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INTRODUCTORY NOTE TO APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (S. AFR. V. ISR.); REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES (I.C.J.)

BY OZLEM ULGEN*

[January 26, 2024; February 16, 2024; March 28, 2024; and May 24, 2024]

Introduction

Genocide is the denial of the right of existence of a human group committed by intentional killing, destruction, or extermination of the group. Prohibited under international law as a *jus cogens* norm, it cannot be derogated from by international agreement or national legislation and imposes obligations *erga omnes*.[1] Genocide is also an international crime, whether committed in time of peace or in time of war.[2] On January 26, 2024, the ICJ delivered a provisional measures order (First PMO) requiring Israel to comply with its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in relation to its military operations in the Gaza Strip.[3] The Court found a plausible risk of Israel committing and/or inciting acts of genocide against Palestinians in the Gaza Strip and demanded, *inter alia*, that it prevent all such acts, in particular killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and imposing measures intended to prevent births within the group.[4]

The deteriorating humanitarian situation—particularly in Rafah, where 1.4 million Palestinians fled and faced starvation—meant that, on February 16, 2024, the Court issued a PMO decision (PMO Decision), the first of its kind in the context of PMOs, not to modify or add new measures to the First PMO but to reaffirm Israel's obligations to comply with the First PMO, including ensuring the safety and security of Palestinians in the Gaza Strip.[5] Worsening conditions of life for Palestinians in the Gaza Strip, in particular the spread of famine and starvation, meant the Court made a second PMO (Second PMO) on March 28, 2024, demanding that Israel take all necessary and effective measures to ensure without delay urgently needed basic services and humanitarian assistance to Palestinians throughout the Gaza Strip.[6] A third PMO (Third PMO), delivered on May 24, 2024, demanded immediate cessation of Israel's offensive in Rafah.[7]

This is the first case before the ICJ in which, prior to substantive proceedings, the Court imposes a series of PMOs in quick succession recognizing the urgent risk of irreparable prejudice to the rights of a people against genocide.[8] The severity of risk escalates to the point where the Court decides the only means to protect these rights is to require immediate cessation of hostilities. South Africa, a party to the Genocide Convention and a state that has endured the crime of apartheid, is bringing the case against Israel by invoking an obligation *erga omnes* (obligation towards all other states of the international community) to prevent genocide and a right to require that acts of genocide discontinue. South Africa claims that, against a background of apartheid, expulsion, ethnic cleansing, annexation, occupation, discrimination, and denial of the right of the Palestinian people to self-determination, Israel has failed to prevent genocide and is engaging in genocidal acts against Palestinians in the Gaza Strip.[9]

Background

On October 7, 2023, Hamas and other armed groups in the Gaza Strip carried out an attack in Israel, killing more than 1,200 people, injuring thousands, and abducting some 240 people and holding them hostage. Israel launched a large-scale military operation in the Gaza Strip by land, sea, and air, causing massive civilian casualties, extensive destruction of civilian infrastructure, and displacement of the overwhelming majority of Palestinians in the Gaza Strip.[10] Despite mounting evidence of civilian casualties, UN agencies warning of the unfolding humanitarian catastrophe, and states calling for an immediate ceasefire, the UN Security Council failed to agree on passing a binding resolution calling for a ceasefire.[11] On October 27, 2023, the UN General Assembly adopted Resolution 10/21 calling for an immediate ceasefire.[12] On December 29, 2023, South Africa filed an application instituting proceedings against Israel before the Court, alleging Israel's violations of its obligations under the Genocide Convention in relation to Palestinians in the Gaza Strip. South Africa also requested the Court to indicate provisional measures to "protect

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against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention, which continue to be violated with impunity" and to "ensure Israel's compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and to punish genocide."[13]

Following the First PMO and PMO Decision, South Africa made a third request on March 6, 2024 for further measures and modification of the First PMO, resulting in the Second PMO. Despite several judges favoring a ceasefire order[14] and the UN Security Council Resolution 2728 (2024), which "demands an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire,"[15] the Court refrained from ordering an immediate ceasefire. Resolution 2728 is legally binding and made pursuant to the Security Council's power to make decisions under Article 25 of the UN Charter, which "Members of the United Nations agree to accept and carry out." The Court's jurisprudence has established that it is not necessary for such a resolution to be adopted under Chapter VII of the UN Charter, which concerns the Security Council's enforcement powers, for it to be legally binding.[16] As a member of the United Nations, Israel is legally obliged to comply with the demand for an immediate ceasefire. Although Hamas is not a member of the United Nations, Resolution 2728 specifically "demands the immediate and unconditional release of all hostages",[17] which can only apply to Hamas, and which therefore means it must also comply with the Resolution. The Court's jurisprudence reflects the binding nature of Security Council resolutions on non-state actors and non-UN members, and when interpreting such resolutions the Court must establish "on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations."[18]

On the same day as the passing of Resolution 2728, the UN Special Rapporteur on the Situation of Human Rights in the Palestinian territories occupied since 1967 released her report, *Anatomy of a Genocide*, concluding that there are reasonable grounds to believe that the threshold indicating Israel's commission of genocide is met, with three specific acts of genocide committed with the requisite intent: killing members of the Palestinian group; causing serious bodily or mental harm to members of the group; and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[19] The Report recommends that states support South Africa to invoke Article 94(2) of the UN Charter to seek further action from the Security Council if Israel does not comply with the Court's Orders.[20]

PMO Requirements and First PMO

The First PMO establishes that the four main requirements for a PMO to be issued (prima facie jurisdiction; standing; rights; and risk of irreparable prejudice and urgency) are satisfied in order to halt the serious risk of irreparable harm and injury to Palestinian rights to protection against genocidal acts and incitement to genocide; access to humanitarian assistance; and preservation of evidence related to genocidal acts and incitement to genocide.

The Court held that it had prima facie jurisdiction under Article IX of the Genocide Convention, with both South Africa and Israel parties to it. With evidence of South Africa's multilateral and bilateral public statements accusing Israel of committing genocidal acts and Israel's public denial of such accusations,[21] the Court considered that a dispute exists between the parties as they hold "clearly opposite views as to whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention."[22] It established that "at least some of the acts or omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention."[23] The Court therefore could not accede to Israel's request that the case be removed from the General List.[24]

The Court noted that obligations contained in the Genocide Convention are obligations owed to all states, *erga omnes partes*, in that each state party has a common interest in their compliance and in invoking the responsibility of another state party for an alleged breach of its obligations *erga omnes partes*.[25] The Court therefore concluded that South Africa had standing to submit its dispute with Israel.[26]

PMOs aim to preserve rights that will be adjudicated upon at the merits stage of a dispute. The Court is not required at this stage to decide whether such rights exist, only that they are plausible. The Court held that "the facts and circumstances mentioned above [paras 45–53] are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible."[27] The facts and circumstances relate to Palestinians constituting a distinct protected group under the Genocide Convention, and that Palestinians of the Gaza Strip form a substantial part of the protected group;[28] large number of deaths and injuries, massive

destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure;[29] the January 5, 2024 statement by the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator; following a mission to North Gaza, the WHO's report on December 21, 2023, that "starvation, destitution and death are evident";[30] the January 13, 2024 statement by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East referring to the "largest displacement of the Palestinian people since 1948," "people live in inhumane conditions, where diseases are spreading ... with the clock ticking fast," and "dehumanising language";[31] examples of statements by senior Israeli officials;[32] and the November 16, 2023 press release by 37 Special Rapporteurs, Independent Experts and members of Working Groups as part of the Special Procedures of the UN Human Rights Council in which they voiced alarm over the "discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials," and on October 27, 2023, the UN Committee on the Elimination of Racial Discrimination's observation that it was "[h]ighly concerned about the sharp increase in racist hate speech and dehumanisation directed at Palestinians since 7 October."[33] The Court held that a link exists between the rights claimed by South Africa and at least some of the provisional measures requested.[34]

At the provisional measures stage, and in line with its jurisprudence, the Court does not have to determine whether genocidal intent exists, which is an element of the crime of genocide under the Genocide Convention.[35] The function of PMOs is to protect the rights of the disputing parties and ensure that these are not prejudiced before a final decision at the merits stage, at which point the Court determines whether all elements of the crime of genocide are satisfied to decide that genocide exists.

The Court must be satisfied that there is an urgent risk of irreparable prejudice to rights claimed before the merits stage of the dispute is decided. Urgent risk means a real and imminent risk of irreparable prejudice to rights, which can occur at any moment. The Court held that the right of Palestinians in the Gaza Strip to be protected from acts of genocide and related prohibited acts under the Genocide Convention, and the right of South Africa to seek Israel's compliance with its obligations under the Convention, were of such a nature that prejudice to them was capable of causing irreparable harm.[36] The Court considered that the civilian population in the Gaza Strip remains "extremely vulnerable," and recalled the deaths, injuries, destruction, and mass displacement caused by the Israeli military operation, and the fact that many Palestinians in the Gaza Strip have no access to basic foodstuffs, potable water, electricity, essential medicines, or heating.[37] The Court considered that the "catastrophic humanitarian crisis in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment,"[38] and concluded that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible before it reaches its final decision.[39]

The First PMO obliges Israel to take all measures within its power to prevent the commission of all acts of genocide; to ensure with immediate effect that its military does not commit such acts; to take all measures within its power to prevent and punish the direct and public incitement to commit genocide; to take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance; and to take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of genocidal acts.[40] These measures were agreed by a majority of either 16–1 or 15–2.[41]

"This Perilous Situation" and the PMO Decision

In the PMO Decision, the Court notes that "the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences', as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024))."[42] The Court refers to "this perilous situation," but does not consider it requires indication of additional provisional measures and instead "demands immediate and effective implementation" of the First PMO. The Court emphasizes that Israel is obliged to comply with its obligations under the Genocide Convention and the First PMO, "including by ensuring the safety and security of the Palestinians in the Gaza Strip." The PMO Decision was communicated to South Africa and Israel by a letter from the Court Registrar, and made public in a Registry press release, which is an unofficial document. Normally, when the Court decides not to modify or add to an existing PMO, it issues another PMO stating that the situation does not demand additional measures and reaffirms the existing

PMO.[43] It may also decide that even when there is a change in the situation, the condition of a risk of irreparable prejudice to rights has not been demonstrated and therefore it cannot modify an existing order.[44]

"Famine is Setting In" and Second PMO

Under Article 76(1) of the Rules of Court, the Court "may . . . modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such . . . modification." To determine whether there is "some change in the situation," the Court must first ascertain, taking into account the facts brought before it, whether there is reason to conclude that the situation has changed since the original PMO was made, and if it has it must then consider whether such a change justifies a modification by the Court.[45] In the *Bosnia Genocide Case*, the Court was reluctant to issue an additional PMO modifying the original order, even with the urgent risk to human life, instead reaffirming that its original order "should be immediately and effectively implemented," then deciding in the main proceedings that there had been non-compliance with the original order and that genocide had been committed.[46]

South Africa's request for additional provisional measures was based on an urgent situation of irreparable harm to the Palestinian right to existence due to suffering starvation and famine. In its response to South Africa's request, Israel recognized that "food insecurity" exists in Gaza, but rejected there are starvation and deaths from malnutrition, or that it is responsible for these through its acts and omissions.[47] It referred to its efforts to facilitate "entry of humanitarian relief consignments," "the establishment of a maritime corridor to allow aid delivery directly to Gaza following security inspections," "establishing a floating pier off the Gaza coast in order to deliver increased amounts of humanitarian aid by sea," and "humanitarian airdrops into Gaza."[48]

The Court recognized that since the First PMO, "the catastrophic living conditions of the Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which [they] have been subjected,"[49] and that they are "no longer facing only a risk of famine . . . but that famine is setting in, with at least 31 people, including 27 children, having already died of malnutrition and dehydration."[50] The Court noted a report from the Integrated Food Security Phase Classification Global Initiative (IPC Global), a global partnership of organizations including, *inter alia*, the World Food Programme, the UN Food and Agriculture Organization, and the World Health Organization, that "Famine is imminent in the northern governorates and projected to occur anytime between mid-March and May 2024."[51] The Court noted the UN Children's Fund reported on March 15, 2024, that "31 per cent of children under 2 years of age in the northern Gaza Strip suffered from acute malnutrition, 'a staggering escalation from 15.6 per cent in January'."[52]

The Court considered that these "exceptionally grave" developments constituted a change in the situation, which entails a "further risk of irreparable prejudice to the plausible rights claimed by South Africa [namely the right of Palestinians in Gaza to be protected from acts of genocide and related prohibited acts under Article III of the Genocide Convention, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention] and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision in the case."[53]

In addition to existing obligations under the First PMO, the Second PMO obliges Israel to take all necessary and effective measures to ensure urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, and hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including increasing the capacity and number of land crossing points and maintaining them open for as long as necessary; and to ensure with immediate effect that its military does not commit acts that constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.[54] These measures were agreed by a majority of either 14–2, unanimously, or 15–1.[55]

The Court also required Israel to submit a report to the Court on all measures taken to give effect to the Second PMO within one month of the date of the Second PMO. South Africa had requested that Israel submit an "open report" to the Court on all measures taken to give effect to all provisional measures ordered by the Court.[56] This would allow public access to Israel's response regarding how it had complied with the orders. The Court required the submission of "a report" rather than an "open report," meaning it will only be disclosed to the Court and South Africa.

"Disastrous" Humanitarian Situation and Third PMO

In the Third PMO, the Court notes a further deterioration in the humanitarian situation in the Gaza Strip since the Second PMO and refers to it as "disastrous." Israeli military bombardments in Rafah, where more than one million Palestinians fled as a result of Israeli evacuation orders covering more than three-quarters of Gaza's entire territory, were followed by an order for 100,000 Palestinians to evacuate the eastern portion of Rafah. According to UN reports, nearly 800,000 people were displaced from Rafah by May 2024.[57] The Court considers that the military offensive in Rafah and "the repeated large-scale displacement of the already extremely vulnerable Palestinian population in the Gaza Strip" constitute a change in situation.[58] It notes warnings from UN officials and agencies that hundreds of thousands of people are at imminent risk of death; that children in Rafah have nowhere safe to go; that one of the last remaining medical facilities in Rafah could no longer function due to ongoing hostilities; and that the World Food Programme could not access a warehouse in Rafah.[59] The Court is not convinced that Israeli efforts to enhance the security of civilians in the Gaza Strip are sufficient to alleviate "the immense risk to which the Palestinian population is exposed as a result of the military offensive in Rafah."[60] It deems that Israel has not provided sufficient information about the safety of the population during the evacuation process or the availability of water, sanitation, food, medicine, and shelter for evacuees.[61] Accordingly, the Court finds that the situation constitutes a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency in the situation.[62]

The Third PMO obliges Israel to immediately halt its military offensive, and any other action in Rafah; maintain the Rafah crossing open for basic services and humanitarian assistance; take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission, or other investigative body mandated by organs of the United Nations to investigate allegations of genocide; and that it should submit a report of all measures taken within one month.[63] Measures in the Third PMO were agreed by a majority of 13–2.[64]

Conclusion

Provisional measures orders are intended to operate as injunctive relief to avert irreparable harm to parties' rights with risks to life and genocide being priority cases. The Court necessarily has to be cognizant of matters unfolding on the ground to be able to assess plausibility of risk and what measures may be needed. Over a period of four months with three provisional measures orders and one provisional measures decision in quick succession, the Court has proved adept at identifying a plausible risk to the right of Palestinians in the Gaza Strip to be protected from acts of genocide. South Africa's right to bring the case against Israel by invoking an obligation *erga omnes* to prevent genocide shows that states have a common interest in seeking, and a responsibility to seek, to enforce international law. An extension of this is the ten states to date that have requested to intervene in the main proceedings of the case.

The PMO Decision represents the first of its kind; neither providing additional obligations for the disputing parties nor completely disregarding the serious effect on the humanitarian crisis and observance of international law of continued non-compliance with the First PMO. The Second PMO's requirement that Israel "ensure" provision of basic services and humanitarian assistance to Palestinians in the Gaza Strip is a notable difference from the First PMO, which required Israel to "enable" such provision. The Second PMO is much more explicit about the depth and breadth of provision needed (food, water, electricity, fuel, shelter, clothing, hygiene and sanitation, medical supplies, and medical care). By the Third PMO, the Court is sufficiently concerned about the real and imminent risk of irreparable harm to Palestinians that it orders a halt to Israel's military offensive and obliges Israel to allow independent investigators to access the Gaza Strip to investigate allegations of genocide. All the PMOs are legally binding and it is for the Court to decide at the merits stage whether Israel has complied or not.

ENDNOTES

1 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. (May 28), 15, 23; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, 1996 I.C.J. Rep. (July 11), 595, ¶ 31; Case Concerning 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. Rep. (Feb. 3), 6, ¶ 64.

2 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, art. I.

3 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of Jan. 26, 2024 [hereinafter First PMO].

4 First PMO, ¶¶ 78, 86(1).

5 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Decision of Feb. 16, 2024, Press release 2024/16, 1 [hereinafter PMO Decision].

6 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of Mar. 28, 2024 [hereinafter Second PMO].

7 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of May 24, 2024 [hereinafter Third PMO].

8 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order, 1993 I.C.J. Rep. (Apr. 8), 3 (genocide against Bosnians) and a second order of September 13, 1993, affirming the first without modification or addition; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures Order, 2021 I.C.J. Rep. (Dec. 7), 361 (racial discrimination of Armenians) and subsequent four orders of Oct. 12, 2022, Feb. 22, 2023, July 6, 2023, Nov. 17, 2023; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures Order, 2011 I.C.J. Rep. (Mar. 8), 6 (territorial incursion and construction of canal) and subsequent two orders of July 16, 2013, Nov. 22, 2013.

9 Application instituting proceedings against the State of Israel concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa), Dec. 29, 2023 [hereinafter South Africa application], ¶ 4.

10 First PMO, ¶ 13.

11 UN Office for the Coordination of Humanitarian Affairs, Hostilities in the Gaza Strip and Israel - reported impact, Day 109 (Jan. 24, 2004); Statement by Martin Griffiths, Under-Secretary for Humanitarian Affairs and Emergency Relied Coordinator, Jan. 5, 2004; World Health Organization, "Lethal combination of hunger and disease to lead to more deaths in Gaza", Dec. 21, 2023; the UN Relief and Works Agency for Palestine Refugees in the Near East, "The Gaza Strip: 100 days of death, destruction and displacement", Statement by Philippe Lazzarini, Commissioner-General, Jan. 13, 2024.

12 UN General Assembly Resolution 10/21 (A/RES/ES-10/21) (Oct. 27, 2023).

13 South Africa application, ¶¶ 115, 145.

14 Second PMO, Joint Declaration of Judges Xue, Brant, Gómez Robledo, and Tladi ¶ 1; Declaration of Judge Charlesworth ¶ 7.

15 UN Security Council Resolution 2728 (S/RES/2728) (Mar. 25, 2024) ¶ 1.

16 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ REP. 1971, 16, ¶ 113.

17 UN Security Council Resolution 2728 (S/RES/2728) (Mar. 25, 2024) ¶ 1.

18 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. (July 22), 403 ¶ 117.

19 Report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian territories occupied since 1967, Anatomy of a Genocide, A/HRC/55/73 (Mar. 25, 2024) [hereinafter Anatomy of a Genocide], ¶¶ 7, 22–45, 93.

20 Anatomy of a Genocide, ¶ 97(b).

21 First PMO, ¶¶ 26–27.

22 *Id.* ¶ 28.

23 *Id.* ¶ 30.

24 *Id.* ¶ 32.

25 *Id.* ¶ 33.

26 *Id.* ¶ 34.

27 *Id.* ¶ 54.

28 *Id.* ¶ 45.

29 *Id.* ¶ 46.

30 *Id.* ¶ 48.

31 *Id.* ¶¶ 49–50.

32 *Id.* ¶¶ 51–52.

33 *Id.* ¶ 53.

34 *Id.* ¶ 59.

35 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures Order, 2020 I.C.J. Rep. (Jan. 23), 23, ¶ 56.

36 First PMO ¶ 66.

37 *Id.* ¶ 70.

38 *Id.* ¶ 72.

39 *Id.* ¶ 74.

40 *Id.* ¶ 86.

41 *See also* Declarations of Judges Xue, Nolte, and Bhandari; Dissenting Opinion of Judge Sebutinde; Separate Opinion of Ad Hoc Judge Barak.

42 PMO Decision.

43 *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures Order 1993, I.C.J. Rep. (Sept. 13), 325, ¶ 59; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures Order, 2022 I.C.J. Rep. (Oct. 12), 578, ¶¶ 19, 23(1) and (2); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures Order, 2023 I.C.J. Rep.

(July 6), ¶¶ 29, 33(1) and (2); Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures Order, 2007 I.C.J. Rep. (Jan. 23), 3, ¶¶ 43, 53, 56.

44 Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures Order, 2013 I.C.J. Rep. (July 16), 230, ¶¶ 35–36, 40(1) and (2).

45 *Id.* ¶ 17.

46 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further Requests for the Indication of Provisional Measures Order, 1993 I.C.J. Rep. (Sept. 13), 325, ¶¶ 52–53, 59, 61; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Judgment, 2007 I.C.J. Rep. (Feb. 26), 43, ¶¶ 471(5) (Serbia's violation of obligation to prevent genocide in Srebrenica), 471(7) (Serbia's non-compliance with the provisional measures order).

47 Observations of the State of Israel on the Request Filed by the Republic of South Africa on 6 March 2024 for the Indication of Additional Provisional Measures and/or the Modification of Measures Previously Indicated, Mar. 15, 2024 [hereinafter Observations of Israel], ¶¶ 19, 37, 50, 53.

48 *Id.* ¶¶ 19, 22, 23, 24 respectively.

49 Second PMO, ¶ 18.

50 *Id.* ¶ 21.

51 *Id.* ¶ 19.

52 *Id.* ¶ 20.

53 *Id.* ¶ 40.

54 *Id.* ¶ 51.

55 *See also* Declarations of Judges Salam, Yusuf, and Charlesworth; Joint Declaration of Judges Xue, Brant, Gómez Robledo, and Tladi; Separate Opinion of Judge Nolte; and Separate Opinion of Ad Hoc Judge Barak.

56 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Urgent Request and Application for the Indication of Additional Provisional Measures and the Modification of the Court's Prior Provisional Measures Decisions Pursuant to Article 41 of the Statute of the International Court of Justice and Articles 75 and 76 of the Rules of Court of the International Court of Justice, 6 March 2024, ¶ 17.

57 Third PMO, ¶ 28.

58 *Id.* ¶ 29.

59 *Id.* ¶¶ 44–45.

60 *Id.* ¶ 46.

61 *Id.*

62 *Id.* ¶ 47.

63 *Id.* ¶ 57.

64 *See also* Dissenting Opinions of Judge Sebutinde and Ad Hoc Judge Barak; Declarations of Judges Nolte, Aurescu, and Tladi.

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APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (S. AFR. V. ISR.) (I.C.J.)*
[January 26, 2024]

26 JANUARY 2024

ORDER

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE DANS LA BANDE DE GAZA

(AFRIQUE DU SUD c. ISRAËL)

26 JANVIER 2024

ORDONNANCE

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TABLE OF CONTENTS

DOI:10.1017/ilm.2024.38

INTERNATIONAL COURT OF JUSTICE

YEAR 2024

2024
26 January
General List
No. 192

26 January 2024

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH, BRANT; *Judges* ad hoc BARAK, MOSENEKE; *Registrar* GAUTIER.

The International Court of Justice, Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

1. On 29 December 2023, the Republic of South Africa (hereinafter "South Africa") filed in the Registry of the Court an Application instituting proceedings against the State of Israel (hereinafter "Israel") concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention").

2. At the end of its Application, South Africa "respectfully requests the Court to adjudge and declare:

(1) that the Republic of South Africa and the State of Israel each have a duty to act in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Palestinian group, to take all reasonable measures within their power to prevent genocide; and

(2) that the State of Israel:

(*a*) has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Article I, read in conjunction with Article II, and Articles III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI;

(*b*) must cease forthwith any acts and measures in breach of those obligations, including such acts or measures which would be capable of killing or continuing to kill Palestinians, or causing or continuing to cause serious bodily or mental harm to Palestinians or deliberately inflicting on their group, or continuing to inflict on their group, conditions of life calculated to bring about its physical destruction in whole or in part, and fully respect its obligations under the Genocide Convention, in particular the obligations provided under Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI;

(*c*) must ensure that persons committing genocide, conspiring to commit genocide, directly and publicly inciting genocide, attempting to commit genocide and complicit in genocide contrary to Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)* and III *(e)* are punished by a competent national or international tribunal, as required by Articles I, IV, V and VI;

(*d*) to that end and in furtherance of those obligations arising under Articles I, IV, V and VI, must collect and conserve evidence and ensure, allow and/or not inhibit directly or indirectly the collection and conservation of evidence of genocidal acts committed against Palestinians in Gaza, including such members of the group displaced from Gaza;

(*e*) must perform the obligations of reparation in the interest of Palestinian victims, including but not limited to allowing the safe and dignified return of forcibly displaced and/or abducted Palestinians to their homes, respect for their full human rights and protection against further discrimination, persecution, and other related acts, and provide for the reconstruction of what it has destroyed in Gaza, consistent with the obligation to prevent genocide under Article I; and

(*f*) must offer assurances and guarantees of non-repetition of violations of the Genocide Convention, in particular the obligations provided under Articles I, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV, V and VI."

3. In its Application, South Africa seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, South Africa asked the Court to indicate the following provisional measures:

(1) The State of Israel shall immediately suspend its military operations in and against Gaza.

(2) The State of Israel shall ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to [in] point (1) above.

(3) The Republic of South Africa and the State of Israel shall each, in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people, take all reasonable measures within their power to prevent genocide.

(4) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people as a group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention, in particular:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to the members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

(*d*) imposing measures intended to prevent births within the group.

(5) The State of Israel shall, pursuant to point (4) *(c)* above, in relation to Palestinians, desist from, and take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent:

(*a*) the expulsion and forced displacement from their homes;

(*b*) the deprivation of:

(i) access to adequate food and water;

(ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;

(iii) medical supplies and assistance; and

(*c*) the destruction of Palestinian life in Gaza.

(6) The State of Israel shall, in relation to Palestinians, ensure that its military, as well as any irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in (4) and (5) above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.

(7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence.

(8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court.

(9) The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

6. The Deputy-Registrar immediately communicated to the Government of Israel the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by South Africa of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute of the Court, the Deputy-Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 3 January 2024.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. South Africa chose Mr Dikgang Ernest Moseneke and Israel Mr Aharon Barak.

9. By letters dated 29 December 2023, the Deputy-Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 11 and 12 January 2024 as the dates for the oral proceedings on the request for the indication of provisional measures.

10. At the public hearings, oral observations on the request for the indication of provisional measures were presented by:

On behalf of South Africa: HE Mr Vusimuzi Madonsela,
HE Mr Ronald Lamola,
Ms Adila Hassim,
Mr Tembeka Ngcukaitobi,
Mr John Dugard,
Mr Max du Plessis,
Ms Blinne Ní Ghrálaigh,
Mr Vaughan Lowe.

On behalf of Israel: Mr Tal Becker,
Mr Malcolm Shaw,
Ms Galit Raguan,
Mr Omri Sender,
Mr Christopher Staker,
Mr Gilad Noam.

11. At the end of its oral observations, South Africa asked the Court to indicate the following provisional measures:

(1) The State of Israel shall immediately suspend its military operations in and against Gaza.

(2) The State of Israel shall ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to [in] point (1) above.

(3) The Republic of South Africa and the State of Israel shall each, in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people, take all reasonable measures within their power to prevent genocide.

(4) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people as a group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention, in particular:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to the members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

(*d*) imposing measures intended to prevent births within the group.

(5) The State of Israel shall, pursuant to point (4) *(c)* above, in relation to Palestinians, desist from, and take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent:

(*a*) the expulsion and forced displacement from their homes;

(*b*) the deprivation of:

(i) access to adequate food and water;

(ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;

(iii) medical supplies and assistance; and

(*c*) the destruction of Palestinian life in Gaza.

(6) The State of Israel shall, in relation to Palestinians, ensure that its military, as well as any irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in (4) and (5) above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.

(7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence.

(8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court, and that such reports shall be published by the Court.

(9) The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

12. At the end of its oral observations, Israel requested the Court to

(1) [r]eject the request for the indication of provisional measures submitted by South Africa; and

(2) [r]emove the case from the General List".

*

* *

I. INTRODUCTION

13. The Court begins by recalling the immediate context in which the present case came before it. On 7 October 2023, Hamas and other armed groups present in the Gaza Strip carried out an attack in Israel, killing more than 1,200 persons, injuring thousands and abducting some 240 people, many of whom continue to be held hostage. Following this attack, Israel launched a large-scale military operation in Gaza, by land, air and sea, which is causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza (see paragraph 46 below). The Court is acutely aware of the extent of the human tragedy that is unfolding in the region and is deeply concerned about the continuing loss of life and human suffering.

14. The ongoing conflict in Gaza has been addressed in the framework of several organs and specialized agencies of the United Nations. In particular, resolutions have been adopted by the General Assembly of the United Nations (see resolution A/RES/ES-10/21 adopted on 27 October 2023 and resolution A/RES/ES-10/22 adopted on 12 December 2023) and by the Security Council (see resolution S/RES/2712 (2023) adopted on 15 November 2023 and resolution S/RES/2720 (2023) adopted on 22 December 2023), referring to many aspects of the conflict. The scope of the present case submitted to the Court, however, is limited, as South Africa has instituted these proceedings under the Genocide Convention.

II. PRIMA FACIE JURISDICTION

1. PRELIMINARY OBSERVATIONS

15. The Court may indicate provisional measures only if the provisions relied on by the applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see *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, I.C.J. Reports 2022 (I)*, pp. 217–218, para. 24).

16. In the present case, South Africa seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. Article IX of Genocide Convention provides:

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

18. South Africa and Israel are parties to the Genocide Convention. Israel deposited its instrument of ratification on 9 March 1950 and South Africa deposited its instrument of accession on 10 December 1998. Neither of the Parties has entered a reservation to Article IX or any other provision of the Convention.

2. EXISTENCE OF A DISPUTE RELATING TO THE INTERPRETATION, APPLICATION OR FULFILMENT OF THE GENOCIDE CONVENTION

19. Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. A dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). To determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *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, I.C.J. Reports 2022 (I)*, pp. 218–219, para. 28).

20. Since South Africa has invoked as the basis of the Court's jurisdiction the compromissory clause of the Genocide Convention, the Court must also ascertain, at the present stage of the proceedings, whether it appears that the acts and omissions complained of by the Applicant are capable of falling within the scope of that convention *ratione materiae* (see *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, I.C.J. Reports 2022 (I)*, p. 219, para. 29).

* *

21. South Africa contends that a dispute exists with Israel relating to the interpretation, application and fulfilment of the Genocide Convention. It asserts that, prior to the filing of its Application, South Africa repeatedly and urgently

voiced its concerns, in public statements and in various multilateral settings, including the United Nations Security Council and General Assembly, that Israel's actions in Gaza amount to genocide against the Palestinian people. In particular, as indicated in a media statement issued on 10 November 2023 by the Department of International Relations and Cooperation of South Africa, the Director General of the Department met with the Ambassador of Israel to South Africa on 9 November 2023 and informed him that, while South Africa "condemned the attacks on civilians by Hamas", it considered Israel's response to the attack of 7 October 2023 to be unlawful and it intended to refer the situation in Palestine to the International Criminal Court, calling for investigation of the leadership of Israel for war crimes, crimes against humanity and genocide. Furthermore, at the resumed 10th emergency special session of the United Nations General Assembly on 12 December 2023, at which Israel was represented, the South African representative to the United Nations stated specifically that "the events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention". The Applicant considers that the dispute between the Parties had already crystallized at that time. According to South Africa, Israel denied the accusation of genocide in a document published by its Ministry of Foreign Affairs on 6 December 2023 and updated on 8 December 2023, entitled "Hamas-Israel Conflict 2023: Frequently Asked Questions", stating in particular that "[t]he accusation of genocide against Israel is not only wholly unfounded as a matter of fact and law, it is morally repugnant". The Applicant also mentions that, on 21 December 2023, the Department of International Relations and Cooperation of South Africa sent a Note Verbale to the Embassy of Israel in Pretoria. It claims that, in this Note Verbale, it reiterated its view that Israel's acts in Gaza amounted to genocide and that South Africa was under an obligation to prevent genocide from being committed. The Applicant states that Israel responded by a Note Verbale dated 27 December 2023. It submits however that Israel, in that Note Verbale, failed to address the issues raised by South Africa.

22. The Applicant further submits that at least some, if not all, of the acts committed by Israel in Gaza, in the wake of the attack of 7 October 2023, fall within the provisions of the Genocide Convention. It alleges that, in contravention of Article I of the Convention, Israel "has perpetrated and is perpetrating genocidal acts identified in Article II" of the Convention and that "Israel, its officials and/or agents, have acted with the intent to destroy Palestinians in Gaza, part of a protected group under the Genocide Convention". The acts in question, according to South Africa, include killing Palestinians in Gaza, causing them serious bodily and mental harm, inflicting on them conditions of life calculated to bring about their physical destruction, and the forcible displacement of people in Gaza. South Africa further alleges that Israel "has . . . failed to prevent or to punish: genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, contrary to Articles III and IV of the Genocide Convention".

*

23. Israel contends that South Africa has failed to demonstrate the prima facie jurisdiction of the Court under Article IX of the Genocide Convention. It first argues that there is no dispute between the Parties because South Africa did not give Israel a reasonable opportunity to respond to the allegations of genocide before South Africa filed its Application. Israel submits that, on the one hand, South Africa's public statements accusing Israel of genocide and the referral of the situation in Palestine to the International Criminal Court and, on the other hand, the document published by the Israeli Ministry of Foreign Affairs, which was not addressed directly or even indirectly to South Africa, are not sufficient to prove the existence of a "positive opposition" of views, as required by the Court's jurisprudence. The Respondent emphasizes that, in the Note Verbale from the Embassy of Israel in Pretoria to the Department of International Relations and Cooperation of South Africa, dated 27 December 2023, in response to South Africa's Note Verbale, dated 21 December 2023, Israel had suggested a meeting between the Parties to discuss the issues raised by South Africa, but argues that this attempt to open a dialogue was ignored by South Africa at the relevant time. Israel considers that South Africa's unilateral assertions against Israel, in the absence of any bilateral interaction between the two States prior to the filing of the Application, do not suffice to establish the existence of a dispute in accordance with Article IX of the Genocide Convention.

24. Israel further argues that the acts complained of by South Africa are not capable of falling within the provisions of the Genocide Convention because the necessary specific intent to destroy, in whole or in part, the Palestinian

people as such has not been proved, even on a prima facie basis. According to Israel, in the aftermath of the atrocities committed on 7 October 2023, facing indiscriminate rocket attacks by Hamas against Israel, it acted with the intention to defend itself, to terminate the threats against it and to rescue the hostages. Israel adds moreover that its practices of mitigating civilian harm and of facilitating humanitarian assistance demonstrate the absence of any genocidal intent. Israel asserts that any careful review of the official decisions in relation to the conflict in Gaza made by the relevant authorities in Israel since the outbreak of the war, in particular the decisions made by the Ministerial Committee on National Security Affairs and the War Cabinet, as well as by the Operations Directorate of the Israel Defense Forces, shows the emphasis placed on the need to avoid harm to civilians and to facilitate humanitarian aid. In its view, it is thus clearly demonstrated that such decisions lacked genocidal intent.

* *

25. The Court recalls that, for the purposes of deciding whether a dispute existed between the Parties at the time of the filing of the Application, it takes into account in particular any statements or documents exchanged between the Parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, its intended or actual addressee and its content. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure (see *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, I.C.J. Reports 2022 (I)*, pp. 220–221, para. 35).

26. The Court notes that South Africa issued public statements in various multilateral and bilateral settings in which it expressed its view that, in light of the nature, scope and extent of Israel's military operations in Gaza, Israel's actions amounted to violations of its obligations under the Genocide Convention. For instance, at the resumed 10th emergency special session of the United Nations General Assembly on 12 December 2023, at which Israel was represented, the South African representative to the United Nations stated that "the events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention". South Africa recalled this statement in its Note Verbale of 21 December 2023 to the Embassy of Israel in Pretoria.

