

Corrigé  
Corrected

CR 2024/1

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2024

*Public sitting*

*held on Thursday 11 January 2024, at 10 a.m., at the Peace Palace,*

*President Donoghue presiding,*

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

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VERBATIM RECORD

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ANNÉE 2024

*Audience publique*

*tenue le jeudi 11 janvier 2024, à 10 heures, au Palais de la Paix,*

*sous la présidence de M<sup>me</sup> Donoghue, présidente,*

*en l'affaire relative à l'Application de la convention pour la prévention  
et la répression du crime de génocide dans la bande de Gaza  
(Afrique du Sud c. Israël)*

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COMPTE RENDU

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*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

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*Présents* : M<sup>me</sup> Donoghue, présidente  
M. Gevorgian, vice-président  
MM. Tomka  
Abraham  
Bennouna  
Yusuf  
M<sup>mes</sup> Xue  
Sebutinde  
MM. Bhandari  
Robinson  
Salam  
Iwasawa  
Nolte  
M<sup>me</sup> Charlesworth  
M. Brant, juges  
MM. Barak  
Moseneke, juges *ad hoc*  
  
M. Gautier, greffier

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***The Government of the Republic of South Africa is represented by:***

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Ms Nokukhanya Jele, Special Adviser to the President of the Republic of South Africa,

Ms Phindile Baleni, Director-General in the Presidency of the Republic of South Africa,

Mr Zane Dangor, Director-General of the Department of International Relations and Cooperation of the Republic of South Africa,

Mr Doctor Mashabane, Director-General of the Department of Justice and Constitutional Development,

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*comme conseils adjoints ;*

M. Dvir Saar,

M<sup>me</sup> Tal Eytan,

M. Eran Shamir-Borer,

M. Ben Wahlhaus,

*comme conseillers.*

The PRESIDENT: Please be seated. The sitting is open.

The Court meets today and will meet tomorrow, under Article 74, paragraph 3, of the Rules of Court, to hear the oral observations of the Parties on the Request for the indication of provisional measures submitted by the Republic of South Africa in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

The Court does not include upon the Bench a judge of the nationality of either Party. Accordingly, both Parties availed themselves of the right, under Article 31, paragraph 3, of the Statute, to choose a judge *ad hoc*. South Africa has chosen Judge Dikgang Ernest Moseneke, and Israel, Judge Aharon Barak.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

Before inviting Judge Moseneke and Judge Barak to make their solemn declarations, I shall first, in accordance with custom, say a few words about their careers and qualifications.

Judge Dikgang Ernest Moseneke, of South African nationality, has had a distinguished career as a judge, law practitioner and academic. After obtaining degrees in English, Political Science and Law from the University of South Africa, he practised as an attorney and an advocate with the Pretoria Bar. In 2001, he was appointed a judge on the High Court in Pretoria and, a year later, he became a judge on the Constitutional Court of South Africa, where he was Deputy Chief Justice for more than a decade and Acting Chief Justice in 2013 and 2014. Judge Moseneke is also an Honorary Professor in the Department of Jurisprudence at the University of Pretoria and has served as a Chancellor of the Pretoria Technikon and the University of Witwatersrand in Johannesburg. Judge Moseneke has received numerous honorary doctorates and awards.

I shall now say a few words about the career and qualifications of Judge Barak.

Judge Aharon Barak, of Israeli nationality, has had an eminent career as a judge and law professor. He holds a PhD in Law from the Hebrew University of Jerusalem and served as the Dean of the Faculty of Law of that university between 1974 and 1975. He was appointed to the Israeli

Supreme Court in 1978 and served as its President from 1995 to 2006. Prior to joining the Supreme Court, Judge Barak served as the Attorney General of the State of Israel between 1975 and 1978. He has taught law in a number of law schools, including Yale University, the Hebrew University of Jerusalem and the Reichman University in Herzliya, Israel. Judge Barak has also written extensively in law and has received numerous honorary degrees and awards.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Judge Moseneke to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Judge Moseneke, you have the floor.

JUDGE *AD HOC* MOSENEKE:

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: I thank Judge Moseneke, and I now invite Judge Barak to make the solemn declaration prescribed by the Statute. Judge Barak, you have the floor.

JUDGE *AD HOC* BARAK:

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

The PRESIDENT: I thank Judge Barak. Please be seated. I take note of the solemn declarations made by Judge *ad hoc* Moseneke and Judge *ad hoc* Barak and I declare them duly installed as judges *ad hoc* in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

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I shall now recall the principal steps of the procedure in the present case.

On 29 December 2023, the Government of South Africa filed in the Registry of the Court an Application instituting proceedings against the State of Israel, alleging violations by the latter of its obligations under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. I shall refer to this Convention as the “Genocide Convention”. To found the jurisdiction of the Court,

South Africa invokes Article 36, paragraph 1, of the Statute of the Court and Article IX of the Genocide Convention.

South Africa states that its Application concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023. South Africa contends that the acts and omissions by Israel of which it complains 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”. South Africa asserts that the relevant acts are attributable to Israel, which has failed to prevent genocide and is committing genocide, and which has also violated and continues to violate other fundamental obligations under the Genocide Convention.

The Application contains a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court. According to South Africa,

“[p]rovisional measures are necessary in this case to protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention, which continue to be violated with impunity. South Africa requests that the Court indicate provisional measures to protect and preserve those rights as well as its own rights under the Convention, and to prevent any aggravation or extension of the dispute, pending the determination of the merits of the issues raised by the Application.”

The Registrar will now read out the passage from the Request specifying the provisional measures which the Government of South Africa is asking the Court to indicate. You have the floor, Mr Registrar.

The REGISTRAR: Thank you, Madam President. I quote:

“(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 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.”

The PRESIDENT: I thank the Registrar. Immediately after the Application containing the Request for the indication of provisional measures was filed, the Deputy-Registrar transmitted an original copy thereof to the Government of Israel. He also notified the Secretary-General of the United Nations.

According to Article 74, paragraph 1, of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. Paragraph 2 of the same article states that the Court shall proceed to a decision on the request as a matter of urgency. This imperative must, however, be balanced with the need to fix a date for the oral proceedings in such a way as to afford the parties an opportunity to be represented at the hearings. Consequently, the Parties were informed that the date for the opening of the oral proceedings, during which they could present their observations on the Request for the indication of provisional measures, had been fixed for Thursday 11 January 2024, at 10 a.m.

I would now like to welcome the delegations of South Africa and Israel, and I note the presence before the Court of the Agents and counsel of both Parties. This morning, the Court will hear the single round of oral argument of South Africa, which has submitted the Request for the indication of provisional measures. It will hear Israel tomorrow morning at 10 a.m. For the purposes of this single round of oral argument, each Party will have available to it a three-hour sitting.

In this first sitting, South Africa may, if required, avail itself of a short extension beyond 1 p.m. today, in view of the time taken up by these introductory remarks.

Before I give the floor to the Agent of South Africa, I wish to draw the Parties' attention to Practice Direction XI, which states as follows:

“In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now give the floor to the Agent of South Africa, His Excellency Mr Vusimuzi Madonsela. You have the floor, Excellency.



Mr MADONSELA:

1. Madam President, distinguished Members of the Court, it is an honour and a privilege for me to appear before you today, on behalf of the Republic of South Africa.

2. I wish to express my gratitude to the Court for convening this hearing on the earliest possible date to entertain South Africa's Request for the indication of provisional measures in this matter.

3. In our application, South Africa has recognized the ongoing Nakba of the Palestinian people through Israel's colonization since 1948, which has systematically and forcibly dispossessed, displaced, and fragmented the Palestinian people, deliberately denying them their internationally recognized, inalienable right to self-determination, and their internationally recognized right of return as refugees to their towns and villages<sup>1</sup>, in what is now the State of Israel<sup>2</sup>.

4. We are also particularly mindful of Israel's institutionalized régime of discriminatory laws, policies, and practices designed and maintained to establish domination, subjecting the Palestinian people to apartheid, on both sides of the Green Line. Decades-long impunity for widespread and systematic human rights violations, has emboldened Israel, in its recurrence and intensification of international crimes in Palestine<sup>3</sup>.

5. At the outset South Africa acknowledges that the genocidal acts and omissions by the State of Israel ("Israel") "inevitably form part of a continuum", of illegal acts perpetrated against the Palestinian people since 1948. The Application places Israel's genocidal acts and omissions within the broader context of Israel's 75-year apartheid, 56-year occupation and 16-year siege imposed on the Gaza Strip — a siege which itself, has been described by the Director of UNRWA Affairs in Gaza, as "a silent killer of people"<sup>4</sup>.

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<sup>1</sup> Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, UN doc. CERD/C/304/Add.45, (30 Mar. 1998), para. 18; Report of the Committee on the Elimination of Racial Discrimination, 70th session (19 Feb.-9 Mar. 2007) 71st session (30 July-17 Aug. 2007), para. 211; United Nations General Assembly, Official Records, 62nd session, Supp. No. 18, UN doc. A/62/18.

<sup>2</sup> International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, United Nations, *Treaty Series (UNTS)*, Vol. 999, p. 171, Art. 1; International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 Dec. 1996, *UNTS*, Vol. 993, p. 3, Art. 1; United Nations General Assembly (UNGA) resolution 194 (III), 11 Dec. 1948, para. 11; UNGA resolution 2452 (XXIII), 19 Dec. 1969, para. 1; United Nations Security Council (UNSC) resolution 608, 14 Jan. 1988, para. 1.

<sup>3</sup> UNGA, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, A/76/433 (22 Oct. 2021), <https://undocs.org/A/76/433>, para. 32.

<sup>4</sup> United Nations Relief and Works Agency (UNRWA) @UNRWA, Tweet, (3:18 p.m., Jan. 9, 2024), <https://twitter.com/UNRWA/status/1744725276955926808>.

6. As the Committee on the Elimination of Racial Discrimination (hereinafter “CERD”) warned on 21 December, “hate speech and dehumanising discourse targeted at Palestinians” is raising “severe concerns regarding Israel’s and other State parties’ obligation to prevent crimes against humanity and genocide” in the Gaza Strip<sup>5</sup>. This warning has been followed by a succession of warnings including by 37 United Nations Special Rapporteurs, of “the failure of the international system to mobilise to prevent genocide” in Gaza<sup>6</sup>.

7. Today, we are joined in Court by representatives of the Palestinian state, the Palestinians who work in the field of human rights, including residents of Gaza who were in Gaza just a few days ago. They are some of the lucky ones who managed to get out of Gaza — their future, and the future of their fellow Palestinians who are still in Gaza, depend on the decision this Court will make on this matter.

8. With the leave of the Court, I now call upon His Excellency Mr Ronald Lamola, Minister of Justice of the Republic of South Africa, to make South Africa’s substantive opening remarks.

The PRESIDENT: I thank [the Agent of South Africa] for his statement. And I now invite the Minister of Justice and Correctional Services of the Republic of South Africa, His Excellency Mr Ronald Lamola, to take the floor. You have the floor, Excellency.

Mr LAMOLA:

#### **OPENING REMARKS**

1. Thank you. Madam President and distinguished Members of the Court, it is an honour for me to stand here in front of you on behalf of the Republic of South Africa on this exceptional case. “In extending our hands across the miles to the people of Palestine, we do so in the full knowledge that we are part of a humanity that is at one”. These were the words of our founding President Nelson

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<sup>5</sup> Gaza Strip: States are obliged to prevent crimes against humanity and genocide, UN Committee on the Elimination of Racial Discrimination, <https://www.un.org/unispal/document/gaza-strip-states-are-obliged-to-prevent-crimes-against-humanity-and-genocide-un-committee-stresses-dec21-2023/>.

<sup>6</sup> United Nations, Office of the High Commissioner for Human Rights (OHCHR,) *Gaza: UN experts call on international community to prevent genocide against the Palestinian people* (16 Nov. 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>.

Mandela<sup>7</sup>. This is the spirit in which South Africa acceded to the Convention on the Prevention and Punishment of the Crime of Genocide (“the Convention”) in 1998<sup>8</sup>.

2. This is the spirit in which we approach this Court. As a Contracting Party to the Convention, this is a commitment we owe to the people of Palestine and Israelis alike.

3. As previously mentioned, the violence and the destruction in Palestine and Israel did not begin on 7 October 2023. The Palestinians have experienced systematic oppression and violence for the last 76 years, on 6 October 2023 and every day since 7 October 2023. In the Gaza Strip, at least since 2005, Israel continues to exercise control over the airspace, territorial waters, land crossings, water, electricity and civilian infrastructure<sup>9</sup>, as well as over key government functions<sup>10</sup>. Entry and exit by air and sea to Gaza is strictly prohibited with Israel operating the only two crossing points. Given that continuing effective control by Israel over the territory of Gaza, Gaza is still considered by the international community to be under belligerent occupation by Israel<sup>11</sup>.

4. South Africa unequivocally condemned the targeting of civilians by Hamas and other Palestinian armed groups and the taking of hostages on 7 October 2023, and has again expressly recorded this condemnation, most recently in its Note Verbale to Israel on 21 December 2023.

5. That said, no armed attack on a State’s territory no matter how serious — even an attack involving atrocity crimes — can provide any justification for, or defence to, breaches of the

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<sup>7</sup> Address by President Nelson Mandela at International Day of Solidarity with Palestinian People, Pretoria (4 Dec. 1967), [http://www.mandela.gov.za/mandela\\_speeches/1997/971204\\_palestinian.htm](http://www.mandela.gov.za/mandela_speeches/1997/971204_palestinian.htm).

<sup>8</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), *UNTS*, Vol. 78, p. 277.

<sup>9</sup> Gov.uk, Guidance Overseas Business Risk: The Occupied Palestinian Territories (22 Feb. 2022), <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>, para. 2.5.

<sup>10</sup> See e.g. UNSC resolution 1860, The situation in the Middle East, including the Palestinian question, S/RES/1860 (8 January 2009), <http://unscr.com/en/resolutions/1860>; UNGA resolution 77/30, Assistance to the Palestinian People, A/RES/77/30 (6 Dec. 2022), <https://undocs.org/A/RES/77/30>; HRC, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of Inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 Mar. 2019), <https://undocs.org/A/HRC/40/CRP.2>; UNSC resolution 2720, The situation in the Middle East, including the Palestinian question, S/RES/2720 (22 Dec. 2023), [https://undocs.org/S/RES/2720\(2023\)](https://undocs.org/S/RES/2720(2023)).

<sup>11</sup> See e.g. UNSC resolution 1860, The situation in the Middle East, including the Palestinian question, S/RES/1860 (8 January 2009), [https://undocs.org/S/RES/1860\(2009\)](https://undocs.org/S/RES/1860(2009)) where the Security Council stressed “that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state”. Recently reaffirmed in UNGA resolution 77/30, Assistance to the Palestinian People, A/RES/77/30 (6 Dec. 2022), <https://undocs.org/A/RES/77/30>. See also, HRC, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of Inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 Mar. 2019), <https://undocs.org/A/HRC/40/CRP.2>. UNSC resolution 2720 The situation in the Middle East, including the Palestinian question, S/RES/2720 (22 Dec. 2023), <https://undocs.org/S/RES/2720> (2023) stresses that “the Gaza Strip constitutes an integral part of the territory occupied in 1967” and reiterates “the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State”.

Convention, whether as a matter of law or morality. Israel's response to the 7 October 2023 attack has crossed this line and gives rise to the breaches of the Convention.

6. Faced with such evidence, and our duty to do what we can do to prevent genocide as contained in Article 1 of the Convention, the South African Government initiated this case.

7. South Africa welcomes the fact that Israel has engaged with the case, in order to have the matter resolved by the Court, after careful and objective consideration of the facts and submissions put before it, as the Parties to the Genocide Convention have intended.

8. This hearing is concerned with South Africa's request to the Court for the indication of provisional measures and will necessarily have a narrow and particular focus. I invoke the words of Martin Luther King when he said: "The arch of the universe is long, always bending towards justice."

9. South Africa's case will be presented by a team of six legal counsel, comprising Dr Adila Hassim, Mr Tembeka Ngcukaitobi, Professor John Dugard, Ms Blinne Ni Ghrálaigh, Mr Max du Plessis and Professor Vaughan Lowe.

- (1) Dr Adila Hassim, Senior Counsel, will provide an overview of the risk of genocidal acts and the perpetual vulnerability to acts of genocide;
- (2) Mr Tembeka Ngcukaitobi, Senior Counsel, will examine Israel's alleged genocidal intent;
- (3) Professor John Dugard, Senior Counsel, will focus on prima facie jurisdiction;
- (4) Professor Max du Plessis, Senior Counsel, will discuss the various rights currently under threat;
- (5) Ms Blinne Ní Ghrálaigh, King's Counsel, will present the argument of urgency and potential irreparable harm; and
- (6) Professor Vaughan Lowe, King's Counsel, will speak on provisional measures.

10. I now request, Madam President, the Court to call on Dr Hassim. I thank you.

The PRESIDENT: I thank His Excellency Mr Lamola, and I now invite Ms Adila Hassim to address the Court. You have the floor, Madam.

Ms HASSIM:

### GENOCIDAL ACTS

1. Thank you. Madam President, distinguished Members of the Court, it is a privilege to appear on behalf of the Republic of South Africa in this case of exceptional importance. It is a case that underscores the very essence of our shared humanity as expressed in the preamble to the Genocide Convention.

2. It is my task to address the Court on the genocidal acts that have led to this urgent request for provisional measures under Article 41 of the Statute of the Court. South Africa contends that Israel has transgressed Article II of the Convention, by committing actions that fall within the definition of genocide. The actions show a systematic pattern of conduct from which genocide can be inferred.

### Overview

3. Allow me to place these acts in context. Gaza is one of the two constituent territories of the occupied Palestinian territories, occupied by Israel since 1967. It is a narrow strip, of approximately 365 sq km, as depicted in the map now displayed<sup>12</sup>. Israel continues to exercise control over the airspace, territorial waters, land crossings, water, electricity, electromagnetic sphere and civilian infrastructure in Gaza<sup>13</sup>, as well as over key governmental functions<sup>14</sup>. As the honourable minister has said, entry and exit by air and sea to Gaza is prohibited with Israel operating the only two crossing

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<sup>12</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Hostilities in the Gaza Strip and Israel – reported impact | Day 73* (19 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-73>.

