The Linguistics of International Law: Genocide, Apartheid and the Hermeneutical Boundaries of International Terms and Notions

Abstract

The last few years have seen scholars increasingly underlying the interdisciplinarity of international law. As noted, the formation and implementation of international law is widely shaped by socio-cognitive processes, with language being one of the relevant factors. Yet, although the role of disciplines like sociology, psychology, history and philosophy has been underlined more when it comes to international law's interdisciplinary interactions with social sciences and the humanities, much less has been put on paper regarding the junction between international law and linguistics.

The current article discusses the 'linguistics of international law', focusing on the phenomenon that has been discerned in international discourse the last few years and in light of the conflicts in Ukraine and the Middle East, of applying the linguistic meaning and value certain legal terms have, to situations which are not contextually related to the situations these terms wanted to cover in the first place. Along these lines, in the article I discuss how this has been the case with the terms of 'genocide' and 'apartheid', how the ICJ has reacted to this tendency and how in essence international law must be discussed inside its linguistic semantic frameworks.

1. Introduction

The last few years have seen scholars increasingly underlying the interdisciplinarity of international law. As noted, the formation and implementation of international law is widely shaped by socio-cognitive processes, with language being one of the relevant factors.[1] Yet, although the role of disciplines like sociology, psychology, history and philosophy has been underlined more when it comes to international law's interdisciplinary interactions with social sciences and the humanities,[2] much less has been put on paper regarding the junction between

[1] Andrea Bianchi & Moshe Hirsch, International Law's Invisible Frames: Introductory Insights in INTERNATIONAL LAW'S INVISIBLE FRAMES: SOCIAL COGNITION AND KNOWLEDGE PRODUCTION IN INTERNATIONAL LEGAL PROCESSES (Andrea Bianchi & Moshe Hirsch eds, Oxford University Press, 2021) 3

[2] On the junction between international law and sociology see for example Moshe Hirsch, The Sociology of International Law: Invitation to Study International Rules in their Social Context, 55 U. Toronto L. J. 891 (2005); RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (Moshe Hirsch & Andrew Lang eds,2020) Edward Elgar Publishing; Jens Meierhenrich, Towards a Sociology of International Law: John Hagan and Beyond, 48 Law & Social Inquiry 1281 (2023); Bart Landheer, ON THE SOCIOLOGY OF INTERNATIONAL LAW

international law and linguistics.[3] Even so, in cases this has been done, emphasis tends to be given to the role of language in the interpretation of legal texts or the impressions the latter impart,[4] rather than to the further question of whether the use of language for international law's interpretation can ultimately lead to a new reading of an established legal term. So far, international scholars and judges have not pondered enough over the question of whether language can exhibit a transformative function in international law in the way we come to understand and apply legal terms and any barriers that need to be put in this transformative quest.[5] In other words, international scholars have pointed out to the power of international law as language, but not to the power of language as international law.[6]

Language is not static. This is true in law in general and international law in particular.[7] In the Costa Rica v Nicaragua case where Nicaragua had agreed in a 1858 treaty to grant certain free river navigation rights to Costa Rica 'for the purpose of commerce' and as the two countries disagreed on how the term 'commerce' should be construed, the International Court of Justice (ICJ) held that there are situations where the parties may be presumed to have given

AND INTERNATIONAL SOCIETY, Martinus Nijhoff (1966). On the interrelation between international law and psychology see indicatively Anne van Aaken & Tomer Broude, The Psychology of International Law: An Introduction, 30 EJIL 1225 (2019); Solon Solomon, The Psychological Impact of Military Operations on Civilians and the UN Human Rights Committee Japalali Decision: Exploring Mental Anguish under a Vida Digna, Right to Life Prism, 26 J. Conflict & Security L. 401 (2021); THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds, Oxford University Press, 2012); THE CAMBRIDGE HISTORY OF INTERNATIONAL LAW (Randall Lesaffer & Anne Peters eds, Cambridge University Press, 2024); Anne Orford, What is the History of International Law for? 9 Global Intellectual History 760 (2024).

[3] See for example LANGUAGE AND LEGAL INTEPRETATION IN INTERNATIONAL LAW (Anne Lise Kjaer & Joanna Lam eds, Oxford University Press, 2022); Ilias Bantekas, Language in International Law: Meaning and Construction of its Underlying Culture, 34 Indiana Int'l & Comp. L. Rev. 227 (2024); Dino Kritsiotis, The Power of International Law as Language, 34 California Western L. Rev. 397 (1998); Adam Wisniewski, Remarks on Language and International Law, 14 Adam Mickiewicz University L Rev. 57 (2022); Maks Del Mar, Metaphor in International Law: Language, Imagination and Normative Inquiry, 86 Nordic J Int'l L 170 (2017). See also the fact that in 2017 and in 2023, the Nordic Journal of International Law and the Cambridge International Law Journal respectively dedicated one of their issues to the junction between international law and language.

[4] On this see for example Gerry Simpson, THE SENTIMENTAL LIFE OF INTERNATIONAL LAW, Oxford University Press, 2021; Anne Lise Kjaer & Joanna Lam, The Dynamics of Law and Language in the Interpretation of Legal Sources in LANGUAGE AND LEGAL INTEPRETATION IN INTERNATIONAL LAW (Anne Lise Kjaer & Joanna Lam eds, Oxford University Press, 2022) 1

[5] On this see indicatively William Schabas, Genocide and Ukraine: Do Words Mean what we Choose them to Mean? 20 J. Int'l. Crim. Justice 843-844 (2022); Jennifer Smolka & Benedikt Pirker, International Law and Pragmatics: An Account of Interpretation in International Law, 5 Int'l J. Language & Law 1, 15-16 (2016)

[6] On this see Dino Kritsiotis, The Power of International Law as Language, 34 California Western L. Rev. 397 (1998)

[7] When it comes to domestic law see for example the debate in constitutional law on the 'living constitution'. On this see Michaela Hailbronner, Transformative Constitutionalism: Not Only in the Global South, 65 Am. J. Comp. L. 527, 528 (2017); Lawrence Solum, Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Northwestern U. L. Rev. 1243 (2019)

a meaning to a legal term 'capable of evolving' and that this should be the case with the 'commerce' term in the relevant treaty which was in place for 'a long time'.[8]

Nevertheless, even if law is dynamic and whereas the question of how far the expansive interpretation should go and which factor should determine it (i.e. change of epoch and socio-political milieu, change in the way the recipients of a certain message act) is discussed,[9] the further question of the limits that should be placed in any attempts to transplant a word or term from one context to another one which bears different factual and legal exigencies, has not been adequately discussed either in the field of international law or that of linguistics.[10] This is true even if this transplant takes place in the same legal field but under totally other factual and legal parameters than the ones relevant when the term was adopted so that the question is not one about the term's 'expansive reading', but ultimately about its transformation.[11] This is important, given that repetitions of terms that carry a heavy political and legal weight can end up exerting a penetrating, convincing effect upon legal audiences and ultimately upon international courts and international law itself.[12]

For example, it has been stated how the repeated wide assertion that a norm is a jus cogens norm, can ultimately lead international law to indeed adopt such norm as a jus cogens one.[13] In this case I argue, we do not have an expansive interpretation of the term, but a re-baptizing of its feature, something that comes from the fact that the norm has been repeatedly portrayed as a jus cogens one to the eyes of the public opinion which in turn considers utterly normal to view it as such and pressuring the international law system to accept it accordingly. In that sense, the moment international scholars or international courts discuss this norm as 'jus cogens', they do not just interpret widely an existing norm but rather transplant a new legal creature-the norm as newly begotten bearing also jus cogens characteristics-to the existing

[8] ICJ, Costa Rica v Nicaragua, Dispute Regarding Navigational and Related Rights, ICJ Rep 2009 at 213, paras.57,66

[9] Jennifer Smolka & Benedikt Pirker, International Law and Pragmatics: An Account of Interpretation in International Law, 5 Int'l J. Language & Law 1 (2016)

[10] Legal scholars as well as linguists, have examined the transposal of legal terms in other legal fields mainly regarding private law. On these see Roman Uliasz, The Transplantation of Legal Concepts by Means of Language: A Private Law Perspective, 12 Cambridge Int'l L. J. 266 (2023); Edyta Wieclawska, Contextualising the Notion of Context in Jurilinguistic Studies, 33 Int'l J. Semiot. L. 637 (2020); Mindy Chen-Wishart, Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding? 62 ICLQ 1 (2013);

[11] For the fact that the term 'transplant' is usually used to denote the introduction of a norm from one legal system to another see Irma Johanna Mosquera Valderrama, Legal Transplants and Comparative Law, International Law: Revista Colombiana de Derecho Internacional 261,264 (2003)

[12] Ulf Linderfalk, All the Things that you can do with Jus Cogens: A Pragmatic Approach to Legal Language, 56 German Yearbook of Int'l L. 351 (2013)

[13] Ibid

international law system. Echoing the pragmatics linguistic approach which argues that when we come to decipher and understand the meaning of a word, we must pay attention also to how the recipient of this word understands it,[14] the fact that a wide part of the public wants to install new features to a given legal term, is crucial to how international law mechanisms-be it judges or international scholars or political organs-come to transpose in their international thought and rhetoric the existing international law notions in a way that befits the needs of the public opinion perceptions, the same way a norm coming from a foreign jurisdiction is transposed to a new one, suiting the socio-legal culture and needs of the recipient.[15]