27. The Court notes that Israel dismissed any accusation of genocide in the context of the conflict in Gaza in a document published by the Israeli Ministry of Foreign Affairs on 6 December 2023 which was subsequently updated and reproduced on the website of the Israel Defense Forces on 15 December 2023 under the title "The War Against Hamas: Answering Your Most Pressing Questions", stating that "[t]he accusation of genocide against Israel is not only wholly unfounded as a matter of fact and law, it is morally repugnant". In the document, Israel also stated that "[t]he accusation of genocide . . . is not just legally and factually incoherent, it is obscene" and that there was "no . . . valid basis, in fact or law, for the outrageous charge of genocide".

28. In light of the above, the Court considers that the Parties appear to hold clearly opposite views as to whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention. The Court finds that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

29. As to whether the acts and omissions complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention, the Court recalls that South Africa considers Israel to be responsible for committing genocide in Gaza and for failing to prevent and punish genocidal acts. South Africa contends that Israel has also violated other obligations under the Genocide Convention, including those concerning "conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide".

30. At the present stage of the proceedings, the Court is not required to ascertain whether any violations of Israel's obligations under the Genocide Convention have occurred. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. As already noted (see paragraph 20 above),

at the stage of making an order on a request for the indication of provisional measures, the Court's task is to establish whether the acts and omissions complained of by the applicant appear to be capable of falling within the provisions of the Genocide Convention (cf. *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, I.C.J. Reports 2022 (I)*, p. 222, para. 43). In the Court's view, at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.

3. Conclusion as to prima facie jurisdiction

31. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case.

32. Given the above conclusion, the Court considers that it cannot accede to Israel's request that the case be removed from the General List.

III. Standing of South Africa

33. The Court notes that the Respondent did not challenge the standing of the Applicant in the present proceedings. It recalls that, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* where Article IX of the Genocide Convention was also invoked, it observed that all the States parties to the Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. Such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case. The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Accordingly, the Court found that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 516–517, paras. 107–108 and 112).

34. The Court concludes, prima facie, that South Africa has standing to submit to it the dispute with Israel concerning alleged violations of obligations under the Genocide Convention.

IV. The rights whose protection is sought and the link between such rights and the measures requested

35. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *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, I.C.J. Reports 2022 (I)*, p. 223, para. 50).

36. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which South Africa wishes to see protected exist. It need only decide whether the rights claimed by South Africa, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*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, I.C.J. Reports 2022 (I)*, p. 224, para. 51).

* *

37. South Africa argues that it seeks to protect the rights of the Palestinians in Gaza, as well as its own rights under the Genocide Convention. It refers to the rights of the Palestinians in the Gaza Strip to be protected from acts of genocide, attempted genocide, direct and public incitement to commit genocide, complicity in genocide and conspiracy to commit genocide. The Applicant argues that the Convention prohibits the destruction of a group or part thereof, and states that Palestinians in the Gaza Strip, because of their membership in a group, "are protected by the Convention, as is the group itself". South Africa also argues that it seeks to protect its own right to safeguard compliance with the Genocide Convention. South Africa contends that the rights in question are "at least plausible", since they are "grounded in a possible interpretation" of the Genocide Convention.

38. South Africa submits that the evidence before the Court "shows incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts". It alleges, in particular, the commission of the following acts with genocidal intent: killing, causing serious bodily and mental harm, inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group. According to South Africa, genocidal intent is evident from the way in which Israel's military attack is being conducted, from the clear pattern of conduct of Israel in Gaza and from the statements made by Israeli officials in relation to the military operation in the Gaza Strip. The Applicant also contends that "[t]he intentional failure of the Government of Israel to condemn, prevent and punish such genocidal incitement constitutes in itself a grave violation of the Genocide Convention". South Africa stresses that any stated intention by the Respondent to destroy Hamas does not preclude genocidal intent by Israel towards the whole or part of the Palestinian people in Gaza.

*

39. Israel states that, at the provisional measures stage, the Court must establish that the rights claimed by the parties in a case are plausible, but "[s]imply declaring that claimed rights are plausible is insufficient". According to the Respondent, the Court has also to consider the claims of fact in the relevant context, including the question of the possible breach of the rights claimed.

40. Israel submits that the appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention. It argues that, in situations of urban warfare, civilian casualties may be an unintended consequence of lawful use of force against military objects, and do not constitute genocidal acts. Israel considers that South Africa has misrepresented the facts on the ground and observes that its efforts to mitigate harm when conducting operations and to alleviate hardship and suffering through humanitarian activities in Gaza serve to dispel — or at the very least, militate against — any allegation of genocidal intent. According to the Respondent, the statements of Israeli officials presented by South Africa are "misleading at best" and "not in conformity with government policy". Israel also called attention to its Attorney General's recent announcement that "[a]ny statement calling, inter alia, for intentional harm to civilians . . . may amount to a criminal offense, including the offense of incitement" and that "[c]urrently, several such cases are being examined by Israeli law enforcement authorities". In Israel's view, neither those statements nor its pattern of conduct in the Gaza Strip give rise to a "plausible inference" of genocidal intent. In any event, Israel contends, since the purpose of provisional measures is to preserve the rights of both parties, the Court must, in the present case, consider and "balance" the respective rights of South Africa and Israel. The Respondent emphasizes that it bears the responsibility to protect its citizens, including those captured and held hostage as a result of the attack that took place on 7 October 2023. As a consequence, it claims that its right to self-defence is critical to any evaluation of the present situation.

* *

41. The Court recalls that, in accordance with Article I of the Convention, all States parties thereto have undertaken "to prevent and to punish" the crime of genocide. Article II provides that

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

42. Pursuant to Article III of the Genocide Convention, the following acts are also prohibited by the Convention: conspiracy to commit genocide (Article III, para. *(b)*), direct and public incitement to commit genocide (Article III, para. *(c)*), attempt to commit genocide (Article III, para. *(d)*) and complicity in genocide (Article III, para. *(e)*).

43. The provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. The Court considers that there is a correlation between the rights of members of groups protected under the Genocide Convention, the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 20, para. 52).

44. The Court recalls that, in order for acts to fall within the scope of Article II of the Convention,

> "the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole." (*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 (I)*, p. 126, para. 198.)

45. The Palestinians appear to constitute a distinct "national, ethnical, racial or religious group", and hence a protected group within the meaning of Article II of the Genocide Convention. The Court observes that, according to United Nations sources, the Palestinian population of the Gaza Strip comprises over 2 million people. Palestinians in the Gaza Strip form a substantial part of the protected group.

46. The Court notes that the military operation being conducted by Israel following the attack of 7 October 2023 has resulted in a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure. While figures relating to the Gaza Strip cannot be independently verified, recent information indicates that 25,700 Palestinians have been killed, over 63,000 injuries have been reported, over 360,000 housing units have been destroyed or partially damaged and approximately 1.7 million persons have been internally displaced (see United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Hostilities in the Gaza Strip and Israel — reported impact, Day 109 (24 Jan. 2024)).

47. The Court takes note, in this regard, of the statement made by the United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Mr Martin Griffiths, on 5 January 2024:

> "Gaza has become a place of death and despair.
>
> . . . Families are sleeping in the open as temperatures plummet. Areas where civilians were told to relocate for their safety have come under bombardment. Medical facilities are under relentless attack. The few hospitals that are partially functional are overwhelmed with trauma cases, critically short of all supplies, and inundated by desperate people seeking safety.

> A public health disaster is unfolding. Infectious diseases are spreading in overcrowded shelters as sewers spill over. Some 180 Palestinian women are giving birth daily amidst this chaos. People are facing the highest levels of food insecurity ever recorded. Famine is around the corner.
>
> For children in particular, the past 12 weeks have been traumatic: No food. No water. No school. Nothing but the terrifying sounds of war, day in and day out.
>
> Gaza has simply become uninhabitable. Its people are witnessing daily threats to their very existence — while the world watches on." (OCHA, "UN relief chief: The war in Gaza must end", Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 5 Jan. 2024.)

48. Following a mission to North Gaza, the World Health Organization (WHO) reported that, as of 21 December 2023:

> "An unprecedented 93% of the population in Gaza is facing crisis levels of hunger, with insufficient food and high levels of malnutrition. At least 1 in 4 households are facing 'catastrophic conditions': experiencing an extreme lack of food and starvation and having resorted to selling off their possessions and other extreme measures to afford a simple meal. Starvation, destitution and death are evident." (WHO, "Lethal combination of hunger and disease to lead to more deaths in Gaza", 21 Dec. 2023; see also World Food Programme, "Gaza on the brink as one in four people face extreme hunger", 20 Dec. 2023.)

49. The Court further notes the statement issued by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Mr Philippe Lazzarini, on 13 January 2024:

> "It's been 100 days since the devastating war started, killing and displacing people in Gaza, following the horrific attacks that Hamas and other groups carried out against people in Israel. It's been 100 days of ordeal and anxiety for hostages and their families.
>
> In the past 100 days, sustained bombardment across the Gaza Strip caused the mass displacement of a population that is in a state of flux — constantly uprooted and forced to leave overnight, only to move to places which are just as unsafe. This has been the largest displacement of the Palestinian people since 1948.
>
> This war affected more than 2 million people — the entire population of Gaza. Many will carry lifelong scars, both physical and psychological. The vast majority, including children, are deeply traumatized.
>
> Overcrowded and unsanitary UNRWA shelters have now become 'home' to more than 1.4 million people. They lack everything, from food to hygiene to privacy. People live in inhumane conditions, where diseases are spreading, including among children. They live through the unlivable, with the clock ticking fast towards famine.
>
> The plight of children in Gaza is especially heartbreaking. An entire generation of children is traumatized and will take years to heal. Thousands have been killed, maimed, and orphaned. Hundreds of thousands are deprived of education. Their future is in jeopardy, with far-reaching and long-lasting consequences." (UNRWA, "The Gaza Strip: 100 days of death, destruction and displacement", Statement by Philippe Lazzarini, Commissioner-General of UNRWA, 13 Jan. 2024.)

50. The UNRWA Commissioner-General also stated that the crisis in Gaza is "compounded by dehumanizing language" (UNRWA, "The Gaza Strip: 100 days of death, destruction and displacement", Statement by Philippe Lazzarini, Commissioner-General of UNRWA, 13 Jan. 2024).

51. In this regard, the Court has taken note of a number of statements made by senior Israeli officials. It calls attention, in particular, to the following examples.

52. On 9 October 2023, Mr Yoav Gallant, Defence Minister of Israel, announced that he had ordered a "complete siege" of Gaza City and that there would be "no electricity, no food, no fuel" and that "everything [was] closed". On the following day, Minister Gallant stated, speaking to Israeli troops on the Gaza border:

> "I have released all restraints . . . You saw what we are fighting against. We are fighting human animals. This is the ISIS of Gaza. This is what we are fighting against . . . Gaza won't return to what it was before. There will be no Hamas. We will eliminate everything. If it doesn't take one day, it will take a week, it will take weeks or even months, we will reach all places."

On 12 October 2023, Mr Isaac Herzog, President of Israel, stated, referring to Gaza:

> "We are working, operating militarily according to rules of international law. Unequivocally. It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not aware, not involved. It is absolutely not true. They could have risen up. They could have fought against that evil regime which took over Gaza in a coup d'état. But we are at war. We are at war. We are at war. We are defending our homes. We are protecting our homes. That's the truth. And when a nation protects its home, it fights. And we will fight until we'll break their backbone."

On 13 October 2023, Mr Israel Katz, then Minister of Energy and Infrastructure of Israel, stated on X (formerly Twitter):

> "We will fight the terrorist organization Hamas and destroy it. All the civilian population in [G]aza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world."

53. The Court also takes note of a press release of 16 November 2023, issued by 37 Special Rapporteurs, Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council, in which they voiced alarm over "discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials". In addition, on 27 October 2023, the United Nations Committee on the Elimination of Racial Discrimination observed that it was "[h]ighly concerned about the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October".

54. In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.

55. The Court now turns to the condition of the link between the plausible rights claimed by South Africa and the provisional measures requested.

* *

56. South Africa considers that a link exists between the rights whose protection is sought and the provisional measures it requests. It contends, in particular, that the first six provisional measures were requested to ensure compliance by Israel with its obligations under the Genocide Convention, while the last three are aimed at protecting the integrity of the proceedings before the Court and South Africa's right to have its claim fairly adjudicated.

*

57. Israel considers that the measures requested go beyond what is necessary to protect rights on an interim basis and therefore have no link with the rights sought to be protected. The Respondent contends, *inter alia*, that granting the first and second measures sought by South Africa (see paragraph 11 above) would reverse the Court's case law, as those measures would be "for the protection of a right that could not form the basis of a judgment in exercise of jurisdiction under the Genocide Convention".

* *

58. The Court has already found (see paragraph 54 above) that at least some of the rights asserted by South Africa under the Genocide Convention are plausible.

59. The Court considers that, by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving the plausible rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention. Therefore, a link exists between the rights claimed by South Africa that the Court has found to be plausible, and at least some of the provisional measures requested.

V. RISK OF IRREPARABLE PREJUDICE AND URGENCY

60. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *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, I.C.J. Reports 2022 (I)*, p. 226, para. 65).

61. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*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, I.C.J. Reports 2022 (I)*, p. 227, para. 66). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

62. The Court is not called upon, for the purposes of its decision on the request for the indication of provisional measures, to establish the existence of breaches of obligations under the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under that instrument. As already noted, the Court cannot at this stage make definitive findings of fact (see paragraph 30 above), and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the request for the indication of provisional measures.

* *

63. South Africa submits that there is a clear risk of irreparable prejudice to the rights of the Palestinians in Gaza and to its own rights under the Genocide Convention. It asserts that the Court has repeatedly found that the criterion of irreparable prejudice is satisfied where serious risks arise to human life or other fundamental rights. According to the Applicant, daily statistics stand as clear evidence of urgency and risk of irreparable prejudice, with an average of 247 Palestinians being killed, 629 wounded and 3,900 Palestinian homes damaged or destroyed each day. Moreover, Palestinians in the Gaza Strip are, in the view of South Africa, at

> "immediate risk of death by starvation, dehydration and disease as a result of the ongoing siege by Israel, the destruction of Palestinian towns, the insufficient aid being allowed through to the Palestinian population and the impossibility of distributing this limited aid while bombs fall".

The Applicant further contends that any scaling up by Israel of access of humanitarian relief to Gaza would be no answer to its request for provisional measures. South Africa adds that, "[s]hould [Israel's] violations of the Genocide Convention go unchecked", the opportunity to collect and preserve evidence for the merits stage of the proceedings would be seriously undermined, if not lost entirely.

64. Israel denies that there exists a real and imminent risk of irreparable prejudice in the present case. It contends that it has taken — and continues to take — concrete measures aimed specifically at recognizing and ensuring the

right of the Palestinian civilians in Gaza to exist and has facilitated the provision of humanitarian assistance throughout the Gaza Strip. In this regard, the Respondent observes that, with the assistance of the World Food Programme, a dozen bakeries have recently reopened with the capacity to produce more than 2 million breads a day. Israel also contends that it continues to supply its own water to Gaza by two pipelines, that it facilitates the delivery of bottled water in large quantities, and that it repairs and expands water infrastructure. It further states that access to medical supplies and services has increased and asserts, in particular, that it has facilitated the establishment of six field hospitals and two floating hospitals and that two more hospitals are being built. It also contends that the entry of medical teams into Gaza has been facilitated and that ill and wounded persons are being evacuated through the Rafah border crossing. According to Israel, tents and winter equipment have also been distributed, and the delivery of fuel and cooking gas has been facilitated. Israel further states that, according to a statement by its Defence Minister of 7 January 2024, the scope and intensity of the hostilities was decreasing.

* *

65. The Court recalls that, as underlined in General Assembly resolution 96 (I) of 11 December 1946,

> "[g]enocide 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; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations".
>
> The Court has observed, in particular, that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose", since "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

66. In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the plausible rights in question in these proceedings, namely the right of Palestinians in the Gaza Strip to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention, are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p 26, para. 70).

67. During the ongoing conflict, senior United Nations officials have repeatedly called attention to the risk of further deterioration of conditions in the Gaza Strip. The Court takes note, for instance, of the letter dated 6 December 2023, whereby the Secretary-General of the United Nations brought the following information to the attention of the Security Council:

> "The health-care system in Gaza is collapsing . . . Nowhere is safe in Gaza.
>
> Amid constant bombardment by the Israel Defense Forces, and without shelter or the essentials to survive, I expect public order to completely break down soon due to the desperate conditions, rendering even limited humanitarian assistance impossible. An even worse situation could unfold, including epidemic diseases and increased pressure for mass displacement into neighbouring countries.
>
> . . . . . .
>
> We are facing a severe risk of collapse of the humanitarian system. The situation is fast deteriorating into a catastrophe with potentially irreversible implications for Palestinians as a whole and for peace and security in the region. Such an outcome must be avoided at all costs." (United Nations Security Council, doc. S/2023/962, 6 Dec. 2023.)

68. On 5 January 2024, the Secretary-General wrote again to the Security Council, providing an update on the situation in the Gaza Strip and observing that "[s]adly, devastating levels of death and destruction continue" (Letter dated 5 January 2024 from the Secretary-General addressed to the President of the Security Council, United Nations Security Council, doc. S/2024/26, 8 Jan. 2024).

69. The Court also takes note of the 17 January 2024 statement issued by the UNRWA Commissioner-General upon returning from his fourth visit to the Gaza Strip since the beginning of the current conflict in Gaza: "Every time I visit Gaza, I witness how people have sunk further into despair, with the struggle for survival consuming every hour." (UNRWA, "The Gaza Strip: a struggle for daily survival amid death, exhaustion and despair", Statement by Philippe Lazzarini, Commissioner-General of UNRWA, 17 Jan. 2024.)

70. The Court considers that the civilian population in the Gaza Strip remains extremely vulnerable. It recalls that the military operation conducted by Israel after 7 October 2023 has resulted, *inter alia*, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale (see paragraph 46 above). The Court notes that the operation is ongoing and that the Prime Minister of Israel announced on 18 January 2024 that the war "will take many more long months". At present, many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating.

71. The WHO has estimated that 15 per cent of the women giving birth in the Gaza Strip are likely to experience complications, and indicates that maternal and newborn death rates are expected to increase due to the lack of access to medical care.

72. In these circumstances, the Court considers that the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment.

73. The Court recalls Israel's statement that it has taken certain steps to address and alleviate the conditions faced by the population in the Gaza Strip. The Court further notes that the Attorney General of Israel recently stated that a call for intentional harm to civilians may amount to a criminal offence, including that of incitement, and that several such cases are being examined by Israeli law enforcement authorities. While steps such as these are to be encouraged, they are insufficient to remove the risk that irreparable prejudice will be caused before the Court issues its final decision in the case.

74. In light of the considerations set out above, the Court considers that there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible, before it gives its final decision.

VI. CONCLUSION AND MEASURES TO BE ADOPTED

75. The Court concludes on the basis of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by South Africa that the Court has found to be plausible (see paragraph 54 above).

76. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 28, para. 77).

77. In the present case, having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

78. The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its

power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: *(a)* killing members of the group; *(b)* causing serious bodily or mental harm to members of the group; *(c)* deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and *(d)* imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.

79. The Court is also of the view that Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.

80. The Court further considers that Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.

81. Israel must also take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Genocide Convention against members of the Palestinian group in the Gaza Strip.

82. Regarding the provisional measure requested by South Africa that Israel must submit a report to the Court on all measures taken to give effect to its Order, the Court recalls that it has the power, reflected in Article 78 of the Rules of Court, to request the parties to provide information on any matter connected with the implementation of any provisional measures it has indicated. In view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order. The report so provided shall then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

*

* *

83. The Court recalls that its Orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed (*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, I.C.J. Reports 2022 (I)*, p. 230, para. 84).

*

* *

84. The Court reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of the Republic of South Africa and the State of Israel to submit arguments in respect of those questions.

*

* *

85. The Court deems it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law. It is gravely concerned about the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release.

*

* *

86. For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) By fifteen votes to two,

The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

(*d*) imposing measures intended to prevent births within the group;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Moseneke;
AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barak;

(2) By fifteen votes to two,

The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;
IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Moseneke;
AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barak;

(3) By sixteen votes to one,

The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;
IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judges* ad hoc Barak, Moseneke;
AGAINST: *Judge* Sebutinde;

(4) By sixteen votes to one,

The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;
IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judges* ad hoc Barak, Moseneke;
AGAINST: *Judge* Sebutinde;

(5) By fifteen votes to two,

The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Moseneke;
AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barak;

(6) By fifteen votes to two,

The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.
IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Moseneke;
AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barak.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of January, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of South Africa and the Government of the State of Israel, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge XUE appends a declaration to the Order of the Court; Judge SEBUTINDE appends a dissenting opinion to the Order of the Court; Judges BHANDARI and NOLTE append declarations to the Order of the Court; Judge *ad hoc* BARAK appends a separate opinion to the Order of the Court.

(Initialled) J.E.D

(Initialled) Ph.G.

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Declaration of Judge Xue

1. In the present case, I concur with my colleagues in upholding South Africa's standing, on a prima facie basis, in instituting proceedings against Israel for breach of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). I feel obliged to give a short explanation of my position at this stage.

2. The question of Palestine has been on the agenda of the United Nations since the inception of the Organization. The Palestinian territory is presently under Israel's occupation and control; the Gaza Strip constitutes an integral part of the occupied Palestinian territory. The people of Palestine, including the Palestinians in Gaza, are not yet able to exercise their right to self-determination. In the *Wall* Advisory Opinion, the Court recalled the statement in the General Assembly resolution 57/107 of 3 December 2002 that "the United Nations has a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 49). This responsibility requires that the United Nations, including its principal judicial organ, ensures that the Palestinian people are protected under international law, particularly protected from the gravest crime — genocide.

3. In the past one hundred and nine days, the world was shocked to watch what was unfolding in Gaza. According to United Nations reports, hostilities between Israeli military and Hamas have caused tremendous civilian casualties, unprecedented in history. Following the 7 October massacre and hostage-taking by Hamas, the Israeli military land operation in and air bombardment of Gaza, targeting civilian buildings, hospitals, schools and refugee camps, coupled with the cut-off of food, water, fuel, electricity and telecommunication, and the constant denial of humanitarian assistance from outside, have made Gaza a most dangerous and uninhabitable place. In such a short span of time, it is reported that at least 25,700 Palestinians have been killed, over 63,740 injured, with over 360,000 housing units destroyed or partially damaged and approximately 75 per cent of Gaza's population — 1.7 million people — internally displaced (United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Hostilities in the Gaza Strip and Israel — reported impact, Day 109 (24 Jan. 2024)). Among the victims, most are children and women. The situation in Gaza remains horrendous, catastrophic and devastating. No ceasefire is in sight. According to United Nations reports, the conditions of life in Gaza continue to deteriorate rapidly with catastrophic levels of hunger, a serious shortage of potable water and other essential necessities, a collapsing medical and health system, a looming outbreak of contagious diseases, etc. The gravity of the humanitarian disaster in Gaza threatens the very existence of the people in Gaza and challenges the most elementary principles of morality and humanity.

4. Over sixty years ago, when Ethiopia and Liberia instituted legal proceedings against South Africa for breach of its obligations as the Mandatory Power in South West Africa, the Court rejected the standing of those two applicants for lack of legal interest in the cases. This denial of justice gave rise to strong indignation of the Member States of the United Nations against the Court, severely tarnishing its reputation. The legal issue was further developed in the *Barcelona Traction* case, where the Court recognized that in international law there are certain international obligations owed to the international community as a whole; by the very nature of their importance all States have a legal interest in their protection. They are obligations *erga omnes*. The Court, however, did not touch on the question of standing in that Judgment (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). While the law and practice are still evolving, for a protected group such as the Palestinian people, it is least controversial that the international community has a common interest in its protection. In my view, this is the very type of case where the Court should recognize the legal standing of a State party to the Genocide Convention to institute proceedings on the basis of *erga omnes partes* to invoke the responsibility of another State party for the breach of its obligations under the Genocide Convention.

5. In light of the foregoing considerations and for the reasons contained in the Order of the Court, I agree that the provisional measures indicated in this Order are warranted under the circumstances.

(Signed) XUE Hanqin.

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Dissenting opinion of Judge Sebutinde

In my respectful dissenting opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist — It is not a legal dispute susceptible of judicial settlement by the Court — Some of the preconditions for the indication of provisional measures have not been met — South Africa has not demonstrated, even on a prima facie *basis, that the acts allegedly committed by Israel and of which the Applicant complains, were committed with the necessary genocidal intent, and that as a result, they are capable of falling within the scope of the Genocide Convention — Similarly, since the acts allegedly committed by Israel were not accompanied by a genocidal intent, the Applicant has not demonstrated that the rights it asserts and for which it seeks protection through the indication of provisional measures are plausible under the Genocide Convention — The provisional measures indicated by the Court in this Order are not warranted.*

I. Introduction: context

A. Limited scope of the provisional measures Order

1. Given the unprecedented global interest and public scrutiny in this case, as can be gathered from, *inter alia*, media reports and global demonstrations, the reader of the present Order must be cautious not to assume or conclude that, by indicating provisional measures, the Court has already made a determination that the State of Israel ("Israel") has actually violated its obligations under the Genocide Convention. This is certainly not the case at this stage of the proceedings, since such a finding could only be made at the stage of the examination of the merits in this case (see Order, paragraph 30). Nor must one assume that the Court has definitively determined whether the rights that the Republic of South Africa ("South Africa") asserts, and for which the Applicant seeks protection *pendente lite*, actually exist. At this stage, the Court is only concerned with the preservation through the indication of provisional measures of those rights that the Court may subsequently adjudge to belong to either Party, pending its final decision in the case (see Order, paragraphs 35–36). In this regard, the Court has stated as follows:

> "The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. [The Court] cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, pp. 24–25, para. 66.)

2. Similarly, one should not make the mistaken assumption that the Court has already determined that it has jurisdiction to entertain South Africa's claims on the merits or that it has already found those claims to be admissible. Both of those issues are to be determined at a later phase of the case, after South Africa and Israel have each had an opportunity to submit arguments in relation thereto (see Order, paragraph 84).

B. The Court's jurisdiction is limited to the Genocide Convention and does not extend to grave breaches of international humanitarian law

3. In its Application instituting proceedings before the Court, South Africa invoked, as a basis for the Court's jurisdiction, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") and Article 36, paragraph (1), of the Statute of the Court. Both South Africa and Israel are parties to the Genocide Convention, without reservation (see Order, paragraph 18). Accordingly, for the purposes of the provisional measures Order, the Court's prima facie jurisdiction is limited to the Genocide Convention and does not extend to alleged breaches of international humanitarian law ("IHL"). Thus, while it is not inconceivable that grave violations of international humanitarian law amounting to war crimes or crimes against humanity could

have been committed against the civilian populations both in Israel and in Gaza (a matter over which the Court has no jurisdiction in the present case), such grave violations do not, in and of themselves, constitute "acts of genocide" as defined in Article II of the Genocide Convention, unless it can be demonstrated that they were committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

C. The controversy between Israel and Palestine is historically a political one

4. Furthermore, I am also strongly of the view that the controversy or dispute between the State of Israel and the people of Palestine is essentially and historically a *political or territorial* (and, I dare say, ideological) one. It calls not only for a diplomatic or negotiated settlement, but also for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist. It is my considered opinion that the dispute or controversy is not a legal one calling for judicial settlement by the International Court of Justice. Unfortunately, the failure, reluctance or inability of States to resolve political controversies such as this one through effective diplomacy or negotiations may sometimes lead them to resort to a pretextual invocation of treaties like the Genocide Convention, in a desperate bid to force a case into the context of such a treaty, in order to foster its judicial settlement: rather like the proverbial "Cinderella's glass slipper". In my view, the present case falls in this category, and it is precisely for this, and other reasons articulated in this dissenting opinion, that I have voted against the provisional measures indicated by the Court in operative paragraph 86 of this Order. An appreciation of the historical controversy between the State of Israel and the people of Palestine is a necessary prerequisite to appreciating the context in which the Court is seised with the present case.

II. Political context of the Israeli-Palestinian conflict

5. The United Nations has been heavily involved in the Israeli-Palestinian conflict throughout its history. In 1947, only two years after the founding of the United Nations, the General Assembly recommended a plan of partition regarding the government of the Mandate of Palestine. That plan provided for the creation of two independent States — one Jewish and one Arab — in recognition of the dual rights of self-determination by the Jewish and Arab inhabitants of the land (General Assembly resolution 181 (II) of 29 November 1947). This laid the foundation for the creation of the State of Israel in May 1948. Unfortunately, the rejection of the partition plan by certain Arab leaders and the outbreak of war in 1948 prevented the realization of the laudable goal of two States for two peoples. Since that time, and in particular since the Israeli seizure of the West Bank and Gaza Strip in the 1967 Arab-Israeli war, the United Nations has remained seised of the conflict.

6. In 1967, the Security Council in its resolution 242 affirmed that "the establishment of a just and lasting peace in the Middle East" required the fulfilment of the two interdependent conditions of Israeli withdrawal from territories it had seized in the conflict and recognition of Israel's sovereignty, territorial integrity and "right to live in peace within secure and recognized boundaries free from threats or acts of force" (Security Council resolution 242 of 22 November 1967). In 1973, in resolution 338, which called for a ceasefire in the 1973 Arab-Israeli war, the Security Council again decided that "immediately and concurrently with the ceasefire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East" (Security Council resolution 338 of 22 October 1973). This emphasis on the importance of the Israeli-Palestinian and broader Arab-Israeli peace process was subsequently affirmed by the General Assembly, which has emphasized the need to achieve a "just and comprehensive settlement of the Arab-Israeli conflict" (General Assembly resolution 47/64 (D) of 11 December 1992).

7. The international community's focus on encouraging negotiation between the parties has borne fruit, including the 1979 peace treaty between Israel and Egypt and 1994 peace agreement between Israel and Jordan. Most notably, the 1993 Oslo Accords resulted in the recognition by the Palestinian Liberation Organization ("PLO") of the State of Israel and the recognition by Israel of the PLO as the representative of the Palestinian people. The Declaration of Principles on Interim Self-Government Arrangements, signed by representatives of both parties, endorsed the framework set out in Security Council resolutions 242 and 338 and expressed the parties' agreement on the need to "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace

settlement and historic reconciliation through the agreed political process" (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993). Although the Oslo Accords have not yet been fully implemented, they continue to bind the parties concerned and to provide a framework for allocating responsibilities between Israeli and Palestinian authorities and informing future negotiations.

8. Since that time, the United Nations has repeatedly affirmed the need for negotiations aimed at achieving a two-State solution and resolving the dispute between Israel and Palestine. In 2003, the Security Council, in resolution 1515, "[e]ndorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" (the Quartet was composed of representatives of the United States, European Union, Russian Federation and United Nations) (Security Council resolution 1515 of 19 November 2003). In that resolution, the Security Council "[c]all[ed] on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security" (*ibid.*). Similarly, the Security Council in 2008 declared its support for negotiations between the parties and "support[ed] the parties' agreed principles for the bilateral negotiating process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues" (Security Council resolution 1850 of 16 December 2008). In 2016, the Security Council again recalled both parties' obligations and "[c]alled upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on all final status issues in the Middle East peace process" (Security Council resolution 2334 of 23 December 2016). In this regard, the Security Council "urg[ed] . . . the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving without delay a comprehensive, just and lasting peace in the Middle East" (*ibid.*).

9. The General Assembly has likewise regularly recalled the Oslo Accords and the Quartet Roadmap in its resolutions regarding the Israeli-Palestinian Conflict. For example, the General Assembly has:

> "[r]eiterate[d] its call for the achievement, without delay, of a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, including Security Council resolution 2334 (2016), the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map, and an end to the Israeli occupation that began in 1967, including of East Jerusalem, and reaffirms in this regard its unwavering support, in accordance with international law, for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders". (See General Assembly resolution 77/25 of 6 December 2022; General Assembly resolution 76/10 of 1 December 2021; General Assembly resolution 75/22 of 2 December 2020.)

10. Finally, the Court has itself previously pronounced on the importance of continued negotiations. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explained:

> "Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region." (*Legal Consequences of the*

Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 200–201, para. 162.)

11. As can be seen from the above history, it is clear that a permanent solution to the Israeli- Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. This context must be kept in mind in assessing South Africa's Application and Request for the indication of provisional measures.

III. THE EVENTS OF 7 OCTOBER 2023

12. On 7 October 2023, thousands of members of the *Harakat al-Muqawama al-Islamiya* ("Islamic Resistance Movement" or "Hamas"), a Palestinian Sunni Islamic political and military organization governing the Gaza Strip, invaded the territory of the State of Israel under cover of thousands of rockets fired indiscriminately into Israel and committed massacres, mutilations, rapes and abductions of hundreds of Israeli civilians, including men, women and children. (Israel reports that over 1,200 people were murdered that day, more than 5,500 maimed, and over 240 hostages abducted, including infants, entire families, the elderly, the disabled, as well as Holocaust survivors.) According to Israel, most of the hostages remain in captivity or are simply unaccounted for and many have been tortured, sexually abused, starved or killed while in captivity.

13. Soon after the 7 October attack, Israel, in exercise of what it describes as "its right to defend itself", launched a "military operation" into the Gaza Strip whose objective was, *first*, to defeat Hamas and its network and, *secondly*, to rescue the Israeli hostages. South Africa claims that as a result of the armed conflict that ensued between Israel and Hamas over the past 11 weeks, 1.9 million Palestinians living in Gaza (85 per cent of the population) have been internally displaced; over 22,000 Palestinians, including over 7,729 children, have been killed; over 7,780 are missing and/or presumed dead under the rubble; over 55,243 are severely injured or have suffered mental harm; and vast areas of Gaza, including entire neighbourhoods have been destroyed including 355,000 homes, places of worship, cemeteries, cultural and archaeological sites, hospitals and other critical infrastructure.

14. On 28 December 2023, South Africa filed an Application with the Registry instituting proceedings against Israel concerning alleged violations of the Genocide Convention. South Africa alleges that the acts taken by Israel against the Palestinian people in the wake of the attacks in Israel of 7 October 2023 are genocidal in character because "they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip" (Application, para. 1). In South Africa's view, Israel has violated its obligations under the Genocide Convention in several respects, including by failing to prevent genocide; committing genocide; and failing to prevent or punish the direct and public incitement to genocide. The requests of South Africa are accurately rehearsed in paragraph 2 of the Order.

15. In addition to the Application, South Africa has requested that the Court indicate provisional measures. The provisional measures requested by the Applicant at the end of its oral observations are accurately rehearsed in paragraph 11 of the Order. For its part, Israel, whilst acknowledging that the events of 7 October 2023 and the ensuing war between Hamas and Israel have wracked untold suffering on innocent Israeli and Palestinian civilians, including unprecedented loss of life, protests the Applicant's description of Israel's conduct during this war as "genocide". Israel argues that not every conflict is genocidal, nor does the threat or use of force necessarily constitute an act of genocide within the meaning of Article II of the Genocide Convention. Israel maintains that, in view of the ongoing threat, brutality and lawlessness of Hamas that it continues to face, it has an inherent and legitimate duty to protect the Israeli people and territory, in accordance with international humanitarian law, from attack by an armed group or groups that have openly declared their intention to annihilate the Jewish State. In Israel's view, South Africa's present request for the indication of provisional measures is tantamount to an attempt to deny Israel its ability to meet its legal obligation to defend its citizens, rescue its hostages still in Hamas custody and to enable the over 110,000 internally displaced Israelis to safely return to their homes. In its oral observations, Israel requests the Court to reject South Africa's Request for the indication of provisional measures and to remove the case from the General List.

IV. SOME OF THE CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES HAVE NOT BEEN MET

16. The Court has, through its jurisprudence, progressively developed legal standards or criteria to determine whether it should exercise its power under Article 41 of its Statute to indicate provisional measures. In the present case, the Court should determine (1) whether it has prima facie jurisdiction to entertain the alleged dispute between the Parties (*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, I.C.J. Reports 2022 (I)*, p. 217, para. 24; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, pp. 9–17, paras. 16–42); (2) whether the rights asserted by South Africa are plausible and have a link with the requested measures (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 638, para. 53); and (3) whether the situation is urgent and presents a risk of irreparable prejudice to the rights asserted (*ibid.*, pp. 645–646, paras. 77–78).