<sup>13</sup> GOV.UK, *Guidance Overseas Business Risk: The Occupied Palestinian Territories* (22 Feb. 2022), <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>, para. 2.5.

<sup>14</sup> United Nations Human Rights Council (HRC), Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/50/21 (9 May 2022), <https://undocs.org/A/HRC/50/21>, para. 16.

points<sup>15</sup>. Gaza, which is one of the most densely populated places in the world is home to approximately 2.3 million Palestinians, almost half of them children.

4. For the past 96 days, Israel has subjected Gaza to what has been described as one of the heaviest conventional bombing campaigns in the history of modern warfare<sup>16</sup>. Palestinians in Gaza are being killed by Israeli weaponry and bombs from air, land and sea<sup>17</sup>.

5. They are also 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. This conduct renders essentials to life unobtainable<sup>18</sup>.

6. At this provisional measures stage, as this Court has made clear in *The Gambia v. Myanmar* case, it is not necessary for the Court to come to a final view on the question of whether Israel's conduct constitutes genocide. It is necessary to establish only "whether . . . at least some of the acts alleged . . . are capable of falling within the provisions of the Convention"<sup>19</sup>. On analysing the specific and ongoing genocidal acts complained of, it is clear that at least some, if not all, of these acts fall within the Convention's provisions.

7. These acts are documented in detail in South Africa's Application and confirmed by reliable, often United Nations, sources. It is thus unnecessary and impossible for me to recount all of them. I

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<sup>15</sup> See e.g. UNSC resolution 1860 (8 January 2009), *The situation in the Middle East, including the Palestinian question*, S/RES/1860, [https://undocs.org/S/RES/1860\(2009\)](https://undocs.org/S/RES/1860(2009)) where the Security Council stressed "that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state". Recently reaffirmed in UNGA resolution 77/30 (6 December 2022), *Assistance to the Palestinian People*, A/RES/77/30, <https://undocs.org/A/RES/77/30>. See also, HRC, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of Inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 March 2019), <https://undocs.org/A/HRC/40/CRP.2>. UNSC resolution 2720 (22 December 2023), *The situation in the Middle East, including the Palestinian question*, S/RES/2720, [https://undocs.org/S/RES/2720\(2023\)](https://undocs.org/S/RES/2720(2023)) stresses that "the Gaza Strip constitutes an integral part of the territory occupied in 1967" and reiterates "the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State".

<sup>16</sup> John Paul Rathbone, "Israel's Gaza attack 'one of history's heaviest conventional bombing campaigns'", *The Irish Times* (6 Dec. 2023), <https://www.irishtimes.com/world/middle-east/2023/12/06/israels-gaza-attack-one-of-historys-heaviest-conventional-bombing-campaigns/>.

<sup>17</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #84* (4 Jan. 2024), <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-84-enarhe>.

<sup>18</sup> UN News, *Gaza humanitarian disaster heralds 'breakdown' of society* (8 Dec. 2023), <https://news.un.org/en/story/2023/12/1144547>; UN News, *Gaza: Aid access to north entirely blocked as war escalates in the south* (4 Dec. 2023), <https://news.un.org/en/story/2023/12/1144302>.

<sup>19</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. 14, para. 30.

will highlight only some in order to illustrate the pattern of genocidal conduct. The United Nations statistics that are relied upon are up to date as of 9 January 2024.

8. In South Africa's oral submissions, we will illustrate the facts that we rely on with limited use of audiovisual material. Madam President, we do so with restraint and only where necessary, and always with respect to the Palestinian people.

9. Against this background, I move now to demonstrate in turn how Israel's conduct violates Articles II (a), II (b), II (c) and II (d) of the Convention.

### **The genocidal acts**

#### **Article II (a): killing Palestinians in Gaza**

10. The first genocidal act committed by Israel is the mass killing of Palestinians in Gaza in violation of Article II (a) of the Genocide Convention.

11. As the UN Secretary-General explained five weeks ago, the level of Israel's killing is so extensive that "nowhere is safe in Gaza"<sup>20</sup>. As I stand before you today, 23,210 Palestinians have been killed by Israeli forces during the sustained attacks over the last three months<sup>21</sup>, at least 70 per cent of whom are believed to be women and children<sup>22</sup>. Some 7,000 Palestinians are still missing, presumed dead under the rubble<sup>23</sup>.

12. Palestinians in Gaza are subjected to relentless bombing wherever they go. They are killed in their homes, in places where they seek shelter, in hospitals, in schools, in mosques, in churches and as they try to find food and water for their families. They have been killed if they failed to

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<sup>20</sup> United Nations Secretary-General, *Letter by the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter*, (6 Dec. 2023), [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); United Nations International Children's Emergency Fund (UNICEF), *A dystopic scene that seemed to stretch on endlessly* (Nov. 2023), <https://www.unicef.org.uk/what-we-do/emergencies/no-safety-for-children-in-gaza/>; International Committee of the Red Cross (ICRC), *Israel and the occupied territories: Deescalate now to prevent further human suffering* (28 Oct. 2023), <https://www.icrc.org/en/document/israel-and-occupied-territories-deescalate-now-prevent-further-human-suffering>.

<sup>21</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>. The statistics in this speech are up to date to 9 Jan. 2023.

<sup>22</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #85* (6 Jan. 2024), <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-85>.

<sup>23</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #83* (3 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-83>.

evacuate, in the places to which they have fled and even while they attempted to flee along Israeli declared “safe routes”<sup>24</sup>.

13. The level of killing is so extensive that those whose bodies are found are buried in mass graves, often unidentified<sup>25</sup>.

14. In the first three weeks alone following 7 October, Israel deployed 6,000 bombs per week<sup>26</sup>. At least 200 times, it has deployed two-thousand-pound bombs in southern areas of Palestine designated as “safe”<sup>27</sup>. These bombs have also decimated the north, including refugee camps<sup>28</sup>. Two-thousand-pound bombs are some of the biggest and most destructive bombs available<sup>29</sup>. They are dropped by lethal fighter jets that are used to strike targets on the ground, by one of the world’s most resourced armies.

15. Israel has killed an “unparalleled and unprecedented” number of civilians<sup>30</sup>, with the full knowledge of how many civilian lives each bomb will take<sup>31</sup>.

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<sup>24</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), *UN Human Rights has “grave fears” about toll on civilians in Gaza* (17 Oct. 2023), <https://www.ohchr.org/en/press-briefing-notes/2023/10/un-human-rights-has-grave-fears-about-toll-civilians-gaza>; “Gaza civilians afraid to leave home after bombing of ‘safe routes’”, *The Guardian* (15 Oct. 2023), <https://www.theguardian.com/world/2023/oct/14/gaza-civilians-afraid-to-leave-home-after-bombing-of-safe-routes>; ICRC, *The ICRC urges protection for Gaza civilians evacuating and staying behind* (13 Nov. 2023), <https://blogs.icrc.org/ir/en/2023/11/the-icrc-urges-protection-for-gaza-civilians-evacuating-and-staying-behind/>.

<sup>25</sup> OCHA *Hostilities in the Gaza Strip and Israel | Flash Update #77*, <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-77>.

<sup>26</sup> Francesca Albanese, UN Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967, an interview with UN News, UN News, *Israel-Palestine crisis has ‘reached an unprecedented level of dehumanisation’: Independent rights expert* (29 Oct. 2023), <https://news.un.org/en/story/2023/10/1142952>.

<sup>27</sup> “A Times Investigation Tracked Israel’s use of one of its Most Destructive Bombs in South Gaza” *The New York Times* (21 Dec. 2023), <https://www.nytimes.com/2023/12/21/world/middleeast/israel-gaza-bomb-investigation.html>.

<sup>28</sup> “‘Not seen since Vietnam’: Israel dropped hundreds of 2,000-pound bombs on Gaza, analysis shows”, *CNN* (22 Dec. 2023), <https://edition.cnn.com/gaza-israel-big-bombs/index.html>.

<sup>29</sup> “A Times Investigation Tracked Israel’s use of one of its Most Destructive Bombs in South Gaza” *The New York Times* (21 Dec. 2023), <https://www.nytimes.com/2023/12/21/world/middleeast/israel-gaza-bomb-investigation.html>.

<sup>30</sup> UN Palestine, *Gaza: ‘Unprecedented and unparalleled’ civilian death toll: Guterres* (20 Nov. 2023), <https://palestine.un.org/en/253284-gaza-unprecedented-and-unparalleled-civilian-death-toll-guterres>.

<sup>31</sup> Yuval Abraham, “‘A mass assassination factory’: Inside Israel’s calculated bombing of Gaza”, *+972 Magazine* (30 Nov. 2023), <https://www.972mag.com/mass-assassination-factory-israel-calculated-bombing-gaza/>.



16. More than 1,800 Palestinian families in Gaza have lost multiple family members<sup>32</sup> and hundreds of multigenerational families have been wiped out, with no remaining survivors — mothers, fathers, children, siblings, grandparents, aunts, cousins — often all killed together<sup>33</sup>.

17. This killing is nothing short of destruction of Palestinian life. It is inflicted deliberately. No one is spared, not even newborn babies<sup>34</sup>. The scale of Palestinian child killings in Gaza is such that United Nations chiefs have described it as “a graveyard for children”<sup>35</sup>. The devastation, we submit, is intended to and has laid waste to Gaza beyond any acceptable legal, let alone humane, justification.

### **Article II (b): causing serious mental and bodily harm to Palestinians in Gaza**

18. The second genocidal act identified in South Africa’s Application is Israel’s infliction of serious bodily or mental harm to Palestinians in Gaza in violation of Article II (b) of the Genocide Convention.

19. Israel’s attacks have left close to 60,000 Palestinians wounded and maimed<sup>36</sup> — again the majority of them women and children<sup>37</sup>. This in circumstances where the healthcare system has all but collapsed. I return to this later in my speech. Large numbers of Palestinian civilians including children are arrested, blindfolded, forced to undress and loaded onto trucks, taken to unknown locations<sup>38</sup>. The suffering of the Palestinian people — physical and mental — is undeniable.

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<sup>32</sup> OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 90* (5 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-90>.

<sup>33</sup> Save the Children, *Children’s Mental Health in Gaza Pushed Beyond Breaking Point After Nearly a Month Of Siege and Bombardment* (7 Nov. 2023), <https://www.savethechildren.org.uk/news/media-centre/press-releases/childrens-mentalhealth-in-gaza-deteriorates-one-month-on->.

<sup>34</sup> ICTR, Trial Chamber I, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (2 Sept. 1998), para. 121.

<sup>35</sup> UNICEF, *Gaza has become a graveyard for thousands of children* (31 Oct. 2023), <https://www.unicef.org/press-releases/gaza-has-become-graveyard-thousands-children>.

<sup>36</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>37</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #78* (27 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-78>.

<sup>38</sup> OCHA Statement by the United Nations Resident and Humanitarian Coordinator in the Occupied Palestinian Territory, Lynn Hastings, on International Human Rights Day (10 Dec. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/statement-united-nations-resident-and-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings-international-human-rights-day-enarhe>.

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

20. Turning to the third genocidal act, under Article II (c): Israel has deliberately imposed conditions on Gaza that cannot sustain life and are calculated to bring about its physical destruction. Israel achieves this in at least four ways.

21. *First*, by displacement. Israel has forced the displacement of about 85 per cent of Palestinians in Gaza. There is nowhere safe for them to flee to — those who cannot leave or refuse to be displaced have either been killed or are at extreme risk of being killed in their homes<sup>39</sup>. Many Palestinians have been displaced multiple times, as families are forced to move repeatedly in search of safety<sup>40</sup>.

22. Israel's first evacuation order on 13 October required the evacuation of over 1 million people — including children, the elderly, the wounded and infirm; entire hospitals were required to evacuate, even newborn babies in intensive care. The order required them to evacuate the north to the south within 24 hours. The order itself was genocidal. It required *immediate* movement, taking only what could be carried, while no humanitarian assistance was permitted, and fuel, water and food and other necessities of life had deliberately been cut off. It was clearly calculated to bring about the destruction of the population<sup>41</sup>.

23. For many Palestinians, the forced evacuation from their homes is inevitably permanent. Israel has now damaged or destroyed an estimated 355,000 Palestinian homes — leaving at least half a million Palestinians with no home to return to<sup>42</sup>. The Special Rapporteur on the human rights of internally displaced persons explains that houses and infrastructure “have been razed to the ground,

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<sup>39</sup> See e.g. Israeli strikes on Deir Al Balah on 4 December, preceding civilians being told to flee to these areas, OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #60* (5 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-60>; on the 12th of December 2023 the City of Rafah, after evacuation orders to Rafah and following civilians being told to flee to these areas, OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #67* (12 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-67>; Ben van der Merwe, Michelle Inez Simon Olive Enokido-Lineham, and Data & Forensics Unit, “Israel said Gazans could flee to this neighbourhood - then it was hit”, *Sky News* (22 Dec. 2023), <https://news.sky.com/story/israel-said-gazans-could-flee-to-this-neighbourhood-then-it-was-hit-13034936>.

<sup>40</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>41</sup> See in this regard the position adopted by the parties to the *Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland*, para. 47, available at <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>.

<sup>42</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #87* (8 Jan. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-87>.

frustrating any realistic prospects for displaced Gazans to return home, repeating a long history of mass forced displacement of Palestinians by Israel”<sup>43</sup>. There is no indication at all that Israel accepts responsibility for rebuilding what it has destroyed.

24. Instead, the destruction is celebrated by the Israeli army: soldiers film themselves joyfully detonating entire apartment blocks and town squares; erecting the Israeli flag over the wreckage<sup>44</sup>, seeking to re-establish Israeli settlements on the rubble of Palestinian homes<sup>45</sup> — and thus extinguishing the very basis of Palestinian life in Gaza<sup>46</sup>.

25. *Second*, together with the forced displacement, Israel’s conduct has been deliberately calculated to cause widespread hunger, dehydration and starvation. Israel’s campaign has pushed Gazans to the brink of famine<sup>47</sup>. An “unprecedented 93% of the population in Gaza is facing crisis levels of hunger”<sup>48</sup>. Of all the people *in the world* currently suffering catastrophic hunger, more than 80 per cent are in Gaza<sup>49</sup>.

26. The situation is such that the experts are now predicting that more Palestinians in Gaza may die from starvation and disease than airstrikes<sup>50</sup> and yet Israel continues to impede the effective

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<sup>43</sup> OHCHR, *Israel working to expel civilian population of Gaza, UN expert warns* (22 Dec. 2023), <https://www.ohchr.org/en/press-releases/2023/12/israel-working-expel-civilian-population-gaza-un-expert-warns>.

<sup>44</sup> “Israeli flag raised in symbolic Palestine Square in Gaza City, video shows”, *CNN* (8 Dec. 2023), [https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-12-08-23/h\\_7516b0f4b4970e9a01bffb26f1bb4739](https://edition.cnn.com/middleeast/live-news/israel-hamas-war-gaza-news-12-08-23/h_7516b0f4b4970e9a01bffb26f1bb4739).

<sup>45</sup> “Far-right minister calls for Israel to ‘fully occupy’ Gaza, reestablish settlements”, *The Times of Israel* (15 Dec. 2023), <https://www.timesofisrael.com/far-right-minister-calls-for-israel-to-fully-occupy-gaza-reestablish-settlements/>.

<sup>46</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. 71-72, para. 163.

<sup>47</sup> World Food Programme (WFP) Media, @WFP\_Media, Tweet (10:35 p.m., 9 Dec. 2023), [https://twitter.com/WFP\\_Media/status/1733616413636530607](https://twitter.com/WFP_Media/status/1733616413636530607); Integrated Food Security Phase Classification, *Gaza Strip: Acute Food Insecurity Situation for 24 November - 7 December 2023 and Projection for 8 December 2023 – 7 February 2024* (21 Dec. 2023), <https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1156749/?iso3=PSE>.

<sup>48</sup> World Health Organization (WHO), *Lethal combination of hunger and disease to lead to more deaths in Gaza* (21 Dec. 2023), <https://www.who.int/news/item/21-12-2023-lethal-combination-of-hunger-and-disease-to-lead-to-more-deaths-in-gaza>.

<sup>49</sup> Islamic Relief Worldwide, *Gaza now the world’s worst hunger crisis and on the verge of famine* (9 Jan. 2024), <https://islamic-relief.org/news/gaza-now-the-worlds-worst-hunger-crisis-and-on-the-verge-of-famine/> (21 Dec. 2023).

<sup>50</sup> Save the Children, *Press Release: Deaths by starvation and disease may top deaths by bombs as families squeezed into deadly “safe zones”, two months into Gaza crisis* (9 Dec. 2023), <https://www.savethechildren.net/news/deaths-starvation-and-disease-may-top-deaths-bombs-families-squeezed-deadly-safe-zones-two>.

delivery of humanitarian assistance to Palestinians<sup>51</sup>, not only refusing to allow sufficient aid in, but removing the ability to distribute it through constant bombardment and obstruction<sup>52</sup>.

27. Just three days ago, on 8 January, a planned mission by United Nations agencies to deliver urgent medical supplies and vital fuel to a hospital and medical supply centre was denied by Israeli authorities<sup>53</sup>. This marked the fifth denial of a mission to the centre since 26 December, leaving five hospitals in northern Gaza without access to life-saving medical supplies and equipment<sup>54</sup>.

28. Aid trucks that are allowed in are seized upon by the hungry. What is provided is simply not enough. *[Video playing]* Madam President, Members of the Court, this is an image of an aid truck arriving in Gaza.

29. *Third*, Israel has deliberately inflicted conditions in which Palestinians in Gaza are denied adequate shelter, clothes or sanitation. For weeks, there have been acute shortages of clothes, bedding, blankets and critical non-food items<sup>55</sup>. Clean water is all but gone, leaving far below the amount required to safely drink, clean and cook<sup>56</sup>.

30. Accordingly, the WHO has stated that Gaza is “experiencing soaring rates of infectious disease outbreaks”<sup>57</sup>. Cases of diarrhoea in children under five years of age have increased 2,000 per cent since hostilities began<sup>58</sup>. When combined and left untreated, malnutrition and disease create a deadly cycle<sup>59</sup>.

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<sup>51</sup> Human Rights Watch (HRW), *Israel: Starvation Used as Weapon of War in Gaza* (18 Dec. 2023), <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>.