Along these lines, I will be discussing in this article efforts to transplant two notions to international law, that of 'genocide' and that of 'apartheid'. Both notions are deeply entrenched in international law, but the last years have seen efforts to re-baptize their feature in connection to the conflicts in Ukraine and the Middle East. On this account, the question is to what extent we can stretch international legal terms by not just interpreting them inside their usual legal context, but by further transposing them to contexts which are altogether different on a factual or legal basis, this transposal ultimately bringing the transformation of the very notions themselves. The issue becomes particularly acute in international law, where, as noted correctly, in lack a common cultural or linguistic framework among international judges, various notions can be misunderstood or understood according to the way they are interpreted in the respective judge's national country and by domestic courts there.[16]

In this article I argue for a linguistics approach that favours the approach of international law through frame semantics, meaning concrete frameworks which set forth in advance some parameters in the way a word or a term are to be read.[17] I do not purport to imply that this is the only linguistic approach that could be followed in international law's reading. In fact, there are other linguistic approaches that would yield a totally different conclusion from the one this article advocates. For example, functional linguistics calls for the constant re-interpretation and re-definition of words and terms according to the changing socio-geographical context.[18] Other scholars have argued for the inclusion of pragmatics in international law's interpretation, with the term 'pragmatics' in linguistics signalling how

[14] Jennifer Smolka & Benedikt Pirker, International Law and Pragmatics: An Account of Interpretation in International Law, 5 Int'l J. Language & Law 1 (2016)
[15] Esin Orucu, Law as Transposition, ICLQ 205-207 (2002)
[16] Ilias Bantekas, Language in International Law: Meaning and Construction of its Underlying Culture, 34 Indiana Int'l & Comp. L. Rev. 227, 227-230 (2024)
[17] See infra section 6
[18] C.S. Butler, Functionalist Theories of Language, Encyclopaedia of Language & Linguistics (2nd ed, 2006) 696

words are perceived by the listeners and readers. This would more likely echo the efforts for reading terms like 'genocide' and 'apartheid' even beyond their established legal frameworks.

Yet, I argue that international law cannot follow a functional linguistics or a pragmatic linguistics approach. Law-and international law in particular-must echo stability and adherence to concrete parameters which remain a pre-set guiding torch for States and non-State actors to respect. Clarity and determination about the meaning of international law terms decreases chances that international law's protagonists will try to re-introduce each time to international law's lexicon, a term according to their national or partisan interests. On this account, the article will proceed as follows. The next sections will discuss 'genocide' and 'apartheid' in international law and the way the ICJ has related to the terms with a focus on the Ukraine and Middle East conflicts. I will then examine how the linguistics of international and frame semantics can provide a new venue for a systemic reading of international law terms and concepts.

2. 'Apartheid' in international law

Apartheid means 'being apart' in Afrikaans and as a political regime it is was first enforced in South Africa through the ruling of the white elites on the country's black population.[19] Black South Africans were not only barred from the country's governing schemes but they were not allowed to mingle with white people even in venues like buses or benches. The policy was extended in Namibia, which as Southwest Africa, had been put by the League of Nations under South African trusteeship.[20]

The prohibition against apartheid is being rooted both in customary as well as treaty law.[21] Yet, criticism towards the notion started becoming more intense following a relevant case against South Africa before the ICJ. In 1960, Ethiopia and Liberia filed two separate applications to the ICJ asking the Court to declare that the apartheid policy in South West

[19] Benjamin Zinkel, Apartheid and Jim Crow: Drawing Lessons from South Africa's Truth and Reconciliation, 1 J. Dispute Resolution 229,233 (2019)
[20] Tycho van der Hoog & Bernard Moore, Paper, Pixels or Plane Tickets? Multi-archival perspectives on the decolonization of Namibia, 32 J. Namibian Studies 77, 80 (2022)
[21] Miles Jackson, The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination, 71 ICLQ 831,840 (2022); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243 (1973)

Africa violated South Africa's mandate as well as the League of Nations Covenant under which this mandate was instituted.[22] Whereas the ICJ found that it had jurisdiction to hear the case,[23] it consequently proceeded to hold in the merits case that the case should be dismissed because the applicants lacked standing to bring forth the issue.[24] Moreover, the Court did not hold that apartheid violated the conditions of the UN Mandate enabling South Africa to administer the particular territory, leaving the relevant law 'unchartered'.[25] The Court's particular judgment was criticised by scholars which read into it a political element and the inability of the Court to be more adamant on matters pertaining to racism and gross human rights violations.[26]

The South West Africa litigation highlighted the need for the international community to take a more decisive stance against apartheid. As a result of augmented international pressure, in 1974 the ICJ became once again seized of the issue of South West Africa. In its advisory opinion on the Legal Consequences of South Africa's presence in Namibia, issued after a request from the UN General Assembly, the ICJ held that through its policy of apartheid, South Africa had violated the trusteeship regime and as a result this trusteeship had terminated.[27] The ICJ called South Africa to immediately leave Namibia and to all the other States to recognize any South African presence to the territory as null and void. Eventually, Namibia became independent in 1990 and the apartheid regime fell in South Africa in 1994.[28]

Yet, the ICJ's unwillingness to unequivocally denounce apartheid in the 1960 Southwest Africa case, brought forth further international reactions on a legal plain which indirectly had a considerable effect on how apartheid was to be seen. Thus, the condemnatory feelings towards apartheid served also as a stirring force behind the drafting and adoption in

[22] ICJ, Pleadings, Oral Arguments, Documents, South West Africa Cases, vol.1, 1966, Application Instituting Proceedings by the Government of Ethiopia at 4; Application Instituting Proceedings by the Government of Liberia, 4 November 1960
[23] South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, Judgment, 21 December 1962, ICJ Rep. 1962 at 319
[24] South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Judgment, 18 July 1966, ICJ Rep. 1966 at 6
[25] Rosalyn Higgins, The International Court and South West Africa: The Implications of the Judgment, 42 Int'l. Affairs 573, 595 (1966)
[26] For a synopsis of these critical arguments see Julius Stone, Reflections on Apartheid after the South West Africa Cases, 42 Washington L. Rev. 1069 (1967)
[27] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Rep. 1971 at 16
[28] Kenneth Grundy, Namibia's first year of Independence, 90 Current History 213 (1991); The Day Apartheid Died: South Africa's first free elections-archive, 1994, The Guardian, 26 April 2024 available at The day apartheid died: South Africa's first free elections – archive, 1994 | South Africa | The Guardian

1965 of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD).[29] The Convention includes in article 3 the notion of apartheid as one of its violations.[30] In 1998, the Rome Statute establishing the International Criminal Court, came to include the crime of apartheid as a crime against humanity.[31] In turn, these developments had a catalyst role to the entrenchment of the concept on a wider scale to the international law glossary; human rights NGOs referred to the notion in the reports penned on account of the situation in Myanmar.[32]

The wider entrenchment of the notion of apartheid as a legal basis for the initiation of proceedings against States, can be partially attributed to the fact that the ICERD where 'apartheid's is included, has been increasingly used the last few years by States in order for cases to open before the ICJ. For example, in 2018, Qatar relied on ICERD in order to institute proceedings against the United Arab Emirates (UAE) on allegations that the latter discriminated against Qataris.[33] The ICJ issued in July 2018 a relevant Provisional Measures Orders, ordering the UAE to ensure the protection of Qataris residing at their territory[34] and in 2019 rejected a Provisional Measures request filed by the UAE.[35] In 2021, Azerbaijan and Armenia, both separately filed cases before the ICJ, accusing each other of racial discrimination and ethnic cleansing in the context also of the war the two countries fought on Nagorno Karabakh and citing inter alia in their applications to the Court, article 3 of the ICERD which includes the notion of apartheid, without though claiming that the acts of the other party constituted 'apartheid.'[36]

[29] Patrick Thornberry, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY (Oxford University Press, 2016) 236
[30] International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Res. 2016 (XX), 21 December 1965
[31] ICC Statute, article 8
[32] Human Rights Watch, An Open Prison Without End: Myanmar's Mass Detention of Rohingya in Rakhine State, 8 October 2020
[33] ICJ (Qatar v UAE), Application of the International Convention on the Elimination of all Forms of Racial Discrimination, 11 June 2018
[34] ICJ (Qatar v UAE), Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Provisional Measures, Order of 23 July 2018, ICJ Rep. 406 (2018)
[35] ICJ (Qatar v UAE), Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Provisional Measures, Order of 14 June 2019, ICJ Rep. 361 (2019)
[36] ICJ, (Armenia v Azerbaijan) Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Application Instituting Proceedings, 16 September 2021, para.97; ICJ, (Azerbaijan v Armenia) Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Application Instituting Proceedings, 16 September 2021, para.97

In December 2021, upon relevant requests which were filed separately by both States,[37] the ICJ issued two Provisional Measures Orders, one on the Armenian and one on the Azeri application. Based on ICERD it equally called for Azerbaijan to protect the Armenian prisoners of war and Armenian places of cultural interest and held that Armenia should refrain from all acts relevant to the incitement and promotion of racial hatred against Azeris.[38] A second Azeri request for provisional measures to be issued on the basis of other new violation of the ICERD that Armenia allegedly was culpable of, was rejected by the Court in 2023,[39] whereas an Armenian request for provisional measures to be issued in order for the free movement of Armenians in and out Nagorno Karabakh to be ensured, was accepted by the Court.[40] Against the backdrop of all these cases and decisions, it would not be long before the ICJ would be called to bear its stance not only on the ICERD in general, but also on article 3 and apartheid in particular.