A. THERE ARE NO INDICATORS OF A GENOCIDAL INTENT ON THE PART OF ISRAEL

17. I am not convinced that all the above criteria for the indication of provisional measures have been met in the present case. In particular, South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel, and of which the Applicant complains, were committed with the necessary genocidal intent and that, as a result, they are capable of falling within the scope of the Genocide Convention. Similarly, when it comes to the rights that the Applicant asserts and for which South Africa seeks protection through the indication of provisional measures, there is no indication that the acts allegedly committed by Israel were accompanied by a genocidal intent and that, as a result, the rights asserted by the Applicant are plausible under the Genocide Convention. What distinguishes the crime of genocide from other grave violations of international human rights law (including those enumerated in Article II, paragraphs *(a)* to *(d)*, of the Genocide Convention) is the existence of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Accordingly, the acts complained of by South Africa, as well as the rights correlated to those acts, can only be capable of "falling within the scope of the said Convention" if a genocidal intent is present, otherwise such acts simply constitute grave violations of international humanitarian law and not genocide as such.

18. Thus, even at this preliminary stage of provisional measures, the Court should have examined the evidence put before it to determine whether there are indicators of a genocidal intent (even if it is not the only inference to be drawn from the available evidence at this stage), in order for the Court to conclude that the acts complained of by the Applicant are, prima facie, capable of falling within the scope of the Genocide Convention. Similarly, for purposes of determining plausibility of rights, it is not sufficient for the Court to only look at allegations of the grave breaches enumerated in paragraphs *(a)* to *(d)* of Article II of the Convention. The rights must be shown to plausibly derive from the Genocide Convention.

19. In the present case, South Africa claims that at least some of the acts it has complained of are capable of falling within the scope of the Genocide Convention. These include (1) the killing of Palestinians in Gaza (in violation of Article II *(a)*); (2) causing serious bodily or mental harm to the Palestinians in Gaza (in violation of Article II *(b)*); (3) deliberately inflicting upon the Palestinians in Gaza conditions of life calculated to bring about their physical destruction as a group, in whole or in part (in violation of Article II *(c)*); and (4) imposing measures intended to prevent births within the group (in violation of Article II *(d)*). South Africa further claims that Israel has employed methods of war that continue to target infrastructure essential for survival and that have resulted in the destruction of the Palestinian people as a group, including by depriving them of food, water, medical care, shelter, clothing, lack of hygiene, systematic expulsion from homes or displacement (in violation of Article II *(c)*) (see Application, paras. 125–127). South Africa also claims that certain Israeli officials and politicians have, through their statements, publicly incited the Israeli Defense Force ("IDF") to commit genocide (in violation of Article III *(c)*) and that Israel has failed to punish those responsible for the above violations. To demonstrate a genocidal intent, South Africa referred to the "systematic manner" in which Israel's military operation in Gaza is carried out, resulting in the acts enumerated in Article II of the Convention, as well as to statements of various Israeli officials and politicians that, in the

Applicant's view, communicate State policy of Israel and contain genocidal rhetoric against Palestinians in Gaza, including statements by the Israeli Prime Minister, the Deputy Speaker of the Israeli Parliament (Knesset), the Defense Minister, the Minister of Energy and Infrastructure, the Heritage Minister, the President and the Minister for National Security.

20. Israel contests that it is committing acts of genocide in Gaza or that it has a specific intent to destroy, in whole or in part, the Palestinian people, as such. Israel emphasized that its war is not against the Palestinian people as such, but rather is against Hamas, the terrorist organization in control of Gaza that is bent on annihilating the State of Israel. Israel states that the sole objectives of its military operation in Gaza are the rescue of Israeli hostages abducted on 7 October 2023 and the protection of the Israeli people from displacement and from any future attacks by Hamas, including by neutralizing Hamas' command structures and machinery. The Respondent further argues that any genocidal intent alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. Israel also argues that the statements relied upon by South Africa as containing genocidal rhetoric were all taken out of context and in fact were made in reference to Hamas, not the Palestinian people as such. Moreover, Israel argued that any other persons who might have made statements containing genocidal rhetoric were completely outside the policy and decision-making processes of the State of Israel.

21. As stated above, the tragic events of 7 October 2023 as well as the ensuing war in Gaza are symptoms of a more deeply engrained political controversy between the State of Israel and the people of Palestine. Having examined the evidence put forward by each of the Parties, I am not convinced that a prima facie showing of a genocidal intent, by way of indicators, has been made out against Israel. The war was not started by Israel but rather by Hamas who attacked Israel on 7 October 2023 thereby sparking off the military operation in Israel's defence and in a bid to rescue its hostages. I also must agree that any "genocidal intent" alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. A careful examination of Israel's war policy and of the full statements of the responsible government officials further demonstrates the absence of a genocidal intent. Here I must hasten to add that Israel is expected to conduct its military operation in accordance with international humanitarian law but violations of IHL cannot be the subject of these proceedings which are purely pursuant to the Genocide Convention. Unfortunately, the scale of suffering and death experienced in Gaza is exacerbated not by genocidal intent, but rather by several factors, including the tactics of the Hamas organization itself which often entails its forces embedding amongst the civilian population and installations, rendering them vulnerable to legitimate military attack.

22. Regarding the statements of Israeli top officials and politicians that South Africa cited as containing genocidal rhetoric, a careful examination of those statements, read in their proper and full context, shows that South Africa has either placed the quotations out of context or simply misunderstood the statements of those officials. The vast majority of the statements referred to the destruction of Hamas and not the Palestinian people as such. Certain renegade statements by officials who are not charged with prosecuting Israel's military operations were subsequently highly criticized by the Israeli Government itself. More importantly, the official war policy of the Israeli Government, as presented to the Court, contains no indicators of a genocidal intent. In my assessment, there are also no indicators of incitement to commit genocide.

23. In sum, I am not convinced that the acts complained of by the Applicant are capable of falling within the scope of the Genocide Convention, in particular because it has not been shown, even on a prima facie basis, that Israel's conduct in Gaza is accompanied by the necessary genocidal intent. Furthermore, the rights asserted by South Africa are not plausible and the Court should not order the provisional measures requested. But in light of the Court's Order, I will proceed to consider the other criteria required for the indication of provisional measures. This brings me to another criterion which I also find has not been met, namely that there is no link between the rights asserted by South Africa and the provisional measures sought.

B. THERE IS NO LINK BETWEEN THE ASSERTED RIGHTS AND THE PROVISIONAL MEASURES REQUESTED BY SOUTH AFRICA

24. The next issue is the link between the asserted rights and the measures requested. South Africa has requested the Court to indicate nine types of measures: The requested measures can be divided into several categories.

1. First and second measures

25. The first and second requested measures concern Israel's ongoing military operations in Gaza. They would not merely require Israel to cease all alleged acts of genocide under Article II and III of the Convention — but would require the suspension of all military operations in Gaza, regardless of whether Hamas, an organization not party to these proceedings, continues to attack Israel or continues to hold Israeli hostages. In this respect, Israel would be required to unilaterally cease hostilities, a prospect I consider unrealistic. These two requested measures appear overly broad and are not clearly linked with the rights asserted by South Africa. Israel is currently engaged in an armed conflict with Hamas in response to the Hamas attack on Israeli military and civilian targets on 7 October 2023. Israeli military operations that target members of Hamas and other armed groups operating in Gaza — as opposed to conduct intended to cause harm to the civilian populace of Gaza — would not appear to fall within the scope of Israel's obligations under the Genocide Convention. This is particularly the case for Israeli military operations that comply with international humanitarian law. Accordingly, the first and second measures do not appear to have a sufficient link with the asserted rights. A rejection of the first and second requested measures would be consistent with the Court's approach in *Bosnia* v. *Serbia* and *The Gambia* v. *Myanmar,* where the Court indicated provisional measures but, in doing so, did not bar either Serbia or Myanmar from continuing their military operations more generally (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures*, *Order of 8 April 1993, I.C.J. Reports 1993*, p. 24, para. 52; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 30, para. 86). The measures indicated were restricted to the commission of acts of genocide.

2. Third measure

26. Although the Applicant requests this measure to apply to both Parties, it is not clear how South Africa, which is not a party to the conflict in Gaza, would contribute to preserving the rights of Palestinians in Gaza, much less "prevent genocide". In reality this measure would apply only to Israel. That said, to require Israel to "take all reasonable measures within their powers to prevent genocide" in Gaza would simply be to repeat the obligation already incumbent upon Israel and any other State party under the Genocide Convention. This measure appears to be redundant.

3. Fourth and fifth measures

27. The fourth requested measure requires Israel to refrain from specific actions that South Africa considers to be linked with its obligation to desist from committing any of the acts referred to in Article II, paragraphs *(a)* to *(d)* of the Convention. In my view, this measure, like the first and second, in effect requires Israel to unilaterally stop hostilities with Hamas, which is the only way of guaranteeing that none of the acts stipulated take place. However, as previously stated, this measure, when removed from the requirement of a genocidal intent, merely amounts to a requirement for Israel to abide by IHL, rather than by its obligations under the Genocide Convention. Similarly, the Fifth measure, which requires Israel to refrain from deliberately inflicting on Palestinians in Gaza conditions of life calculated to bring about their destruction in whole or in part, outside the context of the requirement of a genocidal intent, is tantamount to requiring Israel to comply with its obligations under IHL, rather than under the Genocide Convention. Thus, while the expulsion and forced displacement of Palestinians in Gaza from their homes could amount to violations of IHL, the Court has previously determined in the *Bosnia Genocide* case that such conduct does not, as such, constitute genocide. The Court explained that

> "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and

> deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement"(*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*, p. 123, para. 190).

However, such forced displacement, or other forms of "ethnic cleansing" may constitute genocide if intended to bring about the physical destruction of the group.

28. Similarly, the deprivation of necessary humanitarian supplies would only constitute genocide if taken with the requisite special intent. As discussed above, I do not consider that such special intent exists in this case. Therefore, such a measure is not warranted. The third component of the fifth measure refers to "the destruction of Palestinian life in Gaza". This requested measure is extremely vague and would appear to essentially fall within the requirement for Israel to refrain from deliberately inflicting conditions of life calculated to bring about the physical destruction of the Palestinian population of Gaza. It is therefore unclear what would be accomplished by separately indicating this measure. Accordingly, the Fourth and Fifth measures appear not to be linked to the rights asserted by the Applicant under the Genocide Convention.

4. Sixth measure

29. The sixth measure is written in such a way that it simply repeats the prohibitions mentioned in the Fourth and Fifth measures and is therefore not linked to rights asserted by South Africa.

5. Seventh measure

30. The seventh requested measure relates to the preservation of evidence. Although the Court found the existence of such a link with respect to a similar measure requested and indicated in *Gambia* v. *Myanmar (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 24, para. 61), in the present case there is no evidentiary basis for concluding that Israel is engaged in the deliberate destruction of evidence relating to genocide. Moreover, to the extent the requested measure concerns the requirement that Israel allow fact-finding missions and other bodies *access to Gaza*, it would appear to go beyond Israel's obligations under the Genocide Convention. As part of its duties to the Court and to South Africa, Israel may only be required to preserve evidence *under its control*. However, a requirement to allow access to Gaza by third parties does not appear linked with South Africa's asserted rights. Notably, the Court rejected a similar request for access by independent monitoring mechanisms made by Canada and the Netherlands in *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023*, paras. 13 and 83).

6. Eighth and ninth measures

31. With respect to the eighth and ninth requested measures, as previously noted by the Court: "the question of their link with the rights for which [the Applicant] seeks protection

> does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance by the Parties with any specific provisional measure indicated by the Court".

As previously observed, this case is complicated by the fact that in the context of an ongoing war with Hamas, which is not a party to these proceedings, it would be unrealistic to put limitations upon one of the belligerent parties but not the other. Israel would justifiably assert its right to defend itself from Hamas, which would most probably "aggravate the situation in Gaza". For all the above reasons, I am of the view that the provisional measures requested by South Africa do not appear to have a link with South Africa's asserted rights, and that this criterion for the indication of provisional measures is also not met.

32. In conclusion, I am not convinced that the rights asserted by South Africa are plausible under the Genocide Convention, in so far as the acts complained of by the Applicant do not appear to fall within the scope of that Convention. While those acts may amount to grave violations of IHL, they are prima facie, not accompanied by the necessary genocidal intent. I also am of the view that the provisional measures requested by South Africa and not linked to the asserted rights. However, I would also like to express my opinion regarding the provisional measures actually indicated by the Court, which in my view are also unwarranted for the reasons stated in this dissenting opinion.

V. THE PROVISIONAL MEASURES INDICATED BY THE COURT ARE NOT WARRANTED

33. In my view, the *First measure* obligating Israel to "take all measures within its power to prevent the commission of all acts within the scope of Article II of [the Genocide] Convention" effectively mirrors the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention and is therefore redundant. The *Second measure* obligating Israel to ensure "with immediate effect that its military does not commit any acts described in point 1 above" also seems redundant as it is either already covered under the first measure or is a mirror of the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention. The *Third measure* obligating Israel to "take all measures within its power to prevent and punish the direct and public incitement to commit genocide" also mirrors the obligation already incumbent upon Israel under Articles I and III of the Genocide Convention and is therefore redundant. The *Fourth measure* obligating Israel to "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip" has no link with any of the rights purportedly claimed under the Genocide Convention. In other words, under that Convention, a State party has no duty to provide or to enable the provision of, humanitarian assistance, as such. There may be an equivalent duty under IHL but not the Genocide Convention. Besides, there is evidence before the Court that the provision of humanitarian assistance is already taking place with the involvement of Israel and other international organizations, notwithstanding the continuing military operation. The evidence also points to an improvement in the provision of basic needs in the affected areas. This measure too seems unnecessary in the circumstances. Regarding the *Fifth measure* obligating Israel to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Articles II and III of the [Genocide] Convention", there does not seem to be any evidentiary basis for assuming that Israel is engaged in the deliberate destruction of evidence as such. Any destruction of infrastructure is not attributable to the deliberate efforts of Israel to destroy evidence but rather to the exigencies of an ongoing conflict with Hamas, which is not a party to these proceedings. It is difficult to envisage how one of the belligerent parties can be expected to unilaterally "prevent the destruction of evidence" while leaving the other one free to carry on unabated. Finally, in respect of the *Sixth measure*, given that the other measures are not warranted, there is no reason for Israel to be required to "submit a report to the Court on all measures taken to give effect to th[e] Order".

34. Lastly, a word about the Israeli hostages that remain in the custody of their captors and their families. I join the majority in expressing the Court's grave concern about the fate of the hostages (including children, babies, women, the elderly and sometimes entire families) still held in custody by Hamas and other armed groups following the attack on Israel of 7 October 2023, and in calling for their "immediate and unconditional release" (See Order, paragraph 85). I would only add the following observation. In its Request for provisional measures, South Africa emphasised that both Parties to these proceedings have a duty to act in accordance with their obligations under the Genocide Convention in relation to the situation in Gaza, leaving one wondering what positive contribution the Applicant could make towards defusing the ongoing conflict there. During the oral proceedings in the present case, it was brought to the attention of the Court that South Africa, and in particular certain organs of government, have enjoyed and continue to enjoy a cordial relationship with the leadership of Hamas. If that is the case, then one would encourage South Africa as a party to these proceedings and to the Genocide Convention, to use whatever influence they might wield, to try and persuade Hamas to immediately and unconditionally release the remaining hostages, as a good will gesture. I have no doubt that such a gesture of good will would go a very long way in defusing the current conflict in Gaza.

VI. CONCLUSION

35. For all the above reasons, I do not believe that the provisional measures indicated by the Court in this Order are warranted and have accordingly voted against them. I reiterate that in my respectful opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist.

(Signed) Julia SEBUTINDE.

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Declaration of Judge Bhandari

Humanitarian situation in Gaza — Present request for the indication of provisional measures — Court not deciding merits — Requirement for the existence of plausible rights — Consideration of factual evidence on the record — Relevance of conduct for plausibility finding.

1. I agree with the Court's reasoning supporting its Order. I make this declaration to add an additional element to this reasoning.

2. First, by way of background, the attacks on civilians in Israel on 7 October 2023 were acts of brutality that must be condemned in the strongest possible terms. It is estimated that 1,200 Israelis lost their lives and 5,500 were wounded and maimed in those attacks.

3. To date, however, more than 25,000 civilians in Gaza have reportedly lost their lives as a result of Israel's military campaign in response to those attacks, many of them women and children. Several thousands are reportedly still missing. Tens of thousands of others have reportedly been injured. Dwellings, businesses and places of worship have been destroyed. It is also reported by United Nations agencies that 26 hospitals and over 200 schools have been damaged. Approximately 85 per cent of Gaza's population has been displaced as a result of the conflict. The situation in Gaza has turned into a humanitarian catastrophe.

4. I note in this connection that, while the present request only concerns the Genocide Convention, other bodies of international law also apply in an armed conflict such as this one, including in particular international humanitarian law.

5. This is an Order granting provisional measures, in accordance with Article 41 (1) of the Statute and the jurisprudence of the Court. According to this provision, "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

6. Needless to say, the case has not been fully argued at this point, nor does the Court have before it anything even approaching a full factual record. For these reasons alone, it is clear that the Court is not, and cannot be, deciding South Africa's actual claims under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), as articulated in paragraph 110 of its Application instituting proceedings (the "Application"). Similarly, the Court is not, at this stage, deciding whether to grant any of the relief South Africa requests in paragraph 111 of its Application.

7. All the Court is doing is rendering a decision on South Africa's Request for the indication of provisional measures (the "Request"), which is a discrete request to the Court. In making a decision on the Request, different legal tests and thresholds apply. These are elementary points, but, in the particular context of this case, they bear repeating. It is against this background that one must read the Court's Order.

8. As part of its decision on whether to grant provisional measures, the Court must, in weighing the plausibility of the rights whose protection is claimed, consider such evidence as is before it at this stage, preliminary though it might be. In particular, it must, in this case, take into account the widespread destruction in Gaza and loss of life that the population of Gaza has thus far endured. Article II of the Genocide Convention provides that an intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" is a constitutive element of genocide as defined under the Convention. Disputes with respect to the meaning of this requirement have, in the past, been before this Court, and the Court's decisions have shed light on the requirements of this provision. According to the Court's jurisprudence, "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question"[1]. However, the Court need not, at a provisional measures stage, make a final determination on the existence of such intent. In its Order of 23 January 2020 indicating provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, the Court stated that,

> "[i]n view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the

> allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent".

It added that "all the facts and circumstances mentioned . . . are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection . . . are plausible"[2].

9. Again, the Court is not at this point deciding whether, in fact, such intent existed or exists. All it is deciding is whether rights under the Genocide Convention are plausible. Here, the widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it — much of which is a matter of public record and has been ongoing since October 2023 — are by themselves capable of supporting a plausibility finding with respect to rights under Article II.

10. Taken together and, bearing in mind the lower standards that apply in respect of provisional measures as opposed to the merits, the evidence on the record at this stage in the proceedings is such that, in the circumstances of this case, the Court was justified in granting provisional measures in the terms it did.

11. Going further, though, all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt and that remaining hostages captured on 7 October 2023 are unconditionally released forthwith.

(Signed) Dalveer BHANDARI.

ENDNOTES

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148.

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 23, para. 56.

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Declaration of Judge Nolte

1. The circumstances of this case are heartbreaking. On 7 October 2023, persons associated with Hamas attacked Israel from the Gaza Strip. They committed atrocities during which more than 1,000 Israelis were killed and over 200 were taken hostage. Rockets continue to be fired into Israel. Israel has responded with a military operation in the Gaza Strip, as a result of which thousands of Palestinian civilians have been killed and wounded, a large majority of the Palestinians living in the Gaza Strip have been displaced, and a large percentage of all buildings for a population of some 2 million people have been destroyed (see paragraph 13 of the Order)[1]. This apocalyptic situation arises from a very complicated political and historical context. Many people around the world hold widely divergent views about who is responsible for the current situation, about various aspects of the larger conflict, and what needs to be done to resolve them.

I.

2. The Court can play only a limited role in the present proceedings. South Africa has brought its Application against Israel based on the Genocide Convention alone. This means that the case concerns, first, only alleged violations of the Genocide Convention and, second, only alleged violations by Israel of that Convention. Thus, the case does not concern possible violations of other rules of international law, such as war crimes, and it does not concern possible violations of the Genocide Convention by persons associated with Hamas. While these limitations may be unsatisfactory, the Court is bound to respect them. I would like to recall, however, that persons associated with Hamas remain responsible for any acts of genocide that they may have committed. Also, both Israel and persons associated with Hamas remain legally responsible for any possible breaches by them of other rules of international law, including international humanitarian law. Any such responsibility can and should be determined through other legal procedures.

3. The Genocide Convention of 1948 is a very special treaty. It was concluded in 1948 in the wake of the Holocaust committed by Nazi Germany against the Jewish people in Europe. In its preamble, the Convention recognizes that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world", and it expresses the commitment of humanity "to liberate mankind from such an odious scourge". For this purpose, Article II of the Convention legally defines the crime of genocide as specific acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". I can understand that Israel, which was established in 1948 as a homeland offering protection to the Jewish people, including against another genocide, strongly rejects allegations that it has now violated the Genocide Convention.

4. However, the Court cannot dismiss South Africa's Application on this ground. By acceding to the Genocide Convention, Israel has accepted the jurisdiction of the Court under Article IX thereof in "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III".

5. The Court is not asked, in the present phase of the proceedings, to determine whether South Africa's allegations of genocide are well founded. At this stage, the Court may only examine whether the circumstances of the present case, as they have been presented to the Court, justify the ordering ("indication") of provisional measures to protect rights under the Genocide Convention which are at risk of being violated before the decision on the merits is rendered. For this examination, the Court need not address many well-known and controversial questions, such as those relating to the right to self-defence and the right of self-determination of peoples, or regarding territorial status. The Court must remain conscious that the Genocide Convention is not designed to regulate armed conflicts as such, even if they are conducted with an excessive use of force and result in mass casualties.

6. The limited scope of the present phase of the proceeding requires a summary assessment by the Court of certain widely divergent claims by the Parties. It is regrettable how much the Parties talked past each other during the oral proceedings. South Africa hardly mentioned the attack of 7 October 2023 and the ensuing massacre; Israel barely mentioned the United Nations reports on the humanitarian situation in the Gaza Strip. South Africa

hardly mentioned the efforts by Israel to evacuate the civilian population from areas of hostilities; Israel did not satisfactorily address highly problematic forms of speech by some of its officials, including members of its military.

7. Facing the widely divergent presentations of the Parties, the Court needs to apply the existing legal standards. The present case is not the first in which a State has asked the Court to indicate provisional measures based on the Genocide Convention. The Court has already indicated such measures more than once, including in 2020 in the case between The Gambia and Myanmar. As extraordinary as the present case may be, the Court has the means to deal with it: its own jurisprudence. The present Order applies the standards developed in that jurisprudence, without, however, identifying relevant differences between this case and previous cases before the Court and specifying the relative importance of certain factors. I therefore wish to explain why I voted in favour of the Order.

II.

8. It is important to bear in mind that "the essential characteristic of genocide", distinguishing it from other criminal acts (e.g. crimes against humanity and war crimes), is the existence of an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[2]. The Court has established a high threshold for the definite determination of genocidal intent at the stage of the merits. In the absence of a "general plan to this effect", the "intent to destroy, in whole or in part, a protected group" can only be inferred from "a pattern of conduct" if this is the "only reasonable inference that can be drawn" therefrom[3].

9. At this stage of the proceedings, the Court is not called upon to determine definitively whether there have been violations of the rights under the Genocide Convention which South Africa wishes to see protected, but only whether these rights are "plausible" and whether there is a "real and imminent risk of irreparable injury" to them before the Court renders its judgment on the merits[4].

10. The jurisprudence of the Court is not entirely clear as to what "plausibility" entails[5]. Recent jurisprudence suggests that any request for the indication of provisional measures must provide some level of evidence supporting its allegations[6], including indications for the presence of any essential mental elements[7]. In the present Order, the Court has noted the importance of the specific genocidal intent without, however, specifying its plausibility in the present case (see paragraphs 44 and 78).

11. Given the crucial role of genocidal intent for rights under the Genocide Convention and for the distinction between genocidal acts and other criminal acts, the plausibility of this mental element is, in my view, indispensable at the provisional measures stage of proceedings involving allegations of genocide. This is confirmed by the Court's Order of 23 January 2020 in *The Gambia* v. *Myanmar*. It is true that the Court stated in paragraph 56 of that Order that

> "[i]n view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent. In the Court's view, all the facts and circumstances mentioned above (see paragraphs 53–55) are sufficient to conclude that the rights . . . are plausible."

12. However, this does not preclude that such intent must be shown to be plausible under the circumstances. Indeed, the same paragraph 56 confirms that the Order must be read as being based on the facts and circumstances referred to in the preceding paragraphs. There, the Court considered detailed reports by the Independent International Fact-Finding Mission on Myanmar[8]. Each of these reports examines at length — and eventually declares plausible — the existence of genocidal intent[9]. In paragraph 55 of the above-mentioned Order, the Court explicitly takes note of the conclusion drawn in the reports that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present". It was based on these findings regarding genocidal intent that the Court considered the rights under the Genocide Convention to be plausible. The Order of 23 January 2020 thus confirms that the existence of genocidal intent must be plausible for the indication of provisional measures based on the Genocide Convention.

13. Bearing these considerations in mind, I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent. The evidence provided by South Africa regarding the Israeli military operation differs fundamentally from that contained in the reports by the United

Nations fact-finding mission on Myanmar's so-called "clearance operation" in 2016 and 2017 which led the Court to adopt its Order of 23 January 2020 in *The Gambia* v. *Myanmar*. These reports provided detailed indications of the involvement of military and security forces in atrocities committed against the Rohingya group[10]. Having considered various other possible inferences from the available information, in particular security considerations[11], the report found that "[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list [of genocidal intent]", concluding "on reasonable grounds, that the factors allowing the inference of genocidal intent are present"[12]. Based on this information, the Court considered that, under the circumstances, the rights of the Rohingya group deriving from Article II *(a)* to *(d)* of the Genocide Convention, as alleged by The Gambia, were plausible.

14. The information provided by South Africa regarding Israel's military operation is not comparable to the evidence before the Court in *The Gambia* v. *Myanmar* in 2020. While the Applicant cannot now be expected to provide the Court with detailed reports of an international fact-finding mission, it is not sufficient for South Africa to point to the terrible death and destruction that Israel's military operation has brought about and is continuing to bring about. The Applicant must be expected to engage not only with the stated purpose of the operation, namely to "destroy Hamas" and to liberate the hostages, but also with other manifest circumstances, such as the calls to the civilian population to evacuate, an official policy and orders to soldiers not to target civilians, the way in which the opposing forces are confronting each other on the ground, as well as the enabling of the delivery of a certain amount of humanitarian aid, all of which may give rise to other plausible inferences from an alleged "pattern of conduct" than genocidal intent. Rather, these measures by Israel, while not conclusive, make it at least plausible that its military operation is not being conducted with genocidal intent. South Africa has not called these underlying circumstances into question and has, in my view, not sufficiently engaged with their implications for the plausibility of the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention.

15. Even though I do not find it plausible that the military operation is being conducted with genocidal intent, I voted in favour of the measures indicated by the Court. To indicate those measures, it is not necessary for the Court to find that the military operation as such implicates plausible rights of Palestinians in the Gaza Strip. My decision to vote in favour of the measures indicated rests on the plausible claim by South Africa that certain statements by Israeli State officials, including members of its military, give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention (see paragraphs 50–52 of the Order). At the present stage of the proceedings, it is not necessary to determine whether such statements should be characterized as acts of "[d]irect and public incitement to commit genocide" within the meaning of Article III *(c)* of the Genocide Convention. It is true that some of these statements can be read as referring exclusively to Hamas and other armed groups in the Gaza Strip. However, these statements are at least highly ambiguous in their use of dehumanizing and indiscriminate language against Palestinians in the Gaza Strip as a group. Since they were made by high-ranking officials, who thereby also addressed soldiers involved in hostilities in the Gaza Strip, I cannot plausibly exclude that such statements contribute to a potential failure by Israel to prevent and punish acts of public and direct incitement to genocide. Indeed, South Africa has provided evidence, not contradicted by Israel, that inflammatory parts of relevant statements have been echoed in a threatening way by members of the Israeli armed forces[13]. This confirms that such statements may contribute to a "serious risk" that acts of genocide other than direct and public incitement may be committed, giving rise to Israel's obligation to prevent genocide[14].

16. Statements by Israel and by United Nations agencies regarding the access of Palestinians in the Gaza Strip to adequate food, water and other forms of humanitarian assistance differ significantly[15]. United Nations agencies claim that there is a desperate lack of food and other goods necessary for the survival of the population[16]. Their statements raise the question whether the Israeli authorities are unjustifiably restricting the delivery of food and other necessary goods to the entire civilian population in the Gaza Strip, or at least to substantial parts of the population[17]. Under the circumstances and at the provisional measures stage, I think that weight must be given to the respective assessments of United Nations agencies regarding the circumstances of the existentially threatening situation of the group of Palestinians in the Gaza Strip. I have therefore also voted in favour of measure (4).

III.

17. South Africa has, in my view, shown that some, but not all, of the rights which it has alleged are plausible at the present preliminary stage of the proceedings (see paragraph 54 of the Order). I view the measures indicated by the

Court today as responding to certain plausible risks for the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention, and as reminding Israel of its obligations under that Convention.

(Signed) Georg NOLTE.

ENDNOTES

1 See United Nations Office for the Coordination of Humanitarian Affairs, "Hostilities in the Gaza Strip and Israel — reported impact, Day 107" (22 January 2024), available at: https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-107. It should be noted that the United Nations adds a disclaimer which reads as follows: "The UN has so far not been able to produce independent, comprehensive, and verified casualty figures; the current numbers have been provided by the Ministry of Health or the Government Media Office in Gaza and the Israeli authorities and await further verification. Other yet-to-be verified figures are also sourced."

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 62 and 64, paras. 132 and 138–139.

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148; see also *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 (I)*, pp. 196–197, para. 373.

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, pp. 27–28, paras. 74–75.

5 K. Oellers-Frahm and A. Zimmermann, "Article 41", in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (3rd ed.), (OUP 2019), pp. 1157–1158.

6 *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, pp. 242–243, para. 45; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 427, para. 54.

7 See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131–132, paras. 75–76.

8 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 22, para. 55, citing United Nations, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/64, 12 September 2018; United Nations, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2, 17 September 2018; and United Nations, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/50, 8 August 2019.

9 See, IIFFMM (12 September 2018), paras. 84–87; IIFFMM (17 September 2018), paras. 1411–1441; IIFFMM (8 August 2019), para. 90. See further FFM report (16 September 2019), paras. 220–225, 238, which was cited in other paragraphs of the Order.

10 UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 1394–1395 and 1406.

11 *Ibid.*, paras. 1434–1438.

12 *Ibid.*, paras. 1440–1441.

13 CR 2024/1, p. 36, para. 21 (Ngcukaitobi).

14 See *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 (I)*, pp. 221–222, para. 431.

15 CR 2024/2, p. 32, para. 41 (Shaw); pp. 46–49, paras. 51–77 (Raguan); pp. 50–52, paras. 9–13 (Sender); Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths' briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, 'Humanitarian aid' (11 January 2024), available at: https://news.un.org/en/story/2024/01/1145422.

16 Letter from the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter (6 December 2023), available at: https://www.un.org/sites/un2.un.org/files/sg_letter_of_6_december_gaza.pdf.

17 Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths' briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, 'Humanitarian aid' (11 January 2024), available at: https://news.un.org/en/story/2024/01/1145422.

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Separate opinion of Judge *Ad Hoc* Barak

1. South Africa came to the Court seeking the immediate suspension of the military operations in the Gaza Strip. It has wrongly sought to impute the crime of Cain to Abel. The Court rejected South Africa's main contention and, instead, adopted measures that recall Israel's existing obligations under the Genocide Convention. The Court has reaffirmed Israel's right to defend its citizens and emphasized the importance of providing humanitarian aid to the population of Gaza. The provisional measures indicated by the Court are thus of a significantly narrower scope than those requested by South Africa.

2. Notably, the Court has emphasized that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law", which certainly includes Hamas. The Court has also stated that it "is gravely concerned about the fate of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release" (see Order, para. 85).

I. Genocide: an autobiographical remark

3. The Genocide Convention holds a very special place in the heart and history of the Jewish people, both within and beyond the State of Israel. The term "genocide" was coined in 1942 by a Jewish lawyer from Poland, Raphael Lemkin, and the impetus for the adoption of the Genocide Convention came from the carefully planned and deliberate murder of six million Jews during the Holocaust.

4. I was five years old when, as part of Operation Barbarossa, the German army occupied the city in which I was born — Kaunas — in Lithuania. Within a few days, almost 30,000 Jews in Kaunas were taken from their homes and put into a ghetto. It was as if we were sentenced to death, awaiting our execution. On 26 October 1941, every Jew in the ghetto was instructed to gather in the central square, known as "Democracy Square". Around 9,000 Jews were taken from the square on that day and executed by machine gun fire.

There was constant hunger in the overcrowded ghetto. But despite all the difficulties, there was an organized community life. It was a community of individuals condemned to death, yet in their hearts there was a spark of hope for life and a desire to preserve basic human dignity.

5. At the beginning of 1944, the Nazis rounded up all children under the age of 12, loaded them onto trucks and shot them during the infamous "Kinder Aktion". It was clear that I had to leave in order to survive. I was smuggled out of the ghetto in a sack and taken to a Lithuanian farmer. A couple of weeks later my mother and I were transferred to another farmer. We had to be very discreet, so the farmer built a double wall in one of the rooms. We hid in that narrow space until we were finally liberated by the Red Army on 1 August 1944. Only five per cent of the Jews of Lithuania had survived.

6. Genocide is more than just a word for me; it represents calculated destruction and human behaviour at its very worst. It is the gravest possible accusation and is deeply intertwined with my personal life experience.

7. I have thought a lot about how this experience has affected me as a judge. In my opinion, the effect has been twofold. First, I am deeply aware of the importance of the existence of the State of Israel. If Israel had existed in 1939, the fate of the Jewish people might have been different. Second, I am a strong believer in human dignity. The Nazis and their collaborators sought to reduce us to dust and ashes. They aimed to strip us of our human dignity. However, in this, they failed. During the most challenging moments in the ghetto, we preserved our humanity and the spirit of humankind. The Nazis succeeded in murdering many of our people, but they could not take away our humanity.

8. The rebirth following the Holocaust is the rebirth of the human being, of the centrality of humanity and of human rights for every person. Many international instruments focusing on the rights of the individual were adopted after 1945, and the protection of human rights is also deeply rooted in the Israeli legal system.

II. Israel's commitment to the rule of law and international humanitarian law

9. Israel is a democracy with a strong legal system and an independent judicial system. Whenever there is tension between national security interests and human rights, the former must be attained without compromising the

protection of the latter. As I have written: "Security and human rights go hand in hand. There is no democracy without security; there is no democracy without human rights. Democracy is based upon a delicate balance between collective security and individual liberty"[1].

10. The need for such balancing has served as a silver lining in the rulings of the Supreme Court of Israel. Once, in the midst of a military operation in Gaza, the Supreme Court ordered the army to repair the water pipes that had been damaged by army tanks, and to do so while the operation was still ongoing. On the same occasion, it ordered the army to provide humanitarian aid to civilians and to halt hostilities to allow for the burial of the dead[2]. In its judgment on "targeted killings", the Supreme Court ruled that Israel must always act in accordance with international humanitarian law, and that Israel must refrain from targeting terrorists when excessive harm to civilians is anticipated[3].

11. As a judge in the Israeli Supreme Court, I wrote that every Israeli soldier carries with him (or her), in their backpack, the rules of international law[4]. This means that international law guides the actions of all Israeli soldiers wherever they are. I also wrote that when a democratic State fights terrorism, it does so with one hand tied behind its back[5]. Even when fighting a terrorist group like Hamas that does not abide by international law, Israel must abide by the law and uphold democratic values.

12. The Israeli Supreme Court has also held that torture may not be used during the interrogation of terrorists[6], that religious sites and clergy must be protected, and that all captives must be afforded fundamental guarantees[7]. Naturally, as in any democratic society, some of these rulings have been criticized in Israel. Still, the public stands behind them and the military upholds them on a regular basis. Rulings of the Israeli Supreme Court — many of them based on international law — are the standards by which Israel conducts itself.

13. International law is also an integral part of the military code and the conduct of the Israeli army. The Code of Ethics of the Israeli Defense Forces states that

> "[a]n IDF soldier will only exercise their power or use their weapon in order to fulfill their mission and only when necessary. They will maintain their humanity during combat and routine times. The soldier will not use their weapon or power to harm uninvolved civilians and prisoners and will do everything in their power to prevent harm to their lives, bodies, dignity and property."[8]

When those norms are violated, the Attorney General, the State Attorney and the Military Advocate General take the necessary measures to bring those responsible to justice, and their decisions are subject to judicial review. In appropriate cases, the Israeli Supreme Court may instruct them how to act. This is Israel's DNA. Governments have been replaced, new justices have come to the Supreme Court, but the DNA of Israel's democracy does not change.