<sup>52</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> ICRC, *Israel and the occupied territories: The ICRC urges protection for Gaza civilians evacuating and staying behind* (12 Nov. 2023), <https://www.icrc.org/en/document/israel-and-occupied-territories-icrc-urges-protection-gaza-civilians-evacuating-and-staying>; OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #71* (16 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-71>.

<sup>56</sup> WFP, *Gaza Food Security Assessment* (6 Dec. 2023), <https://docs.wfp.org/api/documents/WFP-0000154766/download/>.

<sup>57</sup> Tedros Adhanom Ghebreyesus, @DrTedros, Tweet (7:05 p.m., 20 Dec. 2023), <https://twitter.com/DrTedros/status/1737549701728092481>.

<sup>58</sup> UNICEF, *Intensifying conflict, malnutrition and disease in the Gaza Strip creates a deadly cycle that threatens over 1.1 million children* (5 Jan. 2024), <https://www.unicef.org/press-releases/intensifying-conflict-malnutrition-and-disease-gaza-strip-creates-deadly-cycle>.

<sup>59</sup> UNICEF, *Intensifying conflict, malnutrition and disease in the Gaza Strip creates a deadly cycle that threatens over 1.1 million children* (5 Jan. 2024), <https://www.unicef.org/press-releases/intensifying-conflict-malnutrition-and-disease-gaza-strip-creates-deadly-cycle>; Tedros Adhanom Ghebreyesus, @DrTedros, Tweet (7:05 p.m., 20 Dec. 2023), <https://twitter.com/DrTedros/status/1737549701728092481>.

31. The *fourth* genocidal act under Article II (b) is Israel's military assault on Gaza's healthcare system, which renders life unsustainable. Even by 7 December, the United Nations Special Rapporteur on the right to health noted that "[t]he healthcare infrastructure in the Gaza strip has been completely obliterated"<sup>60</sup>.

32. Those wounded by Israel in Gaza are being deprived of life-saving medical care<sup>61</sup>. Gaza's healthcare system — already crippled by years of blockade and prior attacks by Israel — is unable to cope with the sheer scale of the injuries<sup>62</sup>.

### **Article II (d): reproductive violence**

33. Finally, the United Nations Special Rapporteur on violence against women and girls has pointed to acts committed by Israel that would fall under the fourth category of genocidal acts, in Article II (d) of the Convention.

34. On 22 November she expressly warned the following: "the reproductive violence inflicted by Israel on Palestinian women, newborn babies, infants, and children could be qualified as . . . acts of genocide under Article 2 of the [Genocide Convention] . . . including 'imposing measures intended to prevent births within a group'"<sup>63</sup>.

35. Israel is blocking the delivery of life-saving aid, including essential medical kits for delivering babies<sup>64</sup>, in circumstances where an estimated 180 women are giving birth in Gaza each day<sup>65</sup>. Of these 180 women, the WHO warns that 15 per cent are likely to experience pregnancy or birth-related complications and need additional medical care<sup>66</sup>. That care is simply not available.

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<sup>60</sup> OHCHR, *Gaza: UN expert condemns 'unrelenting war' on health system amid airstrikes on hospitals and health workers* (7 Dec. 2023), <https://www.ohchr.org/en/press-releases/2023/12/gaza-un-expert-condemns-unrelenting-war-health-system-amid-airstrikes>.

<sup>61</sup> UN News, *UPDATED: Injured patients 'waiting to die' in northern Gaza as last hospital shuts down, amid rising 'catastrophic' hunger levels* (21 Dec. 2023), <https://news.un.org/en/story/2023/12/1145017>.

<sup>62</sup> OCHA, *Hostilities in the Gaza Strip and Israel – reported impact | Day #82* (27 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82>.

<sup>63</sup> OHCHR, *Press Release, Women bearing the brunt of Israel-Gaza conflict: UN expert* (20 Nov. 2023), <https://www.ohchr.org/en/press-releases/2023/11/women-bearing-brunt-israel-gaza-conflict-un-expert>.

<sup>64</sup> Associated Press News (AP News), *Cumbersome process and 'arbitrary' Israeli inspections slow aid delivery into Gaza, US senators say* (6 Jan. 2024), <https://apnews.com/article/israel-gaza-rafah-aid-us-senators-2bc2a3c5e5f8af8e2d3f0b7242c1a885>.

<sup>65</sup> United Nations Population Fund (UNPFA), *Crisis in the occupied Palestinian territory* (5 Jan. 2024), <https://www.unpfa.org/crisis-occupied-palestinian-territory>.

<sup>66</sup> WHO, *Women and newborns bearing the brunt of the conflict in Gaza, UN agencies warn* (3 Nov. 2023), <https://www.who.int/news/item/03-11-2023-women-and-newborns-bearing-the-brunt-of-the-conflict-in-gaza-un-agencies-warn#:~:text=Women%2C%20children%20and%20newborns%20in,and%20Works%20Agency%20for%20Palestine>.

### **Pattern of conduct indicates intent**

36. In sum, Madam President, all of these acts, individually and collectively, form a calculated pattern of conduct by Israel, indicating a genocidal intent. This intent is evident from Israel's conduct in:

- (1) specially targeting Palestinians living in Gaza;
- (2) using weaponry that causes large-scale homicidal destruction, as well as targeted sniping of civilians;
- (3) designating safe zones for Palestinians to seek refuge and then bombing these;
- (4) depriving Palestinians in Gaza of basic needs — food, water, healthcare, fuel, sanitation and communications;
- (5) destroying social infrastructure: homes, schools, mosques, churches, hospitals; and
- (6) killing, seriously injuring and leaving large numbers of children orphaned.

37. Genocides are never declared in advance. But this Court has the benefit of the past 13 weeks of evidence that shows incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts.

38. In *The Gambia v. Myanmar* case, this Court did not hesitate to impose provisional measures in relation to allegations that Myanmar was committing genocidal acts against the Rohingya within the Rakhine State<sup>67</sup>. The facts before the Court today are, sadly, even more stark, and like *The Gambia v. Myanmar* case, deserve and demand this Court's intervention.

### **Conclusion**

39. Every day there is mounting irreparable loss of life, property, dignity and humanity for the Palestinian people. Our newsfeeds show graphic images of suffering that has become unbearable to watch. Nothing will stop this suffering, except an order from this Court. Without an indication of provisional measures, the atrocities will continue; with the Israeli Defense Forces indicating that they intend pursuing this course of action for at least a year<sup>68</sup>.

40. In the words of the United Nations Under-Secretary General on 5 January 2024:

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<sup>67</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 23, para. 56.*

<sup>68</sup> Jason Burke, "Israel says Gaza fighting could last a year, amplifying fears of regional war", *The Guardian* (7 Jan. 2024), <https://www.theguardian.com/world/2024/jan/07/israel-says-gaza-fighting-could-last-a-year-amplifying-fears-of-regional-war>.

“You think getting aid into Gaza is easy? Think again. Three layers of inspections before trucks can even enter. Confusion and long queues. A growing list of rejected items. A crossing point meant for pedestrians, not trucks. Another crossing point where trucks have been blocked by desperate, hungry communities. A destroyed commercial sector. Constant bombardments. Poor communications. Damaged roads. Convoys shot at. Delays at checkpoints. A traumatized and exhausted population crammed into a smaller and smaller sliver of land. Shelters which have long exceeded their full capacity. Aid workers themselves displaced, killed. This is an impossible situation for the people of Gaza, and for those trying to help them. The fighting must stop.”<sup>69</sup>

41. Madam President, Members of the Court, that concludes my section on the genocidal conduct of Israel. I thank you for your patient attention, and I ask that you call Advocate Ngcukaitobi to the podium to address the Court on genocidal intent.

The PRESIDENT: I thank Ms Hassim, and I now invite Mr Tembeka Ngcukaitobi to address the Court. You have the floor, Sir.

Mr NGCUKAITOBI:

#### GENOCIDAL INTENT

1. Madam President and distinguished Members of the Court, it is a privilege to appear before the Court on behalf of South Africa. I will address Israel’s genocidal intent.

2. At this stage, the Court is *not* required to determine that the *only* inference to be drawn from the available evidence is genocidal, to order provisional measures, as that is to decide the merits. Rather, the assessment of the existence of an intent to destroy “could be made by the Court only at the stage of the examination of the merits”<sup>70</sup>. That some of the alleged acts may *also* amount to atrocities other than genocide does not *exclude* the finding of *plausible* acts of genocide.

3. Madam President, South Africa is not alone in drawing attention to Israel’s genocidal rhetoric against Palestinians in Gaza. Fifteen United Nations Special Rapporteurs and 21 members

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<sup>69</sup> Martin Griffiths, @UNReliefChief, Tweet (1:13 a.m., 29 Dec. 2023), <https://twitter.com/UNReliefChief/status/1740526522476191938/photo/1>.

<sup>70</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. 14, para. 30 (hereinafter “*The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*”).

of the United Nations Working Groups have warned that what is happening in Gaza reflects “a genocide in the making” and an overt intent to “destroy the Palestinian people under occupation”<sup>71</sup>.

### **Intent from conduct**

4. Israel has a genocidal intent against the Palestinians in Gaza.

5. That is evident from the way in which Israel’s military attack is being conducted, which has been described by Ms Hassim, SC. It is systematic in its character and form: the mass displacement of the population of Gaza<sup>72</sup>, herded into areas where they continue to be killed<sup>73</sup> and the deliberate creation of conditions that “lead to a slow death”.

6. There is also the clear pattern of conduct: the targeting of family homes and civilian infrastructure<sup>74</sup>, laying waste to vast areas of Gaza<sup>75</sup>, and the bombing, shelling and sniping of men, women and children where they stand<sup>76</sup>, the destruction of the health infrastructure, and lack of access to humanitarian assistance, so much so that as we stand today, 1 per cent of the Palestinian population in Gaza has been systematically decimated, and 1 in 40 Gazans have been injured since

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<sup>71</sup> OHCHR, *Gaza: UN experts call on international community to prevent genocide against the Palestinian people* (16 Nov. 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>; see Application instituting proceedings and Request for the indication of provisional measures (29 Dec. 2023), pp. 68-69, available at <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> (hereinafter “the Application”).

<sup>72</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2024), <https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>73</sup> CNN, *Israel struck some areas it directed civilians to in Gaza, CNN analysis shows* (21 Dec. 2023), <https://edition.cnn.com/2023/12/21/middleeast/israel-strikes-evacuation-zones-gaza-intl-cmd/index.html>; Sky News, *Israel said Gazans could flee to this neighbourhood - then it was hit* (22 Dec. 2023), <https://news.sky.com/story/israel-said-gazans-could-flee-to-this-neighbourhood-then-it-was-hit-13034936>; The New York Times, *A Times Investigation Tracked Israel’s Use of One of Its Most Destructive Bombs in South Gaza* (21 Dec. 2023) <https://www.nytimes.com/2023/12/21/world/middleeast/israel-gaza-bomb-investigation.html>.

<sup>74</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #86* (7 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-86>; Al-Haq, @alhaq\_org, Tweet (4:08 p.m., 8 Jan. 2024), [https://twitter.com/alhaq\\_org/status/1744390645341422028](https://twitter.com/alhaq_org/status/1744390645341422028).

<sup>75</sup> OHCHR, *Israel working to expel civilian population of Gaza, UN expert warns* (22 Dec. 2023), <https://www.ohchr.org/en/press-releases/2023/12/israel-working-expel-civilian-population-gaza-un-expert-warns>; Israeli soldiers offering properties, Al-Haq, 8 Jan. 2024, [https://www.youtube.com/watch?v=KzZ98\\_JFfIU&list=PL1PVNSxQtpMU5Ej9anTXtFQrFGMqJGm6t&index=6](https://www.youtube.com/watch?v=KzZ98_JFfIU&list=PL1PVNSxQtpMU5Ej9anTXtFQrFGMqJGm6t&index=6).

<sup>76</sup> OHCHR, *UN Human Rights Office - OPT: Unlawful killings in Gaza City* (20 Dec. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/un-human-rights-office-opt-unlawful-killings-gaza-city>; *A Palestinian father and daughter were killed by Israeli snipers in Gaza*, Middle East Eye, 5 Jan. 2024, [https://www.youtube.com/watch?v=6\\_JTz\\_1iso](https://www.youtube.com/watch?v=6_JTz_1iso); State of Palestine- MFA, Official channel of Palestinian Ministry of Foreign Affairs and Expatriates @pmofa, Tweet (7:08 p.m., 8 Jan. 2023), <https://twitter.com/pmofa/status/1744435890552770905>.



7 October<sup>77</sup>. These two elements alone are capable of evidencing Israel’s genocidal intent in relation to the whole or part of the Palestinian population in Gaza.

7. However, third, there is an extraordinary feature in this case: that Israel’s political leaders, military commanders and persons holding official positions have systematically and in explicit terms declared their genocidal intent; and these statements are then repeated by soldiers on the ground in Gaza as they engage in the destruction of Palestinians and the physical infrastructure of Gaza.

8. We show this third element next.

### **Intent from genocidal speech by leaders and military officials**

9. Israel’s special genocidal intent is rooted in the belief that in fact the “enemy” is not just the military wing of Hamas, or indeed Hamas generally, but is embedded in the fabric of Palestinian life in Gaza.

10. On 7 October, in a televised address, Israeli Prime Minister Benjamin Netanyahu declared war on Gaza, Israel had started “clear[ing] out the communities that have been infiltrated by terrorists” and he warned of an “unprecedented price” to be paid by the enemy<sup>78</sup>.

11. There are more than 2.3 million Palestinians in Gaza. Israel is the occupying Power, in control of Gaza; it controls entry, exit and the internal movements of inside Gaza<sup>79</sup>. And *qua* Prime Minister, Mr Netanyahu exercises overall command over the Israeli Defense Forces and in turn the Palestinians in Gaza.

12. Prime Minister Netanyahu, in his address to the Israeli forces on 28 October 2023 — preparing for the invasion of Gaza — urged the soldiers to “remember what Amalek has done to

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<sup>77</sup> CNN, *One in 100 people in Gaza has been killed since October 7* (8 Jan. 2024) <https://edition.cnn.com/2024/01/08/middleeast/gaza-death-toll-population-intl/index.html>.

<sup>78</sup> Israeli Prime Minister Declares War on Palestinian Militants Hamas, WSJ News, 7 Oct. 2023, <https://www.youtube.com/watch?v=1PsOw7hxiXs>, at 00:17 – 00:25.

<sup>79</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p.167, para. 78 (hereafter “*Advisory Opinion of 9 July 2004*”), available at <https://www.icj-cij.org/sites/default/files/case-related/131/1497.pdf>; HRC, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 Mar. 2019), [https://www.un.org/unispal/wp-content/uploads/2019/06/A.HRC\\_40.CPR\\_2.pdf](https://www.un.org/unispal/wp-content/uploads/2019/06/A.HRC_40.CPR_2.pdf); Security Council resolution 2720 (2023), adopted on 22 December 2023, stresses that “the Gaza Strip constitutes an integral part of the territory occupied in 1967” and reiterates “the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State”, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/424/87/PDF/N2342487.pdf?OpenElement>.

you”<sup>80</sup>. This refers to the biblical command by God to Saul for the retaliatory destruction of an entire group of people known as the Amalekites: “Put to death men and women, children and infants, cattle and sheep, camels and donkeys”<sup>81</sup>. The genocidal invocation to Amalek was anything but idle. It was *repeated* by Mr Netanyahu in a letter to the Israeli armed forces on 3 November 2023<sup>82</sup>. Madam President, let the Prime Minister’s words speak for themselves.

13. The Deputy Speaker of the Knesset, Israel’s Parliament, has called for the *erasure* of the Gaza Strip from the face of the earth<sup>83</sup>.

14. The Defense Force agrees. On 9 October, the Defence Minister Yoav Gallant gave a “situation update” to the army where he said that as Israel was “imposing a complete siege on Gaza”, “there would be no electricity, no food, no water, no fuel”. “Everything would be closed”, because Israel is “fighting human animals”<sup>84</sup>. Speaking to troops on the Gaza border, he instructed them that he has “released all the restraints” and that “Gaza won’t return to what it was before. We will eliminate everything . . . we will reach all places.”<sup>85</sup> Eliminate everything. Reach all places. Without any restraints.

15. The theme of destruction of “human animals” was reiterated by an Israeli Army Coordinator of Government Activities in the Territories (COGAT) on 9 October 2023 who — in an address to “ Hamas and the residents of Gaza ” — stated that Hamas has become ISIS and that “the citizens of Gaza are celebrating instead of being horrified”<sup>86</sup>. He concluded that, “human animals are dealt with accordingly”, “Israel has imposed a total blockade on Gaza, no electricity, no water, *just*

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<sup>80</sup> Address by the Prime Minister of Israel, 28 Oct. 2023, <https://www.youtube.com/watch?v=IIPkoDk6isc>. Translation in “Israel-Hamas war: ‘We will fight and we will win’, says Benjamin Netanyahu”, *Sky News* (28 Oct. 2023), <https://news.sky.com/video/israel-hamas-war-we-will-fight-and-we-will-win-says-benjamin-netanyahu-12995212>.

<sup>81</sup> 1 Samuel 15:3, Bible Hub, [https://biblehub.com/niv/1\\_samuel/15-3.htm](https://biblehub.com/niv/1_samuel/15-3.htm).

<sup>82</sup> Prime Minister’s Office in Hebrew, @IsraeliPM\_heb, Tweet (11:43 a.m., 3 Nov. 2023), [https://twitter.com/IsraeliPM\\_heb/status/1720406463972004198](https://twitter.com/IsraeliPM_heb/status/1720406463972004198).

<sup>83</sup> Nissim Vaturi, Deputy Speaker of the Knesset. Member of the Foreign Affairs and Security Committee, @nissimv, Tweet (5:33 p.m., 7 October 2023) <https://twitter.com/nissimv/status/1710694866009596169>. Translation in “Public Statement: Scholars Warn of Potential Genocide in Gaza”, *Opinio Juris* (18 Oct. 2023), <https://opiniojuris.org/2023/10/18/public-statement-scholars-warn-of-potential-genocide-in-gaza/>. See also p. 62 of the Application.

<sup>84</sup> Statement by Yoav Gallant, Knesset Channel, 9 Oct. 2023, <https://www.youtube.com/watch?v=IxnvS9VY-t0>. Translation in Emanuel Fabian, “Defense minister announces ‘complete siege’ of Gaza: No power, food or fuel”, *The Times of Israel* (9 October 2023), [https://www.timesofisrael.com/liveblog\\_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/](https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-no-power-food-or-fuel/).