3. The invocation of 'apartheid' in the realms of the Middle East conflict

In 1967, following the Six-Day War, the West Bank was captured by the Israeli army. Throughout the following decades, efforts for peace to be reached between Israel and the Palestinians failed and absent a peace agreement, Israel's West Bank occupation ultimately became a prolonged one. Towards the end of this century's second decade, voices in the international community-most notably among human rights NGOs-starting tagging the Israeli West Bank presence as 'apartheid'.[41] These calls had been preceded by a relevant application of the Palestinians to the International Committee on the Elimination of All Forms of Racial Discrimination, asking the Committee to find that Israel's West Bank rule constituted

[37] ICJ, (Armenia v Azerbaijan) Application of the International Convention on the Elimination of all Forms of Racial Discrimination, Request for Provisional Measures, 16 September 2021; ICJ, (Azerbaijan v Armenia) Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Request for Provisional Measures, 23 September 2021

[38] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan), Provisional Measures, Order of 7 December 2021, ICJ Rep 361 (2021); ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia), Provisional Measures, Order of 7 December 2021, ICJ Rep 405 (2021)

[39] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia), Provisional Measures, Order of 22 February 2023, ICJ Rep 36 (2023)

[40] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan), Provisional Measures, Order of 7 December 2021, ICJ Rep 619 (2023)

[41] Yesh Din, The Israeli Occupation of the West Bank and the Crime of Apartheid: Legal Opinion, June 2020; Amnesty International, Israel's Apartheid against Palestinians: Cruel System of Domination and Crime against Humanity, Report, 1 February 2022

'apartheid.[42]' In August 2024, the Conciliation Committee established per the procedures adopted by the International Convention on the Elimination of All Forms of Racial Discrimination, ultimately concluded that Israel's West Bank policy did not constitute apartheid at the moment.[43]

A bit earlier, in July 2024, called by the UN General Assembly to pronounce on Israel's continued West Bank occupation, the ICJ had rendered an advisory opinion on the matter.[44] The opinion request did not explicitly refer to the notion of 'apartheid', yet the fact that a number of States appearing before the Court during the oral hearings, explicitly made reference to the term, put the Court before the following dilemma; should it not relate to these States' apartheid argument, it could be accused of ignoring a basic viewpoint shared by part of the international community. On the other hand, if it did relate to the prolonged Israeli West Bank presence as 'apartheid', it would endanger deviating the essence of the UN General Assembly's request to venues the Assembly itself had not asked for.

Typical of its tendency to find a middle line and compromise upon conflicting views, the Court decided to do make a reference to 'apartheid' in the context of the Israeli West Bank presence. Yet, contrary to what certain States wished for, the Court did not say-at least not explicitly-that such Israeli presence constitutes apartheid. It did though say that the Israeli policies in the West Bank violated article 3 of the Convention against Racial Discrimination, without further elaborating on whether these violations referred to the article's racial discrimination or apartheid component.[45]

[42] ICERD, Communication submitted to the Committee on the Elimination of All Forms of Racial Discrimination by the State of Palestine pursuant to article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, ICERD-ISC-2018/3 (23 April 2018), para.623

[43] On this see Report of the ad Hoc Conciliation Commission on the inter-State communication submitted by the State of Palestine against Israel under article 11 of the International Convention on the Elimination of All Forms od Racial Discrimination, CERD/C/113/3/Add.2, 21 August 2024, para.11 stating that 'The commission notes the worrying assessment made by several United Nations bodies regarding segregation between Palestinians and Israelis as part of policies and practices imposed by Israel through two separate legal systems, road separation and movement restrictions, among other means. The commission is of the view that those acts may amount to a situation of apartheid if no action is taken by Israel to effectively address the issues raised.'

[44] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024

[45] Legal Consequences arising from the Policies and Practices of Israel, para.229

Whereas this ambiguous stance undertaken by the Court may imply compromises made among the judges in the Opinion's final wording,[46] the absence of an explicit reference to apartheid should not mean that the Court tended to adopt this stance, as some scholars tried to argue.[47] Rather, based on Judge Nolte's separate opinion, the picture that comes out from the behind the stage Court deliberations before the issuing of the Opinion, is that the Court did not want to equate the Israeli West Bank actions with apartheid.[48] Ultimately, by uttering an ambiguous stance, the Court, like a contemporary Pythia, demonstrated the limitations of law on how legal terms with heavy hermeneutical gravity come to be invoked.

The question of whether prolonged occupations like that of the West Bank can constitute apartheid is not unique to the Israeli contours. Human rights violations and discriminatory measures can escort any presence of a foreign army in a given territory, yet these phenomena are exacerbated by the duration of such presence. Occupations bear injustice, prolonged occupations bear great injustice. In that sense, the whole apartheid debate should be seen as one that escorts all prolonged occupations. It can equally apply to Northern Cyprus and Western Sahara, both of which are under occupation from the 70s or to Crimea which albeit being occupied for much less, the situation there denotes no Russian volition to leave from the territory.

The continuation of occupation means by definition the continuation of human rights abuses against the local population. The fact that the law of occupation is largely based on decrees that the military commander issues rather than an instituted civil authority like a Parliament, means that by definition the norms governing the lives of the occupied populations are to be full of constraints and not necessarily respecting the rule of law as the latter is understood in Western, liberal societies. This legal reality creates a climate which can easily nurture human rights abuses against the occupied population. Yet, the argument that prolonged occupations constitute apartheid presupposes a chronological point beyond which belligerent occupations cease to legally exist irrespective of how the occupying power acts. This

[46] Solon Solomon, The Limits of the ICJ Advisory Opinion on Israel's Occupation and the West Bank, The Lawfare Blog, 20 August 2024 available at The Limits of the ICJ Advisory Opinion on Israel's Occupation and the West Bank | Lawfare; Marko Milanovic, ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories, EJIL!Talk, 20 July 2024 available at ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories – EJIL: Talk!

[47] David Keane, 'Racial Segregation and Apartheid' in the ICJ Palestine Opinion, EJIL!Talk, 31 July 2024 available at 'Racial Segregation and Apartheid' in the ICJ Palestine Advisory Opinion – EJIL: Talk!

[48] Legal Consequences from the Policies and Practices of Israel, Separate Opinion of Judge Nolte, para.8

theoretical construction presupposes that an automatic termination point for belligerent occupations exists, yet this is not the case in the current international legal framework.

Terming prolonged occupations as apartheid brings forth also the challenge of reading international humanitarian law on racial grounds. The Hague Regulations and the IV Geneva Convention refer to the occupied people as 'the local population' with no distinction to race, colour, gender or other discriminatory features. Moreover, in coming to denounce the establishment of settlements by the occupying power in the occupied territory, article 49 of the IV Geneva Convention speaks about the transfer of civilians of the occupying power to the occupied territory.[49] The provision does not mention the race or other distinctive features of these settlers, just their polity bond as civilians of the occupying power. On the other hand, the notion of apartheid is based on discrimination not due to different legal regimes or different legal bonds with a country, but on racial grounds. If occupations are to be termed as apartheid, the 'local population' and 'civilians' terms must be read only through this racial prism. Yet, if the Israeli West Bank occupation was tagged as 'apartheid' against the West Bank Palestinians, this would lead us to the oxymoron for any transfer of Israeli Arabs as settlers to the West Bank to be condoned due to the fact that these Israeli Arabs have the same racial origin with the West Bank Palestinians and any destruction of West Bank Bedouin villages to be accepted because Bedouins are racially distinct from the Palestinians. In this sense, resort to the apartheid equation sounds as legal acrobatics.

4. 'Genocide' in international law

The World War II Nazi atrocities and the Holocaust gave rise to the need for an international convention to be adopted that would criminalize and punish the notion of 'genocide'. The term, alluded to also in the realms of the Nuremberg Trials,[50] was coined by Raphael Lemkin to depict the Nazi efforts to exterminate the Jews not only as individuals, but as a racial collective group, destroying also this group's historical and cultural existence.[51] Lemkin's efforts to embed genocide in the consciousness of the international community, gradually bore fruits. Stressing the association of genocide with efforts to deny entire human groups than just individuals, in 1946, the UN General Assembly adopted Resolution 96(1) which called the international community to take further steps in order to adopt binding legal

[49] IV Geneva Convention Relating to the Protection of Civilian Persons in Times of War of 12 August 1949, art.49
[50] On this see ICTR, Prosecutor v. Jean Kambanda, ICTR-97-23-S, Judgment 4 September1998, para.16
[51] Raphael Lemkin, Genocide, 15 The American Scholar 227 (1946)

documents that would prevent and punish genocide.[52] Along these lines, in 1948, the United Nations adopted the UN Convention on the Prevention and Punishment of the Crime of Genocide.[53]

The Convention defines as genocide acts which are 'committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[54] Throughout the years following World War II, the Convention was not often cited given the Cold War and the competition that existed between the United States and the Soviet Union which many times brought forth a paralysis also to the UN Security Council. Yet, following the collapse of the Soviet Union, genocide became to be invoked more often as a crime. In that sense, the international community appeared now more ready in the '90s to acknowledge as such cases of genocide that took place. It thus acknowledged the genocide that happened in Srebrenica in the realms of the civil war in the former Yugoslavia as well as the genocide that took place in Rwanda. Similarly, the International Tribunal for Rwanda and the International Tribunal for the former Yugoslavia, referred to genocide in a number of their judgments.[55]

Genocide came to be discussed also before the ICJ both in the realms of its contentious jurisdiction as well as in the context of the advisory opinions. Along these lines, in 1951, responding to a question put forth by the UN General Assembly about the acceptability of certain reservations to the UN Genocide Convention, the ICJ stressed in an advisory opinion how the particular Convention intended to protect cardinal values of the humanity and thus the prevention and punishment of genocide should be deemed to be a common interest of all the signatory countries.[56] The civil war in the former Yugoslavia gave the opportunity to the Court to further discuss genocide on account of relevant applications brought forth on separate