14. Israel's multiple layers of institutional safeguards also include legal advice provided in real time, during hostilities. Strikes that do not meet the definition of a military objective or that do not comply with the rule of proportionality cannot go forward. The holdings of the Israeli Supreme Court and Israel's institutional framework demonstrate a commitment to the rule of law and human life — a commitment that runs through its collective memory, institutions, and traditions.

III. THE COURT'S PRIMA FACIE JURISDICTION

15. The Court has affirmed its prima facie jurisdiction for the purpose of indicating provisional measures (see Order, para. 31). However, it is doubtful whether South Africa brought this dispute in good faith. After South Africa sent a Note Verbale to Israel on 21 December 2023, concerning the situation in Gaza, Israel replied with an offer to engage in consultations at the earliest possible opportunity. South Africa, instead of accepting this offer, which could have led to fruitful diplomatic talks, decided to institute proceedings against Israel before this Court. It is regrettable that Israel's attempt to open a dialogue was met with the filing of an application.

If anything, history has taught us that the best attempts at peace in the Middle East have generally been a result of political negotiations and not judicial recourse. The 1978 peace talks between Egypt and Israel at Camp David are a good example of this. These talks succeeded when a third party — the United States — entered the process and assisted the parties in reaching an agreement. In my opinion, a similar scenario could have unfolded here. While the jurisdictional clause of the Genocide Convention does not require formal negotiations, the principle of good faith dictates

that at least some efforts should be made to resolve disputes amicably before resorting to the Court. South Africa made no such effort and denied Israel a reasonable opportunity to engage meaningfully in a discussion on how to address the difficult humanitarian situation in Gaza.

16. The present case involves an additional difficulty. The other belligerent in the armed conflict in Gaza, Hamas, is not a party to the present proceedings. Thus, it is not possible to indicate measures directed at Hamas in the Order's operative clause. While this does not prevent the Court from exercising its jurisdiction, it is an essential matter to be considered when determining the appropriate measures or remedies in this case.

IV. THE ARMED CONFLICT IN GAZA

17. The Court briefly recalls the immediate context in which the present case came before it, namely the attack of 7 October 2023 by Hamas and the military operation launched by Israel in response to that attack (see Order, para 13). The Court, however, fails to give a complete account of the situation which has unfolded in Gaza since that fateful day.

18. On 7 October 2023, on the day of the Sabbath and the Jewish holiday of "Simchat Torah", over 3,000 Hamas terrorists, aided by members of the Palestinian Islamic Jihad, invaded Israeli territory by land, air and sea. The assault began in the early morning hours, with a barrage of rockets over the entire country and the infiltration of Hamas into Israeli territory. Alerts sounded all over Israel, civilians and soldiers took shelter, and many were later massacred inside those shelters. In other places, houses were burned down with civilians still in their safe rooms, burning alive or suffocating to death. At the Reim Nova Music Festival, young Israelis were murdered in their sleep or while running for their lives across open fields. Women's bodies were mutilated, raped, cut up and shot in the worst possible places. Overall, more than 1,200 innocent civilians, including infants and the elderly, were murdered on that day. Two hundred and forty Israelis were kidnapped and taken to the Gaza Strip, and over 12,000 rockets have been fired at Israel since 7 October. These facts have been largely reported and are indisputable.

19. Israel, faced with an ongoing assault on its people and territory, launched a military operation. The Israeli authorities declared that the purpose of the operation is to dismantle Hamas and destroy its military and governmental capabilities, return the hostages, and secure the protection of Israel's borders.

20. Hamas has vowed to "repeat October 7 again and again"[9]. Hamas is thus an existential threat to the State of Israel, and one that Israel must repel. This terrorist organization rules over the Gaza Strip, exercising military and governmental functions. Hamas seeks to immunize its military apparatus by placing it within and below civilian infrastructure, which is itself a war crime, and intentionally places its own population at risk by digging tunnels under their homes and hospitals. Hamas fires missiles indiscriminately at Israel, including from schools and other civilian installations in Gaza, in the full knowledge that many of them will fall inside Gaza causing death and injuries to innocent Palestinians. This is Hamas's well-known *modus operandi*.

21. A few examples illustrate this well. When humanitarian aid enters Gaza, Hamas hoards it for its own purposes. Hamas has made clear that its tunnel network is designed for its fighters, rather than for civilians seeking shelter from the hostilities. Hamas has compromised the inherently civilian nature of schools and hospitals in Gaza, using them for military purposes by storing or launching rockets from and under these sites.

22. The fate of the hostages is especially disturbing. The act of hostage taking committed by Hamas on 7 October constitutes a grave breach of the Geneva Conventions of 12 August 1949 and is criminalized under the Rome Statute[10]. Hamas has not provided the names of the hostages, or any information regarding who is dead and who is still alive. Nor have they allowed the International Committee of the Red Cross (ICRC) to visit the hostages, as the law requires. The ICRC has not been able to provide medical supplies to the hostages, does not know their whereabouts, and has not succeeded in securing their release. As I write, this agony has now been ongoing for over 100 days.

23. This is not to undermine the suffering of innocent Palestinians. I have been personally and deeply affected by the death and destruction in Gaza. There is a danger of food and water shortages and the outbreak of diseases. The population lives in precarious conditions, facing the unfathomable consequences of war. In the role that has been entrusted to me as a judge *ad hoc,* but also as a human being, it is important for me to express my most sincere and heartfelt regret for the loss of innocent lives in this conflict.

24. The State of Israel was brought before this Court as its leadership, soldiers, and children processed the shock and trauma of the attack of 7 October. An entire nation trembled and, in the blink of an eye, lost its most basic sense of security. Fears of additional attacks were palpable as infiltrations continued in the days following the attack. The immediate context in which South Africa's request was brought to the Court should have played a more central role in the Court's reasoning. While it in no way relieves Israel of its obligations, this immediate context forms the inescapable backdrop for the legal analysis of Israel's actions even at this stage of the proceedings.

V. THE APPROPRIATE LEGAL FRAMEWORK FOR ANALYSING THE SITUATION IN GAZA

25. South Africa seised the Court on the basis of the Genocide Convention, Article IX of which provides the Court with jurisdiction to resolve disputes related to the "interpretation, application or fulfilment" of that treaty, "including those relating to the responsibility of a State for genocide". This does not mean that the Genocide Convention provides the appropriate legal prism through which to analyse the situation.

26. In my view, the appropriate legal framework for analysing the situation in Gaza is International Humanitarian Law (IHL) — and not the Genocide Convention. IHL provides that harm to innocent civilians and civilian infrastructure should not be excessive in comparison to the military advantage anticipated from a strike. The tragic loss of innocent lives is not considered unlawful so long as it falls within the rules and principles of IHL.

27. The drafters of the Genocide Convention clarified in their discussions that

> "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide."[11]

28. Violations of IHL occurring in the context of the armed conflict, must be investigated and prosecuted by the competent Israeli authorities.

VI. LACK OF INTENT

29. Central to the crime of genocide is the element of intent, namely the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group *as such.* International courts have been reluctant to establish such intent and characterize atrocities as genocide. The International Criminal Tribunal for Rwanda (ICTR) was established primarily to prosecute the crime of genocide. Nonetheless, it set a high threshold for proving the *specific intent* required for genocide. In its very first case, the *Akayesu* case, the ICTR described the required specific intent as a "psychological relationship between the physical result and the mental state of the perpetrator" which "demands that the perpetrator clearly seeks to produce the act charged"[12]. This high bar explains some of the full or partial acquittals at the ICTR[13]. An analogous bar was also adopted by the International Criminal Tribunal for Yugoslavia.

30. The Court, with regard to State responsibility, has similarly adopted a restrictive approach in cases involving genocide on the merits. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court concluded that — save in the case of Srebrenica — the widespread and serious atrocities committed in Bosnia and Herzegovina were not carried out with the specific intent to destroy, in part, the Bosnian Muslim group (*Judgment, I.C.J. Reports 2007 (I)*, p. 194, para. 370). Some years later, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court found that the required intent was lacking altogether and therefore dismissed Croatia's claims in their entirety (*Judgment, I.C.J. Reports 2015 (I)*, p. 154, para. 524).

31. I accept that the proof of intent required at this preliminary stage is different from the one required at the merits stage. It is not necessary, at this stage, to convincingly show the *mens rea* of genocide by reference to particular circumstances, or for a pattern of conduct to be such that it could only point to the existence of such intent[14]. However, some proof of intent is necessary. At the very least, sufficient proof to make a claim of genocide plausible.

*

32. I strongly disagree with the Court's approach regarding plausibility and, in particular, I disagree on the question of intent.

33. The Court may indicate provisional measures "only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020,* p. 18, para. 43). In the present case, the Court concluded, with scant evidence, that "the right of the Palestinians in Gaza to be protected from acts of genocide" is plausible (Order, para. 54).

34. To understand the Court's erroneous approach, it is important to compare the present case to the *Gambia* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*. To conclude that the asserted rights were plausible, in the *Gambia* case, the Court relied on two reports issued by an Independent International Fact-Finding Mission (IIFFM)[15]. These reports were based on the meticulous collection of evidence over two years, which included 400 interviews with victims and eyewitnesses, analysis of satellite imagery, photographs and videos, the cross-checking of information against credible secondary information, expert interviews and raw data[16]. The independent experts travelled to Bangladesh, Indonesia, Malaysia and Thailand to interview victims and witnesses and hold other meetings. Furthermore, the Mission's secretariat undertook six additional field missions[17]. In its report of 12 September 2018, the IIFFM concluded that there were "reasonable grounds to conclude that serious crimes under international law ha[d] been committed", including genocide[18]. The IIFFM also stated that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present"[19]. The IIFFM reiterated its conclusions, based on further investigations, in its second report of 8 August 2019.[20]

35. In the present case, there is no evidence comparable to that available to the Court in the *Gambia* case. To determine the plausibility of rights in the present case, the Court relies on four sets of facts. First, it looks at the figures for deaths, injuries and damage to infrastructure reported by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (see Order, para. 46). Second, it relies on a statement made by the Under-Secretary-General of OCHA (see Order, para. 47), a report of the World Health Organization (see Order, para. 48), and a statement by the Commissioner-General of UNRWA (see Order, para. 49). Third, it notes the statements of three Israeli officials (see Order, para. 52). Fourth, it considers the views expressed by a group of Special Rapporteurs and the CERD Committee (see Order, para. 53).

36. Regarding the figures for death, injuries and damage to infrastructure, the Court omits to mention that such figures come from the Ministry of Health of Gaza, which is controlled by Hamas. They are not the United Nations' figures. Furthermore, these figures do not distinguish between civilians and combatants, or between military objectives and civilian objects. It is difficult to draw any conclusions from them.

The statements by the Under-Secretary-General of OCHA, the WHO and the Commissioner-General of UNRWA are insufficient to prove plausible intent. None of these statements mention the term genocide or point to any trace of intent. They indeed describe a tragic humanitarian situation, which is the unfortunate result of an armed conflict, but there is no reference to the subject-matter of the Genocide Convention. Furthermore, the Court is unaware of the underlying information or methodology used by the individuals who made these statements. This is in stark contrast to the evidence available to the Court in the *Gambia* case.

The declarations made by the President of Israel and the Minister of Defence of Israel are not a sufficient factual basis for inferring a plausible intent of genocide. Both authorities have issued several statements clarifying that Israel's intent is the destruction of Hamas, not the Palestinians in Gaza. For example, on 29 October 2023, Israel's Minister of Defence, stated that "we are not fighting the Palestinian multitude and the Palestinian people in Gaza". On 29 November 2023, the President of Israel said that "Israel is doing all it can, in cooperation with various partners, to increase the flow of humanitarian aid to the citizens of Gaza". Regretfully, the Court did not take note of these statements. Finally, regarding the statements made by the Minister of Energy and Infrastructure, the latter is not an official with authority over the military. The relevant factual basis allowing for an inference of intent to commit genocide must stem from the organs which are capable of having an effect on the military operations.

These organs have repeatedly explained that the purpose of the military operation is to target Hamas, not the Palestinians in Gaza.

37. It is concerning that certain Israeli officials have used inappropriate and degrading language, as noted by the group of Special Rapporteurs and the CERD Committee. Indeed, it is an issue that will have to be investigated by the competent Israeli authorities. However, to infer an intent to commit genocide from these statements, which were made in the wake of horrific attacks against the Israeli population, is plainly implausible.

38. The evidence presented by Israel shows that it is the opposite intent that is plausible and guides the military operation in Gaza. Israel pointed out that it has adopted several measures to minimize the impact of hostilities on civilians. For example, Israel continues to supply its own water to Gaza by two pipelines; it has increased access to medical supplies, facilitated the establishment of field hospitals and distributed fuel and winter equipment (see Order, para. 64, referring to CR 2024/2, pp. 50–52). Furthermore, the Prime Minister of Israel stated on 17 October 2023 "[a]ny civilian death is a tragedy . . . we're doing everything we can to get the civilians out of harm's way," and on 28 October 2023 that "the IDF is doing everything possible to avoid harming those not involved".

39. It is surprising that the Court took note of Israel's statements explaining the steps it has taken to alleviate the conditions faced by the population in Gaza, together with the Attorney General's statement announcing the investigation of any calls for the intentional harm to civilians (see Order, para. 73), but then it completely failed to draw conclusions from these statements when examining the existence of intent. It is even more surprising that the Court did not view any of these measures and statements as sufficient to rule out the existence of a plausible intent to commit genocide.

40. The Court's approach to plausibility in the present case is not akin to the one it took in the *Gambia* case, where the Court had compelling evidence of "clearance operations" committed against the Rohingya. These "clearance operations" included sexual violence, torture, the methodical planning of mass killing, denial of legal status, and instigation of hatred based on ethnic, racial, or religious grounds[21].

41. It is concerning that applying the Genocide Convention in these circumstances would undermine the integrity of the Convention and dilute the concept of genocide. The Genocide Convention seeks to prevent and punish the physical destruction of a group *as such*. It is not meant to ban armed conflict altogether. The Court's approach opens the door for States to misuse the Genocide Convention in order to curtail the right of self-defence, in particular in the context of attacks committed by terrorist groups.

VII. THE MEASURES INDICATED BY THE COURT

42. I now turn to the measures indicated by the Court. It is important to recall that the Court has not made any findings with regard to South Africa's claims under the Genocide Convention. The conclusions reached by the Court in this preliminary stage do not prejudge in any way the claims brought by South Africa, which remain wholly unproven (see Order, paras. 30 and 62).

43. Regarding the conditions for the Court to indicate provisional measures, for the reasons stated above, I am not persuaded by South Africa's arguments on the plausibility of rights, since there is no indication of an intent to commit genocide. This is why I voted against the first and second provisional measures indicated by the Court. Nevertheless, it is of the utmost importance to highlight that the first and second measures indicated by the Court merely restate obligations that Israel already has under Articles I and II of the Genocide Convention. The Court has made explicit what is already implicit in light of Israel's existing obligations under the Convention.

44. Although I am convinced that there is no plausibility of genocide, I voted in favour of the third and fourth provisional measures.

With regard to the third measure, which concerns acts of public incitement, I have voted in favour in the hope that the measure will help to decrease tensions and discourage damaging rhetoric. I have noted the concerning statements by some authorities, which I am confident will be dealt with by the Israeli institutions.

With regard to the fourth measure, I voted in favour, guided by my deep humanitarian convictions and the hope that this will alleviate the consequences of the armed conflict for the most vulnerable. Through this measure, the Court

reminds Israel of essential international obligations, which are already present in the DNA of the Israeli military. This measure will ensure that Israel continues to enable the delivery of humanitarian aid to Gaza, which I see as an obligation arising under IHL.

45. However, it is regretful that the Court was unable to order South Africa to take measures to protect the rights of the hostages and to facilitate their release by Hamas. These measures are based on IHL, as are those enabling the provision of humanitarian aid. Moreover, the fate of the hostages is an integral part of the military operation in Gaza. By taking measures to facilitate the release of the hostages, South Africa could play a positive role in bringing the conflict to an end.

46. I voted against the fifth provisional measure, which concerns the preservation of evidence. I did not vote against this measure because evidence is not important, but because South Africa has not shown that Israel has destroyed or concealed evidence. This claim is baseless and therefore should not have been entertained by the Court.

*

47. Genocide is a shadow over the history of the Jewish people, and it is intertwined with my own personal experience. The idea that Israel is now accused of committing genocide is very hard for me personally, as a genocide survivor deeply aware of Israel's commitment to the rule of law as a Jewish and democratic State. Throughout my life, I have worked tirelessly to ensure that the object and purpose of the Genocide Convention is realized in practice; and I have fought to make sure that genocide disappears from our lives.

48. Had the Court granted South Africa's request to put an immediate end to the military operation in Gaza, Israel would have been left defenceless in the face of a brutal assault, unable to fulfil its most basic duties vis-à-vis its citizens. It would have amounted to tying both of Israel's hands, denying it the ability to fight even in accordance with international law. Meanwhile, the hands of Hamas would have been free to continue harming Israelis and Palestinians alike.

49. It is with great respect that I have joined this Court as an *ad hoc* judge. I was appointed by Israel; I am not an agent of Israel. My compass is the search for morality, truth and justice. It is to protect these values that Israel's daughters and sons have selflessly paid with their lives and dreams, in a war that Israel did not choose.

(Signed) Aharon BARAK.

ENDNOTES

1 Aharon Barak, "International Humanitarian Law and the Israeli Supreme Court" (2014), *Israel Law Review*, Vol. 47, para. 185.

2 HCJ 4764/04 *Physicians for Human Rights* v. *IDF Commander in Gaza* (2004).

3 HCJ 769/02 *Public Committee against Torture in Israel* v. *Government of Israel* (2005) (*Targeted Killings*).

4 HCJ 393/82 *Jam'iat Iscan Al-Ma'almoun* v. *IDF Commander in the Judea and Samaria Area* (1983).

5 HCK 769/02 *The Public Committee against Torture in Israel* v. *The Government of Israel* (2006).

6 HCJ 5100/94 *Public Committee Against Torture in Israel* v. *Government of Israel* (1999) (*Interrogations*).

7 HCJ 3278/02 *Center for Defence of the Individual Founded by Dr Lotta Salzerberger* v. *Commander of IDF Forces in the West Bank* (2002).

8 Israeli Defense Forces, Code of Ethics, Additional Values, Purity of Arms.

9 See "Hamas Official Ghazi Hamad: We Will Repeat the October 7 Attack Time and Again Until Israel Is Annihilated; We Are Victims - Everything We Do Is Justified #Hamas #Gaza #Palestinians https://t.co/kXu3U0BtAP" / X (twitter.com).

10 Rome Statute, Articles 2 *(a)* (viii) and 2 *(c)* (iii).

11 UN Economic and Social Council, Draft Convention on the Crime of Genocide, Section II: Comments Article by Article, E/447 (17 June 1947), reproduced in Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008), p. 231.

12 ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 518.

13 Of the 75 defendants whose trials were concluded before the ICTR, 14 were acquitted of all charges and several others were acquitted of genocide charges, often due to the difficulty of proving the required specific intent. See, e.g., ICTR-99-50-A, Appeal Judgement, 4 February 2013, para.

91; ICTR-99-52-A, Appeal Judgment, 28 November 2007, para. 912.

14 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148.

15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020,* p. 22, para. 55.

16 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 37.

17 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 37.

18 See United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, paras. 83 and 84–87.

19 United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441.

20 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/50, 8 August 2019, para. 18.

21 See United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, paras. 27, 52; United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 458–748, 1140.

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DECISION OF THE COURT ON SOUTH AFRICA'S REQUEST FOR ADDITIONAL PROVISIONAL MEASURES (S. AFR. V. ISR.) (I.C.J.)*

[February 16, 2024]

INTERNATIONAL COURT OF JUSTICE
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Press Release
Unofficial

No. 2024/16

16 February 2024

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)

Decision of the Court on South Africa's request for additional provisional measures

THE HAGUE, 16 February 2024. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, the Court, having duly considered South Africa's letter dated 12 February 2024 and Israel's observations thereon received on 15 February 2024, took the following decision, which was communicated to the Parties today by a letter from the Registrar:

> "The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences', as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).
>
> This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures.
>
> The Court emphasizes that the State of Israel remains bound to fully comply with its obligations under the Genocide Convention and with the said Order, including by ensuring the safety and security of the Palestinians in the Gaza Strip."

*This text was reproduced and reformatted from the text available at the International Court of Justice website (visited November 6, 2024), https://www.icj-cij.org/case/192.

History of the proceedings

On 29 December 2023, South Africa filed an Application instituting proceedings against Israel concerning alleged violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") in relation to Palestinians in the Gaza Strip.

The Application also contained a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court. The Applicant requested the Court to indicate provisional measures in order to "protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention" and "to ensure Israel's compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and to punish genocide".

Pursuant to Article 74 of the Rules of Court, "[a] request for the indication of provisional measures shall have priority over all other cases".

Public hearings on the request for the indication of provisional measures submitted by South Africa were held on Thursday 11 and Friday 12 January. On 26 January 2024, the Court delivered its Order on South Africa's request.

Earlier press releases relating to this case are available on the Court's website.

Note: The Court's press releases are prepared by its Registry for information purposes only and do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. The seat of the Court is at the Peace Palace in The Hague (Netherlands). The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States; and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.

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APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (S. AFR. V. ISR.) PROVISIONAL MEASURES ORDER (I.C.J.)*

[March 28, 2024]

28 MARS 2024
ORDONNANCE

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE DANS LA BANDE DE GAZA

(AFRIQUE DU SUD c. ISRAËL)

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

28 MARCH 2024
ORDER

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TABLE OF CONTENTS

DOI:10.1017/ilm.2024.38

INTERNATIONAL COURT OF JUSTICE

YEAR 2024

2024
28 March
General List
No. 192

28 March 2024

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

REQUEST FOR THE MODIFICATION OF THE ORDER OF 26 JANUARY 2024 INDICATING PROVISIONAL MEASURES

ORDER

Present: *President* SALAM; *Vice-President* SEBUTINDE; *Judges* TOMKA, ABRAHAM, YUSUF, XUE, BHANDARI, IWASAWA, NOLTE, CHARLESWORTH, BRANT, GÓMEZ ROBLEDO, CLEVELAND, AURESCU, TLADI; *Judge* ad hoc BARAK; *Registrar* GAUTIER.

The International Court of Justice, Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

1. On 29 December 2023, the Republic of South Africa (hereinafter "South Africa") filed in the Registry of the Court an Application instituting proceedings against the State of Israel (hereinafter "Israel") concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention").

2. In its Application, South Africa seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

3. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. Since at the time of the filing of the Application the Court included upon the Bench no judge of the nationality of either of the Parties, each Party availed itself of its right under Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. South Africa chose Mr Dikgang Ernest Moseneke and Israel chose Mr Aharon Barak. Following the

election to the Court, with effect from 6 February 2024, of Judge Dire Tladi, a South African national, Mr Moseneke ceased to sit as judge *ad hoc* in the case, in accordance with Article 35, paragraph 6, of the Rules of Court.

5. After hearing the Parties, the Court, by an Order of 26 January 2024, indicated the following provisional measures:

> (1) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:
>
> (*a*) killing members of the group;
>
> (*b*) causing serious bodily or mental harm to members of the group;
>
> (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
>
> (*d*) imposing measures intended to prevent births within the group;
>
> (2) The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;
>
> (3) The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;
>
> (4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;
>
> (5) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;
>
> (6) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order."

6. By a communication dated 12 February 2024, South Africa, referring to "the developing circumstances in Rafah", called upon the Court urgently to exercise its power under Article 75, paragraph 1, of the Rules of Court. By a letter dated 15 February 2024, Israel provided its observations on South Africa's communication.

7. By letters dated 16 February 2024, the Registrar transmitted to the Parties the following decision of the Court in response to South Africa's communication:

> "The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences', as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).
>
> This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures.
>
> The Court emphasizes that the State of Israel remains bound to fully comply with its obligations under the Genocide Convention and with the said Order, including by ensuring the safety and security of the Palestinians in the Gaza Strip."

8. On 26 February 2024, Israel submitted, within the time-limit fixed for that purpose, a report on all measures taken to give effect to the Court's Order on the indication of provisional measures of 26 January 2024,

pursuant to paragraph 86, subparagraph 6, thereof. South Africa presented its observations on that report on 11 March 2024.

9. On 6 March 2024, South Africa requested the Court "to indicate further provisional measures and/or to modify its provisional measures indicated on 26 January 2024", with reference to Article 41 of the Statute of the Court, as well as Articles 75, paragraphs 1 and 3, and 76 of the Rules of Court (hereinafter the "Request of 6 March 2024"). The Deputy-Registrar immediately communicated a copy of South Africa's request to the Government of Israel. By a subsequent communication, the Registrar informed the Respondent that 15 March 2024 had been fixed as the time-limit within which it could present written observations regarding that request.

10. On 15 March 2024, Israel provided its written observations on the Request of 6 March 2024.

*

* *

I. General observations

11. South Africa requests the "indication, clarification and/or modification" of provisional measures in the following terms:

> 1. All participants in the conflict must ensure that all fighting and hostilities come to an immediate halt, and that all hostages and detainees are released immediately.
>
> 2. All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must, forthwith, take all measures necessary to comply with all of their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> 3. All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must, forthwith, refrain from any action, and in particular any armed action or support thereof, which might prejudice the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts, or any other rights in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve.
>
> 4. The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address famine and starvation and the adverse conditions of life faced by Palestinians in Gaza, by:
>
> (*a*) immediately suspending its military operations in Gaza;
>
> (*b*) lifting its blockade of Gaza;
>
> (*c*) rescinding all other existing measures and practices that directly or indirectly have the effect of obstructing the access of Palestinians in Gaza to humanitarian assistance and basic services; and
>
> (*d*) ensuring the provision of adequate and sufficient food, water, fuel, shelter, clothing, hygiene and sanitation requirements, alongside medical assistance, including medical supplies and support.
>
> 5. The State of Israel shall submit an open report to the Court on all measures taken to give effect to all provisional measures ordered by the Court to date, within one month as from the date of this Order."

12. At the end of its written observations, Israel asks the Court to reject South Africa's Request of 6 March 2024 and not to indicate any further provisional measures.

* *

13. The Court considers that South Africa's Request of 6 March 2024 is a request for the modification of the Order of 26 January 2024. For this reason, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

> "At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification."

14. The Court must therefore first ascertain whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation that warranted the indication of certain provisional measures in January 2024 has changed since that time. In considering the request before it, the Court will take account of both the situation that existed when it issued the Order of 26 January 2024 and any changes to that situation since that date, as claimed by South Africa. If the Court finds that there was a change in the situation since the delivery of its earlier Order, it will then have to consider whether such a change justifies a modification of its decision concerning provisional measures previously indicated. Any such modification would only be appropriate if the new situation were, in turn, to require the indication of provisional measures; that is to say, if the general conditions laid down in Article 41 of the Statute of the Court were also met in this instance (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 581, para. 12).

15. The Court will thus begin by determining whether there has been a change in the situation that warranted the measures indicated in its Order of 26 January 2024.

* *

16. South Africa states that its Request of 6 March 2024 is prompted by the

> "horrific deaths from starvation of Palestinian children, including babies, brought about by Israel's deliberate acts and omissions . . . including Israel's concerted attempts since 26 January 2024 to ensure the defunding of [the United Nations Relief and Works Agency (UNRWA)] and Israel's attacks on starving Palestinians seeking to access what extremely limited humanitarian assistance Israel permits into Northern Gaza, in particular".

In the Applicant's view, these developments, in particular the widespread starvation, constitute a "change in the situation in Gaza" for the purposes of Article 76 of the Rules of Court.

17. Israel rejects "in the strongest terms" South Africa's claims that incidents of starvation in Gaza are a direct result of its deliberate acts and omissions. It states that the armed hostilities in Gaza were in progress on 26 January 2024 and still continue. Furthermore, according to the Respondent, the Court had already taken account, in its Order of 26 January 2024, of materials introduced by South Africa with respect to food insecurity in Gaza. Consequently, in Israel's view, "the difficult and tragic situation in the Gaza Strip in the last weeks could not be said to materially change the considerations upon which the Court based its original decision concerning provisional measures".

* *

18. The Court recalls that, in its Order of 26 January 2024, it concluded that the civilian population in Gaza was extremely vulnerable, noting that many Palestinians in the Gaza Strip had "no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 70). In its decision communicated to the Parties by letters of 16 February 2024, the Court noted, quoting the United Nations Secretary-General, that the developments in the Gaza Strip, and in Rafah in particular, "would exponentially increase what is already a humanitarian nightmare with untold regional consequences" (see paragraph 7 above). The Court observes with regret that, since then, the catastrophic living conditions of the

Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip have been subjected.

19. The Court notes that, on 18 March 2024, an updated report on food insecurity in the Gaza Strip was issued by the Integrated Food Security Phase Classification Global Initiative (IPC Global Initiative), a global partnership of organizations including, *inter alia*, the World Food Programme (WFP), the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO). According to this report:

> "The IPC acute food insecurity analysis conducted in December 2023 warned of a risk that Famine may occur by the end of May 2024 if an immediate cessation of hostilities and sustained access for the provision of essential supplies and services to the population did not take place. Since then, the conditions necessary to prevent Famine have not been met and the latest evidence confirms that Famine is imminent in the northern governorates and projected to occur anytime between mid-March and May 2024." (IPC Global Initiative, "Special Brief: the Gaza Strip", 18 March 2024.)

20. The Court also notes that earlier, on 15 March 2024, the United Nations Children's Fund (UNICEF) reported that 31 per cent of children under 2 years of age in the northern Gaza Strip suffered from acute malnutrition, "a staggering escalation from 15.6 per cent in January", and warned that "[m]alnutrition among children is spreading fast and reaching devastating and unprecedented levels in the Gaza Strip due to the wide-reaching impacts of the war and ongoing restrictions on aid delivery" (UNICEF, "Acute malnutrition has doubled in one month in the north of Gaza strip: UNICEF", press release, 15 March 2024).

21. The Court observes that Palestinians in Gaza are no longer facing only a risk of famine, as noted in the Order of 26 January 2024, but that famine is setting in, with at least 31 people, including 27 children, having already died of malnutrition and dehydration according to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (OCHA, "Hostilities in the Gaza Strip and Israel — reported impact, Day 169", 25 March 2024).

22. The Court considers that the above-mentioned developments, which are exceptionally grave, constitute a change in the situation within the meaning of Article 76 of the Rules of Court.

23. The Court is also of the view that the provisional measures indicated in the Order of 26 January 2024 do not fully address the consequences arising from the changes in the situation explained above, thus justifying the modification of these measures. However, in order to modify the decision set out in that Order, the Court must still satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation.

II. Conditions for the indication of provisional measures

24. The Court recalls that, in its Order of 26 January 2024 indicating provisional measures in the present case, it concluded that "prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 31). The Court sees no reason to revisit this conclusion for the purposes of deciding on the Request of 6 March 2024.

25. In that Order, the Court also found that at least some of the rights claimed by South Africa under the Genocide Convention and for which it is seeking protection were plausible, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention. The Court considered also that, by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving these rights (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, paras. 54 and 59). The Court also sees no reason to revisit this conclusion for the purposes of deciding on the Request of 6 March 2024.

26. The Court must now consider whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed by South Africa and whether there is urgency that would justify the modification of the decision set out in its Order of 26 January 2024.

27. The Court recalls in this regard that it concluded, in its Order of 26 January 2024, that in view of the fundamental values sought to be protected by the Genocide Convention, the plausible rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm and that there was urgency, in the sense that there existed a real and imminent risk that irreparable prejudice would be caused to those rights before it gives its final decision (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, paras. 65–74).

* *

28. According to the Applicant, the demand for "additional and/or modified provisional measures . . . could not be starker", having regard to the magnitude and gravity of the situation facing the Palestinian people in Gaza. South Africa states that, as of 6 March 2024, in addition to causing the death by starvation of Palestinian children, "Israel has also continued to kill approximately 4,548 Palestinian men, women and children since 26 January 2024, and to wound a further 7,556".

29. The Respondent contends that nothing in the Request of 6 March 2024 establishes that the provisional measures already indicated by the Court would no longer be sufficient. Israel recognizes that food insecurity in Gaza, and especially in northern Gaza, is a serious challenge, but states that there is an "extensive record of Israeli efforts in the humanitarian sphere to alleviate the suffering of the civilian population in general and to address the challenge of food insecurity in particular". Israel refers, *inter alia*, to the establishment of a maritime corridor and a floating pier, to humanitarian airdrops and the facilitation of aid through land routes, as well as its co-operation with United Nations agencies. Furthermore, according to Israel, South Africa has given no justification for the specific additional provisional measures sought in its Request of 6 March 2024.

* *

30. The Court has already observed that the catastrophic humanitarian situation in the Gaza Strip that existed when it issued its Order of 26 January 2024 has deteriorated even further (see paragraphs 18–21 above).

31. The Court notes the unprecedented levels of food insecurity experienced by Palestinians in the Gaza Strip over recent weeks, as well as the increasing risks of epidemics. It recalls, in this regard, the briefing provided to the Security Council by senior representatives of OCHA, FAO and WFP on 27 February 2024. In that context, the Director of Coordination of OCHA stated:

> "In December, it was projected that the entire population of 2.2 million people in Gaza would face high levels of acute food insecurity by February 2024 — the highest share of people facing that level of food insecurity ever recorded worldwide. . . .
>
> Unfortunately, as grim as the picture we see today is, there is every possibility for further deterioration. Military operations, insecurity and extensive restrictions on the entry and delivery of essential goods have decimated food production and agriculture." (United Nations Security Council, doc. S/PV.9560, 27 February 2024.)

32. According to a report issued by WHO on 22 February 2024,

> "[t]he risk of further spread of epidemic-prone diseases is high due to overcrowding, inadequate water, sanitation and waste management, lack of medical/infection prevention and control . . . and basic hygiene supplies, disruption of routine, vaccine- preventable disease programmes, and a dysfunctional health-care system, including staffing issues due to conflict" (WHO, *Infection prevention and control and water, sanitation and hygiene measures in health-care settings and shelters/ congregate settings in Gaza, Technical note, 22 February 2024*).

33. The Respondent has referred to "significant measures undertaken continuously by Israel throughout the present hostilities — including various humanitarian initiatives and the ongoing coordination of access to

humanitarian supplies". The Court recalls that Israel has explained that the challenges it faces in facilitating humanitarian relief to Gaza are manifold, and that "[s]ome of these challenges are inherent to any theatre of active hostilities, particularly one that is densely populated and heavily dependent on international aid".

34. The Court also notes the statement of the United Nations High Commissioner for Human Rights, according to which

> "[t]he situation of hunger, starvation and famine is a result of Israel's extensive restrictions on the entry and distribution of humanitarian aid and commercial goods, displacement of most of the population, as well as the destruction of crucial civilian infrastructure" (Office of the High Commissioner for Human Rights (OHCHR), "Comment by UN High Commissioner for Human Rights Volker Türk on the risk of famine in Gaza", press release, 19 March 2024).

35. The Court observes that, as also stated by United Nations representatives and others, while air and sea routes are helpful under the present circumstances, there is no substitute for land routes and entry points from Israel into Gaza to ensure the effective and efficient delivery of food, water, medical and humanitarian assistance; there is an urgent need to increase the capacity and number of open land crossing points into Gaza and to maintain them open so as to increase the flow of aid delivery (see, for example, United Nations, "Joint statement by Sigrid Kaag, UN Senior Humanitarian and Reconstruction Coordinator for Gaza, and Jorge Moreira da Silva, UN Under-Secretary-General and Executive Director of the United Nations Office for Project Services (UNOPS), welcoming the opening of a maritime corridor to Gaza", press release, 12 March 2024).