<sup>85</sup> Filmography: Ariel Harmoni, Ministry of Defense, Kipa News, 10 Oct. 2023, <https://www.youtube.com/watch?v=I9wx7e4u-xM>. Translation in “Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks”, *Bloomberg* (10 Oct. 2023), <https://www.youtube.com/watch?v=vjHcnNB0E8>.

<sup>86</sup> Video address by Ghassan Alian, 10 Oct. 2023, <https://www.youtube.com/shorts/5a0EWv-o7mE>.

*damage*. You wanted hell, you will get hell.”<sup>87</sup> The language of systematic dehumanization is evident here: “human animals”. *Both* Hamas and civilians are condemned.

16. Within the Israeli cabinet, this is also a widely held view. The Minister of Energy and Infrastructure, Israel Katz, called for the denial of water and fuel as “this is what will happen to a people of children killers and slaughterers”<sup>88</sup>. This admits of no ambiguity: it means to create conditions of death of the Palestinian people in Gaza. To die a slow death because of starvation and dehydration or to die quickly because of a bomb attack or snipers. But to die, nevertheless. In fact, Heritage Minister, Amichai Eliyahu, said that Israel “must find ways for Gazans that are more painful than death”<sup>89</sup>. It is no answer to say that neither are in command of the army. They are ministers in the Israeli Government; they vote in the Knesset and are in a position to shape State policy.

17. The intent to destroy Gaza has been nurtured at the highest levels of State, as President Isaac Herzog has joined the ranks of those signing bombs destined for Gaza — having previously noted that the entire population in Gaza is responsible and that “this rhetoric about civilians not aware, not involved, is absolutely not true . . . we will fight until we break their backbone”. Later attempts by the President and others to neutralize this speech have not altered the sting of his words — which was to tar *all* Palestinians, as responsible for the actions of Hamas. Nor, as I will show below, it has affected how State policy is understood within government.

18. The Minister of National Security repeated the President’s statements that Hamas and civilians are responsible in equal measure. On 10 November 2023, in a televised interview, he stated that “when we say that Hamas should be destroyed, it also means those who celebrate, those who support, and those who hand out candy — they’re all terrorists, and they should also be destroyed”<sup>90</sup>.

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<sup>87</sup> *Ibid.*

<sup>88</sup> Israel Katz, Tweet (10:26 a.m., 10 Oct. 2023) [https://twitter.com/Israel\\_katz/status/1711659347590156417](https://twitter.com/Israel_katz/status/1711659347590156417). Translated by Palestine Negotiations Affairs Department, *Israeli Official Incitement: October 2023* (13 Nov. 2023), <https://www.nad.ps/en/media-room/latest-israeli-incitement-reports>.

<sup>89</sup> Anadolu Ajansi, *Another Israeli minister calls for encouraging Palestinians to leave Gaza*, (5 January 2024) <https://www.aa.com.tr/en/middle-east/another-israeli-minister-calls-for-encouraging-palestinians-to-leave-gaza/3101423#:~:text=We%20must%20find%20ways%20for,than%20death%2C%20Amichai%20Eliyahu%20says&text=Israeli%20Heritage%20Minister%20Amichai%20Eliyahu,killed%20more%20than%2022%2C000%20people>.

<sup>90</sup> Interview with Itamar Ben-Gvir on Channel 12, 11 Nov. 2023, <https://www.youtube.com/watch?v=2yRl-cc-D3w> [10:30 a.m. onwards]. Translated by Quds News Network, @QudsNen, Tweet (7:28 p.m., 12 Nov. 2023), <https://twitter.com/QudsNen/status/1723784790682358189>.

19. These are orders to destroy. And to maim what cannot be destroyed. These statements are not open to neutral interpretations, or after-the-fact rationalizations and reinterpretations by Israel. The statements were made by persons in command of the State. They communicated State policy. It is simple. If the statements were not intended, they would not have been made.

### **Intent from genocidal speech by soldiers**

20. The genocidal intent behind these statements is not ambiguous to the Israeli soldiers on the ground. Indeed, it is directing their actions and objectives.

21. On 7 December 2023, Israeli soldiers proved that they understood the Prime Minister's message to "remember what the Amalek has done to you" as genocidal. They were recorded by journalists dancing and singing: "We know our motto: there are no uninvolved . . ."; that they obey one commandment, "to wipe off the seed of Amalek"<sup>91</sup>. The Prime Minister's invocation of "Amalek" is being used by soldiers to justify the killing of civilians, including children. These are the soldiers repeating the inciting words of their Prime Minister.

22. Israeli soldiers in Gaza were filmed dancing, chanting and singing in November: "May their village burn; may Gaza be erased."<sup>92</sup> There is now a trend among the soldiers to film themselves committing atrocities against civilians in Gaza, in a form of "snuff" video. One recorded himself detonating over 50 houses in Shujaiya<sup>93</sup>; other soldiers were recorded singing: "We will destroy all of Khan Younes and this house"; "we will blow it up for you and for everything you do for us"<sup>94</sup>. These are the soldiers putting into effect their command.

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<sup>91</sup> Yinon Magal, @YinonMagal, Tweet (6:44 a.m., 7 Dec. 2023), <https://twitter.com/YinonMagal/status/1732652279461757102>. Translation by Middle East Eye, @MiddleEastEye, Tweet (1:30 p.m., 8 Dec. 2023), and <https://twitter.com/MiddleEastEye/status/1733116719668113618> (emphasis added).

<sup>92</sup> Peretz sings may your village burn 2, OfekCenter, 26 Nov. 2023, <https://www.youtube.com/watch?v=xcH2o4c5KZY>; Yehuda Shaul, @YehudaShaul, Tweet (3:07 p.m., 19 Dec. 2023), and <https://twitter.com/YehudaShaul/status/1737112315823374498>.

<sup>93</sup> Quds News Network, @QudsNen, Tweet (11 p.m., 20 Dec. 2023), <https://twitter.com/QudsNen/status/1737593767752860117>.

<sup>94</sup> Israeli soldiers sing while demolishing homes in Gaza, Middle East Eye, 2 Jan. 2024, <https://www.youtube.com/shorts/YiolU7WwpUQ>.

23. The commanders of the army are also of the same mind. Israeli army Commander Yair Ben David has stated that the army had done in “Beit Hanoun and did there as Shimon and Levi did in Nablus” and that “[t]he entire Gaza should resemble Beit Hanoun”<sup>95</sup>.

24. Israeli soldier Yishai Shalev published a video against the backdrop of the ruins of what was the site of Al Azhar University with the caption “once upon a time there was a university in Gaza and in practice — a school for murderers and human animals”<sup>96</sup>.

25. Soldiers obviously believe that this language and their actions are acceptable because the destruction of Palestinian life in Gaza is articulated State policy.

26. Senior political and military officials encouraged without censure the 95-year-old Israeli army reservist Ezra Yachin — a veteran of the Deir Yassin massacre against the Palestinians in 1948 — to speak to the soldiers ahead of the ground invasion in Gaza<sup>97</sup>. In his tour, he echoed the same sentiment while being driven around in an official Israeli army vehicle, dressed in Israeli army fatigues:

“Be triumphant and finish them off, and don’t leave anyone behind. *Erase the memory of them. Erase them, their families, mothers and children. These animals can no longer live . . .* If you have an Arab neighbour, don’t wait, go to his home and shoot him . . . We want to invade, not like before, we want to enter and destroy what’s in front of us, and destroy houses, then destroy the one after it. With all of our forces, complete destruction, enter and destroy. As you can see, we will witness things we’ve never dreamed of. *Let them drop bombs on them and erase them.*”<sup>98</sup>

27. As recently as 7 January 2024, a video of a soldier was posted online where he boasts that the army had destroyed the entire village of Hirbet Ahza. For two weeks, he said, they had worked hard to bomb the village and executed their mandate<sup>99</sup>.

28. Any suggestion that senior politicians did not mean what they said — much less that the meaning was not understood by soldiers in Gaza — would be without any merit. The scale of

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<sup>95</sup> Yair Ben David, Commander in the 2908th Battalion, statement, 20 Dec. 2023, <https://www.youtube.com/watch?v=NK8ZnGKspeI>. Translation in “War on Gaza: Israeli commander vows to flatten ‘entire’ Gaza Strip”, Middle East Eye (21 Dec. 2023), <https://www.middleeasteye.net/news/war-gaza-israeli-commander-vows-flatten-entire-gaza-strip>.

<sup>96</sup> Younis Tirawi, @ytirawi, Tweet (1:17 a.m., 6 Jan. 2024), <https://twitter.com/ytirawi/status/1743411493813575711>.

<sup>97</sup> Rayhan Uddin, “Israel-Palestine war: Israeli veteran, 95, rallies troops to ‘erase’ Palestinian children”, Middle East Eye (14 Oct. 2023), <https://www.middleeasteye.net/news/israel-palestine-war-veteran-ezra-yachin-soldiers-erase-children>.

<sup>98</sup> Middle East Eye, @MiddleEastEye, Tweet (9:48 p.m., 13 Oct. 2023), and <https://twitter.com/MiddleEastEye/status/1712918166437806294> (emphasis added).

<sup>99</sup> <https://twitter.com/MOSSADil/status/1744069819912102223>.

destruction in Gaza, the mass targeting of family homes and civilians, the war being “a war on children”<sup>100</sup>, all make clear that genocidal intent is both understood and is being put into practice.

29. The articulated intent is the destruction of Palestinian life in all its manifestations.

### **Intent from public incitement of genocide**

30. The genocidal rhetoric is also commonplace within the Israeli Knesset. Members of the Knesset (MKs) have repeatedly called for Gaza to be “wiped out”<sup>101</sup>, “flatten[ed]”<sup>102</sup>, “eras[ed]”<sup>103</sup>, and “[c]rush[ed] . . . on all its inhabitants”<sup>104</sup>. They have deplored anyone “feel[ing] sorry” for the “uninvolved” Gazans, asserting repeatedly that “there are no uninvolved”<sup>105</sup>, that “[t]here are no innocents in Gaza”<sup>106</sup>, that “the killers of the women and children should not be separated from the citizens of Gaza”<sup>107</sup>, that “the children of Gaza have brought this upon themselves”<sup>108</sup>, and that “there should be one sentence for everyone there — death”<sup>109</sup>. Finally, the lawmakers have called for

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<sup>100</sup> “‘This is a war on children’ says UNICEF spokesperson James Elder, who recently returned from Gaza”, *Channel 4* (14 Dec. 2023), <https://www.channel4.com/news/this-is-a-war-on-children-says-unicef-spokesperson-james-elder-who-recently-returned-from-gaza>.

<sup>101</sup> Revital Gottlieb, @TallyGotliv, Tweet (5:10 p.m., 29 Oct. 2023), <https://twitter.com/TallyGotliv/status/1718676748542296207>.

<sup>102</sup> Interview with Katrin “Keti” Shitrit-Peretz on Now 14, 1 Nov. 2023: Now 14, @Now14Israel, Tweet (9:50 p.m., 1 Nov. 2023), <https://twitter.com/Now14Israel/status/1719834297832526215>; Revital Gottlieb, @TallyGotliv, Tweet (10:41 a.m., 10 Oct. 2023), <https://twitter.com/TallyGotliv/status/1711678420235534705>.

<sup>103</sup> Galit Atbaryan, @GalitDistel, Tweet (12:13 p.m., 1 Nov. 2023), <https://twitter.com/galitdistel/status/1719689095230730656>.

<sup>104</sup> Eliyahu Revivo, @revivoelياهو, Tweet (2:46 p.m., 1 Nov. 2023), <https://twitter.com/revivoelياهو/status/1719727722459508915>.

<sup>105</sup> Revital Gottlieb, @TallyGotliv, Tweet (3:46 p.m., 7 Dec. 2023), <https://twitter.com/TallyGotliv/status/1732788632430186872>.

<sup>106</sup> Avigdor Lieberman, @AvigdorLieberman, Tweet (6:45 p.m., 30 Nov. 2023), <https://twitter.com/avigdorliberman/status/1730297081959530685>.

<sup>107</sup> Interview with Katrin “Keti” Shitrit-Peretz on Now 14, 1 Nov. 2023: Now 14, @Now14Israel, Tweet (9:50 p.m., 1 Nov. 2023), <https://twitter.com/Now14Israel/status/1719834297832526215>.

<sup>108</sup> Meirav Ben-Ari, Knesset Session, 16 Oct. 2023, [https://www.facebook.com/watch/live/?ref=watch\\_permalink&v=3497251110531404](https://www.facebook.com/watch/live/?ref=watch_permalink&v=3497251110531404) [2:29:57]. Translation by Jonathan Ofir, “Israeli Politician Says ‘Children of Gaza Have Brought This Upon Themselves’”, *Truthout* (18 Oct. 2023), <https://truthout.org/articles/israeli-politician-says-children-of-gaza-have-brought-this-upon-themselves>.

<sup>109</sup> “MK Yitzhak Kroizer: ‘The Gaza Strip should be wiped off the map’”, *Galey Israel* (5 Nov. 2023), <https://www.gly.co.il/item?id=30587>. Translation in “Fire Israel’s Far Right”, *Haaretz* (6 Nov. 2023), <https://www.haaretz.com/opinion/editorial/2023-11-06/ty-article/.premium/fire-israels-far-right/0000018b-a11c-dc0b-a1cb-e5de69890000>.

“mercilessly” bombing “from the air”<sup>110</sup>, with some advocating for the use of nuclear (“doomsday”) weapons<sup>111</sup>, and a “Nakba that will overshadow the Nakba of 48”<sup>112</sup>.

31. The Prime Minister’s genocidal speech has gained ground among some elements of civil society. A famous singer has repeated Mr Netanyahu’s Amalek reference, stating that “Gaza must be wiped out and be destroyed with every Amalek seed . . . we simply must destroy all of Gaza and exterminate everyone who is there”<sup>113</sup>; another has called to “erase Gaza, not leave a single person there”<sup>114</sup>. Journalists and commentators have announced that “the woman is an enemy, the baby is an enemy . . . the pregnant woman is an enemy”<sup>115</sup>; that it is necessary to “turn the strip into a slaughterhouse”<sup>116</sup>, to “demolish every house our soldiers come across”<sup>117</sup>. Exterminate everyone.

32. The 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. We should recall, Madam President, that in Article 1 of the Convention, Israel confirmed that “genocide, whether committed in time of peace or in time of war, is a crime under international law” and it undertook “to prevent and to punish” it as such. This failure to prevent, condemn and punish such speech by the Government has served to normalize genocidal rhetoric and extreme danger for Palestinians within Israeli society. As MK Moshe Saada, from the Likud Party, has said, the Government’s own attorneys share his views that Palestinians in Gaza must be destroyed: “You go anywhere, and they tell you to destroy them. In the kibbutz, they tell you to destroy them, my friends

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<sup>110</sup> Revital Gottlieb, @TallyGotliv, Tweet (7:39 a.m., 13 Dec. 2023), <https://twitter.com/TallyGotliv/status/1734840416522948800>.

<sup>111</sup> Revital Gottlieb, @TallyGotliv, Tweet (5:59 p.m., 9 Oct. 2023), <https://twitter.com/TallyGotliv/status/1711426284322996613>.

<sup>112</sup> Ariel Kallner, @ArielKallner, Tweet (10:29 p.m., 7 Oct. 2023), <https://twitter.com/ArielKallner/status/1710769363119141268>. Translated in the New Arab: “Erase Gaza’: How genocidal rhetoric became normalised in Israel”, *The New Arab* (30 Nov. 2023), <https://www.newarab.com/analysis/erase-gaza-how-genocidal-rhetoric-normalised-israel>.

<sup>113</sup> “קובי פרץ: כהנא צדק בכל מילה. המפגינים נגד המלחמה הם כלבים בוגדים מסריחים”, Walla! (12 Nov. 2023), available at <https://e.walla.co.il/item/3622003> (informal translation).

<sup>114</sup> Interview with Eyal Golan on Now 14, 15 Oct. 2023: Now 14, @Now14Israel, Tweet (1:24 p.m., 15 Oct. 2023), <https://twitter.com/Now14Israel/status/1713531211300167928>.

<sup>115</sup> Middle East Eye, @Middle East Eye, Tweet, <https://twitter.com/MiddleEastEye/status/1741069437518680399>.

<sup>116</sup> David Mizrahy Verthaim, @dverthaim, Tweet (4:52 p.m., 7 Oct. 2023), <https://twitter.com/dverthaim/status/1710684531114602891>.

<sup>117</sup> Commentators on Israel’s Channel 14 say Gaza should be demolished into sand, Middle East Eye, 30 Dec. 2023, [https://www.youtube.com/shorts/eRRqAmcyO\\_E](https://www.youtube.com/shorts/eRRqAmcyO_E).

at the State Attorney's office who've fought with me on political issues, in debates, said to me . . . 'it is clear that we need to destroy all Gazans.'"<sup>118</sup> Destroy all Gazans.

### Knowledge of the destruction

33. Israel is aware of its destruction of Palestinian life and infrastructure. Despite this knowledge, it has maintained — and indeed intensified — its military activity in Gaza.

34. As to full awareness, in the week after 7 October, non-governmental organizations and the United Nations warned of an “unprecedented” humanitarian crisis in Gaza<sup>119</sup>. The United Nations stated that “actors must allow humanitarian teams and goods to immediately and safely reach the hundreds of thousands of people in need”<sup>120</sup>. So right from the beginning Israel knew that<sup>121</sup> it was depriving water, food, electricity and essentials for survival<sup>122</sup>. It said so: “Everything is closed.”<sup>123</sup> It has known that it was depriving Palestinians of healthcare and treatment for injury in the middle of an unprecedented bombardment<sup>124</sup>, of food and water, and of other essentials for survival. This prompted the WHO to say: “We are on our knees asking for sustained, scaled up, protected humanitarian operations”, appealing “to all those in a situation to make a decision or influence decision makers, to give us the humanitarian space to address this human catastrophe”<sup>125</sup>.

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<sup>118</sup> Likud MK Moshe Saada says people tell him that Israel “must destroy all Gazans”, Middle East Eye, 3 Jan. 2024, <https://www.youtube.com/shorts/WMxnNkQsfmQ>.