[52] UN General Assembly Resolution 96(1), The Crime of Genocide, 55th Plenary Sess, 11 Dec. 1946. On this see the Resolution's preamble stating that 'genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings'.
[53] UN Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Resolution 260 A(III), 9 December 1948
[54] UN Convention on the Prevention and Punishment of the Crime of Genocide, art.II
[55] On this see ICTR, Prosecutor v. Jean Kambanda, ICTR-97-23-S, 4 September 1998; ICTR, Prosecutor v. Akayesu, ICTR-96.4.T, Judgment, 2 September 1998; ICTY, Prosecutor v. Jelisić, Judgment, IT-95-10-T, 14 December 1999; ICTY, Prosecutor v. Krstić, Judgment, IT-98-33-A, 19 April 2004; ICTY, Prosecutor v. Stakić, Judgment, IT-97-24-A, 2 March 2006; ICTY, Prosecutor v. Vidoje Blagojevic et al., IT-02-60-T, Judgment, 17 January 2005
[56] ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Rep 1951 at 23

occasions, by Bosnia-Herzegovina and Croatia.[57] In the realms of these applications, the Court clarified how genocide should be seen as having two facets-that of prevention and punishment- and how States can be held accountable for the prevention component based on how able they were to take steps in order for genocide not to take place, even beyond their national territory.[58]

Being in the meantime included as a crime in the ICC Statute,[59] genocide continued to be in the frontline of the international law discussion also with the advent of the 21st century. This time, focus was put on minority ethnic groups oppressed by the ruling majority in peacetime scenarios, without this though meaning that genocide ceased to be examined also in the realms of a conflict. Thus, reference was made to the Uighur genocide, to the Rohingya genocide or to the Yezidi genocide. From these, the Rohingya genocide holds a particular significance for our discussion since it inaugurated a trend before the ICJ that ultimately brought the notion of genocide to the epicentre of the ICJ cases referring to the two major conflicts, that in Ukraine and that in the Middle East.

Traditionally, as the cases of Bosnia and Herzegovina v Serbia and Montenegro and Croatia v Serbia indicated, discussion of the crime of genocide was brought up before the ICJ by one of the warring parties against the other. In other words, in the realms of a conflict, one State accused the other of not only committing war crimes, but also genocide. As long as the genocide discussion was put in this framework, it remained up to a point predictable and expectable. It caused no surprise that enemies wanted to portray with the darkest colours any atrocities committed during warfare. This perception of which State was entitled to standing when it comes to opening proceedings before the ICJ, changed in 2019 when Gambia brought forth before the ICJ an application against Myanmar, accusing the latter for the genocide of the Rohingya people,[60] Myanmar's Muslim minority. In its application to the Court, Gambia underlined how Rohingya villages were burned, often with the inhabitants locked in their houses and how the Rohingya people were murdered and raped.[61]

[57] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), ICJ Rep 2007; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia and Montenegro), ICJ Rep 2015

[58] Marco Longobardo, Genocide, Obligations Erga Omnes and the Responsibility to Protect: Remarks on a Complex Convergence, 19 The Int'l J. Human Rights 1199, 1200-1201 (2015)

[59] On this see article 6 of the Rome Statute

[60] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar), Application Instituting Proceedings and Request for Provisional Measures, 11 November 2019

[61] Ibid at para.6

The Gambia application reshuffled the cards when it comes to the ICJ and the crime of genocide. As a third state and not directly affected by Myanmar's actions, Gambia would not have normally a legitimate interest to bring forth a case before the Court. In order to do so, Gambia relied on the UN Genocide Convention and the fact that both it and Myanmar were signatories to it. By arguing that Myanmar was committing genocide, Gambia argued that Myanmar violated its contractual elements under the Genocide Convention, for which Gambia, as a signatory state and party-member to the particular convention, should respond by taking all steps to ensure that the convention will be respected. Genocide after all is a jus cogens prohibition erga omnes, meaning all States have a duty to take measures to prevent it.[62]

Yet, whereas in the past the ICJ had articulated this requirement in order to delineate State actions so that States do not end up committing or tolerating acts of genocide,[63] in The Gambia v Myanmar case the question acquired an additional layer, focusing on the responsibility of third parties for such genocidal actions not to take place even when these States are indirectly affected.[64] In that sense, by accepting Gambia's application, the ICJ seemed to award to States-at least in cases where genocide accusations are at stake-a role of preserving international legality. This in turn resembles the role States have for the preservation of international legality through the ability they have, based on the notion of universal jurisdiction, to prosecute at their domestic courts heinous war crimes and crimes against humanity.

The Gambia case proved to be a turning point in international litigation also regarding the way provisional measures were requested. It was not the first time such measures were requested in relation to genocide, but it was the first time such measures were requested not by

[62] On this see ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Preliminary Objections, Order of 11 July 1996, ICJ, para. 31; ICJ, Armed Activities on the Territory of Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) Judgment, ICJ Rep 2006, paras.27-29,64. For an elaboration of the erga omnes term see also Marco Longobardo, The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons learned and Future Implications in light of The Gambia v Myanmar and Beyond, 24 Int'l Community L. Rev. 476,477,479-480 (2022)

[63] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, para. 6; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, paras. 147 and 148; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, para. 8

[64] Marco Longobardo, The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons learned and Future Implications in light of The Gambia v Myanmar and Beyond, 24 Int'l Community L. Rev. 497-498 (2022)

the party which suffered the immediate harm but from a State which was indirectly affected by any genocidal policy undertaken by Myanmar. On this account, given that Gambia based its request for provisional measures on the argument that the members of the Rohingya group were in grave danger of further genocidal acts if the Court did not take immediate action,[65] in January 2020, the ICJ issued provisional measures in the particular case. The judges ordered Myanmar to take all measures to prevent acts embedded in article 2 of the UN Genocide Convention.[66]

The Gambia v Myanmar case put again on the forefront the concept of genocide and the role that the ICJ can have in addressing the particular crime. In a sense, it took the discussion about genocide, a heinous crime which should be first and foremost tried by the International Criminal Court, from the international criminal law agenda and placed it to the agenda of general public international law beyond the international criminal law ambit. It is questionable whether this whole endeavour should not be criticized for weakening the stance of international criminal law. Yet, at the same time, the same endeavour strengthened the role of classical international law theory about the sources of international law. By arguing that the ICJ should be seized by the case brought before it due to the fact that both Myanmar and Gambia are parties to the UN Convention on Genocide, brought to the forefront, the practical facets multilateral conventions can have when it comes to the ability of ICJ intervention.

In fact, this argument brought forth by Gambia and based on the UN Genocide Convention was indeed inventive. To the extent that the UN Genocide Convention has been signed and ratified by most States, the ability of a signatory State to bring to the Court one of the other signatory States, even if there is no conflict between these two States, inaugurated a new era in international State litigation. Moreover, the same can be said also about non-State litigation and the role of the ICJ to the extent that the same UN Genocide resort allowed Gambia to bring forth a claim before the ICJ in favour of the Rohingya, a non-State group which according to the ICJ Statute does not have standing before the Court. These features that the Gambia v Myanmar introduced, would impact on the way the concept of 'genocide' came to be read in the litigation that took place before the ICJ regarding the two major conflicts that unfolded from 2021 and hence-the conflict in Ukraine and the conflict in the Middle East.

5. The concept of genocide, the ICJ and the Ukraine and Middle East conflicts

[65] Ibid at para.131

[66] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar), Request for the Indication of Provisional Measures, Order of 23 January 2020, ICJ Rep 2020 at 3

Following the dissolution of the Soviet Union in the early 90s, Ukraine became independent. The new State found itself hosting a significant Russian minority, especially in its eastern provinces. These Russian-speaking minority always had fervent ties with Moscow. The Ukrainian efforts to detach this minority from Russia ended up in violent and oppressive practices. From its part, Moscow found the situation to provide the Russian minority in Ukraine with weapons and encouragement to oppose the Kiev regime. Ukraine responded by resorting to the ICJ, opening a case based on the UN Convention on the Elimination of all forms of Discrimination. Yet, as the case was pending before the ICJ, Moscow decided to take more decisive measures involving the use of force. In February 2022, the Russian President Vladimir Putin stated that 'genocide' was taking place against the Russian-speaking population in Eastern Ukraine.[67] Citing this as a ground for military operation, Russia invaded Ukraine, sparking an international conflict between the two States.[68]

Ukraine's reaction was immediate. On 26 February 2022, Ukraine filed an application to the ICJ.[69] Taking note of the fact that Russia had termed any Ukrainian policies in the eastern provinces of the country as 'genocide,' Ukraine asked from the Court to hold that no genocide was taking place and secondly that Russia could not use the UN Genocide Convention and any possible claimed violations by Ukraine as a ground in order to undertake military force against Ukraine.[70] In order to bring forth these arguments, Ukraine relied on the fact that both it and Russia had signed and ratified the UN Convention.[71] Furthermore, Ukraine asked the ICJ to issue provisional measures against Russia.[72]

On 16 March 2022, the Court issued a provisional measures order, holding that Russia should immediately halt its Ukrainian invasion.[73] To the question of whether any Ukrainian actions towards its Russian-speaking population could be termed as 'genocide' and whether

[67] Address by the President of the Russian Federation, The Kremlin, Moscow, 24 February 2022 available at Address by the President of the Russian Federation • President of Russia
[68] The Legal Framework Applicable to the Armed Conflict in Ukraine, OSCE Report at 1 available at 548614.pdf
[69] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia), Application Instituting Proceedings, 26 February 2022
[70] Ibid at para.30
[71] Ibid at paras.11-12
[72] Request for the Indication of Provisional Measures submitted by Ukraine, 26 February 2022
[73] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures, Order of 16 March 2022, ICJ Rep. 2022 211,230-231

even if such genocide was true, the Court held that it did not have evidence in order to reach the conclusion that genocide took place in Eastern Ukraine and that even if such genocide took place, it would be doubtful whether the aim and object of the UN Genocide Convention would sanction any signatory State to take military action in order to stop such genocide.[74]

With such a ruling, the Court on one hand put a halt to any tendency from the States' part to refer to the notion of genocide in order to describe any policies referring to violence and killings of civilians. Additionally, the Court put a halt not only to expansionist interpretations of the 'genocide' notion but also to expansionist conceptually policies which would argue that in the name of averting a genocide, all means-even non peaceful ones-should be sanctioned. While this specific cautious stance from the Court's stance regarding the resort to military means can be justified in relation to the Court's suspicion on Russia's real motives for the military operation given that no genocide was found to take place, it raises questions if taken beyond the context of the particular case. For example, a conclusion that States cannot take military action to prevent genocide from taking place would run contrary to the whole notion of humanitarian intervention as seen palpably in the case of Kosovo or to the notion of the Responsibility to Protect as put forth by the UN Security Council itself in cases like that of the military operation in Libya. Still, the Ukraine v Russia case ICJ genocide conclusions are important to the extent that they delineate the notion of genocide vis a vis also the Gambia v Myanmar jurisprudence.