36. The Court takes note moreover of certain declarations of representatives of the United Nations and the various organizations attempting to provide relief in Gaza, according to which the catastrophic humanitarian situation can only be addressed if the military operations in the Gaza Strip are suspended. For instance, the UN Under-Secretary-General for Humanitarian Affairs stated that "the humanitarian community knows what to do to save lives in Gaza, but we need the right conditions and guarantees. These include a ceasefire and full adherence to the rules of war" (United Nations, Meetings Coverage and Press Releases, "Daily Press Briefing by the Office of the Spokesperson for the Secretary-General", 8 March 2024). In the same vein, WFP's Deputy Executive Director emphasized that "[a] ceasefire in Gaza is urgently needed to enable an operation of this size" (WFP, "WFP food deliveries to northern Gaza face further setbacks", news release, 5 March 2024) and, according to the Executive Director of UNICEF, "[a]n immediate humanitarian ceasefire continues to provide the only chance to save children's lives and end their suffering" (UNICEF, "Acute malnutrition has doubled in one month in the north of Gaza strip: UNICEF", press release, 15 March 2024). The President of the International Committee of the Red Cross (ICRC) also issued an "urgent call [for] a cessation of hostilities to allow for meaningful assistance to reach the people in need" (ICRC, "A statement on Gaza and Israel from the President of the ICRC", news release, 11 March 2024).

37. The Court also takes note of resolution 2728 (2024) of the Security Council, which "*[d]emand[ed]* an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire".

38. The Secretary-General of the United Nations, for his part, referring to the latest IPC Global Initiative report on food insecurity in Gaza, stated that:

> "Palestinians in Gaza are enduring horrifying levels of hunger and suffering.
>
> This is the highest number of people facing catastrophic hunger ever recorded by the Integrated Food Security Classification system — anywhere, anytime.
>
> This is an entirely manmade disaster — and the report makes clear that it can be halted.
>
> Today's report is Exhibit A for the need for an immediate humanitarian cease- fire." (United Nations, Secretary-General's press encounter on Gaza food insecurity report — Statement, 18 March 2024.)

39. The Court recalls that, since 26 January 2024, Israel's military operation has reportedly led to over 6,600 additional fatalities and almost 11,000 additional injuries among Palestinians in the Gaza Strip (OCHA, "Hostilities in the Gaza Strip and Israel — reported impact, Day 169", 25 March 2024).

40. In light of the considerations set out above, and taking account of the provisional measures indicated on 26 January 2024, the Court finds that the current situation before it entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision in the case.

III. CONCLUSION AND MEASURES TO BE ADOPTED

41. The Court concludes, on the basis of the above considerations, that the circumstances of the case require it to modify its decision concerning provisional measures indicated in the Order of 26 January 2024.

42. The Court recalls that, in accordance with Article 75, paragraph 2, of its Rules, when a request for the indication of provisional measures has been made, it has the power under its Statute to indicate measures that are, in whole or in part, other than those requested.

43. In the present case, having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

44. With regard to the measures requested by South Africa addressed to States or entities not parties to the present proceedings, the Court recalls that:

> "the judgment in a particular case by which disputed rights may be adjudged by the Court to belong to the Applicant or to the Respondent has, in accordance with Article 59 of the Statute of the Court, 'no binding force except between the parties' . . . accordingly the Court may, for the preservation of those rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 344, para. 40).

The Court thus cannot, in the exercise of its power to indicate provisional measures in the present case, indicate the first three provisional measures sought by the Applicant (see paragraph 11 above).

45. In conformity with its obligations under the Genocide Convention, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation, Israel shall: *(a)* take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary; and *(b)* ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance.

46. The Court further considers that the catastrophic situation in the Gaza Strip confirms the need for immediate and effective implementation of the measures indicated in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah. In these circumstances, the Court finds it necessary to reaffirm the measures indicated in that Order.

47. In view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order. The report so provided shall then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

48. The Court recalls that its orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed

(*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, I.C.J. Reports 2022 (I)*, p. 230, para. 84).

49. The Court underlines that the present Order is without prejudice to any findings concerning the Respondent's compliance with the Order of 26 January 2024.

*

* *

50. In its Order of 26 January 2024, the Court expressed its grave concern over the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and called for their immediate and unconditional release. The Court finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release.

*

* *

51. For these reasons,

THE COURT,

(1) By fourteen votes to two,

Reaffirms the provisional measures indicated in its Order of 26 January 2024;

IN FAVOUR: *President* Salam; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak;

(2) *Indicates* the following provisional measures:

The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:

(*a*) Unanimously,

Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;

(b) By fifteen votes to one,

Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance;

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Judge* ad hoc Barak;

(3) By fifteen votes to one,

Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order.

IN FAVOUR: *President* Salam; *Vice-President* Sebutinde; *Judges* Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Judge* ad hoc Barak.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-eighth day of March, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of South Africa and the Government of the State of Israel, respectively.

(Signed) Nawaf SALAM,
President.

(Signed) Philippe GAUTIER,
Registrar.

President SALAM appends a declaration to the Order of the Court; Judge YUSUF appends a declaration to the Order of the Court; Judges XUE, BRANT, GÓMEZ ROBLEDO and TLADI append a joint declaration to the Order of the Court; Judge NOLTE appends a separate opinion to the Order of the Court; Judge CHARLESWORTH appends a declaration to the Order of the Court; Judge *ad hoc* BARAK appends a separate opinion to the Order of the Court.

(Initialled) N.S.

(Initialled) Ph.G.

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Declaration of President Salam

[Original English Text]

1. I voted in favour of each of the operative parts of the Court's Order in the present case and I agree with the entirety of the reasoning followed by the Court to reach its conclusions.

2. The context in which the Court has been requested again by South Africa to indicate provisional measures is particularly tragic. As highlighted in the Order, "the catastrophic humanitarian situation in the Gaza Strip that existed when it issued its Order of 26 January 2024 has deteriorated even further" (see paragraph 30 of the Order). Indeed, while on 21 February 2024, the Director-General of the World Health Organization (WHO) was already noting that "Gaza has become a death zone" ("WHO Director-General's opening remarks at the media briefing", 21 February 2024), the situation has worsened further, as the Secretary-General of the United Nations noted a few days ago at the gates of Rafah: "[i]t is monstrous that after so much suffering over so many months, Palestinians in Gaza are marking Ramadan with Israeli bombs still falling, bullets still flying, artillery still pounding, and humanitarian assistance still facing obstacle upon obstacle" (Secretary-General's press encounter at Rafah border crossing, 23 March 2024).

3. Moreover, whereas in January 2024, when it rendered its first Order on provisional measures, the Court referred to an immediate risk of famine, the risk has now materialized and many children have already died of starvation (see paragraph 21 of the Order).

4. As underlined by one of the front-line players on the ground, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), "Hunger has reached catastrophic levels, with over 90 per cent of the population facing acute food insecurity. In northern Gaza, parents are feeding their children animal fodder and native plants" (UNRWA, "UNRWA launches Ramadan campaign against backdrop of Gaza emergency", news release, 12 March 2024).

5. This already catastrophic situation is likely to deteriorate even further, as the representatives of the Office for the Coordination of Humanitarian Affairs (OCHA), the Food and Agriculture Organization of the United Nations (FAO) and the World Food Programme (WFP) emphasized in a briefing before the Security Council (see paragraph 31 of the Order). And in the words of the High Representative of the European Union for Foreign Affairs and Security Policy, "this is a humanitarian crisis which is not a natural disaster. It is not a flood. It is not an earthquake. It is man-made. And when we look for alternative ways of providing support — by sea or by air — we have to remind that we have to do it because the natural way of providing support through roads is being closed, artificially closed. And starvation is being used as a weapon of war." (United Nations, Speech by High Representative Josep Borrell at the annual United Nations Security Council session on EU-UN Cooperation, 12 March 2024.)

6. The scale of this deterioration in the area of health, for example, is well illustrated by the London School of Hygiene and Tropical Medicine and the John Hopkins Center for Humanitarian Health, which have predicted that "[o]ver the next six months, . . . in the absence of epidemics, 6,550 excess deaths would occur under the ceasefire scenario, climbing to 58,260 under the status quo scenario and 74,290 under the escalation scenario". In the event of one or more epidemics, "[their] projections rise to 11,580, 66,720, and 85,750, respectively" (*Crisis in Gaza: scenario-based health impact projections. Report One: 7 February to 6 August 2024*, London School of Hygiene and Tropical Medicine, Johns Hopkins University, 19 February 2024, p. 9).

7. We are therefore faced with a situation in which the conditions of existence of the Palestinians in Gaza are such as to bring about the partial or total destruction of that group. It is important to remember that this conclusion is without prejudice to any decision on the merits of the case before the Court. As to the purpose of the provisional measures, it is to preserve the rights which the Court recognised as plausible in its Order of 26 January 2024, in particular the right of the Palestinians of Gaza to be protected against acts of genocide and related prohibited acts referred to in Article III of the Genocide Convention.

8. Points 2 *(a)* and 2 *(b)* of the operative part of this Order are, in my view, relevant modifications of the measures previously ordered by the Court. Hence, in view of the spread of famine and starvation, the Court considered it

necessary to specify that it is fundamental and indispensable to ensure the unimpeded and large-scale provision of humanitarian aid to the population of the Gaza Strip.

9. Without such humanitarian aid, "the right of existence" of an entire human group, in the words of General Assembly resolution 96 (I) of 11 December 1946, would be jeopardized.

10. Yet the Palestinians in Gaza will only be truly protected if Israel, as ordered in point 2 *(b)*, ensures with "immediate effect" that its army does not commit acts which constitute a violation of any of the rights of this group under the Genocide Convention, including, in this present case of spread of famine and starvation, that its army does not "in any way impede the delivery of urgently needed humanitarian aid".

11. It remains that these new measures ordered by the Court can only take full effect if the "immediate ceasefire for the month of Ramadan" demanded by the Security Council in its resolution 2728 (2024) of 25 March 2024 prior to the issuance of this Order, and which the Court took note of (see paragraph 37), is duly and fully respected by all the parties "and leads to a lasting sustainable ceasefire".

12. Finally, how not to recall the "purely humanitarian and civilizing purpose" pursued by the Genocide Convention, whose object "on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23)?

(Signed) Nawaf SALAM.

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Declaration of Judge Yusuf

Change in the situation in Gaza justifies new measures — Palestinian deaths by disease and starvation, not only bombardment and ground assaults — Indicia of genocide require preservation of the right of existence of the group — Prevention is the only effective way to preserve this right — Court's measures involve obligations of result to prevent genocide — Such obligations can only be met by suspending military operations in Gaza — Time to respect binding measures and end atrocities.

1. The situation in the Gaza Strip has indeed changed. It has grown much more gruesome. The Palestinian population there is not only dying every day from aerial bombardments and armoured ground assaults by the Israeli army. It is also succumbing to disease, malnutrition and starvation. Famine is on the horizon for the majority of the 2.3 million inhabitants (IPC Global Initiative, "Special Brief: the Gaza Strip", 18 March 2024). The Court had already recognized, in its Order on provisional measures of 26 January 2024, the right of the Palestinian population of Gaza to be protected from genocide. It had to act again in view of the exceptional gravity of the situation. I fully agree with its decision to accede to South Africa's request and to indicate further measures in the present Order.

2. There is no need for the Court at the stage of indication of provisional measures to determine the existence of genocidal intent. As stated in its Order on provisional measures relating to *The Gambia* v. *Myanmar*,

> "[i]n view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 23, para. 56).

3. The Court has to base itself on the existence of objective indicia relating to the possible commission of genocide. If such indicia exist, which is the case in Gaza, the Court cannot take the position of a powerless bystander in the face of the possible commission of acts which are so offensive to the conscience of humanity. It has to preserve the rights of the protected group. To this end, it is the function of prevention which matters most and which offers the only effective way of preserving the right of existence of the protected group.

4. It is indeed the very right of existence of the Palestinian population of Gaza that is currently at risk of irreparable prejudice. Nothing less. It is therefore the Court's duty to see to it that the obligations undertaken under the Genocide Convention are respected. As the Court observed in its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

> "[t]he origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations" (*Advisory Opinion, I.C.J. Reports 1951*, p. 23).

5. These are the reasons that led the Court to indicate six provisional measures in its Order of 26 January 2024. They are the same reasons that have prompted it again to indicate further measures in this Order. When the evidence indicates, as it does in the present case, that the extent of the atrocities committed against civilians, and the death and suffering caused to them, is of an order which exceeds by far the necessities of war and the limits imposed by the laws of war, it is the duty of the Court to call for an end to the killing, the causing of bodily injury or mental harm, and the imposition of conditions of life calculated to bring about the physical destruction of the whole or part of the protected group to prevent the commission of genocide.

6. The Court did so by the first two measures it indicated in its Order of 26 January 2024. In the first measure, it ordered that Israel

> "take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:
>
> (*a*) killing members of the group;
>
> (*b*) causing serious bodily or mental harm to members of the group;
>
> (*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
>
> (*d*) imposing measures intended to prevent births within the group".

In the second measure, it ordered that "[t]he State of Israel shall ensure with immediate effect that its military does not commit any acts described" in the first measure, i.e. acts *(a)*, *(b)*, *(c)* and *(d)* above.

7. Such an order by the Court issued under the Genocide Convention, calling on a State to "ensure with immediate effect that its military does not commit" any of the acts enumerated under Article II of the Convention, is tantamount, in terms of the application and fulfilment of the Convention, to an injunction to bring to an end any military operations which may contribute to the commission of such acts. Indeed, the prevention of genocidal acts under the Convention, in particular as a conservatory measure, involves the suspension or termination of any actions undertaken by a State in its territory or in the territory of others which might have contributed to the existence of indicia of genocidal activity.

8. The Court's indication of further provisional measures in the present Order shows that it is not satisfied that all that should have been done has been done by Israel to prevent the commission of genocidal acts. The argument that a State party to the Convention that is involved in a conflict with a non-State actor is not under an obligation to suspend its military operations to prevent genocide or should not be ordered to do so, unless the non-State actor is disarmed, makes no sense whatsoever. It is contrary to the very idea of prevention of genocide and to the objectives of the Convention, which was "manifestly adopted for a purely humanitarian and civilizing purpose".

9. In the same way that a State party to the Convention has a duty to prevent genocide in its territory whatever may be the nature of the forces or actors opposing it, it has also the obligation to prevent genocide in any territory which such party invades or occupies. This is the case with respect to the situation in Gaza. Israel has, therefore, an obligation, as underlined by the Court, to take all measures within its power to prevent the commission of genocidal acts and to ensure that its military does not commit any such acts in Gaza.

10. In view of the catastrophic humanitarian situation and the increasing levels of disease and starvation among the population, the only effective way in which Israel can meet its obligations under the Convention is to suspend its military operations to allow for the delivery of aid and to bring to an end the relentless destruction and death caused by it at the expense of the right of existence of the Palestinian population (Order, para. 36). It is with such an objective in mind that the Court has indicated the second measure in the present Order, which modifies and further elaborates on the second measure of the Order of 26 January 2024 quoted above.

11. It is a measure aimed at bringing to an end the killing, maiming or infliction of conditions of life on the population of Gaza which might bring about the destruction in whole or in part of the group. It calls upon Israel to

> "[e]nsure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance".

It is an obligation of result which must be acted upon immediately. No such result can be obtained without suspending or terminating the aerial bombardments, the ground assaults on urban centres and refugee camps by the Israeli army, and the removal of the obstacles to the delivery of humanitarian aid. It requires an end to the destruction and death in Gaza.

12. The alarm has now been sounded by the Court. All the indicators of genocidal activities are flashing red in Gaza. An injunction has been served for ending the atrocities. The provisional measures indicated by the Court are binding. They are not something that a State party to the Convention is free to respect or to ignore according to its own pleasure. They must be implemented.

13. The rights of the Palestinian population of Gaza, including its right of existence, must be preserved pending the final decision of the Court on the merits. Such rights cannot and should not continue to be subjected to the risk of irreparable prejudice. This can only be achieved through the suspension, with immediate effect, of Israeli military operations. Therefore, Israel must bring its military operations to an end in order to ensure, as directed by the Court, that its army does not commit any acts which are in violation of the rights of the Palestinian population of Gaza to be protected from genocide.

(Signed) Abdulqawi Ahmed Yusuf.

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Joint declaration of Judges Xue, Brant, Gómez Robledo and Tladi

1. In this Order, the measures indicated in subparagraph (2) are the key part of the *dispositif*. Although we all voted in favour of subparagraph (2) *(b)* of the *dispositif*, we deeply regret that this measure does not directly and explicitly order Israel to suspend its military operations for the purpose of addressing the current catastrophic humanitarian situation in Gaza.

2. Notwithstanding that disappointment, we wish to highlight, at the outset, that the current Order is an improvement on the Order of 26 January 2024 in at least one respect. Consistent with the standard under international law, in particular Articles 55 and 56 of the Fourth Geneva Convention, the current Order requires not only that Israel must take measures to "enable" the provision of humanitarian aid, but that it must take measures to "ensure" the provision of such aid.

3. The situation in Gaza is extremely grave and continues to deteriorate every single day. Impediments to the provision of humanitarian assistance have caused unprecedented levels of hunger and suffering among Palestinians, in particular, children and women. One step away from massive famine, living conditions of the 1.7 million people that were pushed to southern Gaza by the Israeli military operations have deteriorated drastically. The Court has at its disposal sufficient information that Israel's military operations have resulted in unprecedented levels of starvation and the absolute collapse of essential civilian infrastructure in the region. The current circumstances could lead to further devastating consequences where the very existence of the Palestinian people in Gaza is at a high risk. As the Court notes in the Order, representatives of the United Nations and the various agencies and organizations with a mandate for the provision of humanitarian aid have unequivocally indicated that, at the present stage, "the catastrophic humanitarian situation *can only be addressed if the military operations in the Gaza Strip are suspended*" (para. 36, emphasis added).

4. In its observations on the Request of South Africa for the indication of additional or modification of provisional measures, Israel claims that it has taken and will continue to take various protective measures and humanitarian initiatives for the protection of the civilians. We, of course, attach importance to Israeli commitments in this regard. The question before the Court in the current circumstances, however, is not whether Israel has made substantial efforts to prevent deaths and injuries of civilians in Gaza but whether the civilians have received, and are able to receive, their desperately needed assistance while the military operations are still going on. In our view, the present scale of the humanitarian crisis in Gaza and the overwhelming consensus that, without the suspension of military operations, this catastrophe will even worsen, constitute circumstances that require the Court to *explicitly* order a suspension of military operations.

5. This matter gives rise to a core concern of elementary considerations of humanity, a core concern that ultimately led the international community of States to conclude the Genocide Convention. Referring to the character of the Genocide Convention in its *Reservations* Advisory Opinion, the Court pointed out the dual objects of the Convention: on the one hand, it is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principles of morality (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Under contemporary international law, obligations under the Convention, even in time of war, cannot be derogated from. As a party to the Convention, Israel remains bound by its obligations under the Convention under all circumstances.

6. In its Order of 26 January 2024, the Court determined that "[t]he Palestinians appear to constitute a distinct 'national, ethnical, racial or religious group'", a protected group within the meaning of Article II of the Genocide Convention. Moreover, Palestinians in the Gaza Strip form a substantial part of that protected group (Order of 26 January 2024, para. 45). The Court further found that some of the rights claimed by South Africa and for which it is seeking protection are plausible. Such plausible rights, in essence, bear on the fundamental right of the Palestinian people to existence.

7. Israel is the occupying Power in the Gaza Strip. It controls Gaza's land border and all its land crossing access as well as its air and maritime areas. Israel's dominant control over Gaza explains why Israel has the primary

responsibility to ensure unhindered and unimpeded access, in particular, the land crossing access, for the delivery of humanitarian assistance to the Palestinians in Gaza. For that purpose, suspension of military operations, including its planned military operation in Rafah, under the circumstances, appears indispensable for any meaningful implementation of the provisional measures indicated.

8. We agree with the factual finding of the Court. In our opinion, however, the Court's factual finding should have led it to decide that Israel must suspend its military operations in a way so as to give full effect to its obligations under this Order. Much to our regret, the measure indicated in subparagraph (2) *(b)* does not extend far enough to make that point explicitly.

(Signed) Xue Hanqin.

(Signed) Leonardo Nemer Caldeira Brant.

(Signed) Juan Manuel Gómez Robledo.

(Signed) Dire Tladi.

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Separate opinion of Judge Nolte

Preconditions for the modification of an order on provisional measures under Article 76 of the Rules of Court — Modification as a form of implementation of an earlier provisional measure — Whether change of the situation in the Gaza Strip since 26 January 2024 justifies the modification.

1. I agree with the present Order. Given the current horrific situation of the Palestinians in the Gaza Strip, raising any apparently technical legal issues now may seem out of place. However, I will do so in the interest of the Court's future practice.

2. According to Article 76, paragraph 1, of the Rules of Court, "the Court may . . . modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such . . . modification". In its jurisprudence, the Court has not easily arrived at the conclusion that a relevant change in the situation has occurred. For example, in its Orders of 12 October 2022 and 6 July 2023 in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, the Court rejected Armenia's requests pursuant to Article 76 by finding "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated" in earlier Orders[1]. In both cases, the Court rather viewed the circumstances as "confirm[ing] the need for effective implementation of the measure indicated" in its earlier Orders[2].

3. The Court's previous treatment of requests under Article 76 confirms that the purpose of a modification of provisional measures is not normally the implementation of provisional measures already indicated. If one party does not comply with a provisional measure, it is usually for the Court to determine in its final judgment that the provisional measure has been violated, but not to repeatedly insist, at the initiative of the other party, that the provisional measure be complied with. Such a use of the procedure under Article 76 of the Rules of Court would be problematic since it could be seen as an implicit determination of a State's non-compliance with the measures set out in an earlier order, thereby prejudging the Court's assessment at the merits phase.

4. I have therefore hesitated about whether the current situation of the Palestinians in the Gaza Strip indeed constitutes a change in the situation which would justify a modification of the existing provisional measures which the Court ordered on 26 January 2024. I do not doubt that the humanitarian situation of the Palestinians in the Gaza Strip has dramatically deteriorated since 26 January 2024. I also take very seriously recently voiced concerns that Israel is using hunger as a "weapon of war"[3] and the provision of humanitarian aid as a "bargaining chip"[4]. My hesitations rather resulted from the fact that this terrible situation would most probably not exist if the Order of 26 January 2024 had been fully implemented. Under this Order, "Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip". The Court adopted this Order noting that "[a]t present, many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating" (para. 70). The Court even envisaged the risk that this situation would become worse, stating that "[i]n these circumstances, the Court considers that the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment" (para. 72).

5. Against this background, the present Order may appear to merely repeat and specify the previous measures indicated by the Order of 26 January 2024 rather than impose additional measures that would be justified by a change in the situation. If the present Order were read in this way it would set a problematic precedent. That precedent would consist in signalling to the parties in this and other cases that the Court considers that the threshold for modifying, adding or specifying a provisional measure is low.

6. However, in the present Order, the Court finds not only that since 26 January 2024 the humanitarian situation has simply deteriorated further, but that the prolonged and widespread deprivation of food has become "exceptionally grave" (para. 22). In coming to this conclusion, the Court points to the best available and manifestly reliable sources of public information according to which famine is imminent, as confirmed by a significant number of deaths by starvation which have already occurred (paras. 19 and 20). In my view, the circumstances which are

described in the present Order go beyond what the Court in its Order of 26 January 2024 considered as being encompassed in the "serious risk of deteriorating further" (para. 72). They rather constitute a qualitative change of the situation which is exceptional. These circumstances also reflect a plausible risk of a violation of relevant rights under the Genocide Convention.

(Signed) Georg Nolte.

ENDNOTES

1 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, pp. 583–584, para. 23 (1); *Request for the Modification of the Order of 22 February 2023 Indicating a Provisional Measure, Order of 6 July 2023*, para. 33 (1).

2 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 583, para. 21; *Request for the Modification of the Order of 22 February 2023 Indicating a Provisional Measure, Order of 6 July 2023*, para. 30.

3 European Commission, "Statement by High Representative Josep Borrell and Commissioner for Crisis Management Janez Lenarčič on famine in Gaza", 18 March 2024, available at: https://civil-protection-humanitarian-aid.ec.europa.eu/news-stories/news/statement-high-representative-josep-borrell-and-commissioner-crisis-management-janez-lenarcic-famine-2024-03-18_en.

4 The White House, "Remarks of President Joe Biden — State of the Union Address As Prepared for Delivery", 7 March 2024, available at: https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery-2/.

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Declaration of Judge Charlesworth

1. I have voted for the three provisional measures indicated by the Court, which supplement the measures contained in the Order of 26 January 2024. I regret, however, that subparagraph (2) *(b)* of the operative paragraph is drafted in such opaque terms that it fails to provide clear guidance to the Parties.

2. The case before the Court is brought in the context of an ongoing conflict that is causing enormous loss of life and human suffering. In January, the Court described the immediate background to this conflict in these terms:

> "On 7 October 2023, Hamas and other armed groups present in the Gaza Strip carried out an attack in Israel, killing more than 1,200 persons, injuring thousands and abducting some 240 people, many of whom continue to be held hostage. Following this attack, Israel launched a large-scale military operation in Gaza, by land, air and sea, which is causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza"[1].

3. The Court found that the Palestinians in the Gaza Strip have a plausible right to be protected from acts of genocide and related prohibited acts, that the Applicant had a plausible right to seek compliance by the Respondent with its obligations under the Genocide Convention, and that these plausible rights were at risk of irreparable prejudice[2]. To address that urgent need for protection, the Court indicated a series of provisional measures.

4. As the Court observes today, the catastrophic humanitarian situation is unremitting and in fact rapidly deteriorating (Order, paras. 18–21). Given that the Palestinian population in the Gaza Strip is now on the brink of famine, South Africa has requested the Court to indicate further provisional measures and/or to modify the measures indicated on 26 January 2024. Starvation, and the resulting loss of life in overwhelming numbers, clearly poses a threat to the right of existence of the Palestinians as a group, a right protected by the Genocide Convention[3].

5. Against this background, the Court's task is to determine whether the existing measures indicated in its Order of 26 January 2024 are sufficient to preserve the rights forming the object of the proceedings on the merits. In its reasoning, the Court draws on a number of United Nations documents to satisfy the requirement of Article 76, paragraph 1, of the Rules of Court that there has been a change in the situation justifying modification. These documents illustrate how the provision of humanitarian aid in the Gaza Strip is undermined by the military campaign. The documents make clear that the only way to prevent further destruction of the Palestinian population in the Gaza Strip is to bring military operations to an end. They all call for ceasefires, whether temporary or permanent.

6. In the dispute brought by South Africa, the Court's mandate is confined to protecting the right of the Palestinian group to be protected from acts of genocide and other prohibited acts under the Genocide Convention only if, and in so far as, that right is prejudiced by Israel's acts. And the Court cannot order a ceasefire as the conflicting parties are not all before it. However, while the Court cannot remove the risk to the Palestinian group completely, it can at least mitigate it by indicating measures directed at the Parties that are before it: Israel and South Africa.

7. In this light, the measures indicated by the Court today only partly respond to the situation that the Court describes and to the continuing threat to the right of the Palestinian group to exist. While the measure in subparagraph (2) *(a)* identifies appropriate actions for Israel to take, the measure in subparagraph (2) *(b)* is elliptical. Instead of employing the convoluted terms of operative subparagraph (2) *(b)*, in my view the Court should have made it explicit that Israel is required to suspend its military operations in the Gaza Strip, precisely because this is the only way to ensure that basic services and humanitarian assistance reach the Palestinian population.

8. Of course, the suspension of Israel's military operations too only partly addresses the risk of destruction of the Palestinians in Gaza. The Court may not have the power to indicate measures directed at entities not bound by its Statute, but it has the power to indicate measures directed at the parties to the dispute before it. While it is Israel's conduct that is in issue before the Court, it does not follow that South Africa has no role to play in preserving the rights in dispute. After all, invocation of responsibility for the breach of *erga omnes* obligations carries duties with it. In my view it is open to the Court to order both Israel and South Africa to take all reasonable measures

within their power to achieve an immediate and sustained humanitarian ceasefire, which would serve to preserve the rights in dispute between them.

(Signed) Hilary Charlesworth.

ENDNOTES

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 13.

2 *Ibid.*, paras. 59 and 74.

3 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

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SEPARATE OPINION OF JUDGE *AD HOC* BARAK

1. This is the third time that South Africa has come to the Court seeking the suspension of the military operation in the Gaza Strip. It is the third time that it has failed. The Court has once again rejected South Africa's main contention and refrained from ordering the suspension of the military operation. It is my hope that South Africa will cease its unbecoming attempts to enter the Great Hall of Justice through the side door of provisional measures and let the Court proceed to the merits of the case, where the true sanctuary of justice lies.

2. The Order issued today does two things. First, it reaffirms the Court's previous Order of 26 January 2024. Second, it reinforces Israel's obligations concerning the provision and access of basic services and humanitarian assistance throughout Gaza. These obligations were, for the most part, already contained in the Court's Order of 26 January 2024 (see Order, para. 45).

3. The Court has also reiterated its call for the immediate and unconditional release of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups (see Order, para. 50).

4. The provisional measures indicated by the Court are thus of a significantly narrower scope than those requested by South Africa. I have voted against operative paragraph (1) because most of the provisional measures indicated by the Court in its Order of 26 January 2024 were unwarranted. I cannot reaffirm provisional measures which were unjustified to begin with. In my separate opinion appended to the Order of 26 January 2024, I elaborated extensively on this issue. With regard to operative paragraph (2), I have voted in favour of the first measure *(a)*, but against the second measure *(b)*. In this opinion, I will explain my reasons for doing so.

I. THE COURT'S GENERAL APPROACH IN *SOUTH AFRICA* V. *ISRAEL*

5. South Africa brought a case before the Court on 29 December 2023 concerning the interpretation, application or fulfilment of the Genocide Convention. However, through successive requests for provisional measures, it has sought to create a second case concerning the conduct of hostilities under the guise of the Genocide Convention. The Court has regrettably allowed South Africa to do so by entertaining its requests for provisional measures beyond the confines of the Genocide Convention. The Court now finds itself entangled in an armed conflict, which presents two problems for the fulfilment of its judicial function.

6. The first problem is that regulating the conduct of hostilities falls outside the Court's jurisdiction, which is limited to the Genocide Convention. The Court does not have jurisdiction to deal with possible violations of international humanitarian law per se. Any measures indicated by the Court must be based on a plausible intent to commit genocide. If intent is not plausible, no measures can be ordered under the Genocide Convention. The Court's reasoning today is far removed from the Genocide Convention and based primarily on humanitarian considerations. The plausibility analysis has gone from thin to essentially non-existent, and the central question of intent has completely disappeared. In short, the Court has accepted South Africa's invitation to become the micromanager of an armed conflict and use the Genocide Convention as an excuse to rule on the basis of international humanitarian law. Managing an armed conflict under the Genocide Convention is a dangerous endeavour, especially when one of the belligerents is not a party to the Convention.

7. The second problem is that the Court is intervening in an armed conflict between Hamas and Israel, but only Israel is bound by its decisions. Hamas is not a party to these proceedings, and therefore the Court cannot direct orders at it. This creates a structural imbalance which is particularly acute in the case of provisional measures addressing the conduct of hostilities. The Court is confronted with the impossible task of squaring a circle. While the Court is powerless to change its Statute, it must take account of this imbalance in its reasoning. Unfortunately, it has failed to do so. The Court has failed to consider that the effective provision of humanitarian aid is not a one-way street; it requires the collaboration of other actors, including Hamas. In effect, part of today's Order shields Hamas while imposing interim obligations on Israel.

8. I am heartbroken by the humanitarian situation in Gaza. In January, I voted in favour of the measure concerning humanitarian aid. In my separate opinion I wrote:

> "I have been personally and deeply affected by the death and destruction in Gaza. There is a danger of food and water shortages and the outbreak of diseases. The population lives in precarious conditions, facing the unfathomable consequences of war. In the role that has been entrusted to me as a judge *ad hoc*, but also as a human being, it is important for me to express my most sincere and heartfelt regret for the loss of innocent lives in this conflict."

I stand by every word.

9. There is little doubt that greater effort is needed to increase the delivery of aid. However, unlike the Security Council, the Court's powers are limited under the Genocide Convention. In today's Order, the Court has artificially linked the Genocide Convention to the provision and access of basic services and assistance, which are issues regulated by international humanitarian law. The thin line it walked in the Order of 26 January 2024 has now been crossed. The Court has not only failed to draw a strong link between the measures it has indicated and any plausible rights under the Genocide Convention, but has also disregarded that the other belligerent, Hamas, is not a party before the Court.

10. I worry about the turn that the Court is taking. Its approach to this case is steadily leaving the land of law and entering the land of politics. The ideas of a judge as a human being should not determine the opinions of a human being when he or she acts as a judge.

II. The shortcomings of the Court's Order

11. I will focus on three fatal flaws in the Order issued by the Court: (1) there is no "change in the situation" that justifies the modification of the Order of 26 January 2024; (2) the conditions for the indication of provisional measures are not met, in particular, because there is no intent and no link between the new measures indicated and any plausible rights under the Genocide Convention; (3) the Court has inadequately dealt with evidence.

1. There is no change in the situation that justifies the modification of the original Order

12. The Court's task is to ascertain whether the situation that warranted the indication of provisional measures on 26 January 2024 has changed. In making this determination, the Court has to take account both of the circumstances that existed when it issued its earlier Order and of the changes that are alleged to have taken place. If the Court finds that there has been a change in the situation since the delivery of its original Order, it will then have to consider whether such a change justifies a modification of the measures previously indicated[1].

13. In today's Order, the Court considers that there has been a "change in the situation" because the living conditions of Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities (see Order, para. 18). The Court also observes that Palestinians in Gaza are no longer facing a risk of famine, but that famine is "setting in" (see Order, para. 21).

14. I do not doubt that the humanitarian situation in Gaza has worsened. However, I fail to see how this constitutes a "change in the situation" within the meaning of Article 76 (1) of the Rules of Court. South Africa made accusations of starvation, based on similar facts, in its original request for provisional measures. It mentioned "food" 80 times, "starvation" 20 times and "famine" five times. Furthermore, in its original Order of 26 January 2024, the Court explicitly noted the risk of starvation and indicated measures in light of this risk. South Africa's new request is not different from its original one. Furthermore, fighting has substantially decreased in comparison to January and February 2024 and the Israeli army has reduced its personnel in Gaza.

15. The Court is also of the view that the provisional measures indicated in the Order of 26 January 2024 do not fully address the consequences arising from the "changes in the situation", thereby justifying the modification of these measures (see Order, para. 23). However, even if we accept that the situation has changed, it is not clear that it cannot be addressed by the Order of 26 January 2024, where the Court indicated that "Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance". I

wonder how this measure is insufficient to take account of the ongoing situation in Gaza. The measures indicated by the Court today may serve to clarify, but are essentially implicit in the Order of 26 January 2024.

16. The Court regrettably confuses the modification of an Order with its implementation, which is an issue to be determined only at the merits stage.

2. The conditions for the indication of provisional measures are not met

17. The modification of provisional measures is only appropriate if the general conditions for the indication of provisional measures are met (see Order, para. 14). The Court's analysis is strikingly brief. The Court merely states that it does not need to revisit its original conclusion that certain rights are plausible, and that at least some of the provisional measures sought by South Africa are aimed at preserving these rights (see Order, para. 25).

18. The Court's lack of reasoning is concerning with regard to the issue of intent. South Africa made no reference to intent in its request for the modification of provisional measures, although it is the key requirement in cases of genocide.

19. To modify provisional measures, the Court needs to be satisfied that plausible intent is present in the "new" situation in Gaza. Israel, in its written observations, presented concrete evidence of its efforts to address the humanitarian catastrophe in Gaza. It mentioned, *inter alia*, the establishment of a maritime corridor (para. 22), the protection of United Nations and Qatari warehouses (para. 28), the delivery of vaccines (para. 33) and incubators (para. 32), the supply of ambulances (para. 32), eye surgeries (para. 31) and field hospitals (para. 30). The Court did not engage with any of these arguments, which are crucial to the question of intent. Instead, it simply dismissed this evidence by quoting a statement by the High Commissioner for Human Rights, who stated that "hunger, starvation and famine is a result of Israel's extensive restrictions on the entry and distribution of humanitarian aid" (see Order, para. 34). The Court conveniently refrains from evaluating Israel's evidence that points in a different direction and dismisses over 20 pieces of evidence by reference to a declaration by one official. Israel has also made it clear in its other communications to the Court that the armed conflict in Gaza is not a war against civilians, but against Hamas. Israel has pointed out that if Hamas releases the hostages and lays down its arms, the hostilities will end. The element of intent is absent in South Africa's case generally, but especially in its new request for the modification of provisional measures.

20. It is also troubling that the Court fails to explain why the provision of basic services and humanitarian assistance is linked to any of the rights found to be plausible under the Genocide Convention. It presumes a link that is nowhere to be found in the text of the Convention. In its Order of 26 January 2024, the Court considered that it was necessary to enable the access of basic services and humanitarian assistance to safeguard the plausible right of the Palestinian people to be protected from genocide. While this measure was already somewhat removed from Israel's obligations under the Genocide Convention, it was understandable due to humanitarian considerations. However, the Court now seeks to extend this problematic line of reasoning and incorporate into the Convention rules that are extrinsic to it, providing no good explanation.