<sup>119</sup> UN News, *Gaza: Nowhere to go, as humanitarian crisis reaches 'dangerous new low'* (13 Oct. 2023), <https://news.un.org/en/story/2023/10/1142282>; Action Against Hunger, Diakonia, Handicap International, Médecins du Monde, Mercy Corps, Norwegian Refugee Council, Oxfam International, Plan International, Save the Children International and War Child UK, *Urgent plea to avert unprecedented humanitarian crisis amid looming Israeli land incursion into Gaza* (13 Oct. 2023), <https://www.nrc.no/news/2023/october/urgent-plea-to-avert-unprecedented-humanitarian-crisis-amid-looming-Israeli-land-incursion-into-Gaza/>; Norwegian Refugee Council, *The fighting must stop immediately* (9 Oct. 2023), <https://www.nrc.no/perspectives/2023/israel-and-gaza-the-fighting-must-stop-immediately/>.

<sup>120</sup> OCHA, *Statement by the Humanitarian Coordinator for the Occupied Palestinian Territory, Lynn Hastings, on the hostilities between Palestinian armed groups in the Gaza Strip and Israel* (10 Oct. 2023), <https://www.ochaopt.org/content/statement-humanitarian-coordinator-occupied-palestinian-territory-lynn-hastings-hostilities-between-palestinian>.

<sup>121</sup> See e.g. OCHA, “*Essential supplies must enter Gaza at the scale needed*”, senior UN official tells Security Council (24 Oct. 2023), <https://www.unocha.org/news/essential-supplies-must-enter-gaza-scale-needed-senior-un-official-tells-security-council>.

<sup>122</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #6* (9 Oct. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-6>.

<sup>123</sup> Statement by Yoav Gallant, 9 Oct. 2023, <https://www.youtube.com/watch?v=1nxvS9VY-t0>.

<sup>124</sup> WHO, *Evacuation orders by Israel to hospitals in northern Gaza are a death sentence for the sick and injured* (14 Oct. 2023), <https://www.who.int/news/item/14-10-2023-evacuation-orders-by-israel-to-hospitals-in-northern-gaza-are-a-death-sentence-for-the-sick-and-injured>; ICRC, *Israel and the occupied territories: Hospitals risk turning into morgues without electricity; hostages must be released immediately* (12 Oct. 2023), <https://www.icrc.org/en/document/israel-and-occupied-territories-hospitals-risk-turning-morgues-without-electricity-hostages-must-be-released>.

<sup>125</sup> UN News, *Israel-Palestine: Gaza buckles under fuel shortage, healthcare in crisis* (24 Oct. 2023), <https://news.un.org/en/story/2023/10/1142732>.



35. Despite this knowledge, Israel continues to target infrastructure essential for survival: water and sanitation infrastructure<sup>126</sup>, solar panels<sup>127</sup>, bakeries, mills, crops<sup>128</sup>. It bombs hospitals, decimating the healthcare system<sup>129</sup>. It targets aid workers and the infrastructure of the United Nations<sup>130</sup>. It is because of the policy of Israel that Gaza has become a place of “death and despair”<sup>131</sup>.

### Conclusion

36. In conclusion, Madam President, many propagators of grave atrocities have protested that they were misunderstood; that they did not mean what they said; and that their own words were taken out of context. What State would admit to a genocidal intent? Yet, the distinctive feature of this case has not been the silence as such, but the reiteration and repetition of genocidal speech throughout every sphere of State in Israel.

37. We remind the Court of the identity and authority of the genocidal inciters: the Prime Minister; the President; the Minister of Defence; the Minister of National Security; the Minister of Energy and Infrastructure; members of the Knesset; senior army officials; and foot soldiers. Genocidal utterances are therefore not out in the fringes; they are embodied in State policy.

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<sup>126</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #4* (10 Oct. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-4>.

<sup>127</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #30* (5 Nov. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-30>; Latin Patriarchate of Jerusalem, *Gaza, 16th December 2023* (16 Dec. 2023), <https://www.lpj.org/en/gaza-16th-december-2023>.

<sup>128</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #35* (10 Nov. 2023), <https://www.unocha.org/publications/report/occupied-palestinian-territory/hostilities-gaza-strip-and-israel-flash-update-35-enarhe>; OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #40* (15 Nov. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-40>.

<sup>129</sup> Emma Farge, “UN agencies voice anger at Gaza hospital attacks, deprivation”, Reuters (19 Dec. 2023), <https://www.reuters.com/world/middle-east/un-agencies-voice-anger-attacks-gaza-hospitals-2023-12-19/>; Forensic Architecture, *Destruction of Medical Infrastructure in Gaza* (20 Dec. 2023), <https://forensic-architecture.org/investigation/destruction-of-medical-infrastructure-in-gaza>.

<sup>130</sup> “U.N. Says Israeli Forces Fired on Aid Convoy in Central Gaza”, *New York Times* (29 Dec. 2023), <https://www.nytimes.com/2023/12/29/world/middleeast/un-israel-gaza-aid.html>; UNRWA, *The Gaza Strip: UNRWA schools sheltering displaced people constantly hit* (19 November 2023), <https://www.unrwa.org/newsroom/official-statements/gaza-strip-unrwa-schools-sheltering-displaced-people-constantly-hit>; UNRWA, *UNRWA Guesthouse in southern Gaza receives three direct hits from Israeli Forces’ naval bombardment* (13 Nov. 2023), <https://www.unrwa.org/newsroom/official-statements/unrwa-guesthouse-southern-gaza-receives-three-direct-hits-israeli-Forces>.

<sup>131</sup> United Nations, Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, *UN relief chief: The war in Gaza must end* (5 Jan. 2024) <https://www.unocha.org/news/un-relief-chief-war-gaza-must-end>.

38. The intent to destroy is plainly understood by soldiers on the ground. It is also fully understood by some within the Israeli society, with the Government facing criticism for allowing in any aid to Gaza, on the basis that it is recanting on its “promise” to starve Palestinians<sup>132</sup>. Any suggestion that Israeli officials did not mean what they said, or were not fully understood — by soldiers and civilians alike — to mean what they said, should be rejected by this Court. The evidence of genocidal intent is not only chilling, it is also overwhelming and incontrovertible.

39. Madam President, it is now my honour to request you to call Mr John Dugard on the subject of jurisdiction.

The PRESIDENT: I thank Mr Ngcukaitobi, and I now invite Prof. John Dugard to take the floor. You have the floor, Professor.

Mr DUGARD:

#### JURISDICTION

1. Madam President, distinguished Members of the Court. It is a great privilege to appear before you today on behalf of the Republic of South Africa. In my speech I will address the question of jurisdiction.

2. The people of South Africa and of Israel both have a history of suffering. Both States have become parties to the Genocide Convention in the determination to end suffering. In this spirit neither has attached a reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

3. It is in terms of this Convention, dedicated to saving humanity, that South Africa brings this dispute before the Court.

4. The prohibition of genocide is a peremptory norm. Obligations under the Genocide Convention are *erga omnes*, obligations owed to the international community as a whole. States parties to this Convention are obliged not only to desist from genocidal acts but also to prevent them.

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<sup>132</sup> Muhammad Shehada, @muhammadshehad2, Tweet (4:44 p.m., 3 Jan. 2024), <https://twitter.com/muhammadshehad2/status/1742572764597228027>; Dan Cohen, @dancohen3000, Tweet (4:18 a.m., 5 Jan. 2024) <https://twitter.com/dancohen3000/status/1743109784570646826>.

That the obligation of States parties to prevent acts of genocide is the foundation of the Convention is clear from its placement in Article I of the Convention.

5. Article IX of the Genocide Convention makes it clear that States parties are guardians of the Genocide Convention. Unlike other treaties designed to protect human rights<sup>133</sup>, it does not oblige States to pursue negotiations as a prelude to approaching this Court. It does not treat the ending of genocidal acts as a bilateral affair between States. Instead, it envisages a situation in which a State, acting on behalf of the international community as a whole, seises the jurisdiction of the Court as a matter of urgency to prevent genocide.

6. South Africa has a long history of close relations with Israel. For this reason, it did not bring this dispute immediately to the attention of the Court. It watched with horror as Israel responded to the terrible atrocities committed against its people on 7 October 2023 with an attack on Gaza that resulted in the indiscriminate killing of innocent Palestinian civilians, most of whom were women and children.

7. The South African Government repeatedly voiced its concerns, in the Security Council<sup>134</sup> and in public statements<sup>135</sup>, that Israel's actions had become genocidal. On 10 November, in a formal diplomatic démarche, it informed Israel that while it condemned the actions of Hamas, it wanted the International Criminal Court (ICC) to investigate the leadership of Israel for international crimes,

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<sup>133</sup> See, for instance, Convention on the Elimination of All Forms of Racial Discrimination, Article 22; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 30.

<sup>134</sup> South Africa, Department of International Relations and Cooperation (DIRCO), *South Africa calls for the international community to hold Israel accountable for breaches of International Law (30 October 2023)*, Application, para. 13, fn. 33, <https://www.dirco.gov.za/south-africa-calls-for-the-international-community-to-hold-israel-accountable-for-breaches-of-international-law/#:~:text=Home-South%20Africa%20calls%20for%20the%20International%20community%20to%20hold,for%20breaches%20of%20International%20Law&text=Save%20the%20Children%20has%20reported,world's%20conflict%20zones%20since%202019>.

<sup>135</sup> South Africa, DIRCO, *Ministerial Statement on the Ongoing Israeli Palestinian Conflict by Dr GNM Pandor, Minister for International Relations and Cooperation, in the National Assembly House of Parliament (7 November 2023)*, Application, para. 13, fn. 34, <https://www.dirco.gov.za/ministerial-statement-on-the-ongoing-israeli-palestinian-conflict-by-dr-gnm-pandor-minister-for-international-relations-and-cooperation-in-the-national-assembly-house-of-parliament-7-november-2023/>; South Africa, The Presidency, *President Ramaphosa Meets with the Jewish Board of Deputies* (13 Nov. 2023), Application, fn. 36 <https://www.thepresidency.gov.za/president-ramaphosa-meets-south-african-jewish-board-deputies>.; Kate Bartlett, "South Africa Refers Israel to The Hague over Gaza War Crimes", *VOA News* (17 Nov. 2023), Application, para. 13, fn. 37, <https://www.voanews.com/a/south-africa-refers-israel-to-the-hague-over-gaza-war-crimes-/7359022.html>.

including genocide<sup>136</sup>. As the Court will know, the definition of genocide in the Rome Statute repeats that of the Genocide Convention<sup>137</sup>.

8. On 17 November South Africa referred Israel's commission of the crime of genocide to the International Criminal Court for "vigorous investigation"<sup>138</sup>. In announcing this decision President Ramaphosa publicly expressed his abhorrence "for what is happening right now in Gaza, which is now turned into a concentration camp where genocide is taking place"<sup>139</sup>. To accuse a State of committing acts of genocide and to condemn it in such strong language is a major act on the part of a State. At this stage it became clear that there was a serious dispute between South Africa and Israel which would end only with the end of Israel's genocidal acts.

9. South Africa repeated this accusation at a meeting of BRICS on 21 November 2023<sup>140</sup> and at an Emergency Special Session of the United Nations General Assembly on 12 December 2023<sup>141</sup>. No response from Israel was forthcoming. None was necessary. By this time, the dispute had crystallized as a matter of law. This was confirmed by Israel's official and unequivocal denial on 6 December 2023 that it was committing genocide in Gaza<sup>142</sup>.

10. However, as a matter of courtesy, before filing the present Application, on 21 December 2023, South Africa sent a Note Verbale to the Embassy of Israel to reiterate its view that Israel's acts of genocide in Gaza amounted to genocide — that it, as a State party to the Genocide Convention, was under an obligation to prevent genocide from being committed<sup>143</sup>. Israel responded by way of a

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<sup>136</sup> South Africa, DIRCO, *DIRCO démarches the Ambassador of the State of Israel* (10 Nov. 2023), Application, para. 13, fn. 35. <https://www.dirco.gov.za/dirco-demarches-the-ambassador-of-the-state-of-israel/>.

<sup>137</sup> See Article 6 of the Rome Statute of the International Criminal Court.

<sup>138</sup> South Africa, Embassy in the Netherlands, *Letter from the South African Embassy in The Netherlands to the Prosecutor of the International Criminal Court* (17 Nov. 2023) Application, para. 13, fn. 38, <https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17November-2023pdf>.

<sup>139</sup> Kate Bartlett, "South Africa Refers Israel to The Hague over War Crimes", VOA News (17 Nov. 2023), Application, para. 13, fn. 37, see above fn 3.

<sup>140</sup> South Africa The Presidency, *Opening Remarks by President Ramaphosa to the Extraordinary Joint Meeting of BRICS Leaders of Invited BRICS members on the Situation in the Middle East* Application, para. 13, fn. 39, <https://www.thepresidency.gov.za/opening-remarks-president-cyril-ramaphosa-extraordinary-joint-meeting-brics-leaders-and-leaders>.

<sup>141</sup> UN News, *UN General Assembly votes by large majority for immediate humanitarian ceasefire during emergency session* (video of the session a 1:13:37) (12 Dec. 2023), Application, para. 13, fn. 40., <https://news.un.org/en/story/2023/12/1144717>.

<sup>142</sup> See Israel, Ministry of Foreign Affairs, *Hamas-Israel Conflict 2023: Frequently asked Questions*, updated to 8 Dec., pp. 13-5. This statement declares: "The accusation of genocide in these circumstances is not just legally and factually incoherent, it is obscene": [https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English\\_Documents\\_Israel-Hamas-Conflict-2023-FAQs-Israel-MFA-8-12-23.pdf](https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English_Documents_Israel-Hamas-Conflict-2023-FAQs-Israel-MFA-8-12-23.pdf).

<sup>143</sup> South Africa, DIRCO, Note Verbale (21 Dec. 2023), Ref No ISRA/10/2023. judges' folder, tab 2, pp. 2-3.

Note Verbale<sup>144</sup> that failed to address the issues raised by South Africa in its Note and neither affirmed nor denied the existence of a dispute. This was emailed late on 27 December 2023, this Note Verbale was received by the relevant South African team on 29 December 2023 after the present Application was filed<sup>145</sup>.

11. On 4 January 2024, South Africa replied to this Note Verbale<sup>146</sup>, highlighting Israel's failure to provide any response to the matters raised by South Africa over the previous months, as reiterated in its Note Verbale. South Africa made it clear that, given Israel's ongoing conduct against Palestinians in Gaza, the dispute referred to in its Note Verbale of 21 December 2023—remained unresolved and was “plainly not capable of resolution by way of a bilateral meeting”. Nevertheless, South Africa proposed a meeting on 5 January 2023, again out of courtesy. Israel responded to this Note Verbale by proposing that “we reconnect to coordinate a meeting at the earliest opportunity” after the close of hearings in the present case<sup>147</sup>. To this South Africa understandably replied that such a meeting would serve no purpose<sup>148</sup>. Madame President, these Notes Verbales are to be found in the judges' folder.

12. The existence of a dispute is a matter to be determined by an objective determination of the facts<sup>149</sup> as they existed at the time of the filing of the Application<sup>150</sup>. At this time South Africa had already accused Israel in the Security Council, the General Assembly and other public fora of engaging in genocidal acts. It had conducted a diplomatic démarche on Israel warning it that it viewed its conduct as genocidal. It had requested the International Criminal Court to vigorously investigate crimes under the Genocide Convention committed by Israel in the Gaza Strip and it accused Israel, *inter alia*, of the deliberate targeting of civilians, intentionally causing starvation and impeding relief

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<sup>144</sup> Israel, Note Verbale (27 Dec. 2023), Ref No 2023/1645/004, judges' folder, tab 3, p. 4.

<sup>145</sup> The Court was informed about this matter in a letter dated 5 Jan. 2024. See judges' folder, tab 6, p. 8.

<sup>146</sup> South Africa, *Note Verbale* (4 Jan. 2024), Ref No. ISRA/01/2024. Judges' folder, tab 4, pp. 5-6.

<sup>147</sup> Judges' folder, tab 5, p. 7.

<sup>148</sup> Judges' folder, tab 7, p. 9.

<sup>149</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, pp. 849-850, para. 39.

<sup>150</sup> *Ibid.*, p. 851, para. 42.

supplies. It had accused Israeli leaders of expressing the “intent of committing genocide”<sup>151</sup>. Israel had flatly denied South Africa’s accusations<sup>152</sup>.

13. Despite these harsh accusations, Israel has persisted in its genocidal acts against the population of Gaza. What more evidence could be required to establish a dispute? It is precisely because of a situation of this kind, affecting the international community as a whole, that Article IX of the Genocide Convention does not require negotiations as a precondition to seising the jurisdiction of the Court. Certainly a respondent State cannot prevent a referral to the Court by claiming that there is no dispute and that it wants discussions on this matter when the existence of a dispute is clear. For a State to insist on a time frame for negotiations would simply be a licence to commit genocide and would run counter to the object and purpose of the Genocide Convention.

14. Madam President, the question of the crystallization of a dispute has been addressed by this Court in preliminary objections at the merits stage where the burden of proof is higher. Although the Court has generally adopted a flexible approach to this subject<sup>153</sup>, it has laid down a number of tests for the existence of a dispute:

- (a) “It must be shown that the claim of one party is positively opposed by the other”<sup>154</sup>;
- (b) The date for determining the existence of the dispute is the date of the application but subsequent conduct may be considered<sup>155</sup>;
- (c) Whether the dispute exists must be determined by an objective determination of the facts<sup>156</sup>;

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<sup>151</sup> International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan, KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties* (17 Nov. 2023), [https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwje1M\\_6gdCDAXg1QIHHcp3BNIQFnoECC0QAQ&url=https%3A%2F%2Fwww.icc-cpi.int%2Fnews%2Fstatement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine&usg=AOvVaw1SF2ycSLIZ\\_pRLQiAIDeGj&opi=89978449](https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwje1M_6gdCDAXg1QIHHcp3BNIQFnoECC0QAQ&url=https%3A%2F%2Fwww.icc-cpi.int%2Fnews%2Fstatement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine&usg=AOvVaw1SF2ycSLIZ_pRLQiAIDeGj&opi=89978449).

<sup>152</sup> See above, fn. 10.

<sup>153</sup> See the dissenting opinion of Judge Crawford in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 1093-94, paras. 2-3, pp. 1095-1101, paras. 7-19.

<sup>154</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

<sup>155</sup> *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*, p. 502, para. 64.