In the Ukraine v Russia genocide litigation, the ICJ was asked to intervene in order to hold not that genocide takes place, but the opposite, meaning that genocide does not take place. In that sense, the particular case differs from the Gambia v Myanmar litigation. Nevertheless, it does resemble the latter with the provisional measures request as well as by the Ukrainian reliance on the UN Genocide Convention where Russia is also a State Party. At the same time, whereas in the Gambia v Myanmar litigation, reference to the UN Genocide Convention was made by Gambia-the applicant State-on a pro-active basis, advocating the application of the Convention, in the Ukraine v Russia case the argument is the opposite. There, the signature and ratification of the Convention by Russia, is being brought forth by Ukraine as an argument on why the UN Genocide Convention should not apply or be used as a legal argument when it comes to the situation of the Ukrainian measures towards the Russian-speaking minority. In

[74] Ibid at para.59

other words, whereas the Gambia v Myanmar case showed the potentials of the UN Genocide Convention as a jurisprudential ground, the Ukraine v Russia case came to stress the limitations. In coming to do so, Ukraine underlined in its application how the UN Genocide Convention can be interpreted not in good faith based on an artificial expansion of the notion of 'genocide' meant to serve the interests of certain State measures, in this case the Russian invasion that took place.

Furthermore, the Ukraine-Russia ICJ litigation is important because it largely constitutes the prototype upon which South Africa stepped in order to bring forth proceedings against Israel before the ICJ. Like in the Ukraine-Russia case, South Africa's jurisdictional ground laid upon the fact that both countries had signed and ratified the Genocide Convention. In that sense, South Africa accused Israel of genocide.

On October 7th, Hamas perpetrated a large-scale terrorist attack inside Israel, killing 1,127 Israelis, the largest number of people killed in one day till then in the history of the State of Israel.[75] As a result, the Israeli Army launched a military operation aimed- according to the Israeli government's stated objectives- to eliminate the Hamas threat to the Israeli population and bring forth a change of governance in the Strip.[76] This, given that Hamas had taken control over Gaza in 2007 through a coup which had overthrown the Palestinian Authority after the Israeli disengagement from the Strip in 2005.

As months passed by and the Israeli operations in Gaza continued unfolding, calls started augmenting in the international community for these operations to be put to a halt. Moreover, the argument started to be voiced that Israel was perpetrating genocide in Gaza. In December 2024, South Africa decided to file a case before the ICJ on these grounds.[77] Relying on the fact that both South Africa and Israel are signatories to the UN Genocide Convention, South Africa argued that it had the standing of taking Israel to Court due to alleged violations of the particular Convention taking place in Gaza. In order to substantiate its arguments, the South African application based itself on sayings by Israeli politicians calling for the complete

[75] Hamas's Attack was the Bloodiest in Israel's History, The Economist, 12 October 2023 available at Hamas's attack was the bloodiest in Israel's history

[76] Kevin Benson, What is The End State? Assessing Israel's Objectives for a Gaza Campaign, Modern War Institute at West Point, 19 October 2023 available at What is the End State? Assessing Israel's Objectives for a Gaza Campaign - Modern War Institute

[77] ICJ, Application Instituting Proceedings containing a Request for the Indication of Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, 29 December 2023

annihilation of the Gaza population following the October 7th attack and massacre or to Reports by UN Rapporteurs on the dire situation in Gaza following the post-October 7th Israeli military operations.[78] Moreover, further than this, the South African application dedicated a considerable part to prior Israeli military operations, before the ones taking place post-October 7th, trying to paint a wide picture of recurring systematic violations by the Israeli army of basic Palestinian rights in Gaza and arguing that such violations could not but be part of a systematic Israeli plan to exterminate the Palestinian Gaza population.[79]

In filing its case before the Court, South Africa asked for the issuing also of provisional measures. In the realms of these measures, South Africa asked the Court to declare that Israel committed genocide and thus should immediately halt its military operations in Gaza.[80] In January 2024, the Court rendered its judgment on the provisional measures request.[81] It did not unequivocally find that Israel commits genocide in Gaza and it did not order the immediately end of the Israeli military operations.[82] The Court nevertheless underlined that some of the Israeli actions and omissions pinpointed by South Africa might fall under the auspices of the Convention and called upon Israel to prevent and punish any actions or statements that could be seen as incurring genocide.[83]

By not simply holding as requested that genocide took place in Gaza, the Court showed cognizance of the cautiousness with which the 'genocide' concept has to be treated by persons of international law. As the Court noted, its judgment did not mean either that the Court wanted to say that genocide did not take place or could not have taken place.[84] Rather, the Court conceded, very honestly and responsibly, that in the provisional measures phase, it did not have before it the evidence to indicate even with high probability that this was the case.

The Ukraine and Middle East cases show how reference to 'genocide' can be sometimes made outside the usual context we would anticipate the term to be cited, meaning either in the realms of hostilities which take place in the midst of the 'fog of war' and can by definition

[78] Ibid, paras.101-109
[79] Ibid, paras.27-31
[80] Ibid, para.144
[81] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) Order of Provisional Measures, 26 January 2024
[82] Ibid, para.30
[83] Ibid, paras.30,78-79
[84] Ibid, para.30

entail a high number of civilian victims, especially in cases of urban warfare,[85] or in the context of a wider State policy targeting a minority group without necessarily the intent to obliterate this group from the map. Moreover, it shows the difference in the way legal experts and politicians or world leader have come to relate to the term. For example, in the context of the Ukraine-Russia conflict, the same politicians who have used in their statements the word' genocide', have expressed ignorance when being asked on whether their statement means that they believe that genocide has legally taken place.[86] Others have pointed out how especially in the realms of post-Soviet Union republics, the term 'genocide' has been broadly used as a synonymous to the 'absolute evil' and not as an indication that a genocide takes place as the crime is defined on legal terms.[87]

Yet, the problem is, that to the extent that the utterance of these words comes by world leaders and major politicians, the repetition of such heavy-weighted statements ultimately moulds the public opinion towards calling for prosecutions and legal action. Rebaptized thus with the political weight politicians have rendered them, these notions enter again the public international law discourse and the ICJ is brought in to pronounce its stance. On this account and irrespective of different rulings and approaches in the realms of the main case proceedings, the ICJ unwillingness to quickly climb up the 'genocide' or 'apartheid' wagon, speaks world and demonstrates the linguistic structural limitations embedded in the interpretation and application of any legal terms and imposed by semantic frames as will be discussed below.

6. The Linguistics of International Law

In law in general and in international law in particular, language does not function in a vacuum but shapes and interacts with a legal reality. Socio-linguists point out on how the social and the historical environment play a role in the way certain words and notions are being understood and perceived. In major conflicts, the construction of conflicting narratives

[85] Ibid, para. 40; Geoffrey Corn, Ground Truth: The Disconnect, Context and Challenges of Israel's War against Hamas, The Cipher Brief, 29 February 2024 available at Ground Truth: The Disconnect, Context and Challenges of Israel's War against Hamas

[86] On this see William Schabas, Genocide and Ukraine: Do Words Mean what we Choose them to Mean? 20 J. Int'l. Crim. Justice 843-844 (2022)

[87] Max Fisher, Putin's Baseless Claims of Genocide Hint at More than War, The New York Times, 19 February 2022 available at Putin's Baseless Claims of Genocide Hint at More Than War - The New York Times

plays an equally important role as the use of force and the resort to violence.[88] International law scholars have underlined how language and terminology is important in the realms of decision-making and the interpretation judges award to specific notions.[89] Yet, the linguistics of international law extend beyond any interpretational quests. This means three things.

First, the linguistics of international law come to touch upon the discernment of the difference between the legal use and the colloquial, non-legal use of the same terms. For example, the word 'damages' can denote in everyday spoken English the destruction that has occurred to an object, whereas in tort law it refers to the compensation owed for the loss suffered as a result of a wrongful act.[90] Secondly, if legal language is about understanding correctly legal terms, the same is true also about legal frameworks. Language works in context and frameworks and international lawyers are generally aware of the importance context plays to the meaning of a legal terms.[91] In that sense, similar to how scholars have pointed out to the important of the emotional context in coming to read and approach international judgments,[92] the linguistic context should not be ignored. Unless legal terms are being read in tandem with the linguistic origins and ordinary meaning, any legal discussion runs the danger of becoming general, abstract and in the end bereft of any legal meaning.