21. In order to conclude that there is a risk of irreparable prejudice to the plausible rights claimed by South Africa, the Court takes note of several statements according to which the humanitarian situation in Gaza can only be addressed by suspending the military operation (see Order, para. 36). These statements, however, were made under political rather than legal considerations, and addressed to Israel and Hamas. More importantly, they do not draw any link between the suspension of the military operations and the Genocide Convention. Neither does the Court assert the existence of such link. Thus, the fact that the Court has noted these statements in finding the existence of a risk of irreparable prejudice should not be interpreted as meaning that a ceasefire is necessary to comply with the measures indicated by the Court. Indeed, the Court has expressly refrained from ordering the suspension of the military operation in the operative clause, precisely because the obligation to ensure humanitarian aid can be achieved through other means.

3. The Court's inadequate treatment of evidence

22. The Court's overall treatment of evidence is problematic. The Court's conclusions are grounded in several declarations by United Nations officials and reports by intergovernmental organizations that were not submitted by

either Party. Furthermore, Israel and South Africa did not have the opportunity to comment on any of the evidence relied upon by the Court.

23. For example, to conclude that the living conditions in Gaza have deteriorated since January, the Court relied on a special brief by the Integrated Food Security Phase Classification Global Initiative (see Order, para. 19), a UNICEF press release (see Order, para. 20) and an OCHA daily report (see Order, para. 21). None of these documents were presented by the Parties. But even more problematic is that all three were published after South Africa and Israel submitted their written briefs.

24. Similarly, the reports noted by the Court according to which the humanitarian situation in Gaza can only be addressed by suspending the military operation were not introduced by the Parties. South Africa and Israel did not have a chance to comment on the press briefing of the Under-Secretary-General for Humanitarian Affairs, the declaration of the World Food Programme Deputy Director, the UNICEF Executive Director, or the declaration by the ICRC President (see Order, para. 36).

25. In *Armenia* v. *Azerbaijan*, the Court stated that its task was to ascertain

> "whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation which warranted the indication of a provisional measure in February 2023 has changed since that time"[2].

26. In the present case, regretfully, the Court arrived at its conclusions based on evidence that neither Party provided, some of which was not public when the Parties prepared their written briefs, and on which they were not given the opportunity to comment.

27. Furthermore, the Court recalls that there have been over 6,300 fatalities and almost 11,000 injuries in the Gaza Strip since 26 January 2024, based on a report by OCHA (Order, para. 39). It, however, fails to mention that those numbers come from the Hamas-run Ministry of Health and refer to the total number of fatalities and injuries, without distinguishing between civilians and combatants. Furthermore, they are general figures concerning the armed conflict and say nothing about the existence of famine or shortage of humanitarian aid.

28. The Court's flexible approach to evidence should not hamper the principle of equality of arms. While the Court may rely on information publicly available, it should be cautious. Particularly when the information is made public after the Parties have submitted their arguments. It is not for the Court to discharge the burden of proof when the Applicant has so clearly failed to do so.

29. I hope in the future that the Court will develop clearer rules to determine the extent to which it may rely on evidence that was not submitted by the parties, and on which the parties were not given the opportunity to comment. A stricter approach is especially called for in a case involving allegations of genocide, which requires fully conclusive evidence[3].

III. The measures indicated by the Court

30. The first measure in operative paragraph (2) provides that Israel shall take measures to ensure the unhindered provision by all concerned of urgently needed basic services and humanitarian assistance. The Order also includes a non-exhaustive list of basic services and assistance, as well as particular measures that Israel shall take. I have voted in favour of this measure for the same reasons expressed in paragraph 44 of my separate opinion appended to the Order of 26 January 2024. I do not think this measure is grounded in the preservation of plausible rights under the Genocide Convention. However, it is consistent with Israel's obligations under international humanitarian law, if interpreted in light of Article 23 of the Fourth Geneva Convention and the applicable customary international law. It is only in this sense that I have supported it. I have been guided by moral reasons, hoping that it will alleviate the consequences of the armed conflict for the most vulnerable.

31. I feel compelled to recall, however, that the situation on the ground concerning the provision of humanitarian aid is more difficult than it appears. Israel is not the only responsible party. In most cases, Hamas quickly takes control of the aid when it enters Gaza or prevents it from being delivered to those who need it the most. In other instances, when the aid reaches civilians, it triggers mass movements of people and creates a high-risk environment

for humanitarian workers. Even if one would want much more to be done for the delivery of aid, the process is not without complications. The power vacuum that is emerging in Gaza, particularly in the north, makes it more difficult to provide aid effectively. We have now seen efforts to deliver aid from the air, which Israel has supported, and the United States is considering the establishment of a floating port. Israel has agreed to help all of these initiatives. The main problems today are, *inter alia*, the unloading, storage and distribution of aid, and, most of all, securing all of these stages from acts of looting.

32. The second measure in operative paragraph (2) orders Israel to ensure that its military does not commit acts which violate the rights of the Palestinians in Gaza under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance. I have voted against this measure for two reasons. First, because it is not grounded in the preservation of plausible rights under the Genocide Convention, since there is no indication of an intent to commit genocide. Second, because this measure deliberately builds an artificial link between Israel's obligations under the Genocide Convention and the obligation not to prevent the delivery of humanitarian assistance. A State that prevents the delivery of humanitarian assistance may violate international humanitarian law, but not the rights of a protected group under the Genocide Convention. In the past, the Court has carefully explained that the Genocide Convention should not be interpreted as incorporating rules of international law that are extrinsic to it[4].

33. I voted against the submission of a report because I am not persuaded that such reports are an effective tool for the Court given its current working methods.

IV. CONCLUDING REMARKS

34. The war in Gaza is Israel's second war of independence. Israel's very existence was imperilled on 7 October 2023, and since that time, the daughters and sons of Israel have made the ultimate sacrifice to safeguard their nation's survival.

35. In one of my judgments as President of Israel's Supreme Court I wrote:

> "This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit, and this strength allows it to overcome its difficulties."[5]

I am glad that the Court has decided not to tie both of Israel's hands behind its back, preserving its right to protect its people.

36. As judges, our approach is grounded in principles, operating within the confines of the law rather than outside it. The principle of the rule of law remains paramount. While there may be compelling ideas on how to end the fighting in Gaza, these belong to the realm of personal opinions, not judicial decisions.

37. I sincerely hope that this war comes to an end as quickly as possible, and that the hostages will return to Israel immediately. The key lies in the hands of Hamas. Hamas started the war and Hamas can finish it. It is time for the thunder of war to be replaced by the bells of peace.

(Signed) Aharon BARAK.

ENDNOTES

1 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 581, para. 12.

2 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating a Provisional Measure of 22 February 2023, Order of 6 July 2023,* p. 4, para. 16.

3 *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 (I)*, p. 129, para. 209.

4 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening), Preliminary Objections, Judgment of 2 February 2024,* para. 146; *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 (I)*, p. 221, para. 430.

5 *Public Committee Against Torture* v. *Israel*, HCJ 5100/94, 1999, pp. 36–37.

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APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (S. AFR. V. ISR.) – PROVISIONAL MEASURES ORDER (I.C.J.)*

[May 24, 2024]

24 MAY 2024
ORDER

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE DANS LA BANDE DE GAZA

(AFRIQUE DU SUD c. ISRAËL)

24 MAI 2024
ORDONNANCE

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Table of Contents

INTERNATIONAL COURT OF JUSTICE

YEAR 2024

2024
24 May
General List
No. 192

24 May 2024

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP

(SOUTH AFRICA *v.* ISRAEL)

REQUEST FOR THE MODIFICATION OF THE ORDER OF 28 MARCH 2024

ORDER

Present: *President* SALAM; *Vice-President* SEBUTINDE; *Judges* ABRAHAM, YUSUF, XUE, BHANDARI, IWASAWA, NOLTE, CHARLESWORTH, BRANT, GÓMEZ ROBLEDO, CLEVELAND, AURESCU, TLADI; *Judge* ad hoc BARAK; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

1. On 29 December 2023, the Republic of South Africa (hereinafter "South Africa") filed in the Registry of the Court an Application instituting proceedings against the State of Israel (hereinafter "Israel") concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention").

2. In its Application, South Africa seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

3. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. Since at the time of the filing of the Application the Court included upon the Bench no judge of the nationality of either of the Parties, each Party availed itself of its right under Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. South Africa chose Mr Dikgang Ernest Moseneke and Israel chose Mr Aharon Barak.

5. After hearing the Parties, the Court, by an Order of 26 January 2024, indicated the following provisional measures:

(1) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures

within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

(*a*) killing members of the group;

(*b*) causing serious bodily or mental harm to members of the group;

(*c*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

(*d*) imposing measures intended to prevent births within the group;

(2) The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;

(3) The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;

(4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;

(5) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;

(6) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order."

6. Following the election to the Court, with effect from 6 February 2024, of Judge Dire Tladi, a South African national, Mr Moseneke ceased to sit as judge *ad hoc* in the case, in accordance with Article 35, paragraph 6, of the Rules of Court.

7. By a letter dated 12 February 2024, South Africa, referring to "the developing circumstances in Rafah", called upon the Court urgently to exercise its power under Article 75, paragraph 1, of the Rules of Court. By a letter dated 15 February 2024, Israel provided its observations on South Africa's communication.

8. By letters dated 16 February 2024, the Registrar informed the Parties of the following decision of the Court in response to South Africa's communication:

> "The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences', as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).
>
> This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures.
>
> The Court emphasizes that the State of Israel remains bound to fully comply with its obligations under the Genocide Convention and with the said Order, including by ensuring the safety and security of the Palestinians in the Gaza Strip."

9. On 26 February 2024, Israel submitted, within the time-limit fixed for that purpose, a report on all measures taken to give effect to the Court's Order on the indication of provisional measures of 26 January 2024, pursuant to paragraph 86, subparagraph 6, thereof. South Africa duly presented its observations on that report.

10. On 6 March 2024, South Africa requested the Court "to indicate further provisional measures and/or to modify its provisional measures indicated on 26 January 2024", with reference to Article 41 of the Statute of the Court, as well as Articles 75, paragraphs 1 and 3, and 76 of the Rules of Court. On 15 March 2024, Israel provided its written observations on that Request.

11. By an Order of 28 March 2024, the Court reaffirmed the provisional measures indicated in its Order of 26 January 2024 and indicated the following provisional measures:

> "The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:
>
> (*a*) Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;
>
> (*b*) Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance".

The Court also directed Israel to submit a report to the Court on all measures taken to give effect to that Order, within one month as from the date thereof.

12. On 29 April 2024, Israel submitted, within the time-limit fixed for that purpose, a report on all measures taken to give effect to the Court's Order on the indication of provisional measures of 28 March 2024, pursuant to paragraph 51, subparagraph 3, thereof. South Africa duly presented its observations on that report.

13. On 10 May 2024, South Africa submitted to the Court an "urgent Request for the modification and indication of provisional measures" pursuant to Article 41 of the Statute and Articles 75 and 76 of the Rules of Court.

14. In its Request, South Africa asked the Court to indicate the following provisional measures:

> 1. The State of Israel shall immediately withdraw and cease its military offensive in the Rafah Governorate.
>
> 2. The State of Israel shall immediately take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies or officials, investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence, and shall ensure that its military does not act to prevent such access, provision, preservation or retention.
>
> 3. The State of Israel shall submit an open report to the Court: *(a)* on all measures taken to give effect to these provisional measures within one week as from the date of this Order; and *(b)* on all measures taken to give effect to all previous provisional measures indicated by the Court within one month as from the date of this Order."

15. The Registrar immediately communicated to the Government of Israel a copy of South Africa's Request, in accordance with Article 73, paragraph 2, of the Rules of Court. In a separate communication on the same day, Israel was invited to present written observations on that Request by 15 May 2024. By letters dated 13 May 2024, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 16 and 17 May

2024 as the dates for the oral proceedings on the Request. By a letter also dated 13 May 2024, Israel asked the Court to postpone the hearings to the following week. After having ascertained the views of the Applicant, which opposed this request, the Court, in light of the circumstances, decided not to postpone the hearings. The Parties were informed of the Court's decision by letters dated 14 May 2024.

16. At the public hearings held on 16 and 17 May 2024, oral observations on the Request were presented by:

On behalf of South Africa: HE Mr Vusimuzi Madonsela,
Mr Vaughan Lowe,
Mr John Dugard,
Mr Max du Plessis,
Ms Adila Hassim,
Mr Tembeka Ngcukaitobi,
Ms Blinne Ní Ghrálaigh.

On behalf of Israel: Mr Gilad Noam,
Ms Tamar Kaplan Tourgeman.

17. At the end of its oral observations, South Africa asked the Court to indicate the following provisional measures:

> "South Africa respectfully requests the Court to order the State of Israel, as a State party to the Genocide Convention and as a [P]arty to these proceedings, to:
>
> (1) *immediately, and further to its obligations under the Court's previous Orders of 26 January 2024 and 28 March 2024*, cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip;
>
> (2) *immediately, and further to its obligations under provisional measure 4 of the Court's 26 January 2024 Order and provisional measures 2 (a) and 2 (b) of the Court's 28 March 2024 Order*, take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies and/or officials, investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence; and ensure that its military does not act to prevent such access, provision, preservation or retention;
>
> (3) submit an open report to the Court *(a)* on all measures taken to give effect to these provisional measures within one week as from the date of this Order; and *(b)* on all measures taken to give effect to all previous provisional measures indicated by the Court within one month as from the date of this Order."

18. At the end of its oral observations, Israel requested the Court to "reject the request for the modification and indication of provisional measures submitted by the Republic of South Africa".

19. At the end of the hearings, a Member of the Court put a question to Israel, which provided a written reply to the question on 18 May 2024. South Africa submitted written comments on the reply provided by Israel on 20 May 2024.

*

* *

I. General observations

20. In the view of the Court, South Africa's present Request is a request for the modification of the Order of 28 March 2024. For this reason, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

> "At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification."

21. The Court must first ascertain whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation that warranted the decision set out in its Order of 28 March 2024 has changed since that time. If the Court finds that there was a change in the situation since the delivery of its earlier Order, it will then have to consider whether such a change justifies a modification of its earlier decision concerning provisional measures. Any such modification would be appropriate only if the general conditions laid down in Article 41 of the Statute of the Court were also met in this instance (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 581, para. 12).

22. The Court will thus begin by determining whether there has been a change in the situation that warranted the decision set out in its Order of 28 March 2024.

* *

23. South Africa states that its present Request is prompted by the ground incursion that Israel's military began on 7 May 2024 in Rafah, the "last refuge" in Gaza for 1.5 million Palestinians, the majority of whom had been forcibly displaced from northern and central Gaza, and the last viable centre in Gaza for habitation, public administration, and the provision of basic public services and medical care. South Africa contends that Israel has now seized control of both the Rafah crossing and the Kerem Shalom (Karem Abu Salem) crossing, thereby taking full and direct control over all entry and exit points for people and goods to and from Gaza, and that it has closed the former crossing and "mostly disabled" the latter. It alleges that medical facilities in Rafah are also in danger, as the main facility in the entire Rafah Governorate is no longer operational, while the functioning of others is severely impacted. South Africa argues that Israel has directed Palestinians in the eastern portion of Rafah to relocate to "the so-called Al-Mawasi 'humanitarian area' in the Khan Younis Governorate", which is allegedly already overcrowded and lacking in safety, as well as in essential services. According to South Africa, a mass evacuation on this scale is "impossible to carry out safely". The Applicant adds that, in any event, "there is nowhere for Palestinians in Rafah to go", as approximately 76 per cent of the territory of Gaza is now under evacuation orders, and "an estimated two thirds of homes have been damaged or destroyed".

24. In the Applicant's view, Israel's military incursion into Rafah, in light of the extreme risk it poses to humanitarian supplies and basic services in Gaza, to the Palestinian medical system and to the survival of Palestinians in Gaza as a group, "is not only an escalation of the prevailing situation, but gives rise to new facts that are causing irreparable harm to the rights of the Palestinian people in Gaza". South Africa argues that "[t]his amounts to a change in the situation in Gaza since the Court's Order of 28 March 2024, within the meaning of Articles 75 (3) and 76 (2) of the Rules of the Court".

*

25. Israel rejects South Africa's contention that there has been a change in the situation since the Court's Order of 28 March 2024. It claims that, "[w]hile many civilians have indeed evacuated to Rafah over the past few months, the

fact remains that the city of Rafah also serves as a military stronghold for Hamas, which continues to pose a significant threat to the State of Israel and its citizens". Israel refutes South Africa's allegations that it has closed critical border crossings in Gaza, or that it has failed to facilitate the provision of fuel for sustaining humanitarian operations and facilities. Israel emphasizes that, on the contrary, it has made continuous efforts to alleviate the humanitarian situation in the Gaza Strip, including by opening a new land crossing at Erez West on 12 May 2024, by facilitating the establishment of a floating pier off the Gaza coast, which became operational on 17 May 2024, and by supporting the "rehabilitation of hospitals" in and outside Rafah.

26. Israel contends that it "continues to take extraordinary measures in order to minimize harm to Palestinian civilians in Gaza", in particular by informing civilians of planned operations by the Israeli Defense Forces in specific areas, by putting in place clear and definite targeting procedures so as to achieve the requisite military needs while minimizing civilian harm, by taking additional measures to ensure that the Israeli Defense Forces are aware of sensitive sites, such as medical services and shelters, and by ensuring that humanitarian aid continues to be delivered during the course of hostilities.

* *

27. The Court recalls that, in its Order of 26 January 2024, it noted that the military operation conducted by Israel following the attack of 7 October 2023 had resulted in "a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 46). In its decision communicated to the Parties by letters of 16 February 2024, the Court noted, quoting the United Nations Secretary-General, that the developments in the Gaza Strip, and in Rafah in particular, "would exponentially increase what [wa]s already a humanitarian nightmare with untold regional consequences" (see paragraph 8 above). The Court further recalls that, in its Order of 28 March 2024, it observed with regret that the catastrophic living conditions of the Palestinians in the Gaza Strip had deteriorated further since January 2024, especially in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip had been subjected (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 18).

28. The Court notes that the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024. In this regard, the Court observes that the concerns that it expressed in its decision communicated to the Parties on 16 February 2024 with respect to the developments in Rafah have materialized, and that the humanitarian situation is now to be characterized as disastrous. After weeks of intensification of military bombardments of Rafah, where more than a million Palestinians had fled as a result of Israeli evacuation orders covering more than three quarters of Gaza's entire territory, on 6 May 2024, nearly 100,000 Palestinians were ordered by Israel to evacuate the eastern portion of Rafah and relocate to the Al-Mawasi and Khan Younis areas ahead of a planned military offensive. The military ground offensive in Rafah, which Israel started on 7 May 2024, is still ongoing and has led to new evacuation orders. As a result, according to United Nations reports, nearly 800,000 people have been displaced from Rafah as at 18 May 2024.

29. The Court considers that the above-mentioned developments, which are exceptionally grave, in particular the military offensive in Rafah and the resulting repeated large-scale displacement of the already extremely vulnerable Palestinian population in the Gaza Strip, constitute a change in the situation within the meaning of Article 76 of the Rules of Court.

30. The Court is also of the view that the provisional measures indicated in its Order of 28 March 2024, as well as those reaffirmed therein, do not fully address the consequences arising from the change in the situation explained above, thus justifying the modification of these measures. However, in order to modify its earlier decision concerning

provisional measures, the Court must still satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation.

II. CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

31. The Court recalls that, in its Order of 26 January 2024 indicating provisional measures in the present case, it concluded that "prima facie, it ha[d] jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 31). In its Order of 28 March 2024 concerning South Africa's Request of 6 March 2024 for the modification of the Order of 26 January 2024, the Court stated that it saw no reason to revisit that conclusion (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 24). The Court likewise sees no reason to do so for the purposes of deciding on the present Request.

32. In the Order of 26 January 2024, the Court also found that at least some of the rights claimed by South Africa under the Genocide Convention and for which it was seeking protection were plausible, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under that Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 54). The Court saw no reason to revisit this conclusion in its Order of 28 March 2024 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 25). The Court likewise sees no reason to do so for the purposes of deciding on the present Request. It further considers that, by their very nature, at least some of the provisional measures sought pursuant to the present Request (see paragraph 17 above) are aimed at preserving the rights claimed by the Applicant that the Court has found to be plausible.

33. The Court must now consider whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed by South Africa and whether there is urgency.

34. The Court recalls in this regard that it has previously concluded that, in view of the fundamental values sought to be protected by the Genocide Convention, the plausible rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 66; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 27).

* *

35. The Applicant states that the situation in Gaza "could not be more urgent" and therefore demands the indication of further or modified provisional measures. South Africa refers, in particular, to the widespread risk of violent death and injury faced by the displaced Palestinian population, as well as to the increased restrictions on the provision of humanitarian assistance and the deprivation of access to healthcare that will ensue if hospitals in Rafah are rendered inoperable.

36. The Applicant contends that there has already been "a total collapse of infrastructure, of sanitation, of water, of food supply: in short, the conditions necessary to sustain life for the 2.3 million Palestinians in Gaza". According to South Africa, "[t]he level of destruction that Israel has caused across Gaza and is now wreaking on Rafah threatens the very survival of future Palestinian generations in Gaza".

37. South Africa further contends that the very manner in which Israel is pursuing its military operations in Rafah, as well as elsewhere in Gaza, is itself genocidal. Thus, according to South Africa, an "explicit order that

Israel 'cease its military activities'" is required to "protect what is left of Palestinian life in Gaza". South Africa emphasizes that there are no evacuation zones in Gaza where humanitarian aid and assistance are provided. It contends, in particular, that Al-Mawasi cannot be considered as a humanitarian zone for Palestinians instructed to evacuate from Rafah because it is

> "profoundly unsafe: over-crowding, mountains of waste, and the lack of water and sanitation are leading to the spread of disease, while Israeli military attacks on the area, including aerial bombardment, shelling and sniping, have led to and continue to lead to serious injury and death".

According to South Africa, Israel "had no plan in place to accommodate the hundreds of thousands of Palestinians ordered to flee Rafah and other areas in early May 2024 — just like it had no plan to accommodate those forced to flee as a result of previous evacuation orders".

38. The Applicant finally states that Israel's "complete refusal to allow independent investigators" in Gaza entails a risk that the true number of Palestinian casualties will remain unknown and that evidence will be obliterated as a result of Israel's ongoing military operation. In South Africa's view, this justifies the imposition of a measure requiring Israel to grant unimpeded access to Gaza to "persons able to investigate ongoing atrocities", particularly in light of the recent discovery of multiple mass graves at Nasser Hospital in Khan Younis and at Al Shifa Hospital in Gaza City with bodies "reportedly showing signs of torture and summary executions".

*

39. Israel maintains that the allegations against it are "patently untrue" and that many of South Africa's assertions lack any basis in fact or law. The Respondent argues that the provisional measures indicated by the Court that are currently in place are entirely sufficient and claims that South Africa has not established that the "extreme measures" that it now seeks are justified.

40. Israel contends that there has not been "a large-scale assault" on Rafah, but rather that specific, limited and localized operations have been undertaken, prefaced by incremental and localized evacuations and support for humanitarian activities. It states that, as part of its efforts to facilitate the evacuation of civilians from parts of the Rafah region where intense hostilities were expected, "a humanitarian area was initially delineated by Israel in the Al-Mawasi area" located outside the theatre of planned hostilities. Israel states that this area was "expanded very significantly" since the beginning of the military offensive.

41. According to the Respondent, the Israeli Defense Forces implement "[r]estricted fire areas" and "tactical pauses in fighting along evacuation routes" to enhance the security of the Palestinians evacuating. Israel further states that two main routes can reach this "humanitarian area", making it possible to deliver aid, including from the floating pier off the Gaza coast operational since 17 May 2024. It also alleges that it actively facilitates the provision of food, water and shelter, and that six of the eight field hospitals in Gaza are located in that area. Israel submits that it has purchased 40,000 tents capable of sheltering 320,000 people in the humanitarian area and that 7,000 of those tents have entered Gaza. According to Israel's assessment, approximately 800,000 civilians have evacuated the Rafah area to date, whether as a result of sectoral warnings issued by the Israeli Defense Forces or on their own initiative.

42. In Israel's view, an Order by the Court requesting the cessation of hostilities by Israel "would mean that 132 hostages would remain to languish in Hamas' tunnels forsaken . . . [and that] Hamas would be left unhindered and free to continue its attacks against Israeli territory and Israeli civilians". Israel also states that its military action in Rafah has the purpose of protecting its civilians and rescuing the Israeli hostages still held by Hamas and other armed groups. The Respondent further states that it has in place the necessary mechanisms to examine and investigate allegations of wrongdoing by its military forces and to ensure accountability.

* *

43. The Court recalls that, on 7 May 2024, Israel began a military offensive in Rafah, following weeks of intensified bombardment, and that, as a result, approximately 800,000 Palestinians were displaced from Rafah as at 18 May 2024 (see paragraph 28 above).

44. The Court notes that senior United Nations officials have consistently underscored the immense risks associated with a military offensive in Rafah. For instance, on 3 May 2024, the Spokesperson of the Office for the Coordination of Humanitarian Affairs (OCHA) warned that an assault on Rafah would put "hundreds of thousands of people . . . at imminent risk of death" and would severely impact the humanitarian operation in the entire Gaza Strip, which is run primarily out of Rafah (OCHA, "Hostilities in the Gaza Strip and Israel — Flash Update #162", 6 May 2024). On 6 May 2024, the United Nations Children's Fund (UNICEF) indicated that about half of the approximately 1.2 million Palestinians sheltering in Rafah were children, and warned that military operations therein would result in "the few remaining basic services and infrastructure they need to survive being totally destroyed" (UNICEF, "UNICEF warns: There is 'nowhere safe to go' for the 600,000 children of Rafah", press release, 6 May 2024).

45. United Nations sources indicate that the above-mentioned risks have started to materialize and will intensify even further if the operation continues. For instance, on 8 May 2024, the Director- General of the World Health Organization stated that the Al Najjar Hospital, one of the last remaining medical facilities in the Rafah Governorate, was no longer functional due to the ongoing hostilities in its vicinity. On 17 May 2024, the World Food Programme (WFP) warned that it had been unable to access its warehouse in Rafah for over a week and observed that "[t]he incursion into Rafah is a significant setback to recent modest progress on access" (WFP, "Gaza updates: WFP responds to hunger crisis as Rafah incursion cuts access to warehouse", press release, 17 May 2024).

46. On the basis of the information before it, the Court is not convinced that the evacuation efforts and related measures that Israel affirms to have undertaken to enhance the security of civilians in the Gaza Strip, and in particular those recently displaced from the Rafah Governorate, are sufficient to alleviate the immense risk to which the Palestinian population is exposed as a result of the military offensive in Rafah. The Court observes, for instance, that according to a statement by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Mr Philippe Lazzarini, on 18 May 2024,

> "[t]he areas that people are fleeing to now do not have safe water supplies or sanitation facilities. Al-Mawasi — as one example — is a sandy 14 square kilometre agricultural land, where people are left out in the open with little to no buildings or roads. It lacks the minimal conditions to provide emergency humanitarian assistance in a safe and dignified manner."

The Court observes that Israel has not provided sufficient information concerning the safety of the population during the evacuation process, or the availability in the Al-Mawasi area of the necessary amount of water, sanitation, food, medicine and shelter for the 800,000 Palestinians that have evacuated thus far. Consequently, the Court is of the view that Israel has not sufficiently addressed and dispelled the concerns raised by its military offensive in Rafah.

47. In light of the considerations set out above, and taking account of the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, the Court finds that the current situation arising from Israel's military offensive in Rafah entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision.

III. CONCLUSION AND MEASURES TO BE ADOPTED

48. The Court concludes, on the basis of the above considerations, that the circumstances of the case require it to modify its decision set out in its Order of 28 March 2024.

49. The Court recalls that, in accordance with Article 75, paragraph 2, of its Rules, when a request for the indication of provisional measures has been made, it has the power under its Statute to indicate measures that are, in whole or in part, other than those requested. In the present case, having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

50. The Court considers that, in conformity with its obligations under the Genocide Convention, Israel must immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.

51. The Court recalls that, in its Order of 26 January 2024, it ordered Israel, *inter alia*, to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of [the Genocide Convention]" (see paragraph 5 above). In the present circumstances, the Court is also of the view that, in order to preserve evidence related to allegations of acts falling within the scope of Article II and Article III of the Genocide Convention, Israel must take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide.

52. The Court also considers that the catastrophic situation in Gaza confirms the need for the immediate and effective implementation of the measures indicated in its Orders of 26 January 2024 and 28 March 2024, which are applicable throughout the Gaza Strip, including in Rafah. In these circumstances, the Court finds it necessary to reaffirm the measures indicated in those Orders. In so doing, the Court wishes to emphasize that the measure indicated in paragraph 51 (2) *(a)* of its Order of 28 March 2024, requiring the "unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance", necessitates that the Respondent maintain open land crossing points, and in particular the Rafah crossing.

53. In view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order. The report so provided will then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

54. The Court recalls that its orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023*, p. 29, para. 65).

55. The Court underlines that the present Order is without prejudice to any findings concerning the Respondent's compliance with the Orders of 26 January 2024 and 28 March 2024.

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56. In its Orders of 26 January 2024 and 28 March 2024, the Court expressed its grave concern over the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and called for their immediate and unconditional release. The Court finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release.

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57. For these reasons, The Court,

(1) By thirteen votes to two,

Reaffirms the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which should be immediately and effectively implemented;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak;

(2) *Indicates* the following provisional measures:

The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:

(*a*) By thirteen votes to two,

Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak;

(*b*) By thirteen votes to two,

Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak;

(*c*) By thirteen votes to two,

Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak;

(3) By thirteen votes to two,

Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order.

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge* ad hoc Barak.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of South Africa and the Government of the State of Israel, respectively.

(Signed) Nawaf SALAM,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President SEBUTINDE appends a dissenting opinion to the Order of the Court; Judges NOLTE, AURESCU and TLADI append declarations to the Order of the Court; Judge *ad hoc* BARAK appends a dissenting opinion to the Order of the Court.

(Initialled) N.S.

(Initialled) Ph.G.

DISSENTING OPINION OF VICE-PRESIDENT SEBUTINDE

Table of Contents

I. INTRODUCTION

1. I have voted against the Order because I firmly believe that the provisional measures previously indicated and reaffirmed by the Court adequately address the current situation in the Gaza Strip, including Rafah. Israel's ongoing military operations in Rafah are part of the broader conflict initiated by Hamas on 7 October 2023, when Hamas attacked Israeli territory, killing citizens and abducting others. To protect Palestinian civilians in the Gaza Strip caught in this conflict, the Court has at South Africa's request and in accordance with the Applicant's rights under the Genocide Convention, indicated several binding and effective provisional measures. Therefore, despite the frequent changes in the location and intensity of hostilities, the situation in Rafah does not constitute a "new fact" that would necessitate modifying the existing measures under Article 76, paragraph (1) of the Rules of Court. This forms the basis of my dissent from the majority. To maintain its judicial integrity, the Court must avoid reacting to every shift in the conflict and refrain from micromanaging the hostilities in the Gaza Strip, including Rafah. South Africa's current request inviting the Court to indicate new provisional measures or to modify the existing ones, marks the fourth within the past few months.

2. Once again, South Africa has invited the Court to micromanage the conduct of hostilities between Israel and Hamas. Such hostilities are exclusively governed by the laws of war (international humanitarian law) and international human rights law, areas where the Court lacks jurisdiction in this case. Regrettably, the wording of the Court's directive in operative clause 57, paragraph (2) *(a)*, ordering Israel to "halt its military offensive . . . in the Rafah Governorate", is susceptible to ambiguity and could be misunderstood or misconstrued as ordering an indefinite, unilateral ceasefire, thereby exemplifying an untenable overreach on the part of the Court. In my understanding, the objective of the Court is to order Israel to suspend its military offensive in Rafah only in so far as such suspension is necessary to prevent the bringing about of conditions of life that could bring about the destruction of the Palestinians in Gaza. In my view, a suspension of Israel's military offensive in Rafah, whether temporary or indefinite, has no link to South Africa's plausible rights or Israel's obligations under the Genocide Convention, as required by Article 41 of the Statute of the Court and its associated jurisprudence. This directive, which could be erroneously misunderstood as mandating a unilateral ceasefire in part of Gaza, amounts to micromanaging the hostilities in Gaza by restricting Israel's ability to pursue its legitimate military objectives, while leaving its enemies, including

Hamas, free to attack without Israel being able to respond. This measure also implicitly orders Israel to disregard the safety and security of the over 100 hostages still held by Hamas, a terrorist organization that has refused to release them unconditionally.

3. I firmly believe that Israel has the right to defend itself against its enemies, including Hamas, and to continue efforts to rescue its missing hostages. These rights are not incompatible with its obligations under the Genocide Convention. Israel can continue pursuing its legitimate aims of combating Hamas and rescuing its hostages, provided it respects its obligations under the Genocide Convention and the provisional measures indicated by the Court. In this dissenting opinion, I highlight the broader context of the war in Gaza, which context was, in my view, not fully or accurately reflected in the present Order. I also examine in a more balanced way, the ongoing humanitarian situation in the Gaza Strip, including Israel's efforts at mitigating civilian casualties, since the Court's last Order on 28 March 2024. Lastly, I provide my reasons for rejecting the provisional measures indicated by the Court in the current Order.

II. The broader context of the war in the Gaza Strip

4. As stated above, South Africa has submitted its fourth request for the indication of provisional measures in as many months (on 29 December 2023; 12 February 2024; 6 March 2024 and 10 May 2024). Significant developments have occurred in Israel and the Gaza Strip since the Court's last Order on 28 March 2024. When considering whether new facts have emerged that justify modifying the existing provisional measures under Article 76, paragraph (1) of the Rules of Court, it is essential to view the ongoing conflict between Israel and Hamas in Rafah within its full context. Since 7 October 2023, Israel has been engaged in armed conflict on multiple fronts, facing attacks from various actors and directions. Hamas continues to launch attacks from Gaza, including Rafah, and still holds over 100 Israeli hostages despite calls from this Court, the United Nations Security Council, and the international community for their unconditional release. Several States believe that the release of these hostages would significantly help end the conflict in Gaza[1].

5. According to Israel, more than 10,000 rockets have been fired from Gaza into Israel since the hostilities began[2], including over a thousand recently from Rafah, even from the vicinity of the Rafah crossing. A rocket launched from Rafah recently landed in a children's playground[3]. Israel reports that Rafah hosts several Hamas battalions and numerous tunnels used by Hamas fighters[4]. South Africa has not disputed these facts. An Israeli operation in February 2024 resulted in the rescue of two hostages, and more recently, the bodies of three more hostages killed in captivity were recovered from Rafah. It is plausible that additional hostages in captivity remain in the area, which is why Israel has declared its intention to locate and return them, dead or alive, to their families. This is a right that the Court cannot deny Israel or the hostages.

6. Apart from Hamas, other armed groups in the Gaza Strip and the West Bank continue to pose threats to Israeli soldiers and civilians. These groups include Palestinian Islamic Jihad and the Al-Aqsa Martyrs Brigades, both of which regularly engage in violent attacks against Israeli soldiers and civilians. In addition, Israel is involved in a large-scale conflict in its north against Hezbollah, another armed group based in Lebanon. Hezbollah frequently launches rockets, missiles, and drones directed at Israeli targets, including civilian areas in northern Israel, using advanced weaponry such as guided missiles and missile-firing drones[5]. Hezbollah's leader has praised Hamas's actions, including the 7 October 2023 attack, and has expressed solidarity with Hamas, openly calling for the annihilation of Israel.

7. Since the 28 March 2024 Order of the Court, Israel has also faced attacks from further afield. The Houthis, another armed group based in Yemen and backed by Iran, have targeted civilian shipping in the Red Sea believed to be connected to Israel, and launched long-range ballistic missiles and drones at Israeli cities, despite international condemnation and efforts to de-escalate the situation[6]. The Houthis have also expressed solidarity with Hamas and openly called for the destruction of Israel. On 13 April 2024, Iran launched a large-scale attack on Israel involving more than 200 drones, cruise missiles, and ballistic missiles aimed at Israeli territory[7]. While South Africa does not dispute these facts, the Court's present Order omits these developments, which are crucial to understanding Israel's continued military operations in the Gaza Strip, including Rafah.