<sup>156</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, pp. 849-850, para. 39.

(d) “[A] dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed’”<sup>157</sup>.

15. When these propositions are applied to the facts of this case it is incontrovertible that a dispute exists between South Africa and Israel. South Africa strongly believes that what Israel is doing in Gaza amounts to genocide; Israel denies this and claims that such an accusation is legally and factually wrong and moreover is obscene<sup>158</sup>.

16. An objective determination of the facts shows that a dispute existed on the date of the submission of South Africa’s Application and this has been confirmed by Israel’s subsequent statements and by its continuing conduct in Gaza. Moreover, Israel must have been aware from South Africa’s public statements, the démarche and the referral of the matter to the International Criminal Court of Israel’s genocidal acts that a dispute existed between the two States.

17. Madame President, the Court has indicated that in an application for provisional measures it is sufficient to show that there is a prima facie basis for jurisdiction<sup>159</sup>. It is submitted that South Africa has convincingly established the existence of a dispute between it and Israel over the fulfilment of the latter’s obligations under the Genocide Convention.

18. Finally, it is submitted that regard should be had to the special considerations that apply to the existence of a dispute under Article IX of the Genocide Convention between a State that brings an application in furtherance of its obligation to prevent genocide and a State accused of committing genocide.

This concludes my speech, Madam President. I thank you, Members of the Court, for your attention. I now ask you to call to the podium Professor Max du Plessis to address you on the nature of the rights requiring protection and the link between such rights and the measures requested. Thank you.

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<sup>157</sup> *Ibid.*, p. 850, para. 41.

<sup>158</sup> See above, fn. 10.

<sup>159</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011 (I)*, pp. 17-18, para. 49; *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 239, para. 29.

The PRESIDENT: I thank you, Professor Dugard. Before I give the floor to the next speaker, the Court will observe a coffee break of 10 minutes. The sitting is adjourned.

*The Court adjourned from 11.35 a.m. to 11.55 a.m.*

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Professor Max du Plessis. You have the floor, Professor.

Mr DU PLESSIS:

**NATURE OF THE RIGHTS REQUIRING PROTECTION AND THE LINK BETWEEN  
SUCH RIGHTS AND THE MEASURES REQUESTED**

**Introduction**

1. Madam President, distinguished Members of the Court. It is a privilege to appear before you. It is truly my honour to represent South Africa in these proceedings. I will be focusing on the nature of the rights that South Africa seeks to preserve through its Application and the link between such rights and the measures requested.

2. As well established in the Court's jurisprudence, and most recently in this Court's decision in *The Gambia* case, for the Court to exercise its power to indicate provisional measures, the rights claimed by South Africa on the merits — and for which it is seeking protection — must be “at least plausible”<sup>160</sup>.

3. This threshold does not require the Court to “determine definitively whether the rights which [South Africa] wishes to see protected exist”<sup>161</sup>.

4. Rather, the rights asserted must merely be “grounded in a *possible* interpretation” of the Convention<sup>162</sup> and “the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by [it] to belong [to either party]”<sup>163</sup>.

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<sup>160</sup> *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 18, para. 43

<sup>161</sup> *Ibid.*

<sup>162</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60 (emphasis added).

<sup>163</sup> *Ibid.*, p. 151, para. 56.



### **Rights to be protected: core rights**

5. Palestinians in Gaza — as a very substantial and important part of the Palestinian national, racial and ethnical group — simply but profoundly are entitled to exist<sup>164</sup>.

6. As South Africa's Ambassador pointed out in opening, to situate the right to exist, and the threats to that right, requires the Court to appreciate that this Application by South Africa is brought within a particular context. What is happening in Gaza now is not correctly framed as a simple conflict between two parties. It entails, instead, destructive acts perpetrated by an occupying Power, Israel, that has subjected the Palestinian people to an oppressive and prolonged violation of their right to self-determination for more than half a century. And those violations occur in a world where Israel for years has regarded itself as beyond and above the law. As the UN Special Rapporteur on the Occupied Palestinian Territories explained in 2022: "The occupation by Israel has been conducted in profound defiance of international law and hundreds of United Nations resolutions, with scant pushback from the international community."<sup>165</sup>

7. That context is important, as South Africa made clear in its Application. Where the international community has failed Palestinians for so long, and despite Israel's wilful defiance of Palestinians' rights, South Africa turns to this Court seeking to protect the core rights of Palestinians in Gaza to be protected from acts of genocide, attempted genocide, direct and public incitement to genocide, and complicity in and conspiracy to commit genocide. As the Court knows, the Convention prohibits the destruction of a group, or part of that group, including through killing, causing serious bodily and mental harm, and inflicting conditions of life calculated to bring about the group's physical destruction.

8. Through these core rights, the Convention further protects the rights of its members to life and physical and mental integrity. Palestinians in Gaza — women, men, children — because of their membership in a group, are protected by the Convention, as is the group itself.

9. The core rights are violated and threatened by a remarkable set of facts outlined by my colleagues and set out in detail in South Africa's Application with supporting evidence. In the

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<sup>164</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23. The right of existence represents the very core of the Genocide Convention. As this Court found in its 1951 Advisory Opinion: "it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups".

<sup>165</sup> Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, A/HRC/49/87 (12 Aug. 2022), para. 11.

speeches to this Court today, South Africa has chosen, as you have heard, to avoid the showing of graphic videos and photos. It has decided against turning this Court into a theatre for spectacle. It knows, as well as Your Excellencies, the temptation for both sides in a dispute to parade pictures to shock. But South Africa's Application, in this Court today, is built on a foundation of clear legal rights, not images. The detailed material before the Court is marshalled to show a case for provisional measures based firmly on this Court's prior decisions. And South Africa advances its case on the basis that Palestinians' rights are equally as worthy of protection — on the unprecedented evidence before you — as those of the victim groups that this honourable Court has previously protected, by its issuance of provisional measures in the past.

10. The material confirms the rights in issue and their violation: that Israel has committed and is committing acts capable of being characterized as “genocidal”. You have heard from Ms Hassim about direct extermination of thousands of people and children of the Palestinian population in Gaza since 7 October last year; and South Africa and the world together stand witness to the forced evacuation of over 85 per cent of the population of Gaza from their homes and the herding of them into ever smaller areas, without adequate shelter or medical care, to be attacked, killed and harmed. So, the rights are immediately and urgently in need of protection because of the ongoing denial by Israel of the conditions necessary for life. It is difficult, with respect, to think of a clearer or more abundantly urgent case. Arif Husain, the chief economist at the United Nations World Food Program, chillingly warned a week ago, on 3 January:

“I’ve been doing this for the past two decades, and I’ve been to all kinds of conflicts and all kinds of crises. And, for me, this [the situation in Gaza] is unprecedented because of, one, the magnitude, the scale, the entire population of a particular place; second, the severity; and, third, the speed at which this is happening, at which this has unfolded, is unprecedented. In my life, I’ve never seen anything like this in terms of severity, in terms of scale, and then in terms of speed.”<sup>166</sup>

11. Madam President, esteemed judges, the core rights, on the evidence provided by South Africa in its Application, are demonstrably being violated. Multiple further statements by

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<sup>166</sup> “Gaza is Starving: The chief economist of the World Food Program explains how the scarcity of food may tip the territory into famine.”, Isaac Chotiner (3 Jan. 2024), *The New Yorker*, <https://www.newyorker.com/news/q-and-a/gaza-is-starving>. Mr Husain's comments were based on a report dated 21 Dec. 2023 (Gaza Strip: IPC Acute Food Insecurity November 2023 – February 2024 - [https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_Gaza\\_Acute\\_Food\\_Insecurity\\_Nov2023\\_Feb2024.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Acute_Food_Insecurity_Nov2023_Feb2024.pdf)). The UN World Food Program is a partner organization in compiling the report. See also Oxfam “Starvation as weapon of war being used against Gaza civilians” (25 Oct. 2023), <https://www.oxfam.org/en/press-releases/starvation-weapon-war-being-used-against-gaza-civilians-oxfam>.

United Nations bodies and experts<sup>167</sup>, as well as various expert human rights organizations and institutions<sup>168</sup> and States<sup>169</sup>, all of which is set out in South Africa's Application, confirm as much: they collectively have considered the acts committed by Israel to be genocidal, or at the very least, warned that the Palestinian people are at risk of genocide. Since the Application was initiated, further States<sup>170</sup> — 13 to date, including the Arab League and the Organisation of Islamic Cooperation, representing 57 States — as well as other experts<sup>171</sup> have expressed their support for the case, thereby underlining the plausibility of South Africa's claim for provisional measures.

12. For the purposes of the indication of provisional measures, the rights asserted by South Africa under the Genocide Convention and their protection corresponds with the very object and purpose of the Convention. Based on the materials before the Court, the acts by Israel complained of are capable of being characterized as at least plausibly genocidal. As Mr Ngcukaitobi has explicated, the evidence of the specific genocidal intent is clear from the statements by Israeli government officials and soldiers towards Palestinians in Gaza and which may be characterized as at the very least “plausibly” genocidal. This at least “plausible” genocidal intent can also be deduced from the pattern of conduct against Palestinians in Gaza. It is also — again at the very least — plausible 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, and it is further plausible that South Africa has an obligation to prevent genocide, including by taking all reasonable measures within its powers to influence effectively the actions of persons perpetrating

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<sup>167</sup> Application, pp. 67 to 69, para. 108.

<sup>168</sup> Application, p. 70, para. 109.

<sup>169</sup> Application, p. 4, para. 12.

<sup>170</sup> In the 12 days since the Application, 12 States, the Arab League and the Organisation of Islamic Co-operation, representing 57 States (note overlap of 6 States between OIC and statements: Malaysia, Türkiye, Jordan, Maldives, Pakistan, Bangladesh; overlap with Arab League: Palestine (29 Dec. 2023); Organization of Islamic Co-operation, representing 57 States (30 Dec. 2023); Malaysia (2 Jan. 2024); Türkiye (3 Jan. 2024); Jordan (4 Jan. 2024); Maldives (5 Jan. 2024); Bolivia (8 Jan. 2024); Venezuela (9 Jan. 2024); Pakistan (9 Jan. 2024); Bangladesh (9 Jan. 2024); Namibia (9 Jan. 2024); Nicaragua (9 Jan. 2024); Arab League (10 Jan. 2024); Brazil (10 Jan. 2024)).

<sup>171</sup> For example, Professor Gentian Zyberi (member of the UN Human Rights Committee) on 6 Jan. stressed that:

“By now there is NO DOUBT that Israeli authorities’ conduct in Gaza meets at least the threshold of Article II (c) of the 1948 Genocide Convention: ‘(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’” and “It also, at a minimum, meets Article III (b), (c) and (d) on (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; and (d) Attempt to commit genocide. Not only there is enough for the provisional measures stage, but also enough on the merits” (<https://twitter.com/GentianZyberi/status/1743615390301774285>).

Balakrishnan Rajagopal, UN Special Rapporteur on the right to housing, similarly stated “Thank you South Africa” (<https://twitter.com/adequatehousing/status/1740788601539961328>).

and likely to commit genocide, or engaging in direct or public incitement to genocide. So let me be clear: South Africa's obligation is motivated by the need to protect Palestinians in Gaza, and their absolute rights not to be subjected to genocidal acts.

13. Notwithstanding the incontestably serious nature of the allegations against Israel, the Court should not be required, before granting provisional measures, to ascertain whether the existence of a genocidal intent is the *only* plausible inference to be drawn from the material before it<sup>172</sup>. That would amount to the Court making a determination on the merits.

14. Moreover, South Africa has stressed that any motive or effort by Israel to destroy Hamas does not preclude genocidal intent by Israel towards the whole or part of the Palestinian people in Gaza. Evidence of other motives explaining its conduct as a perpetrator will not save Israel from a finding that it also possessed the requisite genocidal intent<sup>173</sup>. And because of a fundamental feature of genocide — namely that the prohibitions on genocide and associated offences are *jus cogens* in nature — they are subject therefore to no exception or qualification<sup>174</sup>. They are absolute in nature, in times of war and peace, always, and everywhere.

15. Furthermore, the fact that the alleged acts may *also* be characterized as crimes other than genocide should not exclude the plausible inference of the existence of genocidal intent. As the United Nations Secretary-General has stated, the prevention of genocide is “intrinsicly connected” to preventing crimes against humanity and war crimes, as these crimes “tend to occur concurrently in the same situation rather than as isolated events . . . . Consequently, initiatives aiming at preventing one of the crimes will, in most circumstances, also cover the others.”<sup>175</sup> And as also set out in the ILC Articles on State responsibility, “the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful”<sup>176</sup>.

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<sup>172</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. 18-19, para. 46.

<sup>173</sup> *Prosecutor v. Jelešić*, No. IT-95-10-A. Judgment (5 July 2001), para. 49. Trial Chamber II, *Popović et al*, Judgment of 10 June 2010, Case No. IT-05-88-T, para. 866; Trial Chamber, *Prosecutor v. Krstić*, Judgment of 2 August 2001, Case No. IT-98-33, para. 572.

<sup>174</sup> See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, *I.C.J. Reports 1951*, p. 23; *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. 62-64, para. 64.

<sup>175</sup> UN Human Rights Council, *Prevention of genocide: Report of the Secretary-General*, A/HRC/41/24 (8 Oct. 2019), <https://undocs.org/A/HRC/41/24>, para. 3.

<sup>176</sup> United Nations Legislative Series, *Materials on the Responsibility of States for Internationally Wrongful Acts*, Second Edition, 2023, p. 214 (Article 15. Breach consisting of a composite act), Commentary: para 9.

### **Rights to be protected: South Africa / erga omnes**

16. Madam President, honourable Members of the Court, South Africa's claims thus concern, in the first place, its own obligations as a State party to the Genocide Convention to act to prevent and punish genocide. In the Application, South Africa has stressed that it "is acutely aware of its own obligation — as a State party to the Convention — to prevent genocide"<sup>177</sup>. Indeed, this Court has recognized "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge'"<sup>178</sup>. As the prohibition of genocide is "assuredly a peremptory norm of international law (*jus cogens*)"<sup>179</sup>, it is crucial that States pursue their interest under the Convention in ensuring acts of genocide are prevented.

17. Additionally, due to the "special characteristics"<sup>180</sup> of the Genocide Convention, the respondent State owes this duty not only to the Palestinian people, but to *all* States parties to the Genocide Convention, including South Africa.

18. This has been emphasized repeatedly by this Court, and most recently in *The Gambia* case, where the Court held:

"all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. *That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.*"<sup>181</sup>

19. Similarly, the Court has reiterated that: "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."<sup>182</sup>

20. Accordingly, "any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the

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<sup>177</sup> Application, para. 3. As regards its own standing, see also para. 16 of the Application: "Given that South Africa's claim concerns its own obligations as a State party to the Genocide Convention to act to prevent genocide — to which Israel's acts and omissions give rise — South Africa plainly has standing in relation thereto".

<sup>178</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

<sup>179</sup> *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. 111, para. 161.

<sup>180</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

<sup>181</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. 17, para. 41, emphasis added.

<sup>182</sup> *Ibid.*, quoting its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end”<sup>183</sup>. That means that South Africa is asserting both a collective and an individual right<sup>184</sup>.

21. It is thus beyond doubt that South Africa is entitled to invoke the responsibility of Israel under the Genocide Convention. Through South Africa’s interest in the “common interest”, and as a State party to the Genocide Convention itself, it is entitled to safeguard compliance with that instrument.

### Comparisons with other cases

22. As has been explained, the events unfolding in Gaza at the hands of the Israeli forces are frighteningly unprecedented. Yet what this Court is being asked to do in these proceedings — interdicting genocidal acts on an interim basis — is sadly by no means novel. In relation to genocide, the Court has indicated provisional measures in analogous circumstances to these, in *The Gambia* case, where, as here, a State sought provisional measures on the basis of the *erga omnes* right that the Genocide Convention be complied with. Also in respect of genocide, the Court did the same in the *Bosnia*<sup>185</sup> and *Ukraine* cases<sup>186</sup>. And most recently, this Court further accepted the *erga omnes* character of parties’ rights in relation to the Torture Convention<sup>187</sup>.

23. South Africa respectfully contends that, in this case, the rights of the Palestinians in Gaza are no less worthy of this Court’s considerable protective power under Article 41 to issue provisional measures. This Court cannot but find as it did in *The Gambia* case, where this Court held “that there is a correlation between the rights of members of groups protected under the Genocide Convention,

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<sup>183</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. 17, para. 41, emphasis added.

<sup>184</sup> In the words of the International Criminal Tribunal for the former Yugoslavia: “the violation of such an [erga omnes] obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para. 151 (regarding the crime of torture).

<sup>185</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 19-20, para. 36; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 343-344, para. 38.

<sup>186</sup> *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*, p. 225, para. 60.

<sup>187</sup> *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*, <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf>, para. 50.

the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party”<sup>188</sup>.

**Article 41 compliance — rights of Palestinians and South Africa — Convention rights**

24. South Africa’s request therefore complies with Article 41 of this Court’s Statute and engages the power of this Court “to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party”<sup>189</sup>. South Africa requests this Court to discharge that critical protective power, and South Africa does so by virtue of its own clear right, and solemn obligations held towards the international community as a whole<sup>190</sup>.

25. For the Court to indicate one or more provisional measures, there must also be a link between the rights the protection of which is sought and the provisional measure being requested<sup>191</sup>. Such a link manifestly exists, we say, between the rights claimed by South Africa in its Application and the provisional measures requested, which are directly linked to the rights which form the subject-matter of the dispute. The provisional measures sought therefore ensure the protection of rights “which might ultimately form the basis of a judgment in the exercise of [the Court’s] jurisdiction”<sup>192</sup> in due course.

26. The rights at stake in these proceedings are certainly “at least plausible”, “grounded in a possible interpretation” of the Convention, as the Convention imposes on parties the obligation to prevent and punish genocide under Article I, and in doing so intends to protect groups and parts of groups from genocide.

27. The Convention was designed to protect both States parties and human groups. When acts in breach of the Convention are perpetrated, it is the fundamental rights of people, and the relevant

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<sup>188</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. 20, para. 52.

<sup>189</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. 18, para. 43.

<sup>190</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, paras. 31 to 32.

<sup>191</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. 18, para. 44, citing *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. 422, para. 44.