For example, 'war' has a specific meaning associated with the existence of hostilities. If we start broadening the usage of the term 'war' in other contexts, we risk reaching a point where 'war' will be invoked to justify military action even with no armed conflict in place, becoming thus an amorphous and general notion. This is the case for example with the 'war on terror' which was used as a framework in order for the U.S. to conduct drone strikes in countries like Somalia with which the U.S. was not in war[93] or with the term 'economic war' or 'economic warfare', which embeds in it the threat of use of force in case vital economic

[88] Orna Ben-Naftali, Eitan Diamond & Aner Shofty, Esprit de Corpse: Genocide in the Shadowland of Gaza? Journal of Genocide Research 1,5 (2024)
[89] Tomasz Stawecki, Legal Interpretation as a Solution to Disputes over the Validity of Laws in LANGUAGE AND LEGAL INTERPETATION, supra note 3 at 26-27
[90] Thomas Kadner Graziano, The Purposes of Tort Law, 14 J Eur. Tort L. 23 (2023)
[91] Benedikt Pirker and Jennifer Smolka, International Law and Linguistics: Pieces of an Interdisciplinary Puzzle, 11 J Int'l Dispute Settlement 501, 508 (2020)
[92] Orna Ben-Naftali, Eitan Diamond & Aner Shofty, Esprit de Corpse: Genocide in the Shadowland of Gaza? Journal of Genocide Research 1,12 (2024)
[93] Drone Strikes and Targeted Killings: Domestic and International Perspectives, Panel Discussion moderated by Harold Koh, 2014 at 11 available at 4_drone_strikes.pdf

interests of a country are at stake.[94] Equally, the word 'revolution' has a certain political meaning, denoting the public overturn of a despotic regime. If this term is not delineated strictly, terrorist acts can end up being termed as 'revolutionary'.

Moreover, the description of such frameworks on a legal basis may differ from the way non-legal people understand the same notion. For example, in international law, an 'attack' needs to have a special gravity in order to be termed as such and trigger the right to self-defence. Low-scale incidents involving the use of force may not be branded as an 'attack,'[95] although they may be referred as such by people or the media. Equally, people and the media may use the word 'genocide' to describe an extensive massive campaign against not just the physical but also the cultural annihilation of a people. Yet, on international legal terms, the crime of genocide does not cover this cultural element. The same is true with the concept of apartheid. In the COVID era, reference has been made to 'vaccine apartheid' in order to describe inequalities in the vaccination of the world population between the Global North and the Global South.[96] The idea behind the use of the 'apartheid' term was the fact that these vaccination inequalities had also a racial basis, with non-white people in the Global South getting less vaccinated.[97] Yet, the question is whether any differentiation in the treatment of various populations can be automatically branded as apartheid, even if the racial element is present and assuming of course there is no prior intent for such racial discrimination to take place.

Thirdly, if language in law is about how legal language interacts in the application of legal provisions and frameworks, in cases of such an application, what needs to be examined is whether this application is possible in the first place. This is all truer in international law which is composed by different branches. The autonomy these branches hold with the existence of even different judicial or quasi-judicial bodies as dispute solving mechanisms, has raised the question of international law's fragmentation and has prompted scholars to address it. Under this lens, when transposing notions and elements from one international

[94] Tor Egil Forland, The History of Economic Warfare: International Law, Effectiveness, Strategies, 30 J Peace Research 151 (1993)
[95] Solon Solomon, The Great Oxymoron: Jus in Bello Violations as Legitimate non-forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study, 9 Chinese J. Int'l L. 501,510 (2010)
[96] Simar Singh Bajaj et als, Vaccine Apartheid: Global Cooperation and Equity, 399 The Lancet, April 2022 at 1452
[97] UN expert urges States to End 'Vaccine Apartheid', UN Human Rights Office of the High Commissioner Press Release, 14 June 2022 available at UN expert urges States to end 'vaccine apartheid' | OHCHR

legal field to another, what needs to be examined is whether the second field is susceptible of receiving them. For example, in the laws of war an attack is unlawful if the military commander could possibly foresee that the incurred civilian harm would be disproportionate to the expected military advantage. In international criminal law though the military officer must be able to definitely foresee the magnitude of such harm outweighing the military advantage.[98] As evident, the jus in bello proportionality parameters cannot apply ipso facto in international criminal law. More than this, the slight differences in phraseology that the drafters of the ICC Statute tried to insert when referencing to the jus in bello proportionality principle-for example the word 'clearly' before the notion of 'excessive harm' or the word 'overall' when it comes to the need for a concrete and direct advantage -have been criticized by scholars as providing no further clarity.[99]

Similarly, the transposal of whole international legal fields does not happen automatically in another context. International human rights law does apply concurrently with the laws of war but this does not mean that human rights provisions apply in situations of warfare without any legal filtering. In its advisory opinion on the legality of nuclear weapons, the ICJ proceeded to establish the lex specialis principle which albeit has since been criticized, is still applicable and denotes the fact that any such transposal can take place on a mutatis mutandis basis. This, on the hypothesis that such transposal is possible in the first place. In some instances it may not be.[100]

The fact that human rights notions should be read differently according to the legal frameworks under which they are called to apply, is not strange to the discipline of linguistics which sees the social and historical environment playing a role in the way certain words and notions are being understood and perceived. Scholars have underlined how this is important in the realms of decision-making both when it comes to international courts and national courts in different jurisdictions. In both cases, the interpretation judges reach regarding specific notions is influenced by their socio-cultural backgrounds. Yet, equally importantly, the socio-linguistic approach makes evident that in coming to reach a judgment on whether a

[98] Jessica C. Lawrence & Kevin Jon Heller, The Limits of Article 8 (2)(b)(IV) of the Rome Statute, the First Ecocentric Environmental Law Crime, 20 Georgetown Int'l. Environmental L. Rev. 61, 78-79 (2007)
[99] Jessica C. Lawrence & Kevin Jon Keller, ibid at 77 (citing Robert Cryer)
[100] On this see for example the fact that tort law damages do not apply for acts of warfare or that international human rights law does not apply in cases-including warfare scenarios-where the State has derogated from certain human rights provisions. On this see Haim Abraham, TORT LIABILITY IN WARFARE: STATES' WRONGS AND CIVILIANS' RIGHTS, Oxford University Press, 2024.

certain term or legal characterization applies to a given situation, judges are to consider also the socio-legal contours that can give to this term or special characterization.

For example, although ICJ judges do not provide insights on how they reach a certain conclusion, it can be argued that in coming to refrain in the provisional measures phase from holding that Israel committed genocide, despite the harsh statements by Israeli politicians which-as South Africa tried to argue-could point out to genocidal intent, the Court did take into account the contours under which these statements were issued, meaning shortly after a horrendous massacre that shocked the Israeli society and seriously questioned the country's security arrangements. Similarly, in coming not to automatically be led to an assertion that Israel commits genocide by relying only on these statements, the Court may have taken into consideration the fact that some of these statements came from far-right Israeli politicians. This need for the reading of legal terms to be put in a certain framework, is highlighted in linguistics by the concept of 'frame semantics' as will be explained in the next section.

6.1 Frame semantics and the transposal of legal terms from one field to another

International law scholars have pointed out to the use of 'frames' in international decision-making.[101] Whereas these scholars have focused on the use of frames in international law in conjunction mostly with sociology or cognitive psychology from where these frames derive,[102] frames can be relevant also in linguistics.[103] Linguistic frames or 'frame semantics'[104] have not been adequately addressed so far in the international law literature. This is important, given that contrary to cognitive and communicative frames which are sometimes fluid and not clear,[105] linguistic frames[106] are the ones most solidly defined and

[101] For a list of relevant international law scholars and publications see Anne van Aaken & Jan-Philip Elm, Framing in and though Public International Law in Andrea Bianchi & Moshe Hirsch at 35
[102] Ibid
[103] Karen Sullivan, Three levels of Framing, 14 Cognitive Science, 1 (April 2023)
[104] For the terminology see Shafqat Mumtaz Virk et als, Exploiting Frame Semantics and Frame-Semantic Parsing for Automatic Extraction of Typological Information from Descriptive Grammars of Natural Languages, Proceedings of Recent Advances in Natural Language Processing, 1247, Varna, Bulgaria, Sept.2-4 2019 available at Exploiting Frame-Semantics and Frame-Semantic Parsing for Automatic Extraction of Typological Information from Descriptive Grammars of Natural Languages
[105] International law scholars have discussed how scholars can render some objectivity to international law, but can equally be unpredictable, not based on rationality. On this see Anne van Aaken & Jan-Philip Elm, Framing in and though Public International Law in Andrea Bianchi & Moshe Hirsch at 35-37
[106] For the difference in the terminology between 'linguistic' and 'semantic' see Karen Sullivan at 6

applied.[107] Language does not operate in a vacuum but in certain frames which in turn render a certain interpretational value and meaning to a given term. The content of this meaning given to a certain word derives from extensive language data, showing how the specific word has been used over and over again.[108] Thus, by accepting to use a certain word, someone accepts also the frame to which this word belongs. Whereas interpretation can be dynamic and this meaning can change over the years, still, this is the outcome of a change in the frame itself, like than the arbitrary detachment of a given notion from the original frame in which it has been placed. On this account, linguists view language as something not uprooted from the general context inside which a word appears.[109] In essence, frame semantics advocate for the reading of terms and sentences inside their wider context, so that language can make sense and can serve as an efficient means of communication, offering predictability by what someone means by choosing to use a certain word or phrase.

Along these lines, frame semantics as a means to promote the language's logical structure, meets cognitive linguistics. This is important because it shows how resort to frame semantics is not just an intellectual exercise but is being dictated by logic itself. Cognitive linguistics speak about the 'perspectival nature of linguistic meaning',[110] accepting the fact that the world is not objectively referred to in the language, since language depicts the need of different people or cultures. For cognitive linguistics we think and communicate in conceptual structures that are not subjective, but 'mediated by the habitus of human interaction.'[111] Equally, legal interpretation should not be seen as a binary exercise where choice is offered between two notions or meanings for one of them to be true, but as a categorization exercise which relies on combining and bringing together background knowledge, a set of prior assumptions and present day conditions.