8. These threats collectively pose a significant risk to the safety, security, and welfare of Israel and its citizens. While the international community is rightfully concerned about the safety and security of the displaced Palestinian

civilians in Gaza, it is equally important to recognize that Israel's ongoing conflict with Hamas and Hezbollah has resulted in the displacement of 60,000 Israelis from their homes in southern Israel[8] and another 60,000 in northern Israel[9]. Israel has the right to respond to these existential threats, which are interconnected and coordinated. In doing so, Israel is expected to comply with international obligations, including under international humanitarian law. However, neither international law in general nor the Genocide Convention in particular deprive Israel of the right to take necessary and proportionate actions to defend its citizens and territory against such armed attacks on multiple fronts. Had the Court taken this broader context into consideration when evaluating South Africa's fourth request for provisional measures, it might have arrived at a more balanced result that leaves unimpeded Israel's right to defend itself and its citizens against its enemies and that avoids the untenable overreach demonstrated in some of the measures indicated.

III. THE HUMANITARIAN SITUATION IN THE GAZA STRIP

9. The reality of the humanitarian situation in Gaza is far more complex than South Africa suggests in its fourth Request. While the war in Gaza has undoubtedly had devastating humanitarian consequences on innocent civilians, the responsibility for the suffering of the Palestinians of Gaza does not lie only with Israel and nor is it correct to say that Israel has failed to act to alleviate that suffering. Israel has consistently maintained that as a fighting tactic, members of Hamas embed themselves amongst the civilian population often making it difficult for Israeli forces to distinguish between innocent civilians and legitimate military combatants. Citing a deterioration in the humanitarian situation in the Gaza Strip and in Rafah in particular, South Africa asserts that there has been a change in the situation since the Court's March 2024 Order necessitating the indication of additional measures[10]. However, the evidence actually shows a gradual improvement in the humanitarian situation in Gaza since the Court's Order, reflecting efforts by Israel to comply with the Order. Within a week of the Court's March Order, the Israeli Security Cabinet met and made a formal decision to continue and increase efforts to facilitate the provision of humanitarian aid for the civilian population of Gaza[11]. The Israeli government allocated approximately US$52 million to this effort[12].

10. Furthermore, multiple concrete actions were taken by Israel to facilitate the provision of humanitarian aid for the civilian population of Gaza since the March Order of the Court. This includes the opening of three additional land crossings. A new land route between Israel and northern Gaza at Gate 96 was established in March 2024 and has been operating since[13]. The East Erez crossing, which was attacked and destroyed by Hamas on 7 October 2023, was reopened on 1 May 2024[14]. Most recently, the West Erez crossing was opened on 1 May 2024[15]. These three crossings operate in conjunction with the Kerem Shalom crossing, which remains operational after it was forced to pause operations from 5 to 8 May 2024 following a Hamas rocket attack on the crossing[16]. Although the Rafah crossing is currently closed, Israel has asserted, without contradiction, that efforts are underway to reopen the crossing, including discussions with Egypt and other relevant actors[17]. In addition to the opening of new crossings, there is evidence that Israel has expanded the capacity of the existing Kerem Shalom crossing, extended its opening hours and improved the movement of trucks delivering aid through the crossing[18]. Efforts also appear to have been made to expand the number of trucks bound for Gaza that are able to enter Israel from Jordan[19] and to extend the opening hours at the Nitzana crossing with Egypt[20].

11. Israel has also facilitated the opening of new sea routes into Gaza. Israel and Cyprus have agreed on the establishment of a maritime corridor to allow for the direct delivery of aid to Gaza. Shipments of humanitarian aid took place using this corridor in March and April 2024[21]. Furthermore, a floating pier off the Gaza coast constructed with the assistance of the United States Government began operation on 17 May 2024 and is expected to allow for the delivery of up to 150 truckloads of aid a day, once fully operational[22]. Airdrops to Gaza have also continued since the Court's 28 March Order and have been co-ordinated by Israel[23].

12. The above efforts have resulted in a tangible improvement in the amount of aid entering Gaza. Figures from the Israeli Government show a steady increase in the number of trucks of humanitarian aid entering Gaza since the Court's March 2024 Order[24]. Media reports show that the number of truckloads entering the territory reached a peak for the entire conflict in early May[25]. Figures from OCHA — which only account for aid from the Rafah and Kerem Shalom crossings and do not include aid entering from other crossings or routes — also show an increase in the number of truckloads since the March Order[26]. Although there appears to have been a significant slowdown in

aid entering southern Gaza as a result of the closure of the Rafah crossing and temporary closure of the Kerem Shalom crossing, recent reports indicate that large-scale aid transfers have resumed through the Kerem Shalom crossing[27]. As a result of these increased efforts, thousands of food trucks have entered Gaza; multiple large bakeries have reopened; greater amounts of animal fodder have been able to enter the Strip; water pipelines have been repaired and water pumps supplied with fuel; millions of litres of fuel have been able to enter Gaza; and clothing, hygiene and sanitation supplies have been supplied to Gazan civilians[28].

13. This improvement in the supply of aid has been recognised by third parties. The UN Senior Humanitarian and Reconstruction Coordinator for Gaza, Ms Sigrid Kaag, has noted the steps taken by Israel to improve aid delivery since 5 April 2024 and has stated that she considers there to have been "very constructive co-operation with her mission" by Israeli authorities, including the Israeli War Cabinet[29]. Third States, including the United States, United Kingdom and Germany have also acknowledged improvements in the delivery of humanitarian assistance[30].

14. In addition to taking action to increase the amount of aid entering Gaza, Israel has taken action intended to improve access to medical care in the Strip. The ongoing fighting has naturally made it substantially more difficult to provide adequate medical care. Israel has acted since the Court's March Order to remedy this situation. This includes efforts to facilitate the entry of medical supplies and the construction of field hospitals and mobile clinics[31]. Israel noted before the Court that eight field hospitals are now operating in Gaza, with another due to open this month and the establishment of further hospitals being considered[32]. There is also evidence that Israel has evacuated thousands of Gazans for treatment abroad, facilitated the arrival of additional ambulances into Gaza and has continued to supply hospitals even in the midst of active fighting[33].

15. Finally, Israel has throughout the conflict warned Palestinians in Gaza of upcoming operations and has repeatedly requested the evacuation of civilians from areas of active fighting[34]. Such actions are inconsistent with the intent to destroy the group in question. Israel has also acted to make infrastructure available at shelter sites and has facilitated the supply of shelter equipment into Gaza[35].

16. To be sure, the efforts taken by Israel thus far have not entirely alleviated the ongoing humanitarian crisis in the Gaza Strip. War inevitably, and tragically, affects the lives of civilians. But this does not make Israel's war against Hamas inherently illegitimate or unlawful and nor does it transform it into an act of genocide. Furthermore, Israel is not the only party responsible for the humanitarian situation in Gaza. Indeed, Israel does not currently govern or exercise full control over the Gaza Strip and a majority of Israeli troops appear to have left the territory in April 2024[36]. In this regard, South Africa's Request is to some extent paradoxical in that South Africa requests the withdrawal of Israel from Gaza yet also expects Israel to act on the ground to ensure the effective delivery of aid in the territory.

17. Hamas bears at least partial responsibility for the welfare of Palestinians in Gaza. It remains in control of much of civil life there and aid organizations are reportedly required to coordinate their efforts with the Hamas civil authorities[37]. Hamas' conduct has also impeded the effective delivery of aid. Hamas has launched rocket attacks at aid crossings and at the construction site of Gaza's floating pier[38]. There is also evidence that Hamas has seized aid for its own use[39].

18. Another actor that plays a key role in facilitating aid delivery is Egypt, which shares a border with Gaza and controls part of both the Rafah and Kerem Shalom crossing facilities. As Israel has noted, efforts to reopen the Rafah crossing require Egyptian co-operation[40]. There have also been reports that Egypt has prevented the movement of aid trucks from Egypt towards Kerem Shalom[41].

19. Finally, logistical constraints may sometimes operate to prevent the effective delivery of aid by third parties, including international and non-governmental organizations[42]. For example, the United States has noted that a lack of available trucks has prevented the United Nations from distributing aid that has been delivered into Gaza[43].

IV. The provisional measures indicated by the Court

1. Order reaffirming measures indicated in the Orders of 26 January 2024 and 28 March 2024

20. I have voted against the Order in operative paragraph 57 (1) because I believe that it is unnecessary. Furthermore, it erroneously presumes that Israel is somehow not "effective[ly] implement[ing]"[44] the existing provisional

measures earlier indicated including those "reaffirm[ing]" existing orders[45], a finding the Court can only make at the merits stage of the proceedings. The Court must have faith in the measures it indicates which create binding obligations upon the parties to whom they are directed. The Court should also avoid trying to enforce its own orders as that is not the rationale behind the modification of provisional measures under Article 76 (1) of the Rules of Court. Is the Court going to reaffirm its earlier provisional measures every time a party runs to it with allegations of a breach of its provisional measures? I should think not.

2. Order halting Israel's military offensive in Rafah Governorate

21. I have voted against the Order in operative paragraph 57 (2) *(a)* because I believe it is an overreach by the Court that has no link with South Africa's plausible rights under the Genocide Convention. As explained above, this measure does not entirely prohibit the Israeli military from operating in Rafah. Instead, it only operates to partially restrict Israel's offensive in Rafah to the extent it implicates rights under the Genocide Convention. However, as stated above, this directive may be misunderstood as mandating a unilateral ceasefire in Rafah and amounts to micromanaging the hostilities in Gaza by restricting Israel's ability to pursue its legitimate military objectives, while leaving its enemies, including Hamas, free to attack without Israel being able to respond. This measure also implicitly orders Israel to disregard the safety and security of the more than 100 hostages still held by Hamas, a terrorist organization that has refused to release them unconditionally. I reiterate that Israel has the right to defend itself against its enemies, including Hamas, and to continue efforts to rescue its missing hostages. These rights are not incompatible with its obligations under the Genocide Convention.

3. Order halting "any other action" in Rafah that may inflict conditions of life that could bring about the physical destruction of the Palestinians in Gaza

22. Furthermore, I have voted against the Order in operative paragraph 57 (2) *(a)* requiring Israel to "immediately halt . . . any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part", because I believe it is unnecessary and is already covered by the existing measures in operative paragraph 86 (1) *(d)*, (2) and (4) of the Order of 26 January 2024 and reiterated in the Order of 28 March 2024. The newly indicated measure merely repeats verbatim what is contained in the previous Orders, which are binding and applicable throughout the Gaza Strip including Rafah.

4. Order requiring Israel to maintain open the Rafah crossing

23. I have voted against the Order in operative paragraph 57 (2) *(b)* requiring Israel to "maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance" because I believe the existing provisional measures are robust enough and already adequately cover the current situation, including over the Rafah crossing. In particular, the measure in operative clause 51 (2) in the Order of 28 March 2024 already requires Israel to,

> "in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:
>
> (*a*) Take all necessary and effective measures to ensure, without delay, in full co- operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;
>
> (*b*) Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance."

Furthermore, as stated above, Egypt, which shares a border with Gaza and controls part of both the Rafah and Kerem Shalom crossing facilities, plays a key role in facilitating aid delivery through the Rafah crossing. There have also been reports that Egypt has prevented the movement of aid trucks from Egypt towards Kerem Shalom[46]. Without Egypt's co-operation, Israel alone cannot "maintain open the Rafah crossing"[47] which would render the Court's current order, which is directed at Israel but not Egypt, impracticable.

5. Order requiring Israel to ensure unimpeded access of fact-finding missions

24. I have voted against the measure requiring Israel to facilitate the unimpeded access to Gaza of fact-finding missions, internationally mandated bodies or officials, investigators, and journalists. In this regard, it can be noted that more than 1,000 personnel of international organizations have entered Gaza since November 2023[48]. Furthermore, there are allegations that Hamas has itself engaged in the destruction of documentary evidence[49]. This measure responds to South Africa's request made earlier in December 2023 and rejected by the Court in its January Order but repeated in the present request. In its December Request, South Africa asked that the Court indicate a measure stating that

> "The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence"[50].

25. In the 26 January Order, the Court did indicate a measure requiring Israel to prevent the destruction of evidence and ensure its preservation but did not require that access be granted to fact-finding missions or similar bodies. The primary concern with granting South Africa's request is that it is not sufficiently linked with plausible rights under the Genocide Convention. While a general measure requiring the preservation of evidence acts directly to preserve the rights at issue, requiring access by fact-finding missions imposes a much broader obligation without a clear textual basis in the Genocide Convention. South Africa has also not put forward any specific evidence that Israel is engaging in the destruction of evidence that may require the indication of new measures relating to this issue. There may also be legitimate security reasons behind preventing the access of certain individuals into Gaza during an active conflict, given that their safety could not be guaranteed.

26. Furthermore, the Court has never imposed an obligation upon a sovereign State to admit third-party observers onto its territory. Notably, the Court's January rejection of South Africa's earlier request was in line with the approach taken in *Gambia* v. *Myanmar* and in *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republic)*, where the Court rejected a similar request for access by independent monitoring mechanisms made by the applicants. The Court also rejected a request by Armenia in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)* for access by the United Nations and its agencies to the Armenians of Nagorno-Karabakh. In Syria, Myanmar and Nagorno-Karabakh there is a far lower level of media presence and international scrutiny than there is in Gaza. Thus, it is difficult to reconcile a decision to grant this particular measure with the approach taken by the Court in those other cases. For the above reasons I have voted against it.

6. Order requiring Israel to file another report

27. Lastly, I have voted against the last measure requiring the filing of yet again one more report from Israel. In view of the number of reports that the Court has already ordered Israel to file, this measure could be seen as another effort by the Court to enforce the implementation of its existing orders, which is a power it does not possess.

V. Issues of procedure

28. Finally, I find it necessary to note my serious concerns regarding the manner in which South Africa's Request and incidental oral hearings were managed by the Court, resulting in Israel not having sufficient time to file its written

observations on the request. In my view, the Court should have consented to Israel's request to postpone the oral hearings to the following week to allow for Israel to have sufficient time to fully respond to South Africa's Request and engage counsel. Regrettably, as a result of the exceptionally abbreviated time-frame for the hearings, Israel could not be represented by its chosen Counsel, who were unavailable on the dates scheduled by the Court. It is also regrettable that Israel was required to respond to a question posed by a Member of the Court over the Jewish Sabbath. The Court's decisions in this respect bear upon the procedural equality between the Parties and the good administration of justice by the Court.

(Signed) Julia SEBUTINDE.

ENDNOTES

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3 CR 2024/28, p. 10, para. 15 (Noam).

4 CR 2024/28, p. 10, paras. 14–15 (Noam).

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11 Report by the State of Israel to the International Court of Justice, 28 April 2024 (Israel's April Report), paras. 10, 19.

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26 OCHA, Hostilities in the Gaza Strip and Israel – reported impact: Day 124, 17 May 2024.

27 CR 2024/28, p. 26, para. 26 (Kaplan Tourgeman).

28 Israel's April Report, paras. 41–55.

29 OCHA, Remarks to the Security Council by Sigrid Kaag, Senior Humanitarian and Reconstruction Coordinator for Gaza, 24 April 2024, YouTube, UN Senior Official on Gaza – Media Stakeout, 24 April 2024, https://www.youtube.com/watch?v=1Q-ds2CdjtQ&t=1s.

30 US Department of State, Press Briefing, Department Press Briefing — April 15, 2024, 15 April 2024; US Department of State, Press Briefing, Department Press Briefing — April 23, 2024, 23 April 2024; German Foreign Office, Auswärtiges Amt, @Auswartigesamt, Instagram 18 April 2024.

31 Israel's April Report, paras. 56–57.

32 CR 2024/28, p. 27, para. 28 (Kaplan Tourgeman).

33 Israel's April Report, paras. 59–60, 111; CR 2024/28, p. 27, para. 29 (Kaplan Tourgeman).

34 Israel's April Report, para. 109; CR 2024/28, p. 28, para. 31 (Kaplan Tourgeman).

35 Israel's April Report, paras. 52–53.

36 Israel's April Report, para. 89.

37 Israel's April Report, paras. 90–96.

38 CR 2024/28, pp. 23–24, paras. 9, 17 (Kaplan Tourgeman).

39 Israel's April Report, para. 94.

40 CR 2024/28, p. 23, para. 11 (Kaplan Tourgeman).

41 New York Times, Actions by Israel and Egypt Squeeze Gaza Aid Routes, 10 May 2024.

42 Israel's April Report, para. 96.

43 US Department of State, Press Briefing, Department Press Briefing — April 23, 2024, 23 April 2024.

44 See Order of 24 May 2024, paragraph 52.

45 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order*

of 28 March 2024, operative paragraph 51 (1); and "Decision of the Court on South Africa's Request for additional provisional measures" contained in Press Release No. 2024/16 dated 16 February 2024.

46 "Actions by Israel and Egypt Squeeze Gaza Aid Routes", *The New York Times*, 10 May 2024.

47 CR 2024/28, p. 23, para. 11 (Kaplan Tourgeman).

48 Israel's April Report, para. 124.

49 Israel's April Report, para. 123.

50 Application of South Africa, para. 144.

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Declaration of Judge Nolte

Function of the International Court of Justice — Conditions for the modification of provisional measures — Extraordinary situation resulting from the Israeli military offensive in Rafah.

1. More than seven months after the attack by Hamas against Israel on 7 October 2023 and the start of the Israeli military operation in response, the situation in the Gaza Strip remains catastrophic. As there is still no sign of a political solution, the Court has been approached once again by South Africa. Within five months, the Court has been called upon to indicate provisional measures four times. It has indicated provisional measures twice and refused to do so once[1].

2. The Court can play only a limited role in resolving the situation. It must be careful not to overstep the limits of what it can and should do. The Court must be guided by the mandate conferred on it by the Charter of the United Nations[2], its Statute[3] and the Genocide Convention[4]. More than ever, it is important not to lose sight of the Court's basic function:

> "the Court as the principal judicial organ of the United Nations . . . acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way."[5]

3. With this in mind, it was only after considerable hesitation that I voted in favour of the present Order. I can only outline briefly the reasons for my hesitation and my ultimate support for the Order.

Conditions for the modification of provisional measures

4. Article 76, paragraph 1, of the Rules of Court provides that "the Court may . . . modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such . . . modification".

5. For the Court to modify provisional measures pursuant to Article 76, paragraph 1, three conditions must be met[6]. First, the Court must ascertain whether "the situation that warranted the indication of certain provisional measures . . . has changed since that time"[7]. Secondly, it must consider whether the "the provisional measures indicated . . . do not fully address the consequences arising from the changes in the situation"[8] and thus justify a modification. Finally, the Court "must . . . satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation"[9].

6. As to the first condition, it is not obvious that the current military offensive in Rafah constitutes "some change in the situation" not previously considered. Indeed, the Court has already referred to the deteriorating situation in Rafah in its letter to the Parties of 16 February 2024[10] and in its Order of 28 March 2024[11]. In particular, in its letter of 16 February, the Court assessed the risk resulting from military activity in Rafah at a time when a very large number of internally displaced Palestinians were already present in Rafah and when there also appeared to be no other safe areas to go to[12]. Thus, as horrifying as the situation is and remains, it was essentially the same situation with which the Court was confronted when it was seised of similar requests in January, February and March. One may therefore doubt whether there is indeed "some change in the situation", in the sense of Article 76, paragraph 1, of the Rules of Court.

7. It is equally doubtful that the second condition is met. When the Court considered the situation in Rafah in February and March 2024, it estimated that the measures it had indicated on 26 January 2024 were sufficient to address the possibility of a military operation by the Israeli armed forces in Rafah[13].

8. I remain of the view that the Court should not set "problematic precedent[s]" that "would consist in signaling to the parties in this and other cases that the Court considers that the threshold for modifying, adding or specifying a provisional measure is low"[14]. The Court should also avoid the risk of prejudicing a finding on the merits that an order has been violated. Moreover, the "purpose of a modification of provisional measures is not normally the implementation of provisional measures already indicated"[15].

9. This latter concern manifestly arises in the present case. South Africa has openly stated that it expects the Court to act in order to render its own previous Orders "effective", to prevent them from becoming "worthless" and to step in for the United Nations Security Council and General Assembly, which, according to South Africa, are not fulfilling their mandate in the present case[16].

10. The Security Council of the United Nations has the "primary responsibility for the maintenance of international peace and security" (Article 24, paragraph 1, of the United Nations Charter). It is the Security Council that shall "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security" (Article 39 of the United Nations Charter), and thus to prevent the violation of related rules of international law, including those arising from the Genocide Convention.

11. This does not mean that the responsibility of the Security Council is exclusive[17]. As the "principal judicial organ of the United Nations" (Article 92 of the United Nations Charter), the Court is tasked with contributing to the maintenance of international peace and security through the judicial settlement of legal disputes (Article 33, paragraph 1, of the United Nations Charter). However, "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions"[18]. The Security Council and the Court "therefore perform their separate but complementary functions with respect to the same events"[19]. In the present case, the Court's jurisdiction is limited to the Genocide Convention. In contrast to the Security Council, it is not tasked with the monitoring or enforcement of the Genocide Convention, but only with the settlement of disputes over the "interpretation, application or fulfilment" of that Convention[20]. Its incidental jurisdiction under Article 41 of the Statute does not transform the Court into a monitoring body or even an enforcement organ.

Specification of the Court's previous Orders in the present case

12. Does this mean that the Court could not, or should not, have rendered the present Order? Article 76, paragraph 1, does not explicitly address the question whether the Court may indicate new measures when it anticipated a certain contingency in the abstract in its original order, but when specific subsequent circumstances raise questions as to how the original measure should be interpreted.

13. Article 76, paragraph 1, of the Rules of Court is not formulated in strict terms. The Court may modify an order "if, *in its opinion* [emphasis added], some change in the situation justifies such revocation or modification". With this self-imposed rule[21], the Court has given itself a guideline rather than a strict limitation on the exercise of its power under Article 41 of its Statute. In any event, Article 76, paragraph 1, of the Rules of Court cannot be read as limiting the Court's power under Article 41 of its Statute. The Court is inherently competent under this provision to interpret, and thus to specify (or clarify), the measures it has previously indicated to ensure the sound administration of justice[22].

14. Every specification (clarification) requires a modification of the terms of the original order, even if its substance remains the same. The Court's power to interpret and thus to specify the terms suggests that "some change in the situation" may also consist of subsequent developments which the Court had generally anticipated as a possibility, but with respect to which significant uncertainties arise as to how the previous order applies to them.

15. Of course, the possibility that new developments may give rise to more specific provisional measures risks encouraging parties to come back to the Court unnecessarily, for political purposes. While the Court should remain vigilant not to allow much room for repeated requests of this kind, I now recognize that it cannot be excluded that there may be situations in which, "in its opinion", a specification of a previous order is exceptionally warranted[23].

16. In the present case, I agree that the extraordinarily dramatic humanitarian situation in and around Rafah, resulting from the Israeli military offensive which started on 7 May 2024, and the lack of clarity concerning what Israel calls "designated humanitarian areas" justify a specification of the existing measures of 26 January and 28 March 2024, according to which

> "[t]he State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip"[24];

and

> "[t]he State of Israel shall . . . [t]ake all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary"[25].

In my view, the first measure indicated today specifies these previous measures by stating that "The State of Israel shall . . . [i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part".

17. To arrive at this specification, it is not necessary to find that it is plausible that the current military offensive in Rafah, or the military operation in the Gaza Strip more generally, as such is being pursued with genocidal intent. Indeed, I remain unconvinced that the evidence presented to the Court provides plausible indications that the military operation undertaken by Israel as such is being pursued with genocidal intent[26]

18. The reason for today's measure is, in my view, that Israel has not sufficiently demonstrated that it can "enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians" without limiting its current military offensive in Rafah (see, in particular, paragraph 46 of the Order).

19. To find that Israel's "obligation to prevent, and the corresponding duty to act"[27], plausibly exist, it is not necessary to find that Israel has violated its obligations under the Genocide Convention. For the obligation of prevention under the Genocide Convention to arise, a serious risk of conduct falling within the scope of Article III of the Genocide Convention and the knowledge of a State of such a risk is sufficient[28]. At the present stage of provisional measures, it is sufficient that a risk of conduct falling within the scope of Article III of the Genocide Convention and the knowledge of Israel of such a risk is plausible.

20. Based on the information before the Court, I consider that this is the case for three reasons.

First, the situation in the areas to which Palestinians are fleeing remains highly precarious. I recognize that Israel has submitted a response to the question put to it regarding the conditions prevailing in the designated humanitarian areas, in which it has demonstrated substantial efforts to mitigate the humanitarian situation resulting from its military offensive in Rafah[29]. However, even by Israel's own account, the dwellings, including tents, available and set up in the designated humanitarian areas are clearly insufficient for sheltering the hundreds of thousands of Palestinians who have been called by Israel to leave Rafah or who have been prompted by the current military offensive to flee[30]. I take seriously Israel's assertion that the people arriving in the designated humanitarian areas, including in Al-Mawasi, have sufficient water at their disposal[31], and I note that Israel has made efforts to enable humanitarian organizations to deliver sufficient food, water, and other basic humanitarian necessities, including through a newly established pier[32]. However, the various recent statements by representatives of different United Nations agencies and other international organizations which are quoted in South Africa's response leave me with strong doubts as to whether Israel is able and willing to simultaneously conduct its current military offensive in Rafah and ensure the most basic conditions for the survival of Palestinians who have arrived, and who are expected to arrive, in the designated humanitarian areas, including the delivery of sufficient food and other basic humanitarian necessities[33].

21. I also have serious doubts whether Israel's public commitment and its efforts to enable the delivery of food and other humanitarian goods can give the Court enough confidence to assume that "urgently needed basic services and humanitarian assistance" will sustainably be provided in time to the people who have left and will leave Rafah, and to those who remain there despite the ongoing military offensive. My doubts that Israel will follow up on its public commitments result not least from the repeated interruptions of humanitarian aid deliveries by private Israeli citizens, which the police and the military have not prevented[34].

22. Finally, and relatedly, I am concerned by reports about continuing significant incendiary public speech in Israel, including by senior Israeli officials. When the Court adopted its first Order on 26 January 2024, I wrote

separately that "such statements may contribute to a 'serious risk' that acts of genocide other than direct and public incitement may be committed, giving rise to Israel's obligation to prevent genocide"[35]. Unfortunately, significant incendiary speech has continued and, in some cases, has even been accompanied by open support for denying humanitarian aid and assistance to the population in Gaza.

23. I am not referring to speech which can be interpreted as only being directed against Hamas, but, for example, to a statement by the Israeli Minister of Finance, Mr Bezalel Smotrich — a member of the Security Cabinet — who reportedly stated at the end of April 2024: "[T]here are no half measures. Rafah, Deir al-Balah, Nuseirat — total annihilation"[36]; and to a statement by the Vice Chair of the international arm of the ruling Likud Party of 3 May 2024 on Israeli television, who reportedly declared: "I think we needed to invade Rafah yesterday . . . There are no uninvolved . . . [We] need to go in and kill and kill and kill"[37]. Even if those statements come from persons who do not have immediate responsibility for Israel's conduct in Gaza, they are at least serious indications of a volatile political context, which gives rise to doubts as to whether the State of Israel will uphold its public commitments regarding the delivery of humanitarian aid and assistance to the Palestinians in Gaza, particularly those who have fled, and will continue to flee, to Rafah. My concerns are reinforced by reports about utterances by senior Israeli officials publicly opposing the delivery of humanitarian aid by international organizations and openly supporting attacks on aid trucks destined for Gaza[38]. In this regard, I note that the Minister of National Security, Mr Itamar Ben Gvir, when asked about recent attacks in Israel on humanitarian convoys, reportedly stated that "it's the cabinet that should be stopping the trucks"[39].

24. Based on this information, I am of the view that statements made by high-ranking Israeli officials, interrupted, and delayed, deliveries of humanitarian aid and assistance, and the still highly precarious situation in Al-Mawasi and other evacuation areas, contribute to a risk for access to humanitarian aid urgently needed to ensure the survival of the Palestinian people in Gaza[40].

25. For this reason, I considered it justified that the Court specify that the Orders indicated on 26 January and 28 March 2024 limit the current military offensive in Rafah as far as it could endanger the rights of the Palestinian people under the Genocide Convention, notably their access to basic humanitarian needs. The Court's Order does not address military operations outside Rafah and the measure obliging Israel to halt the current military offensive in Rafah is conditioned by the need to prevent "conditions of life that could bring about [the] physical destruction in whole or in part" of the Palestinian group in Gaza. Thus, this measure does not concern other actions of Israel which do not give rise to such a risk.

Conclusion

26. I understand that, in the present case, the Court has exercised its discretion under Article 41 of its Statute and Article 76 of the Rules of Court in order to specify general measures indicated on 26 January and 28 March 2024, with a view to providing more guidance for the specific situation resulting from the current offensive by Israel in Rafah. While I maintain my general concerns regarding the risk of the Court overstepping its mandate under the Genocide Convention and its own Statute by being drawn into implementing its own orders[41], I ultimately decided to agree to this measure, which is justified by the extraordinary situation resulting from the Israeli military offensive in Rafah which started on7 May 2024.

(Signed) Georg Nolte.

ENDNOTES

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*; *ibid.*, decision of the Court on South Africa's request for additional provisional measures, 16 February 2024, press release No. 2024/16; *ibid.*, *Request for the modification of the Order of 26 January 2024 indicating provisional measures, Order of 28 March 2024*.

2 Hereinafter the "United Nations Charter".

3 Hereinafter the "ICJ Statute" or "the Statute".

4 Hereinafter the "Genocide Convention".

5 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 23, para. 29.

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 14; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 581, para. 12.

7 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 14.

8 *Ibid*., para. 23.

9 *Ibid*.

10 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, decision of the Court on South Africa's request for additional provisional measures, 16 February 2024, press release No. 2024/16.

11 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, paras. 6–7, 18, 46.

12 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, decision of the Court on South Africa's request for additional provisional measures, 16 February 2024, press release No. 2024/16:

> "The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences', as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).
>
> This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures".

13 *Ibid*.

14 *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 5.

15 See *ibid*., paras. 3 and 5.

16 CR 2024/27, p. 13, paras. 4–5 (Lowe) and p. 61, paras. 24–25 (Ní Ghrálaigh).

17 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163.

18 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95.

19 *Ibid*.

20 See Articles VIII and IX of the 1948 Genocide Convention.

21 See Article 30, para. 1, of the ICJ Statute.

22 See *mutatis mutandis Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16.

23 See *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 5.

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024*, para. 86 (4).

25 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51 (2) (a).

26 See *Order of 26 January 2024*, declaration of Judge Nolte, para. 13

27 *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 (I)*, pp. 221–222, para. 431.

28 *Ibid*.

29 See the response of Israel to the question posed by Judge Nolte, 18 May 2024.

30 *Ibid*., paras. 26–31.

31 *Ibid*., paras. 22–25.

32 *Ibid*., para. 14.

33 See written comments of South Africa on the reply of Israel to the question addressed to it by Judge Nolte, 20 May 2024.

34 Daily Press Briefing by the Office of the Spokesperson for the Secretary-General of 14 May 2024, (https://press.un.org/en/2024/db240514.doc.htm); Eden Solomon, Josh Breiner and Bar Peleg, "Two Trucks With Humanitarian Aid Bound for Gaza Set on Fire in the West Bank", *Haaretz*, 14 May 2024, https://www.haaretz.com/israel-news/2024-05-14/ty-article/.premium/two-trucks-with-humanitarian-aid-bound-for-gaza-set-on-fire-in-the-west-bank/0000018f-75f7-ddbe-addf-77ff80bb0000; see also Lorenzo Tondo and Quique Kierszenbaum, "Israeli soldiers and police tipping off groups that attack Gaza aid trucks", *The Guardian*, 21 May 2024, https://www.theguardian.com/world/article/2024/may/21/israeli-soldiers-and-police-tipping-off-groups-that-attack-gaza-aid-trucks; Felix Pope, "Activists who attacked Gaza aid truck claim Israeli police tipped them off", *The Jewish Chronicle*, 21 May 2024, available at: https://www.thejc.com/news/israel/activists-who-attacked-gaza-aid-claim-israeli-police-tipped-them-off-ohrioh5q.

35 *Order of 26 January 2024*, declaration of Judge Nolte, para. 15.

36 "Israel's Far-right Minister Smotrich Calls for 'No Half Measures' in the 'Total Annihilation' of Gaza", *Haaretz*, 30 April 2024, https://www.haaretz.com/israel-news/2024-04-30/ty-article/.premium/smotrich-calls-for-no-half-measures-in- thetotal-annihilation-of-gaza/0000018f-2f4c-d9c3-abcf-7f7d25460000.

37 Mohammad Alsaafin, "It's Clearer Than Ever: Israel's War Has Failed Catastrophically", *The Nation*, 9 May 2024, https://www.thenation.com/article/archive/rafah-invasion-israel-failure/.

38 N. Zilber, "Israel calls UN a 'terror organisation' as tensions escalate over Gaza war", *The Financial Times*, 15 May 2024, https://www.ft.com/content/f0945f3c-e4ab-4c04-8e1e-1e6f8397cb2c; see also "'Why Are My Cops Here?' Itamar Ben-Gvir Rages at Israel's Police Chief for Protecting Gaza Aid Convoys", *Haaretz*, 20 May 2024, available at: https://www.haaretz.com/israel-news/2024-05-20/ty-article/.premium/itamar-ben-gvir-rages-at-israels-police-chief-for-protecting-gaza-aid-convoys/0000018f-91ed-d17a-a9df-91fd3b670000.

39 "Ben Gvir: The cabinet should be stopping Gaza aid trucks — not protesters", *The Times of Israel*, 19 May 2024, https://www.timesofisrael.com/liveblog_entry/ben-gvir-the-cabinet-should-be-stopping-gaza-aid-trucks-not-protesters/.

40 See in particular Article II *(c)* of the Genocide Convention.

41 See *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 3.

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Declaration of Judge Aurescu

Proper interpretation of the second provisional measure regarding the halt of the military offensive — provisional measures already indicated address the current situation — the ordered provisional measures do not affect the right to protect civilians or free hostages — developments of the "change in the situation" requirement regarding the degree of an already examined situation — missed opportunity to include a reference to resolution 2728 (2024) of the Security Council

1. By this Declaration, I would like to reiterate my support for the decision of the Court to indicate provisional measures (paragraph 57 of the Order). The situation in Gaza, especially in the Rafah Governorate, has reached the critical level of a humanitarian catastrophe.

2. At the same time, I find it necessary to mention the following issues in relation to this Order.

3. *First,* I consider that the second provisional measure indicated ("The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate . . . [i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part") is somehow unclear as to whether the last part of it (starting with "which may inflict") only refers to "any other action" (which is not defined) or to both halting the Israeli military offensive and "any other action". In my view, this measure needs to be interpreted that it indicates as well the halt of the Israeli military offensive to the extent that it "may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part". I also consider that it would have been consistent and clearer, from the perspective of the connection of this measure with the Genocide Convention — which represents the *ratione materiae* basis of the Court's jurisdiction and, at the same time, which establishes the limits of the Court's action in response to the present Request — for this provisional measure to use the same terminology as in the Court's Order of 28 March 2024: instead of the "Palestinian group in Gaza", the "Palestinians in Gaza as a protected group under the Genocide Convention"[1].

4. *Second*, the Court has already issued numerous provisional measures in its Orders of 26 January 2024 and 28 March 2024. When issuing them, the Court took into account the analyses of various competent UN bodies according to which the situation in the Gaza Strip, unless Israel changes its course of action, would deteriorate dramatically. As the Court said in the present Order, "the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024". As predicted, the humanitarian situation is now to be characterized as disastrous (paragraph 28 of the Order). I am of the view that the previous two Court's Orders already address in a comprehensive manner the present situation, which was foreseen at the time of the two Orders. On 26 January 2024 the Court ordered Israel to "take all measures within its power to prevent the commission of all acts within the scope of Article II of [the] Convention"[2]. In addition to that, on 28 March 2024, the Court ordered Israel to "[e]nsure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the [Genocide] Convention"[3]. These measures prohibit conducting a military offensive that may inflict on the Palestinians as a protected group under the Genocide Convention conditions of life that could bring about its physical destruction in whole or in part. On 26 January 2024, the Court also ordered Israel to "take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip"[4], which was supplemented by the measure indicated on 28 March 2024, namely to "increase[e] the capacity and number of land crossing points and maintaining them open for as long as necessary"[5], while the second measure indicated in March reinforces the first one just mentioned; they evidently apply to the Rafah crossing as well. Finally, on 26 January 2024 the Court ordered Israel to, *inter alia*, "take effective measures to prevent the destruction and ensure the preservation of evidence".[6] Naturally, this includes ensuring the unimpeded access to the Gaza Strip of any competent body to collect the evidence.