<sup>192</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 35.

group, that are violated. Those fundamental rights — of Palestinians in Gaza — would be the subject of any judgment by this Court on the merits.

28. Madam President, Members of the Court. To find otherwise would not only be to treat Palestinians differently, as less worthy of protection than others. It would also be for the Court to unduly limit its own competence, to turn its back upon its extensive prior jurisprudence, and to close its eyes to the breach of the rights which lie at the heart of the Convention, and which breaches are taking place in Gaza right now, as I close.

Madam President, I ask you now to call Ms Ní Ghrálaigh, KC, to the podium, who will address you on the risk of further genocidal acts, the risk of irreparable harm and urgency, and I thank you for your attention.

The PRESIDENT: I thank Professor du Plessis. And I now invite Ms Blinne Ní Ghrálaigh to take the floor. You have the floor, Madam.

Ms NÍ GHRÁLAIGH:

**RISK OF FURTHER GENOCIDAL ACTS, RISKS OF IRREPARABLE PREJUDICE  
AND URGENCY**

**Introduction and apology**

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un grand honneur pour moi que de paraître devant la Cour de nouveau. C'est également à la fois un privilège et une lourde responsabilité que de représenter l'Afrique du Sud dans cette affaire d'une si grande gravité.

2. Il me revient d'examiner l'urgence et le risque de préjudice irréparable aux droits revendiqués — les deux dernières conditions auxquelles est subordonné l'exercice du pouvoir de la Cour d'indiquer des mesures conservatoires.

3. Je souhaiterais avant cela adresser aux Membres francophones de la Cour les excuses sincères de l'Afrique du Sud du fait qu'elle ne présente aucune de ses soumissions en langue française. L'Afrique du Sud vous prie de n'y voir aucun manque de courtoisie de sa part.

4. Je vais, si vous me le permettez, poursuivre ma plaidoirie en langue anglaise.



## Overview

5. Madam President, Members of the Court, there is an urgent need for provisional measures to protect Palestinians in Gaza from the irreparable prejudice caused by Israel's violations of the Genocide Convention.

6. The United Nations Secretary-General and its Chiefs describe the situation in Gaza variously as “a crisis of humanity”<sup>193</sup>, a “living hell”<sup>194</sup>, a “blood bath”<sup>195</sup>, a situation of “utter, deepening [and unmatched] horror”<sup>196</sup>, where “an entire population” is “besieged and under attack, denied access to the essentials for survival”<sup>197</sup>, “on a massive scale”<sup>198</sup>. As the United Nations Under Secretary-General for Humanitarian Affairs stated last Friday:

“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.”<sup>199</sup>

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<sup>193</sup> United Nations, Meetings Coverage and Press Releases, *Press Conference by Secretary-General António Guterres at United Nations Headquarters* (6 Nov. 2023), <https://press.un.org/en/2023/sgsm22021.doc.htm>; OCHA, *UN relief chief: The war in Gaza must end* (5 Jan. 2024), .

<sup>194</sup> UNRWA, *Remarks of UNRWA Commissioner-General Philippe Lazzarini at the Global Refugee Forum* (13 Dec. 2023), <https://www.unrwa.org/newsroom/official-statements/statement-unrwa-commissioner-general-philippe-lazzarini-global-refugee>; UN News, *‘Ten weeks of hell’ for children in Gaza: UNICEF* (19 Dec. 2023), <https://news.un.org/en/story/2023/12/1144927>; “Gaza has become “uninhabitable”: UN Aid Chief Griffiths”, *The Statesman* (6 Jan. 2024), <https://www.thestatesman.com/world/gaza-has-become-uninhabitable-un-aid-chief-griffiths-1503256794.html>.

<sup>195</sup> Tedros Adhanom Ghebreyesus @DrTedros, Tweet (9:49 p.m., 7 Jan. 2024), <https://twitter.com/DrTedros/status/1744098839110320633>.

<sup>196</sup> OHCHR, *Opening statement by UN High Commissioner for Human Rights Volker Türk at press conference ahead of Human Rights Day* (6 Dec. 2023), <https://www.ohchr.org/en/statements-and-speeches/2023/12/opening-statement-un-high-commissioner-human-rights-volker-turk>; “‘Level of horror in Gaza is unmatched in our lifetime’: UN”, *Press TV* (27 Dec. 2023), <https://www.presstv.ir/Detail/2023/12/27/717140/Palestine-Gaza-Israel-UN-Francesca-Albanese>;

<sup>197</sup> United Nations Inter-Agency Standing Committee (IASC), *Statement by Principals of the Inter-Agency Standing Committee, on the situation in Israel and the Occupied Palestinian Territory, “We need an immediate humanitarian ceasefire”* (5 Nov. 2023), <https://interagencystandingcommittee.org/about-inter-agency-standing-committee/statement-principals-inter-agency-standing-committee-situation-israel-and-occupied-palestinian>.

<sup>198</sup> OHCHR, *Opening statement by UN High Commissioner for Human Rights Volker Türk at press conference ahead of Human Rights Day* (6 Dec. 2023), <https://www.ohchr.org/en/statements-and-speeches/2023/12/opening-statement-un-high-commissioner-human-rights-volker-turk>.

<sup>199</sup> 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), <https://www.unocha.org/news/un-relief-chief-war-gaza-must-end>.



the world], in famine or a catastrophic type of hunger, are in Gaza right now”<sup>205</sup>. Indeed, experts warn that deaths from starvation and disease risk significantly outstripping deaths from bombings<sup>206</sup>.

8. The daily statistics stand as clear evidence of the urgency and of the irreparable prejudice: on the basis of the current figures, on average 247 Palestinians are being killed and are at risk of being killed each day<sup>207</sup>, many of them literally blown to pieces<sup>208</sup>. They include 48 mothers each day — two every hour — <sup>209</sup> and over 117 children each day<sup>210</sup>, leading UNICEF to call Israel’s actions a “war on children”<sup>211</sup>. On current rates, which show no sign of abating, each day, over three medics<sup>212</sup>, two teachers<sup>213</sup>, more than one United Nations employee and more than one journalist will be killed<sup>214</sup> — many while at work, or in what appear to be targeted attacks on their family homes or where they are sheltering<sup>215</sup>. The risk of famine will increase each day<sup>216</sup>. Each day, an average of

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<sup>205</sup> Interview with Arif Husain, Chief Economist at the United Nations World Food Program, quoted in Isaac Chotiner, “Gaza is Starving”, *The New Yorker* (3 Jan. 2023), <https://www.newyorker.com/news/q-and-a/gaza-is-starving>; Save the Children, *Press Release: Deaths by starvation and disease may top deaths by bombs as families squeezed into deadly “safe zones”, two months into Gaza crisis* (9 Dec. 2023), <https://www.savethechildren.net/news/deaths-starvation-and-disease-may-top-deaths-bombs-families-squeezed-deadly-safe-zones-two>.

<sup>206</sup> Henry Mance, “UN aid chief Martin Griffiths: ‘The war in Gaza isn’t halfway through’”, *Financial Times* (18 Dec. 2023), <https://www.ft.com/content/01b592be-47c7-4a20-9bbd-621aa40f7640>.

<sup>207</sup> 23,210 to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 94* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>. The statistics are up to date until 9 January 2024 throughout.

<sup>208</sup> Maram Humaid, “‘Piles of body parts’: Gaza’s Maghazi residents find families ‘in pieces’” *Al Jazeera* (28 Dec. 2023), <https://www.aljazeera.com/features/2023/12/28/piles-of-body-parts-gazas-maghazi-residents-find-families-in-pieces>; Hiba Yazbek and Karen Zraick, “A Doctor in Gaza Describes ‘Horrific Scenes’ After Israeli Airstrikes”, *The New York Times* (2 Nov. 2023), <https://www.nytimes.com/2023/11/02/world/middleeast/voices-airstrikes-jabaliya-hospital.html>.

<sup>209</sup> United Nations, Meetings Coverage and Press Releases, *Two Thirds of Gaza War Dead Are Women and Children, Briefers Say, as Security Council Debates Their Plight* (22 Nov. 2023), <https://press.un.org/en/2023/sc15503.doc.htm>.

<sup>210</sup> 7,729 children to 11 Dec. 2023: OCHA, *Hostilities in the Gaza Strip and Israel—reported impact | Day 67* (12 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-67>.

<sup>211</sup> Interview with James Elder, UNICEF Spokesperson by CNN, “CNN speaks to UNICEF about dire situation in Gaza”, CNN (15 Dec. 2023), <https://www.cnn.com/videos/world/2023/12/14/exp-unicef-gaza-james-elder-live-121402-pseg1-cnni-world.cnn>.

<sup>212</sup> 326 medics to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 94* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>.

<sup>213</sup> 221 teachers to 2 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #87* (8 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-87>.

<sup>214</sup> 148 UN staff and 112 journalists to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel—reported impact | Day 94* (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>.

<sup>215</sup> Committee to Protect Journalists, *Journalist casualties in the Israel-Gaza war* (9 Jan. 2024), <https://cpj.org/2024/01/journalist-casualties-in-the-israel-gaza-conflict/>; Human Rights Watch, *Letter to President Joe Biden Re: Protecting journalists and press freedom in the Israel-Gaza war* (10 Jan. 2024), <https://www.hrw.org/news/2024/01/10/letter-president-joe-biden-re-protecting-journalists-and-press-freedom-israel-gaza>; “U.N. observes minute's silence for 101 staff killed in Gaza”, Reuters (13 Nov. 2023), <https://www.reuters.com/world/un-observes-minutes-silence-101-staff-killed-gaza-2023-11-13/>.

<sup>216</sup> United Nations, The Question of Palestine, *WFP Palestine Emergency Response – IPC analysis concludes that Gaza already surpassed the acute food insecurity threshold of famine – Situation Report 12* (4 Jan. 2024), <https://www.un.org/unispal/document/wfp-palestine-emergency-response-situation-report-12-jan4-2024/>.

629 people will be wounded<sup>217</sup>, some multiple times over<sup>218</sup> as they move from place to place, desperately seeking sanctuary. Each day, over 10 Palestinian children will have one or both legs amputated<sup>219</sup>, many without anaesthetic<sup>220</sup>. Each day, on current rates, an average of 3,900 Palestinian homes will be damaged or destroyed<sup>221</sup>. More mass graves will be dug<sup>222</sup>. More cemeteries will be bulldozed and bombed and corpses violently exhumed, denying even the dead any dignity or peace<sup>223</sup>. Each day, ambulances, hospitals and medics will continue to be attacked and killed<sup>224</sup>. The first responders who have spent three months — without international assistance — trying to dig families out of the rubble with their bare hands will continue to be targeted;<sup>225</sup> on current figures one will be killed almost every second day, sometimes in attacks launched against those attending the scene to rescue the wounded<sup>226</sup>. Each day yet more desperate people will be forced to relocate from where they are sheltering or will be bombed in places where they had been told to

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<sup>217</sup> 59,167 to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 94* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>.

<sup>218</sup> Nidal Al-Mughrabi, “Bombarded twice in Gaza, 4-year-old Ahmed loses parents, then legs”, Reuters (16 Nov. 2023), <https://www.reuters.com/world/middle-east/bombarded-twice-gaza-4-year-old-ahmed-loses-parents-then-legs-2023-11-15/>; “Teenage girl patient killed in shelling of Gaza’s Nasser Hospital as Israel takes aim at health facilities”, *The New Arab* (18 Dec. 2023), <https://www.newarab.com/news/teenage-girl-killed-shelling-gazas-nasser-hospital>.

<sup>219</sup> Save the Children, *Gaza: More than 10 children a day lose a limb in three months of brutal conflict* (7 Jan. 2024), <https://www.savethechildren.net/news/gaza-more-10-children-day-lose-limb-three-months-brutal-conflict>; “Gaza’s child amputees face further risks without expert care”, *The Business Standard* (5 Jan. 2024), <https://www.tbsnews.net/hamas-israel-war/gazas-child-amputees-face-further-risks-without-expert-care-769690>.

<sup>220</sup> UNICEF, *Facing life in the Gaza Strip with a new disability* (21 Dec. 2023), <https://www.unicef.org/sop/stories/facing-life-gaza-strip-new-disability>.

<sup>221</sup> 359,000 housing units damaged or destroyed to 7 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #88* (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-88>.

<sup>222</sup> Euro-Med Human Rights Monitor, *Israel demolishes Gaza cemeteries, confiscates dead bodies of Palestinians* (14 Dec. 2023), <https://euromedmonitor.org/en/article/6032/Israel-demolishes-Gaza-cemeteries,-confiscates-dead-bodies-of-Palestinians>.

<sup>223</sup> Christoph Koettl and Christiaan Triebert, “Satellite Imagery and Video Shows Some Gazan Cemeteries Razed by Israeli Forces”, *The New York Times* (14 Dec. 2023), <https://www.nytimes.com/2023/12/14/world/middleeast/gaza-cemeteries-damage-israel.html>; Unearthing the dead: Israeli forces destroy cemetery in Gaza city, Al Jazeera English, 10 Jan. 2024, <https://www.youtube.com/watch?v=5zmZwrbrwcc>.

<sup>224</sup> 121 ambulances to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 94* (9 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>; 294 health attacks and 94 health facilities affected to 29 Dec. 2023: WHO, *oPt Emergency Situation Update* (29 Dec. 2023), [https://www.emro.who.int/images/stories/Sitrep\\_-\\_issue\\_19.pdf](https://www.emro.who.int/images/stories/Sitrep_-_issue_19.pdf).

<sup>225</sup> Rami Jarrah @RamiJarrah, Tweet (3:42, 9 Jan. 2024), <https://twitter.com/ramijarrah/status/1744731362391973962>; Al-Haq, Al Mezan, PCHR, *Civilians trapped under the rubble: medical and rescue teams denied access to IOF-deployed areas* (17 Dec. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/civilians-trapped-under-rubble-medical-and-rescue-teams-denied-access-iof-deployed-areas>.

<sup>226</sup> OCHA, *Hostilities in the Gaza Strip and Israel — reported impact | Day 94* (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>; Al-Haq, Al Mezan, PCHR, *Civilians trapped under the rubble: medical and rescue teams denied access to IOF-deployed areas* (17 Dec. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/civilians-trapped-under-rubble-medical-and-rescue-teams-denied-access-iof-deployed-areas>.

evacuate to<sup>227</sup>. Entire multi-generational families will be obliterated;<sup>228</sup> and yet more Palestinian children will become “WCNSF”: “Wounded Child – No Surviving Family” — the terrible new acronym borne out of Israel’s genocidal assault on the Palestinian population in Gaza<sup>229</sup>.

9. There is an urgent need for provisional measures to prevent imminent, irreparable prejudice to the rights in issue in this case. There could not be a clearer or more compelling case. In the words of the Commissioner-General of the United Nations Relief and Works Agency, there must be “an end to the decimation of Gaza and of its people”<sup>230</sup>.

### **The Court’s case law**

#### **Criterion of urgency**

10. Turning to the Court’s case law, as the Court has recently reaffirmed, “[t]he condition of urgency is met when acts susceptible of causing irreparable prejudice can ‘occur at any moment’ before the Court makes a final decision on the case”<sup>231</sup>. That is precisely the situation here. Any of those matters to which I have referred can and are occurring at any moment. United Nations Security Council resolutions demanding “the immediate, safe, unhindered delivery of humanitarian assistance, at scale”<sup>232</sup> throughout Gaza and “full, rapid, safe, and unhindered humanitarian

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<sup>227</sup> OHCHR, *Gaza: Türk urges ceasefire as civilians pushed to frontier amid escalation* (19 Dec. 2023), <https://www.ohchr.org/en/press-releases/2023/12/gaza-turk-urges-ceasefire-civilians-pushed-frontier-amid-escalation>; OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #86* (7 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-86>; “Gaza civilians afraid to leave home after bombing of ‘safe routes’”, *The Guardian* (15 Oct. 2023), <https://www.theguardian.com/world/2023/oct/14/gaza-civilians-afraid-to-leave-home-after-bombing-of-safe-routes>.

<sup>228</sup> OCHA, *Hostilities in the Gaza Strip and Israel | Flash Update #10* (16 Oct. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-10>; OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 90* (5 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-90>; Walaa Sabah, “War on Gaza: How Israel wiped out one family in a so-called ‘safe zone’”, *Middle East Eye* (6 Jan. 2024), <https://www.middleeasteye.net/news/war-gaza-how-israel-wiped-out-one-family-supposed-safe-zone-gaza>.

<sup>229</sup> Save the Children, *Children’s Mental Health in Gaza Pushed Beyond Breaking Point After Nearly a Month of Siege and Bombardment* (7 Nov. 2023), <https://www.savethechildren.net/news/children-s-mental-health-gaza-pushed-beyond-breaking-point-after-nearly-month-siege-and>; Nedal Samir Hamdouna, Aseel Mousa, Julian Borger, “The plight of Gaza’s ‘WCNSFs’ – wounded child, no surviving family”, *The Guardian* (22 Dec. 2023), <https://www.theguardian.com/world/2023/dec/22/the-plight-of-gazas-wcnsfs-wounded-child-no-surviving-family>.

<sup>230</sup> UNRWA, *Letter from UNRWA Commissioner-General Philippe Lazzarini to the UN General Assembly President Mr. Dennis Francis* (7 Dec. 2023), <https://www.unrwa.org/resources/un-unrwa/letter-unrwa-commissioner-general-philippe-lazzarini-un-general-assembly>.

<sup>231</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. 24, para. 65; *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. 226-227, para. 66; originally from *Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Order of 7 December 2016)*, *I.C.J. Reports 2016 (II)*, p. 1169, para. 90.

<sup>232</sup> UNSC resolution 2720 (22 Dec. 2023), *The situation in the Middle East, including the Palestinian question*, S/RES/2720, [https://undocs.org/S/RES/2720\(2023\)](https://undocs.org/S/RES/2720(2023)).

access”<sup>233</sup> remain unimplemented. United Nations General Assembly resolutions calling for a humanitarian ceasefire have been ignored<sup>234</sup>. The situation could not be more urgent. Since these proceedings were initiated on 29 December 2023 alone, an estimated over 1,703 Palestinians have been killed in Gaza, and over 3,252 injured<sup>235</sup>.

### **Irreparable prejudice: serious risks to human life and other fundamental rights**

11. As to the criterion of irreparable prejudice, for decades now, the Court has repeatedly found it to be satisfied in situations where serious risks arise to human life or to other fundamental rights.