For example, the words 'stallion' and 'mare' were deciphered through a process of thinking that centred in the fact that both are horses and that their difference lies to the fact

[107] Karen Sullivan at 6
[108] On this, see Karen Sullivan at 7 (mentioning the example of how the meaning of the verb 'kill' is deciphered by the FrameNet project through collection of instances of frames from large text collections like the 100-million-word British National Corpus)
[109] Dirk Geeraerts & Hubert Cuyckens, Introducing Cognitive Linguistics in THE OXFORD HANDBOOK OF COGNITIVE LINGUISTICS (Dirk Geeraerts & Hubert Cuyckens eds, Oxford University Press, 2007) at 15
[110] Dirk Geeraerts & Hubert Cuyckens, supra note 15 at 5
[111] Jacob Livingston Slosser & Mikael Rask Madsen, Institutionally Embodied Law: Cognitive Linguistics and the Making of International Law in Andrea Bianchi & Moshe Hirsch eds, 2021 at 81

that a stallion is a male horse and a mare a female horse.[112] In this binary linguistic exercise, the final result is based on truth conditions, meaning the conditions under which one can attest to the fact that a concept should logically apply in a given situation.[113] Yet, the world of ideas is more amorphous and not tangible. This complicated nature is first and foremost depicted in law and how ambiguous the latter can be, all the more so in international law, where State interests are also very stark.

Having this in mind, frame semantics seems to appear more adequate to be linguistically transposed to international law. For frame semantics, notions have to be grouped into frames, meaning 'specific unified frameworks of knowledge'.[114] In order thus to be better understood, a word or notion is connected to a whole knowledge structure that relates to this word or notion.[115] Thus, frames comprise the reading of a word not on an isolated basis, but inside its general historical, social or interactive framework, enabling thus its better understanding. For example, the word 'restaurant' could easily be seen as denoting only the physical place of an eating place, yet under frame semantics, a 'restaurant' should be seen as part of a whole chain comprising transactional ties with its suppliers, employment ties with its staff and contractual ties with its clients.[116] In that sense, on one hand in frame semantics, the word 'restaurant' is placed inside a wider framework which helps us to better understand it and secondly renders some logical expectation on how is meant to understand the particular notion. In turn, this logical expectation provides linguistic and ultimately communicational certainty to the extent that the definition of restaurant cannot be suggested beyond the aforementioned parameters.

Transcribing this discussion to the world of law, a given norm or notion can be interpreted according to the interpreter's point of view,[117] nevertheless there is a certain interpretational framework beyond which any interpretational quest cannot go. In that sense, despite any subjectivity that the interpretational exercise can render to the application of

[112] William Croft & D Alan Cruse, COGNITIVE LINGUISTICS (Cambridge University Press, 2012) 7
[113] William Croft & D Alan Cruse, supra note 19 at 7
[114] Charles Fillmore, Frames and the Semantics of Understanding, 6 Quaderni di Semantica 222 (1985) (cited in Lang Chen & Csilla Weninger, Knowledge Structures for Knowledge Communication: Dominant Semantic Frames in Research Articles, Lingua 309 (2024)
[115] Lang Chen & Csilla Weninger, Knowledge Structures for Knowledge Communication: Dominant Semantic Frames in Research Articles, Lingua 309 (2024)
[116] William Croft & D Alan Cruse, supra note 19 at 7
[117] Martin Wahlisch, Cognitive Frames of Interpretation in International Law in INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi, Daniel Peat & Matthew Windsor eds, Oxford University Press, 2015) 332

international law, scholars have argued how this does not mean that international law is something fluid and totally subjective. Rather, the so-called 'objectivity of international law' can still exist and universal norms can still be developed.[118] Taking this thought one step further, this means that legal notions are interpreted inside existing frames which denote in advance specific values and meaning. In essence, these frames provide some universally agreed interpretative frameworks, which safeguard that any hermeneutical exercise of a given legal notion, will not end up being arbitrary or detached from reality.[119] In turn, the whole process guarantees that the interpretation of a given legal notion or provision will stick to the expectations of the international lawmaker, who, in article 31 of the Vienna Convention on the Law of Treaties, heralded the need for international norms to be read according to their object and aim as well as in tandem with the general context.[120]

6.2 Frame semantics in the case of the 'genocide' and 'apartheid' terms: The impact of the legal transposal limitations on international law's nature and validity

The fact that the selection of specific words matters when it comes to international behaviours, is palpably demonstrated in words with heavy political and legal weight, like 'genocide' and 'apartheid'. In these instances, the possible alternative characterization of a certain attitude as a 'war crime' or a 'violation of international law'- terms that hold a lesser semantic weight- does play a role. In the case of 'genocide' and 'apartheid', the application of frame semantics calls for the usage of the particular terminology in specific settings and instances which must satisfy certain preconditions, as discussed above in section 2. Yet, in our days, we have seen scholars using the terms as a powerful political and rhetorical tool.[121] This is for example the case with the term 'cultural genocide' which albeit could adequately describe what Rafael Lemkin did believe should be included in the genocide concept, namely

[118] Martin Wahlisch, Cognitive Frames of Interpretation in International Law in INTERPRETATION IN INTERNATIONAL LAW (Andrea Bianchi, Daniel Peat & Matthew Windsor eds, Oxford University Press, 2015) 332
[119] Shiri Krebs, LawWars: Experimental Data on the Impact of Legal Labels on Wartime Event Beliefs, 11 Harvard National Security Journal, 106,122 (2020)
[120] Anne van Aaken, The Cognitive Psychology of Rules of Interpretation in International Law, 115 AJIL Unbound 258,259 (2021)
[121] Elisa Novic, THE CONCEPT OF CULTURAL GENOCIDE (Oxford University Press, 2016) 1

the attempts to destroy a people's cultural heritage,[122] it was ultimately rejected as a notion by the drafting States of the Genocide Convention.[123]

'Economic genocide' is another term scholars have used through recourse to the 'genocide' element in order to argue that 'economic genocide' comes to just put in terminological language through specification to the economic conditions, of what article 2 of the Genocide Convention describes as 'genocide' when the provision comes to speak of the imposition of harsh life conditions able to lead to the extermination of an ethnic group.[124] Yet, similar to the notion of 'cultural genocide', any State attempts to explicitly include the term 'economic genocide' into the Genocide Convention, did not prove successful.[125] The same is true for 'political genocide' which some scholars have argued should be used to describe the extermination of political groups.[126]

On a similar expansive note, the term 'apartheid' has been used also in relation to situations where the segregation of a group is not based on racial grounds. Thus, for example, in countries where women or LGBTI have been largely excluded from social life, reference has been made to 'gender apartheid.'[127] Moreover, 'apartheid' has been referred to in connection with scenarios where the segregation between racial groups does not take place de jure but de facto, by the existing reality in a specific field of public life. For example, scholars have resorted to the term 'educational apartheid' to describe the fact that socio-economic conditions have developed the tendency for white and black people to be enrolled to separate schools.[128] The term 'educational apartheid' has equally been mentioned as a

[122] Dirk Moses, Raphael Lemkin, Culture and The Concept of Genocide in THE OXFORD HANDBOOK OF GENOCIDE STUDIES (Donald Bloxham & Dirk Moses eds, Oxford University Press, 2010) 34
[123] Leora Bilsky & Rachel Klagsbrun, The Return of Cultural Genocide? 29 EJIL 373,387-390 (2018); Jeffrey Bachman, Bringing Cultural Genocide into the Mainstream in CULTURAL GENOCIDE: LAW, POLITICS AND GLOBAL MANIFESTATIONS (Jeffrey Bachman ed, 2019, Routledge) 1
[124] P Sean Morris, Economic Genocide Under International Law, 82 J. Criminal L. 18, 19 (2018)
[125] Naznin Sultana Niti, Re-Evaluating Economic Genocide: When Policy becomes Predator, 10 J. Arts & Humanities 1,4 (2021)
[126] David Nersessian, GENOCIDE AND POLTIICAL GROUPS (Oxford University Press, 2010), 182-183; Frank Chalk, Redefining Genocide in GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS (George Andreopoulos ed, University of Pennsylvania Press, 1997) 52; William Schabas, GENOCIDE IN INTERNATIONAL LAW (Cambridge University Press, 2000) 139-140
[127] Draft Articles on Prevention and Punishment of Crimes against Humanity: Recommendations from the Working Group on discrimination against Women and Girls, Human Rights Council, Working Group on discrimination against Women and Girls, A/HRC/WG.11/40/1, 15 February 2024, para.1; Global: Gender Apartheid must be Recognized as a Crime under International Law, Amnesty International, 17 June 2024 available at Global: Gender apartheid must be recognized as a crime under international law - Amnesty International
[128] Jonathan Kozol, Our Educational Apartheid, 15 Race, Poverty and The Environment 67 (2008)

descriptor of the gap between public and top private schools in England[129] and terms like 'economic apartheid' or 'apartheid economy' have been coined to put to paper the income inequalities in countries like the United States[130] or Canada.[131]

Yet, the expansion of the 'genocide' and 'apartheid' terminology begets not only questions of epistemological credibility as far as linguistics is concerned, but also impacts directly-mostly to the negative-international law's impact and ability to endorse change and action. The use of 'genocide' and 'apartheid' puts international law in big letters. If 'genocide' and 'apartheid' do take place, then the international community must act. This premises which is based on the psychological platform upon which collective feelings of repulsion towards these notions correctly rest, energizes international bodies to swiftly act. Whereas this is not per se bad, the problem is that sometimes this energizing effect is so intense that it does not take into account, the ability of these bodies to react successfully. In other words, this approach, presupposes that international law and international bodies are exempt from any political pressures or limitations which necessitate dialogue and discussions between States and thus omnipotent. In that sense, it is a linear approach. The international community is seen as one homogenous unit which decides to act against the State or non-State entity responsible for 'genocide' or 'apartheid' and automatically this international communal will is to be imposed. Yet, as experience has shown, this is far from how our world works. Rather, many times, international bodies are unable to impose their will, not though because they are impotent, but because many times, there is a question in the first place whether 'genocide' or 'apartheid' have actually taken place. Whereas frame semantics render such a result totally expectable, the ignoring of these frames lead interpreters of international law to question either its validity as a field of law or its impact and potential for instigating changes in the international arena.