5. The Court could have used the opportunity offered by the present Request of South Africa not only to reaffirm the provisional measures already in force, but also to clarify how they apply to the current situation. As a matter of fact, South Africa asked the Court, during the public hearings, to clarify the Court's previously indicated provisional measures: it mentioned "[t]he Court's reluctance to date to order 'directly and explicitly' that Israel cease its military operations in Gaza in order to give effect to the provisional measures indicated by the Court — relying instead on necessary implication", and that "[t]he severity of the situation involving 'horrific human suffering' mandates that the Court make explicit that which was implicit in its previous Orders, and that it now order Israel to cease its military operations in unequivocal, express terms"[7]. It is however positive, although, in my view, insufficient in the light of the above, that the first provisional measure indicated in the Order "[r]eaffirms the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which should be immediately and effectively implemented" (paragraph 57 of the Order).

6. *Third,* I do believe that the Court should have used the opportunity of the present Request and Order to make clear that the provisional measures indicated, especially the second one referring to the "halt [of] [Israel's] military offensive, and [of] any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction", do not affect in any way the legitimate right of Israel to undertake actions, which should be conducted in strict conformity with international law, including in a manner responding to the criteria of proportionality and necessity, to protect its civilian citizens and to free the hostages still held in the Rafah area by Hamas and other armed groups. The reference in paragraph 56 of the Order to the grave concern of the Court over the fate of the hostages abducted during the 7 October 2023 attack is, in my view, a welcome, but insufficient statement.

7. *Fourth,* in paragraph 29 of this Order, just like in the Order of 28 March 2024[8], in relation to the change in the situation within the meaning of Article 76 of the Rules of Court, the Court observed that the developments are "exceptionally grave". The requirement for a "change in the situation" in order to revoke or modify a provisional measure in force has been enshrined in the Rules of the Court since 1936, during the times of the Permanent Court of International Justice. However, it has not been much elaborated upon and until now it remained ambiguous whether the change in the situation needs to be in type or it can also be in degree. I believe that the reference to the exceptional gravity in the recent orders demonstrates that a change in the degree or the aggravation of an already existing situation, even though predicted, can justify the need for the Court to issue new or modify the already indicated provisional measures.

8. *Last*, *but not least*, in paragraph 37 of the Order of 28 March 2024, the Court took "note of resolution 2728 (2024) of the Security Council, which '*d]emand[ed]* an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire'". I believe that the Court could have used the opportunity of the present Order to include in its *dispositif* a measure by which it could have asked Israel to take all necessary and effective measures to implement with immediate effect the Security Council resolution 2728 (2024), including a "lasting sustainable ceasefire". Such a measure, beyond representing an innovation in the Court's jurisprudence, would have had, at the same time, not only the advantage of underscoring the distribution and sharing of the role of maintaining the international peace and security between the Security Council and the International Court of Justice, but also of extending to the relevant provisions of the mentioned Security Council resolution the legal force of the provisional measures indicated by the Court — thus inaugurating new, promising cooperation avenues between the two principal organs of the United Nations.

(Signed) Bogdan Aurescu.

ENDNOTES

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 45.

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Provisional Measures, Order of 26 January 2024*, para. 86.

3 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51.

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Provisional Measures, Order of 26 January 2024*, para. 86.

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51.

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel)*, *Provisional Measures, Order of 26 January 2024*, para. 86 (emphasis added).

7 CR 2024/27, Verbatim Record, Public sitting held on Thursday 16 May 2024, at 3 p.m., at the Peace Palace, p. 57, para. 14 (Ní Ghrálaigh).

8 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 22.

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Declaration of Judge Tladi

Court's approach for the modification of previous orders — The relationship between Article 41 of the Statute and Articles 75 and 76 of the Rules of Court — Security concerns, self- defence and proportionality.

1. I have voted in favour of the *dispositif* in the Order. I am of the view that the Court's Order and the particular measures identified therein are fully justified given the circumstances. I write this declaration to make only two points. The first concerns the Court's approach to requests for the indication of measures in cases where there already exists a decision on provisional measures, i.e. the Court's approach for the modification of previous decisions. The second purpose is to address the question of security concerns at the heart of Israel's defence.

I. The requirement for the modification of measures

2. The Court has taken great care to explain that, in its view, South Africa's request is based on Article 76 (1) of the Rules of Court, i.e. South Africa is requesting the Court to "modify" the previous Orders on provisional measures because there has been "some change in the situation justifying such . . . modification". The Court takes this definitive position notwithstanding that South Africa's application itself is non-committal about the basis of the request. In addition to Article 76 (1), South Africa's application also refers to Article 75 (3), which is dependent on the presentation of "new facts" rather than "some change in the situation".

3. For the Court, there has been "some change in the situation" since its Order of 28 March 2024. This is because, according to the Court, "the catastrophic humanitarian situation in the Gaza Strip which" it previously noted "was at risk of deteriorating, has deteriorated, and done so even further since the Court adopted its Order of 28 March 2024". Specifically with respect to Rafah, the Court notes that the fears it expressed in its decision of 16 February 2024 have now materialized and that "the humanitarian situation is now to be characterized as disastrous". The Court also refers to the displacement of a significant portion of the population.

4. Although all of these factors were present in March 2024, I share the Court's assessment that this intensification can, and in the present case does, represent "some change in the situation". At the same time, it is not inconceivable that these same factors could be seen by some as merely a continuation of the same operation by Israeli forces that formed the basis of the Court's Order of 26 January 2024, or the Order of 28 March 2024. In other words, it is not beyond the realm of debate whether intensification, or worsening of the situation, can be seen as a "change in the situation".

5. In *Bosnia and Herzegovina* v. *Yugoslavia*, the Court was able to find that "the grave risk" that underlined its original order for provisional measures "has been deepened by the *persistence of* conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts" and that this provided sufficient evidence of "some change in the situation"[1]. Indeed, Bosnia and Herzegovina based its request for the indication of provisional measures on the "*continuing* . . . campaign of genocide against the Bosnian People — whether Muslim, Christian, Jew, Croat or Serb"[2]. Elsewhere, the Request by Bosnia and Herzegovina refers to the "rapidly *escalating* human catastrophe"[3]. These factors are similar to the factors identified by the Court, both in its March Order and the current Order, as constituting evidence of "some change in the situation".

6. Yet, in relation to the current case, in its letter of 16 February 2024, while noting the worsening situation in Gaza and that "the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences'", the Court did not see it fit to modify its January 2024 Order. Similarly, in its Order of 12 October 2022 in *Armenia* v. *Azerbaijan*, the Court considered that an eruption of hostilities after the conclusion of a ceasefire agreement was insufficient to establish a change in the situation because the situation had "remained unstable" and "tenuous"[4]. In the view of the Court, notwithstanding the eruption of new hostilities, "the situation that existed [when the first Order was issued] is ongoing and is no different from the present situation"[5].

7. In my view, there is no inconsistency between the positions the Court took in its decisions of 16 February 2024 and 12 October 2022 on the one hand, and on the other hand, its Order of 27 July 1993 in *Bosnia Genocide* and the current Order. All that these decisions illustrate is that there cannot be a hard line between "change in situation" and

"no change in situation". For this reason, in my view, the emphasis ought not to fall on whether there is "some change in situation". The real question, and therefore the proper place of emphasis, ought to be on whether whatever circumstances put forward are such as to justify the indication of new measures or to modify existing Order.

8. Ultimately, we should not lose sight of the fact that the Rules of Court are intended to facilitate the implementation and application of the Statute, and in my view, the golden rule remains Article 41 of the Statute. The polar star contained in Article 41 empowers the Court to make an order for provisional measures "if it considers [the] circumstances so require". This broad rule is aptly captured in Article 76 (1) of the Rules of Court which not only refers to "some change in the situation" but, and for me most importantly, states that modification of an existing order should only be made only if the changed situation "justifies such . . . modification".

9. The Court should not conduct a superficial search for "some change in circumstances" or "new facts". I do not mean to suggest that the Court has done so in this case. Both in the current Order, and in past Orders, notably in *Bosnia Genocide*, the Court has focused on whether the *circumstances* presented to it "justify" the adoption of new or modified measures.

10. While I agree with the conclusion of the Court that there has been some change in the situation which warrants the modification of its previous Orders, I do find the path to that conclusion somewhat troubling. In particular, I am not convinced by the Court's apparent insistence on a clinical separation between the "change in the situation" and circumstances justifying the new modification. While it may sound rigorous and intellectually sound to identify categories and boxes, e.g. "change of situation" or "new facts" and insist that no decision on modification can be made unless one of these categories is ticked, this approach denies the Court the ability to undertake an honest assessment of whether the circumstances as they present themselves justify the modification of the previous Order and the indication of different measures.

11. Indeed, the problem with the Court's general reasoning is laid bare at paragraph 21. There the Court says that it first has to ascertain whether there has been a change in the situation, but that the modification (or new measures) can only be indicated "if the general conditions laid down in Article 41 of the Statute were *also* met in this instance"[6], suggesting that the conditions in Article 41 of the Statute are additional to the requirements of Articles 75 and 76 of the Rules of Court. This clinical distinction between the change in the situation (or new facts) and Article 41 is superficial. Articles 75 and 76 of the Rules of Court should not be seen as additional to the requirements of Article 41 of the Statute, but rather as giving flesh to it. Thus, to suggest that first we search for a change in the situation and then only determine whether the requirements of Article 41 of the Statute have been met is to completely undermine Article 41 of the Statute and to de-emphasize the main condition of "if circumstances so require".

12. In my view, the proper application of the law is reflected in the Court's conclusion where, at paragraph 48, it states that in its assessment, "the circumstances of the case require it to modify its decision set out in its Order of 28 March 2024". It does so without the clinical separation of "change in the situation" and the question whether circumstances justify the modification of previous Orders. In fact, in the conclusion (Section III), the Court does not refer at all to the "change in the situation".

II. The right of Israel to defend itself

13. A central issue in Israel's submissions is its right to defend itself and its people. In its submissions, Israel stated several times that it has the right and obligation to defend itself and its citizens from Hamas attacks. At one level, the argument is that the attack on 7 October 2023 constituted an armed attack to which Article 51 of the Charter of the United Nations entitles Israel to respond. At another level, the argument is that there is a general right to act for the protection of Israel and its population (beyond what is provided for in Article 51). Whether the latter is part and parcel of the former is unclear, but if it is being put forward as an independent ground for the use of force, then it is clearly incorrect.

14. For the limited purpose of this declaration, it is unnecessary to resolve the relationship of the two aspects of the right to security and self-defence. What is important to state is that South Africa, in its oral submissions, preempted the self-defence and security argument with a three- pronged response. First, it argued that self-defence can never be a justification for genocide. Second, it argued that Israeli operations were disproportionate to the

attacks by Hamas. Finally, South Africa argued that, in accordance with the Court's *Wall* Advisory Opinion, Israel is not entitled to use force against a territory under its occupation.

15. As to the first issue, there is no question that the position put forward by South Africa is legally correct, and I am sure Israel would not dispute that position. But Israel will dispute (and in fact has disputed) the fact that a genocide is being committed. South Africa's first prong is therefore intricately wound up with the merits of the case. Similarly, questions have been raised about whether, at the time of the 7 October attacks by Hamas, Gaza was *in fact* occupied. The third prong is thus also perhaps best addressed at the merits phase. But it is not clear to me why Israel does not *at all* address the second prong, i.e. the gross disproportion of its response to the 7 October attacks. Indeed, throughout its oral submissions, one could not but be struck by the gross disproportion between the harms caused by Hamas that Israel is complaining of and statistics of loss and devastation on the Palestinian side occasioned by Israel's military operations. It would have been good to hear Israel respond to this question.

16. The security concern relied on by Israel raises another issue. Israel has explained that to grant South Africa's request "would mean that Hamas would be left unhindered and free to continue its attacks against Israeli territory and Israeli civilians". Yet this position suggests a false choice between two extremes. It suggests that Israel is obliged either to allow the violation of its rights and those of its citizens or to engage in limitless operations causing the catastrophic consequences that have been so widely reported.

17. The Court has ordered Israel to "halt its military offensive in Rafah". The reference to "offensive" operations illustrates that legitimate defensive actions, *within the strict confines of international law*, to repel *specific attacks*, would be consistent with the Order of the Court. What would not be consistent is the continuation of the offensive military operation in Rafah, and elsewhere, whose consequences for the rights protected under the Convention on the Prevention and Punishment of Genocide has been devastating.

III. Conclusion

18. There are no more words to describe the horrors in Gaza. The words "apocalyptic", "exceptionally grave", "disastrous" and "catastrophic" have all been used to describe the current situation, and all seem to pale in comparison to what is unfolding before our very eyes. Almost daily we are confronted with gut-wrenching accounts of victims and survivors and images of unimaginable suffering. That this is happening in the age in which international law has been said to have matured into "a much more socially conscious legal order"[7] is simply incongruous.

19. Today, the Court has, in explicit terms, ordered the State of Israel to halt its offensive in Rafah. The Court has previously, albeit in implicit and indirect ways, ordered the State of Israel not to conduct military operations elsewhere in Gaza because such operations prevent the delivery of human assistance and cause harm to the Palestinian people. The Court has also reiterated its urgent call for Hamas to release the hostages. But the Court is only a court!

(Signed) Dire Tladi.

ENDNOTES

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 337, para. 22, read with para. 53 (emphasis added).

2 *Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Bosnia and Herzegovina*, 27 July 1993, p. 1 (emphasis added).

3 *Ibid.*, p. 3 (emphasis added).

4 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, pp. 582–583, para. 18.

5 *Ibid.*, p. 583, para. 18.

6 Emphasis added.

7 Bruno Simma, "From Bilateralism to Community Interest in International Law", 217 *Recueil des cours de l'Académie de droit international de La Haye* (1994), 229, p. 234.

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DISSENTING OPINION OF JUDGE *AD HOC* BARAK

1. Once again, South Africa has requested the Court to order the State of Israel to "cease its military operations in the Gaza Strip. . . and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip"[1]. Once again, South Africa's request has been rejected by the Court. Instead, the first additional measure indicated by the Court provides that

> "The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part"[2].

This measure requires Israel to halt its military offensive in the Rafah Governorate only in so far as is necessary to comply with Israel's obligations under the Genocide Convention. In this sense, it merely reaffirms Israel's existing obligations under the Convention. Even without an order issued by the Court, a military offensive that may result in a violation of a State's obligations under the Genocide Convention would have to stop. Israel has never disputed this. Thus, the measures indicated by the Court differ decisively from those requested by South Africa. Instead of ordering a blanket suspension and a total withdrawal from the Gaza Strip, the Court's Order is expressly limited to offensive action in the Rafah Governorate. Since the measure contains an explicit link to Israel's existing obligations under the Genocide Convention ("which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part"), Israel is not prevented from carrying out its military operation in the Rafah Governorate as long as it fulfils its obligations under the Genocide Convention. As a result, the measure is a qualified one, which preserves Israel's right to prevent and repel threats and attacks by Hamas, defend itself and its citizens, and free the hostages.

2. South Africa has turned to the International Court of Justice four times in just five months. Each time it has requested a ceasefire or the suspension of Israel's military operation in Gaza, accusing Israel of engaging in genocide against the Palestinian people. The Court declined to order any kind of ceasefire or suspension in its decisions of 26 January 2024, 16 February 2024 and 28 March 2024. Its reasons were as simple as they were important. South Africa failed to substantiate its claim that Israel's military operation is plausibly motivated by genocidal intent. In fact, the Court itself recognized the immediate context in which Israel decided to undertake the military operation: the attacks of 7 October 2023 by Hamas, which continues to pose an existential threat to Israel, and the abduction of hundreds of Israeli citizens and other foreign nationals to Gaza. Against this background, the Court understood that it cannot order one party to stop, while the other is free to continue. These reasons have lost none of their validity since the Court issued its previous Orders. Today's Order does not undermine these considerations.

3. The Court was fully aware that Israel's military operation in the Gaza Strip would not be taking place had the attacks by Hamas on 7 October 2023 and the abduction of 250 hostages not occurred. In my view, the specific, credible and up-to-date evidence provided by Israel, expertly and convincingly presented by its legal team during the hearings, played a decisive role in refuting any allegations of intent by South Africa. Israel was able to produce this evidence despite the extremely limited amount of time that it had to prepare for the hearings. Even though Israel was in a procedurally disadvantageous position, South Africa did not succeed with its principal request before the Court.

4. Indeed, I cannot fail to note the difference between South Africa's written request of 10 May 2024, its final submissions of 16 May 2024 and the measures indicated by the Court. South Africa, which initially brought a much more limited and specific written request, asking the Court to order Israel to "immediately withdraw and cease its military offensive in the Rafah Governorate"[3], subsequently returned to the request it had already made three times in almost identical terms: it asked for a measure ordering Israel to "cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally

and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip"[4]. And yet South Africa's tactics failed. Once again, its request for an "immediate[], total[] and unconditional[] withdraw[al]" of the Israeli army from the Gaza Strip, based on allegations of genocide, failed. To me, this makes clear that today's Order was not adopted because there was any piece of evidence substantiating the allegations made by South Africa under the Genocide Convention.

5. I am not oblivious to the increasing suffering in Gaza. On the contrary, I am no less alarmed by the humanitarian situation in Gaza than the rest of my colleagues at the Court. Nevertheless, I find myself unable to vote in favour of the operative clause of today's Order, because the military operation does not plausibly raise questions under the Genocide Convention. In particular, there is no evidence of intent. Needless to say, every armed conflict, including this one, raises relevant questions under human rights and international humanitarian law. However, those questions, and the corresponding responsibilities, must continue to be addressed and decided by Israel's independent and robust judicial system.

6. The Court's treatment of evidence regarding the conditions for the indication of provisional measures for protecting rights under the Genocide Convention is particularly concerning. The Court relies primarily on statements made by United Nations officials on social media and on press releases issued by relevant organizations (see Order, paragraphs 44–46). It relies on these statements and press releases without even inquiring into what kind of evidence they draw upon. The Court's approach is in stark contrast with its previous jurisprudence, in which it has stated that "United Nations reports [are] reliable evidence only 'to the extent that they are of probative value and are corroborated, if necessary, by other credible sources'"[5]. In the present case, the statements and press releases noted by the Court have simply not been corroborated. The Court has not inquired into the methodology or amount of research underlying their preparation, as it has done in previous cases[6]. I fail to see how the Court's approach here is compatible with its previous decisions to exclude elements of United Nations reports which rely only on second-hand sources[7]. This complete deviation from the Court's usual treatment of evidence is particularly concerning given that the present case concerns "charges of exceptional gravity" requiring "proof at a high level of certainty appropriate to the seriousness of the allegation"[8]. While I am aware that this standard has been developed for a later stage of such proceedings, it should have at least informed the treatment of evidence at the stage of provisional measures.

7. In this opinion, I wish to do three things. *First*, to offer some remarks on the situation in Rafah and Al-Mawasi. *Second*, to show that there is no place for the indication of new measures. Nothing of what South Africa has argued points to a "change in the situation", which is a condition for the indication of new measures. Rather, its request seeks to turn the Court into a micromanager of the armed conflict. In this context, I will also address the glaring absence of proof establishing, even based on a plausibility standard, circumstances that point to intent of genocide. *Third*, I wish to clarify the scope of the measures indicated by the Court, in particular the limited nature of the suspension and how it still preserves Israel's fundamental right to defend itself and its citizens.

I. The situation in Rafah and Al-Mawasi

8. Israel's military operation in the Gaza Strip cannot be understood — in fact, would not exist — without the existential threat posed by Hamas and the ongoing captivity of more than one hundred hostages. It is telling that neither the threat posed by Hamas nor the situation of the hostages were mentioned by South Africa in its written request or oral argument. Not even once.

9. For years Rafah, which is part of the Gaza Strip, has been, and still is, the stronghold of Hamas. Israel explained that the indiscriminate threats and attacks by Hamas against Israel have not ceased for a single day[9]. Hamas continues to hide in and around hospitals and schools, and to use Palestinian civilians as human shields[10].

Israel maintained that hundreds of rockets have been fired from Rafah over the last two weeks hitting several cities and towns in Israel[11]. Israel also referred to the elaborate tunnel system under Rafah consisting of 700 tunnel shafts, of which some 50 cross into Egypt[12]. According to Israel, these tunnels are used by Hamas to supply itself with weapons and ammunition, and could potentially be used to smuggle hostages or senior Hamas operatives out of Gaza[13].

10. In order to prevent and repel the threat posed by Hamas and free the hostages, Israel has to carry out military operations in Rafah and in the entirety of the Gaza Strip. It has both a right and a duty to prevent and repel these

threats and attacks. As stated by its highest authorities, Israel has only one aim: to defeat Hamas and bring the hostages back to Israel.

11. Israel explained during the hearings, and in its reply to the question asked by Judge Nolte, that it has taken measures to establish humanitarian zones where the civilian population may safely evacuate. The Al-Mawasi area has been designated as the principal, but not the only safe zone for the persons fleeing from Rafah. Israel provided evidence that the Al-Mawasi area is connected to the two main humanitarian routes in Gaza and to the new temporary pier (JLOTS)[14]. The Al-Mawasi area is not just "barren sand dunes"[15]. According to Israel, it is connected to the Bani Suhueila water line, which Israel has helped to repair, and has water tanks, water pumps and desalination plants[16]. It has also been reinforced with additional supplies of shelter, food and medicine, *inter alia*, and the construction of two field hospitals[17]. On 12 May 2024, Israel announced another new field hospital in the Al-Mawasi area. This constitutes the eighth field hospital facilitated by Israel in Gaza since the beginning of the war[18].

II. NO PLACE FOR THE INDICATION OF NEW MEASURES

12. In my previous opinions, I have set out my views regarding the ill-advised approach taken by the Court since the institution of proceedings by South Africa in December 2023. It is an approach that taints this and all prior orders. As was already the case with respect to the Order of 28 March 2024, this Order does not meet the conditions laid down in Article 76, paragraph 1, of the Rules of Court. The Court can modify an order indicating provisional measures only if there is a change in the circumstances that justifies such modification. Despite the fact that these conditions are not met, the Court has imposed additional measures on Israel. In so doing, it is acting outside its judicial function and beyond the jurisdiction conferred on it by States under Article 41 of the ICJ Statute. Its approach also severely undermines the integrity of the Genocide Convention.

1. NO CHANGE IN THE SITUATION

13. South Africa seeks to portray Israel's military operation in Rafah as a "change in the situation" that would justify the indication of new measures. Yet the military operation in Rafah is not a *new* military campaign. It forms part of Israel's ongoing military operation throughout the Gaza Strip, which began in October 2023. It is an integral part of its overall effort to prevent and repel ongoing threats and attacks by Hamas and free the hostages in captivity. Indeed, both in its letter of 16 February 2024 and in its Order of 28 March 2024, the Court explicitly referred to the deteriorating situation in Rafah. The Court should not act every time there is a development in the hostilities. Otherwise, it will become the micromanager of an armed conflict.

2. NO JUSTIFICATION FOR NEW MEASURES

14. The Court can only modify an order for provisional measures if the existing measures are not capable of fully addressing the consequences arising from the change in the situation. However, any consequences that may arise from Israel's actions in Rafah are already covered by the Court's two previous Orders. By its Order of 26 January, the Court has already ordered Israel to take all measures within its power to prevent acts that fall within the scope of the Genocide Convention[19]. Israel must also ensure with immediate effect that its military does not commit any acts prohibited by the Genocide Convention[20]. Furthermore, it must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance[21]. The humanitarian aid obligations were strengthened by the Order of 28 March 2024[22]. Even though I voted against several of these measures, they are binding decisions of the Court[23]. In this sense, the Court's previous Orders already restrict Israel's military operation in Rafah in such a way that they protect any plausible rights found by the Court under the Genocide Convention. Indeed, it is telling that the present Order does not explain at all why it considers that the previous measures "do not fully address the consequences arising from the change in the situation" in the relevant paragraph (see Order, paragraph 30).

15. What South Africa's request appears to be about is Israel's compliance with the previous Orders. However, it is neither for South Africa nor the Court to assess Israel's compliance with the previous Orders at this stage of the proceedings. The Court shall do so only at the merits stage. South Africa also seems to be asking the Court to assume the role of the General Assembly and the Security Council. But the Court cannot exceed its judicial function just because South Africa believes that these bodies have not fulfilled their functions effectively.

3. No circumstances for indicating provisional measures: the lack of intent

16. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the rights claimed by a party, pending a decision on the merits. In the present case, the rights in question are those that exist under the Genocide Convention. No more, no less. South Africa's task was, therefore, to demonstrate that Israel's actions create a risk of irreparable prejudice to *those* rights. Not to rights under international humanitarian law or under human rights law, but under the Genocide Convention alone. South Africa has failed to do so.

17. The conduct of a State can only create a risk of irreparable prejudice to rights under the Genocide Convention, if such conduct falls within the scope of the Convention. For this to be the case, the specific intent to commit genocide (*dolus specialis*) must be present. If the *dolus specialis* of genocide is absent, the conduct does not fall within the scope of the Convention and, consequently, the rights under the Genocide Convention are not implicated.

18. The threshold to find an intent of genocide is very high. In *Bosnian Genocide*, the Court held that

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent".[24]

19. South Africa has not produced any evidence that would allow the Court to draw this conclusion; not even on the basis of a plausibility standard. Indeed, South Africa has not produced a single piece of *new* evidence that would substantiate the plausible existence of genocidal intent.

20. In contrast to South Africa, Israel distinguishes between Hamas and civilians in Gaza. I find it pertinent to recall that, on 12 February 2024, South Africa brought a request for the indication of provisional measures on the ground that a military operation in Rafah was imminent. The Court rightly rejected it. Israel did not act in February. Instead, as Israel explained, it planned a military operation that would minimize the harm to civilians as much as possible. In the period between February and May, Israel took several measures to protect the civilians that would have to evacuate the Rafah area, some of which were detailed in Israel's reply to Judge Nolte's question. The stated purpose of its military operation in Rafah is to prevent and repel the threat posed by Hamas, to defend itself and its citizens, and to free the hostages. Several high-ranking Israeli officials have reiterated that the military operation is being conducted against Hamas, not the Palestinian people[25].

21. Israel has also noted that the IDF has called on eastern Rafah residents to evacuate. The evacuation messages were communicated through flyers, text messages, phone calls and media broadcasts in Arabic. This information has been corroborated by independent media reports[26].

22. Israel has taken measures to mitigate the harm suffered by the Palestinians displaced from Rafah to the humanitarian area established in Al-Mawasi. Israel is not sending Palestinians to the middle of nowhere. It is not sending them, as South Africa put it, "to the barren sand dunes of Al-Mawasi". On the contrary, Israel is sending them to specifically designated evacuation zones, to which it directs humanitarian aid and assistance. In paragraph 11 of this opinion, I described the measures taken by Israel in the Al-Mawasi area.

23. I find it difficult to understand why the Court failed to acknowledge, even in a sentence, that there has been an increase of humanitarian aid and assistance entering the Gaza Strip. Indeed, these past months have seen the highest numbers of humanitarian trucks entering Gaza since the beginning of the war. Importantly, last week, the IDF reported that it had allowed hundreds of humanitarian aid trucks carrying flour and fuel into Gaza through the Kerem Shalom and Erez crossings. As shown by the statement of United Nations Senior Humanitarian Coordinator Sigrid Kaag and Israel's reports submitted to the Court, there has been a significant increase in the amount of humanitarian aid delivered to Gaza[27]. The newly constructed temporary pier (JLOTS) is now operating, and the Cyprus Maritime Corridor will make it possible to increase the entry of humanitarian aid and assistance. Israel maintains that it has facilitated both of these initiatives. Regrettably, the Court did not consider or even take account of these developments.

24. One may think that Israel should do more to protect civilians in Rafah. However, that question is not at stake in the present case. The Court can *only* indicate measures to protect rights that are plausible under the Genocide Convention. The relevant question is one of plausible intent. I do not see how Israel's conduct could even plausibly amount to a pattern that provides the basis for inferring the specific intent required by the Genocide Convention. Why would a State that has the intention to destroy a group provide tents, humanitarian aid and field hospitals? Why would they issue warnings and build humanitarian zones?

25. The absence of proof of plausible intent in all of South Africa's requests is the fatal flaw of its case. The Court cannot look at the *actus reus* without also looking at the *mens rea*. How can the measures indicated by the Court preserve rights under the Genocide Convention when there is no show of intent whatsoever? This is why I have voted against the majority of the measures indicated by the Court thus far.

26. The road taken by the Court is a dangerous one. It weakens the régime of the Genocide Convention by using it (or misusing it) to arbitrate an armed conflict. How can States trust the Court with the settlement of disputes concerning the interpretation and application of multilateral conventions, if they are used for purposes that are entirely removed from the original intention of the parties?

III. THE LIMITED NATURE OF THE MEASURES INDICATED BY THE COURT

27. The first measure indicated by the Court reaffirms the previous Orders of 26 January and 28 March 2024. Since I voted against the majority of the measures indicated by the Court in those Orders, I have voted against this measure as well.

28. The first additional measure indicated by the Court reiterates an obligation that already exists for Israel under the Genocide Convention, and specifies the measures previously indicated by the Court in its Orders of 26 January and 28 March 2024. This measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part".

I have voted against this measure because the conditions necessary for its indication under Article 76, paragraph 1, of the Rules of Court are not met. However, I note that this measure does not require Israel to refrain from its military operation in Rafah altogether. It is not an unconditional obligation to halt the military operation. It specifies that Israel must, in accordance with its obligations under the 1948 Genocide Convention, conduct its military offensive in a way that does not deprive the Palestinian civilian population of its essential means of existence. Naturally, if the military offensive was being carried out in violation of Israel's obligations under the Genocide Convention, it would need to end. Nevertheless, there is no evidence, even at the low standard required for provisional measures, that any rights under the Genocide Convention are implicated. The Court's first measure is therefore limited to offensive (and not defensive) military action in Rafah, and requires a halt only in so far as is necessary to protect the Palestinian group in Gaza from conditions of life that could bring about its physical destruction. This qualified measure shows that the Court is cognizant of Israel's need to undertake those military operations that are necessary to prevent and repel threats and attacks by Hamas, and to take action to defend itself and its citizens and free the hostages held in Gaza.

29. The second additional measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance".

This measure reaffirms the Court's two previous Orders. In particular, it specifies the measure indicated in paragraph 86, subparagraph 4, of the Order of 26 January 2024, and paragraph 51, subparagraph 2 *(a)*, of the Order of 28 March

2024. I voted in favour of both of those measures because I believe that the provision of humanitarian aid and assistance is crucial. However, I cannot support this new specification because it is targeted at the Rafah crossing. The Court did not have a single piece of evidence regarding the situation of the Rafah crossing. The Parties did not present any evidence on whether Israel, Egypt, or both, are responsible for the current closure of the Rafah crossing. More importantly, the Rafah crossing can only operate if both Egypt and Israel agree. I do not understand how Israel can be expected to "maintain open" a crossing with respect to which it does not have exclusive control. The Court has indicated this measure with scant evidence before it and ignoring that another sovereign State controls the other half of the crossing.

30. The third additional measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding missions or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide".

This measure again reaffirms Israel's existing obligations under the first two Orders, which provide that Israel must preserve evidence. I voted against this measure because South Africa has not provided evidence that additional measures are required for the preservation of evidence. Neither the geographic scope nor the mandate of these fact-finding missions is clearly defined. It is also unclear what a "competent organ" means in this context. While I understand the merits of independent fact-finding, such measures should not arise out of a Court order, but rather based on consent.

31. The fourth additional measure provides that "Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date if this Order". This measure extends Israel's reporting obligations. I voted against this measure because the reporting obligations have not served a meaningful purpose.

IV. Concluding remarks

32. I would like to end by reiterating that I sincerely hope that this war comes to an end as quickly as possible, and that the hostages will return to Israel immediately[28]. In this regard, I appreciate that the Court, in this Order, "finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release" (paragraph 56 of this Order). Like every State, Israel has the fundamental right to protect its citizens and itself. This right receives a special dimension in the case of the hostages, in the sense that it imposes a duty on the State to do everything in its power to bring them back to Israel. The fulfilment of this duty is not in conflict with Israel's obligations under the Genocide Convention because it stems from Israel's intent to protect its citizens and not from an intent to commit acts prohibited under the Genocide Convention. As I have written in my first opinion in this case, "[i]t is to protect these values that Israel's daughters and sons have selflessly paid with their lives and dreams, in a war that Israel did not choose"[29]. The key to ending this war does not lie in asking the Court to intervene in this conflict by making unsubstantiated allegations of genocide against Israel. The key to ending this war lies in the hands of Hamas. Hamas has started the war and can finish it by releasing the hostages and by fully respecting the security of the State of Israel and its citizens.

33. The Court is in a difficult position and facing great pressure. Even so, the Court should not have sacrificed the integrity of the Genocide Convention and overstepped the limits of its jurisdiction in response to public pressure. The urge to "do something" is understandable, particularly as the ceasefire request comes before this Court for the fourth time. But this cannot be sufficient. The absence of Hamas from the proceedings and a jurisdiction confined to the Genocide Convention and Article 41 of the ICJ Statute remain significant obstacles, as they were in January when South Africa made its first request.

34. I underwent similar experiences in my 28 years as a judge on Israel's Supreme Court. The only way that I found to be truthful as a judge was to leave aside the "background noise" and focus purely on the legal reasoning. This is the only common language that we judges have. We cannot be bothered by political, military or public policy troubles. We can only be concerned with legal troubles. We are a court of law, not one of public opinion. When we

judges sit at trial, we also stand on trial. We will not be judged by hysteria and the fleeting waves of the hour, but by history.

(Signed) Aharon BARAK.

ENDNOTES

1 Request of South Africa, 10 May 2024, para. 25.

2 Order, para. 57 (2) *(a)*.

3 Request of South Africa, 10 May 2024, para. 25.

4 CR 2024/27, p. 63, para. 3 (Madonsela).

5 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 85, para. 215.

6 *Ibid.*, p. 66, para. 152.

7 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 225, para. 159.

8 *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(I)*, pp. 129–130, paras. 209–210.

9 CR 2024/28, pp. 9–10, paras. 11–15 (Noam); see also Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11–12 January 2024, 10 January 2024, tab 6 ("The Hamas Agenda") and tab 7 ("Hamas Threat to the Israeli Population").

10 Judges' folder submitted by Israel (17 May 2024), tab 2; CR 2024/28, p. 11, para. 19 (Noam); see also Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11–12 January 2024, 10 January 2024, tab 7 ("The Embedment of Hamas Military Infrastructure in the Urban Terrain and the Risk to Civilians in Gaza").

11 Judges' folder submitted by Israel (17 May 2024), tab 1; CR 2024/28, pp. 9–10, paras. 11–15 (Noam).

12 *Ibid*.; see also CR 2024/28, p. 10, para. 14 (Noam).

13 CR 2024/28, p. 10, para. 14 (Noam).

14 Response of the State of Israel to the question posed by Judge Nolte at the oral hearings of 17 May 2024 on South Africa's fourth request for provisional measures, 18 May 2024, para. 8.

15 CR 2024/27, p. 20, para. 13 (Dugard).

16 Response of the State of Israel to the question posed by Judge Nolte at the oral hearings of 17 May 2024 on South Africa's fourth request for provisional measures, 18 May 2024, paras. 22–25.

17 *Ibid.*, paras. 19–21, 26–31.

18 *Ibid.*, paras. 32–34.

19 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 86 (1).

20 *Ibid*., para. 86 (2).

21 *Ibid*., para. 86 (4).

22 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the modification of the Order of 26 January 2024 indicating provisional measures, Order of 28 March 2024*, para. 51 (2)*(a)*.

23 *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

24 *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 (I)*, pp. 196–197, para. 373.

25 Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11–12 January 2024, 10 January 2024, tab 2 ("Selected Public Statements by Israeli Leaders Stating the War's Objectives and Commitment to International Law"); see also CR 2024/28, p. 25, paras. 22–24 (Kaplan Tourgeman).

26 CR 2024/28, p. 28, para. 31 (Kaplan Tourgeman).

27 OCHA, Remarks to the Security Council by Sigrid Kaag, Senior Humanitarian and Reconstruction Coordinator for Gaza, 24 April 2024.

28 See separate opinion of Judge Barak, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, para. 37.

29 *Ibid.*, para. 49.