

**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)**

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**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**

## TABLE OF CONTENTS

	<i>Paragraphs</i>
CHRONOLOGY OF THE PROCEDURE	1-12
I. INTRODUCTION	13-14
II. PRIMA FACIE JURISDICTION	15-32
1. Preliminary observations	15-18
2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention	19-30
3. Conclusion as to prima facie jurisdiction	31-32
III. STANDING OF SOUTH AFRICA	33-34
IV. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED	35-59
V. RISK OF IRREPARABLE PREJUDICE AND URGENCY	60-74
VI. CONCLUSION AND MEASURES TO BE ADOPTED	75-84
OPERATIVE CLAUSE	86

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**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 Ragan,  
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”.

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## 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”.

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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.

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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).

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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.

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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.

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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.

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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.

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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".

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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.

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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.

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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.

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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).

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84. The Court reaffirms that the decision given in the present proceedings in no way prejudices 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.

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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.

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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 Application.

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 Application. 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 are 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”<sup>1</sup>. 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”<sup>2</sup>.

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.

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<sup>1</sup> *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.

<sup>2</sup> *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.

## 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)<sup>1</sup>. 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”.

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<sup>1</sup> 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.”

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"<sup>2</sup>. 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<sup>3</sup>.

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

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<sup>2</sup> *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.

<sup>3</sup> *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.

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<sup>4</sup>.

10. The jurisprudence of the Court is not entirely clear as to what “plausibility” entails<sup>5</sup>. Recent jurisprudence suggests that any request for the indication of provisional measures must provide some level of evidence supporting its allegations<sup>6</sup>, including indications for the presence of any essential mental elements<sup>7</sup>. 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<sup>8</sup>. Each of these reports examines at length — and eventually declares plausible — the existence of genocidal intent<sup>9</sup>. 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

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<sup>4</sup> *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.

<sup>5</sup> 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.

<sup>6</sup> *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.

<sup>7</sup> 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.

<sup>8</sup> *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.

<sup>9</sup> 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.

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<sup>10</sup>. Having considered various other possible inferences from the available information, in particular security considerations<sup>11</sup>, 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"<sup>12</sup>. 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

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<sup>10</sup> UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 1394-1395 and 1406.

<sup>11</sup> *Ibid.*, paras. 1434-1438.

<sup>12</sup> *Ibid.*, paras. 1440-1441.



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<sup>13</sup>. 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<sup>14</sup>.

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<sup>15</sup>. United Nations agencies claim that there is a desperate lack of food and other goods necessary for the survival of the population<sup>16</sup>. 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<sup>17</sup>. 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.

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

<sup>14</sup> 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.

<sup>15</sup> 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>.

<sup>16</sup> 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](https://www.un.org/sites/un2.un.org/files/sg_letter_of_6_december_gaza.pdf).

<sup>17</sup> 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>.

## 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"<sup>1</sup>.

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<sup>2</sup>. 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<sup>3</sup>.

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<sup>4</sup>. 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<sup>5</sup>. 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<sup>6</sup>, that religious sites and clergy must be protected, and that all captives must be afforded fundamental guarantees<sup>7</sup>. Naturally, as in any democratic society, some of these rulings

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

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

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

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

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

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

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

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.”<sup>8</sup>

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

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<sup>8</sup> Israeli Defense Forces, Code of Ethics, Additional Values, Purity of Arms.

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”<sup>9</sup>. 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

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<sup>9</sup> 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).

is criminalized under the Rome Statute<sup>10</sup>. 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 seized 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.”<sup>11</sup>

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<sup>10</sup> Rome Statute, Articles 2 (a) (viii) and 2 (c) (iii).

<sup>11</sup> 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.

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”<sup>12</sup>. This high bar explains some of the full or partial acquittals at the ICTR<sup>13</sup>. 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<sup>14</sup>. However, some proof of intent is necessary. At the very least, sufficient proof to make a claim of genocide plausible.

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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

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

<sup>13</sup> 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.

<sup>14</sup> *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.

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)<sup>15</sup>. 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<sup>16</sup>. 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<sup>17</sup>. 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<sup>18</sup>. The IIFFM also stated that “on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present”<sup>19</sup>. The IIFFM reiterated its conclusions, based on further investigations, in its second report of 8 August 2019.<sup>20</sup>

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

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<sup>15</sup> *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.

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

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

<sup>18</sup> 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.

<sup>19</sup> 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.

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



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". Regrettably, 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<sup>21</sup>.

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<sup>21</sup> 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.

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 prejudice 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.

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