hypothetically possible that accusing Israel of genocide was done purposely in order to imply pressure to improve the humanitarian situation? Could this accusation be made because it was possible based on the jurisdiction clause in the Genocide Convention? Is it possible that the purpose of the South Africa's Application served as a tool to draw attention to the worsening humanitarian situation of the civilian population in Gaza? Could it be seen as a way to force Israel to comply more with international humanitarian law?

These questions are raised as mainly rhetorical questions. As stated by the ICJ in the case of Ukraine summarised in the section 3.3, the Court only very exceptionally rejects a claim which is otherwise based on a valid title of jurisdiction on the ground of abuse of process. The Court also does not deal with the political motivation of the state which chose the judicial settlement at ICJ. In the context of the two orders of the court on preliminary measures, summarised in chapter 2, it can be, in author's opinion stated, that even if the answer to the above listed rhetorical question was "yes", it could have served the right purpose. That is the protection of the civilians suffering as a result of the war and this is not only a matter of the Fourth Geneva Convention, but also a part of the peremptory norms (*ius cogens*), the compliance with which is in the interest of the international community as a whole.

Conclusion

This conclusion is meant rather as an "open conclusion". The reason for this is that all the author's opinions were based on her understanding of the ongoing conflict which she monitored for the purpose of this paper from October 2023 until the end of March 2024. The further development of this war

cannot be predicted. It is also impossible to foresee the ICJ's future decision in this case. Nevertheless, it can be assumed, that the South Africa's Application could have served mainly for the benefit to adopt a legally binding directives, the aim of which was to relieve suffering of the civilians in Gaza. As a base for the application was the Genocide convention, which allows the contracting parties to reach out to the ICJ.

For this reason, author responded the research question *Under what circumstances would it be possible to consider the responsibility of the State of Israel for the crime of genocide?* in a following way. As stated in the section 3.2 as and 3.4, it is essential that there is proven without any doubt the intention of the state of commit the genocide. This can be proven based on clearly formulated orders towards the army, some of its units or individuals. The examined general statements of Israeli senior politicians cannot be considered as an individual order to carry out genocide. These statements are rather exaggerated expressions of inappropriate content. However, those statements were not orders to proceed in the warfare in such a way that the actions of the military units operating in Gaza would fulfil the definition of the crime of genocide. There must be also found a link between the conduct of the individuals who committed the crime of genocide and the state. Therefore, it must be proven without any doubts, that these individuals were controlled by the state or fulfilled the orders of the state. In the case of Bosnian genocide, the ICC held responsible the individuals from committing the crime of genocide, but the ICJ did not find proofs based on which the conduct of the individuals was attributed to the state. Therefore, in the case of the ICJ decision over the Bosnian genocide, the state was not held responsible for committing the crime of genocide. It was "only" found responsible for failing to prevent the crime of genocide. This was because the state was aware of this chance due to the high level of animosity between the groups. A similar scenario could hypothetically be considered in the case of Israel. With regard to the case of Bosnia, in author's opinion, Israel should certainly proceed with extreme caution and in such a way in order to prevent any conduct, which could subsequently be qualified as a failure to fulfil the obligation of the state to prevent genocide. Israel should in no way underestimate the animosity between Israelis and Palestinians as well as the difficult living conditions of the civilian inhabitants in Gaza and as reported by relevant parties to the ICJ, worsening humanitarian situation. Therefore, it is absolutely necessary to make sure that there would be taken all necessary measures to prevent famine in Gaza and to overall improve the living conditions of the displaced individuals. In regard to the further progress of the military operations in Gaza, it might become relevant to consider opening humanitarian corridors so at least the most vulnerable inhabitants of Gaza could shelter outside the Gaza territory. This could be done in cooperation with Egypt as well as with the Palestinian Authority.

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