The second issue that underlines the need for the role of frame semantics to be acknowledged in the realms of any reference to 'genocide' or 'apartheid' refers to how the usage of such rhetoric proves ultimately detrimental to the development of international law.

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[129] Heidi Ashton & David Ashton, Creativity and the Curriculum: Educational Apartheid in 21st century England, a European outlier? 29 Int'l. J. Cultural Policy 484 (2023)
[130] Robert Reich et als, Toward an Apartheid Economy? Harvard Business Review, September-October 1996 available at Toward an Apartheid Economy?
[131] Grace-Edward Galabuzi, Canada's Creeping Economic Apartheid, CSJ Foundation for Research and Education, May 2001 available at Canada's Creeping Economic Apartheid

If all violations of international law have to be 'genocide' or 'apartheid' in order to be deemed to be gross and something about which international law should urgently react, this is an encompassing endeavour that ultimately pulls the interpretational strains of any other legal attitudes which do not a priori constitute 'genocide' or 'apartheid'. In other words, the fear is that international scholars and States will strive to baptize any international law violation as 'genocide' or 'apartheid.' For example, in the realms of Israel's military operations in Gaza following the 7/10 Hamas attack, scholars have talked about 'domicide', 'medicide', 'scholasticide', 'urbicide'.[132]

It is doubtful though whether the creation of new words whose common denominator id the 'cide' suffix, is needed and provides any services. Rather, it can be argued that this insistence of international theory for all denounceable attitudes to be tagged as 'cide', leads to dilution of the notion of 'genocide' itself; if everything can be something similar to 'genocide' as the 'cide' suffix implies, then 'genocide' becomes an all-encompassing notion which is left to be seen as rather general and abstract.[133] This stands opposite to the efforts following World War II through the adoption of the Genocide Convention, for genocide to be defined as a legal notion bearing certain characteristics.

The extensive reference to 'genocide' through the 'cide' suffix, brings to mind the extensive usage of the 'war on terror' terminology by the United States following the 9/11 attacks, something that was criticized due to the fact that it fermented the securitization of international law. Moreover, like the 'war on terror' phraseology that not only tested international law's interpretational limits but also polarized the international community, the same fears are in place also when it comes to the wide use of 'genocide' and 'apartheid' terms.

6.3 The linguistics of international law: Discussing the (inter) disciplinary implications beyond the 'genocide' and 'apartheid' references

[132] Michelle Burgis-Kasthala & Matilde Masetti Placci, Lost for Words, yet Grasping for Neologisms: Gaza, Genocide and the Discursive Limits of International Law, EJIL!Talk, 14 November 2024 available at Lost for Words, yet Grasping for Neologisms: Gaza, Genocide and the Discursive Limits of International Law – EJIL: Talk!

[133] Matilde Silva, The Overuse, Misuse and Need for a Restrictive Application of the Legal Concept of 'Genocide': Lessons from the Russian-Ukrainian and Israeli-Palestinian conflicts, LLM Dissertation, September 2024 at 92 (on file with the author)

The last few years have seen international law exploring its legacy by resorting back in time. Studies in the history of international law have helped unveil not only the Statist origins of modern international law, but also how some of its precepts can be found even in antiquity, for example in the ancient Greek or Roman world.[134] Equally, this historical view of international law, has helped emphasize past injustices that have taken place under the legal coverage of international law, most notably the slave trade and the colonization of continents beyond Europe.

This denouncement of international law's colonialist past has been accompanied with tangible actions, such as the destruction of slave traders statues in England or the emergence of the Black Lives Matter movement.[135] It has further instigated a wider debate-at least in the United Kingdom and the United States-on whether racist or slave trade-engaging facets of their history should be denounced more starkly either through the removal of relevant statues commemorating people engaging in such practices or through the retaining of these statues, adding only further historical information next to the monument on these people's role.[136] One of the arguments put forth in favour of the latter approach, has been that these people, slave-traders or white supremacists, should be judged in light of the era they lived, when slave trade was legal and racism towards Black people was accepted.[137]

This argument shows the perilous way we can be led to if we start interpreting linguistic terms on a relative basis, outside their contextual meaning, as the latter has been shaped throughout history and centuries of usage of the human language. The call thus for a further study of the linguistics of international law in the latter's interpretation and citation is in essence a call for history and human dignity to be respected, in tandem with international

[134] See for example Emiliano Buis, TAMING ARES: WAR, INTERSTATE LAW AND HUMANITARIAN DISCOURSE IN CLASSICAL GREECE (Brill, 2018) 12-15; Victor Alonso, War, Peace and International Law in Ancient Greece in WAR AND PEACE IN THE ANCIENT WORLD (K.A. Raaflaub ed, John Wiley & Sons, 2007) 206 reprinted in THE USE OF FORCE IN INTERNATIONAL LAW (Tarcisio Gazzini & Nicholas Tsagourias eds, 2012) 3; Adriaan Lanni, The Laws of War in Ancient Greece, 26 Law & History Rev. 469 (2008); Gabriel Shoemaker, Ancient Greek Arbitration: Practices, Failures and the Decline of the Greek World, 55 NYU J. Int'l L. & Politics 24 (2023); Arthur Nussbaum, The Significance of Roman Law in the History of International Law, 100 U. Penn. L. Rev. 678 (1952)

[135] Sophie Campbell, Statues are Just the Start-the UK is Peppered with Slavery Heritage, The Conversation, 10 June 2020 available at Statues are just the start – the UK is peppered with slavery heritage; Camilla Turner, The Inside Story of Why Rhodes didn't fall, The Telegraph, 29 May 2021 available at The inside story of why Rhodes didn't fall

[136] Joanna Burch-Brown, Should Slavery's Statues be Preserved? On Transitional Justice and Contested Heritage, 39 J Applied Philosophy 807 (2022)

[137] In Burch-Brown's words, figures may be held 'to unreasonable standards given the social milieu in which they lived'. On this see Burch-Brown, id at 814

law's interdisciplinary potential. Furthermore, this discovery of the role linguistics play in the understanding of international law's concepts in historical depth, does not bring international law only in an internal disciplinary dialogue with its component sub-fields like the history of international law or the psychology of international law. It also promotes the role other disciplines like sociology, religion or international relations play in the understanding of international law. If the latter is a contextual system due to be interpreted in conjunction with a set socio-political background, as cognitive linguistics argue for, then, sociology can shed light on why certain notions are interpreted in a specific way in different periods. Equally, cognizance of the religious milieu at the time a specific international treaty was forged, can provide a better understanding of its provisions or of the treaty as a whole.[138] Finally, the interdisciplinary dialogue with international relations and the various theories the latter endorse, can highlight why world leaders or international bodies have opted to phrase a particular dictum in a certain mode in a given moment.

This whole task is very important since it showcases international law as an integral part of the international system. If humanities and social sciences are needed in order for international law to be understood, as is the case for any linguistic text, then international law is not a closed club of inapplicable set of norms endorsed by the powerful States and not respected by them, phrased in a jargon full of ambiguities and grey zones so that States can easily avoid its implementation. Rather, international law becomes a plausible linguistic enterprise. Just like any other text, also international legal texts are subject to linguistics and the rules the latter sets. In other words, no exclusivity and no elitism is preserved for international law. Whereas this approach is encouraging for international law's legitimacy and acceptance among the non-international law experts, it may cause dismay to international law scholars and States which would presumably like to see international law detached from any linguistical interpretational norms. This is for sure an oxymoron for which international law may not be currently prepared, but which should be aware of.

7. Conclusion

[138] For example see the explicit reference in article 4 of the American Convention on Human Rights of the fact that the right to life is protected 'from the moment of conception', this under the heavy influence of the Catholic Church in order for the fetus to be acknowledged as entitled to the right to life.

The last few years have seen a wide usage in international litigation and rhetoric of two historic international law notions-these of genocide and apartheid-which carry a big emotional and political weight, apart from their legal significance as jus cogens norms. This legal gravity has been further underlined by the fact that the two notions have been invoked-separately or together-in the realms of the two major conflicts that have been in the epicentre of the international community from 2022 and hence-that in Ukraine and the one in the Middle East. By critically discussing the use of these terms on account of the particular conflicts and the relevant cases before the ICJ, the current article attempted to delve into the wider problematic of the usage of language in international law, underpinning the linguistics of international law, a field which has not been adequately explored so far. In that sense, it has demonstrated how any linguistic expansions do not refer only to any wide interpretational quests of existing notions and provisions, but also to the hermeneutic transposal of legal notions outside their natural legal and socio-political context and framework.

Language is a living organism, but there are certain red lines that any good-willed interpreter cannot surpass. These red lines are set by the science of language itself. Along these lines, the current article analysed and discussed frame semantics as the linguistics approach which calls for the embedment of words and phrases into their wider context. To the extent that law still at least uses words and language as its major conduit for conveying its meanings and messages, the need to take such linguistics exigencies into account, is not something that legal scholars should ignore.