12. In the cases of *Georgia v. Russia*, and *Armenia v. Azerbaijan*, the Court ordered provisional measures having found a serious risk of irreparable prejudice where hundreds of thousands of people had been forced from their homes<sup>236</sup>.

13. In ordering provisional measures in the latter case, the Court noted the context of “the long-standing exposure of the population . . . to a situation of vulnerability” including “hindrances to the importation . . . of essential goods, causing shortages of food, medicine, and other life-saving medical supplies”<sup>237</sup>.

14. In Gaza, as you have heard, nearly two million people — over 85 per cent of the population — have been repeatedly forced to flee their homes and shelters — not just once or twice but some three, four or more times over<sup>238</sup> — into shrinking slivers of land, where they continue to be bombed

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<sup>233</sup> UNSC resolution 2712 (15 Nov. 2023), *The situation in the Middle East, including the Palestinian question*, S/RES/2712, [https://undocs.org/S/RES/2712\(2023\)](https://undocs.org/S/RES/2712(2023)).

<sup>234</sup> UNGA resolution ES-10/21 (27 Oct. 2023), *Protection of civilians and upholding legal and humanitarian obligations*, A/RES/ES-10/21, <https://undocs.org/A/RES/ES-10/21>; UNGA resolution ES-10/22 (12 Dec. 2023), *Protection of civilians and upholding legal and humanitarian obligations*, A/RES/ES-10/22, <https://undocs.org/A/RES/ES-10/22>.

<sup>235</sup> 21,507 killed and 55,915 injured by 29 December 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 84* (29 Dec. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-84>; 23,210 killed and 59,167 injured as to 9 January 2024: OCHA, *Hostilities in the Gaza Strip and Israel - reported impact | Day 94* (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>.

<sup>236</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order of 15 October 2008, p. 396, para. 142; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order of 17 November 2023, para. 58.

<sup>237</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order of 17 November 2023, para. 55.

<sup>238</sup> UNRWA, *Situation Report #59 On the Situation in the Gaza Strip and the West Bank, including East Jerusalem* (2 Jan. 2024), <https://www.unrwa.org/resources/reports/unrwa-situation-report-59-situation-gaza-strip-and-west-bank-including-east-jerusalem>; WFP, *Gaza on the brink as one in four people face extreme hunger* (20 Dec. 2023), <https://www.wfp.org/stories/gaza-brink-one-four-people-face-extreme-hunger>.

and killed<sup>239</sup>. This is a population that Israel had already made vulnerable through 16 years of military blockade and crippling “de-development”<sup>240</sup>. Today, Israel’s “hindrances” to the import of food and essential items have brought Gaza “to the brink of famine”, with adults — mothers, fathers, grandparents — regularly foregoing food for the day so that children can eat at least something<sup>241</sup>. Medicine shortages and the lack of medical treatment, clean water and electricity, are so great that large numbers of Palestinians are dying or are at imminent risk of dying preventable deaths<sup>242</sup>, cancer and other services have long shut down<sup>243</sup>, women are undergoing caesarean sections without anaesthetic<sup>244</sup>, in barely functioning hospitals described as scenes from a “horror movie”<sup>245</sup>; with many undergoing otherwise unnecessary hysterectomies in an attempt to save their lives<sup>246</sup>.

15. In the *Canada and the Netherlands v. Syria* torture case, the Court made clear that “individuals subject to torture and other acts of cruel, inhuman or degrading treatment or punishment . . . are at serious risk of irreparable prejudice”<sup>247</sup>. Palestinians in Gaza are also at risk of

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<sup>239</sup> UNRWA, *Situation Report #59 On the Situation in the Gaza Strip and the West Bank, including East Jerusalem* (2 Jan. 2024), <https://www.unrwa.org/resources/reports/unrwa-situation-report-59-situation-gaza-strip-and-west-bank-including-east-jerusalem>.

<sup>240</sup> United Nations Conference on Trade and Development (UNCTAD), *Developments in the economy of the Occupied Palestinian Territory* (2023) (11 Sept. 2023), TD/B/EX(74)/2, [https://unctad.org/system/files/official-document/tdbex74d2\\_en.pdf](https://unctad.org/system/files/official-document/tdbex74d2_en.pdf), paras. 35-58.

<sup>241</sup> WFP, *Gaza grapples with catastrophic hunger as new report predicts famine if conflict continues* (21 Dec. 2023), <https://www.wfp.org/news/gaza-grapples-catastrophic-hunger-new-report-predicts-famine-if-conflict-continues>; CARE International, *Gaza: After two months of war, women last to eat and children first to die* (7 Dec. 2023), <https://www.care-international.org/news/gaza-after-two-months-war-women-last-eat-and-children-first-die>; UN News, *Global Perspective Human Stories, UPDATED: Everyone is hungry in Gaza, warn UN humanitarian* (2 Jan. 2024), <https://news.un.org/en/story/2024/01/1145227>.

<sup>242</sup> Médecins sans Frontières (MSF), *In Gaza, “the wounded are in danger of dying in the next few hours”* (19 Oct. 2023), <https://www.msf.org/gaza-wounded-are-danger-dying-next-few-hours-palestine>; UNICEF, *Intensifying conflict, malnutrition and disease in the Gaza Strip creates a deadly cycle that threatens over 1.1 million children* (5 Jan. 2024), <https://www.unicef.org/lac/en/press-releases/intensifying-conflict-malnutrition-and-disease-gaza-strip-creates-deadly-cycle>.

<sup>243</sup> “Gaza’s only cancer hospital goes out of service, health officials say”, Reuters (1 Nov. 2023), <https://www.reuters.com/world/middle-east/gazas-only-cancer-hospital-goes-out-service-health-officials-2023-11-01/>; Corky Siemaszko, “Thousands of cancer patients in Gaza are out of medication and losing hope, hospital says”, *NBC News* (1 Jan. 2024), <https://www.nbcnews.com/news/world/live-blog/israel-hamas-war-live-updates-idf-warns-military-campaign-gaza-last-20-rcna131784/rcrd28912?canonicalCard=true>; Tedros Adhanom Ghebreyesus, @DrTedros, Tweet (8:49 p.m., 7 Jan. 2024), <https://twitter.com/DrTedros/status/1744098839110320633?s=20>.

<sup>244</sup> UN News, *Interview: 5,500 women in Gaza set to give birth ‘in race against death’* (7 Nov. 2023), <https://news.un.org/en/interview/2023/11/1143327>.

<sup>245</sup> UN Web TV, *UNICEF, WHO, OHCHR, UNHCR - Press Briefing: Rob Holand, Emergency Coordinator WHO* (1 Dec. 2023), <https://webtv.un.org/en/asset/k1r/k1r01d247a> (at 22:15).

<sup>246</sup> Juzoor for Health and Social Development, *The ravages of war: impact on mothers and newborns in Gaza* (11 Nov. 2023), [https://www.juzoor.org/cached\\_uploads/download/2023/11/11/maternal-health-report-final-1699726911.pdf](https://www.juzoor.org/cached_uploads/download/2023/11/11/maternal-health-report-final-1699726911.pdf); Interview with Dr Mai Al-Kaileh (Palestinian Minister of Health) on Al Arabiya, 27 Dec. 2023, <https://www.instagram.com/reel/C1W2QFCvmM8/?igsh=Ynk1NjRzdndnaHM5>.

<sup>247</sup> *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Order of 16 November 2023, para. 71.

such irreparable prejudice, with videos of Palestinian boys and men, rounded up and stripped and degraded, broadcast to the world<sup>248</sup>, alongside footage of serious bodily harm, and accounts of serious mental harm and humiliation<sup>249</sup>.

16. In *Qatar v. United Arab Emirates*, the Court considered provisional measures to be justified having regard to the risk of irreparable prejudice deriving from factors such as: people being forced to leave their places of residence without the possibility of return; the “psychological distress” of “temporary or potentially ongoing separation from their families” and the harm associated with students being “prevented from taking their exams”<sup>250</sup>. If provisional measures were justified there, how could they not be in Gaza, where countless families have been separated — with some family members evacuating under Israeli military orders and others staying behind at extreme risk to care for the wounded, infirm and the elderly; where husbands, fathers and sons are being rounded up and separated from their families, taken to unknown locations for indeterminate periods of time<sup>251</sup>. In the *Qatar* case, the Court issued a provisional measures Order where harm to approximately 150 students was in issue. In Gaza, 625,000 school children have not attended school for three months<sup>252</sup>, with the United Nations Security Council “[e]xpressing deep concern that the disruption of access to education has a dramatic impact on children, and that conflict has lifelong effects on their physical and mental health”<sup>253</sup>. Almost 90,000 Palestinian university students cannot attend university in

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<sup>248</sup> “Video shows stripped Palestinian men detained in Gaza”, BBC News (8 Dec. 2023), <https://www.bbc.co.uk/news/world-middle-east-67659296>; “Palestinian detainees describe horrific torture by Israeli forces”, *Al Jazeera* English (26 Dec. 2023), <https://www.youtube.com/watch?v=leVJAiGMDqI>; Palestine Online, @OnlinePalEng, Tweet (4:30 p.m., 7 Dec. 2023), <https://twitter.com/OnlinePalEng/status/1732799688259121639>.

<sup>249</sup> OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #77” (26 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-77>; Al-Haq, Al Mezan, PCHR, “Urgent Call for Independent Investigation Amidst Persistent Reports of Torture, Enforced Disappearance, and Another Palestinian “Death” in Israeli Custody” (2 Jan. 2024), <https://www.mezan.org/en/post/46349>.

<sup>250</sup> *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. 431, para. 69.

<sup>251</sup> OHCHR, “OPT: Disturbing reports from the north of Gaza of mass detentions, ill-treatment and enforced disappearances of possibly thousands of Palestinians” (16 Dec. 2023), <https://reliefweb.int/report/occupied-palestinian-territory/un-human-rights-office-opt-disturbing-reports-north-gaza-mass-detentions-ill-treatment-and-enforced-disappearances-possibly-thousands-palestinians>; “Where will I leave these children, on the street?” The struggle for survival faced by disabled Palestinians in Gaza”, *CNN* (17 Nov. 2023), <https://edition.cnn.com/2023/11/17/middleeast/disabled-palestinians-gaza-survival-intl-cmd/index.html>.

<sup>252</sup> UNESCO, “Gaza: UNESCO calls for an immediate halt to strikes against schools” (27 Oct. 2023), <https://www.unesco.org/en/articles/gaza-unesco-calls-immediate-halt-strikes-against-schools>; OCHA, “Hostilities in the Gaza Strip and Israel - reported impact | Day 73” (19 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-73>.

<sup>253</sup> UNSC, resolution 2712, The situation in the Middle East, including the Palestinian question, S/RES/2712 (15 Nov. 2023), [https://undocs.org/S/RES/2712\(2023\)](https://undocs.org/S/RES/2712(2023)).



Gaza<sup>254</sup>. Over 60 per cent of schools, almost all universities and countless bookshops and libraries<sup>255</sup> have been damaged or destroyed, and hundreds of teachers and academics have been killed<sup>256</sup>, including deans of universities and leading Palestinian scholars<sup>257</sup>, obliterating the very prospects for the future education of Gaza's children and young people<sup>258</sup>.

### Provisional measures and genocide

17. Notably, the Court has found provisional measures to be justified in all three cases where they were previously sought in relation to violations of the Genocide Convention. It did so in *Bosnia v. Serbia* in 1993, finding — on the basis of evidence that was certainly no more compelling than that presently before the Court — that it was sufficient to determine that there was “a grave risk of acts of genocide being committed”<sup>259</sup>. The Court found provisional measures to be justified in *The Gambia v. Myanmar* case, on the basis of a risk of irreparable prejudice to the Rohingya, “subjected to . . . mass killings . . . as well as beatings, the destruction of villages and homes, denial of access to food, shelter and other essentials of life”<sup>260</sup>.

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<sup>254</sup> Birzeit University, “We, law students of Birzeit University, call on the world to stop the ongoing genocide by the Israeli occupation against the Palestinians in Gaza” (13 Nov. 2023), <https://www.birzeit.edu/en/news/we-law-students-birzeit-university-call-world-stop-ongoing-genocide-israeli-occupation-against>; “Palestinian campus death toll passes 400, says ministry”, Times Higher Education (1 Nov. 2023), <https://www.timeshighereducation.com/news/palestinian-campus-death-toll-passes-400-says-ministry>; Ahmed Asmar, “4,119 Palestinian school students killed, 7,536 injured in Gaza since Oct. 7”, AA (2 Jan. 2024), <https://www.aa.com.tr/en/middle-east/4-119-palestinian-school-students-killed-7-536-injured-in-gaza-since-oct-7/3097921>.

<sup>255</sup> OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #86” (7 Jan. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-86>; “Laila Hussein Moustafa, “Opinion: When libraries like Gaza’s are destroyed, what’s lost is far more than books”, *Los Angeles Times* (12 Dec. 2023), <https://www.latimes.com/opinion/story/2023-12-12/gaza-library-bombing>.

<sup>256</sup> “Ministry of Education: Over 4,296 Palestinian students killed, 8,059 injured since start of Israeli aggression on October 7”, Wafa (9 Jan. 2024), <https://english.wafa.ps/Pages/Details/140607>.

<sup>257</sup> “Israeli air strike in Gaza kills prominent scientist Sufyan Tayeh: Palestinian ministry”, *The Business Standard* (3 Dec. 2023), <https://www.tbsnews.net/world/israeli-air-strike-gaza-kills-prominent-scientist-sufyan-tayeh-palestinian-ministry-750974>. Dr Said Al-Zubda, the President of the University College of Applied Sciences, Nour Naim, @NourNaim88, Tweet (1:36 p.m., Jan. 1, 2024), <https://twitter.com/NourNaim88/status/1741800681567100950>.

<sup>258</sup> Katherine Hearst, “War on Gaza: Palestinian drama teacher killed amid ‘deadliest’ assault on refugee camp”, Middle East Eye (28 Dec. 2023), <https://www.middleeasteye.net/news/war-gaza-palestinian-drama-teacher-killed-israeli-assault-refugee-camp>; Killing of Captain Hani Al-Masri a Palestinian footballer and the coach of the Palestinian Olympic football team, Quds News Network, @QudsNen, Tweet (2:29 p.m., Jan. 6, 2024), <https://twitter.com/QudsNen/status/1743625904809452014>.

<sup>259</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Order of 8 April 1993, I.C.J. Reports 1993, p. 22, para. 45; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 347, para. 49.

<sup>260</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. 26, para. 71.

18. More recently, in indicating provisional measures in *Ukraine v. Russian Federation*, the Court considered that Russia's military activities had "resulted in numerous civilian deaths and injuries" and "caused significant material damage, including the destruction of buildings and infrastructure", giving rise to a risk of irreparable prejudice<sup>261</sup>. The Court had regard to the fact that "[a]ttacks are ongoing and are creating increasingly difficult living conditions for the civilian population", which it considered to be "extremely vulnerable"<sup>262</sup>. The Court also considered the fact that "[m]any persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating" and that many were attempting to flee "under extremely insecure conditions"<sup>263</sup>. This is occurring in Gaza on a much more intensive scale, to a besieged, trapped, terrified population that has nowhere safe to go.

#### **Provisional measures in situations of armed conflict**

19. Lest the contrary be suggested, it is clear from *Ukraine v. Russian Federation* that the fact that the urgent risk of irreparable harm arises in a situation of armed conflict does not undermine much less preclude a request for provisional measures. That is also clear from the Court's other Judgments.

20. In the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*<sup>264</sup>, for example, the Court ordered provisional measures based on its finding "that persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remain extremely vulnerable" and that there was "a serious risk that the rights at issue in this case . . . may suffer irreparable prejudice"<sup>265</sup>. Similarly, in *Costa Rica v. Nicaragua*, the Court indicated provisional measures in part on the basis that the presence of troops in the disputed territory gave

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<sup>261</sup> *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. 228, para. 75.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000.*

<sup>265</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43.

“rise to a real and present risk of incidents liable to cause irreparable harm in the form of bodily injury or death”<sup>266</sup>.

21. In relation to the Genocide Convention in particular, the Court recalled in *The Gambia v. Myanmar*, that “States parties expressly confirmed their willingness to consider genocide as a crime under international law which they must prevent and punish independently of the context ‘of peace’ or ‘of war’ in which it takes place”<sup>267</sup>.

22. More recently, in the case of *Guyana v. Venezuela*, the Court considered that the serious risk of Venezuela “acquiring and exercising control and administration of the territory in dispute” gave rise to a risk of irreparable prejudice to the rights asserted in the case<sup>268</sup>. Similar factors are in issue here, having regard to the territorial ambitions and settlement plans for Gaza being raised by members of the Israeli Government, and the relationship of those factors to the very survival of Palestinians in Gaza as such.

### **Provisional measures and mitigation of risk**

23. Similarly, any scaling up by Israel of access of humanitarian relief to Gaza in response to these proceedings or otherwise would be no answer to South Africa’s request for provisional measures. In the case of *Iran v. United States*, the Court found a risk of irreparable harm from the exposure of individuals to “danger to health and life”<sup>269</sup> caused by restrictions placed on “medicines and medical devices”, “foodstuffs” and other “goods required for humanitarian needs”<sup>270</sup>. That was notwithstanding the assurances offered by the United States for it to expedite the consideration of humanitarian issues<sup>271</sup>; and notwithstanding the fact that essentials were in any event exempt from

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<sup>266</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011 (I), p. 24, para. 75.

<sup>267</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, p. 27, para. 74, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 615, para. 31.

<sup>268</sup> *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Provisional Measures, Order of 1 December 2023, para. 37.

<sup>269</sup> *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. 650, paras. 91-92.

<sup>270</sup> *Ibid.*, pp. 643-644, para. 70.

<sup>271</sup> *Ibid.*, p. 650, paras. 91-92.

the United States sanctions<sup>272</sup>. The Court considered that the assurances were “not adequate to address fully the humanitarian and safety concerns raised” and that “there remain[ed] a risk that measures adopted” by the United States “may entail irreparable consequences”<sup>273</sup>.

24. In *Armenia v. Azerbaijan*, unilateral undertakings to alleviate restrictions alongside the *full* resumption of humanitarian and commercial deliveries did not defeat a request for the indication of provisional measures<sup>274</sup>. The Court was clear that while contributing “towards mitigating the imminent risk of irreparable prejudice resulting from” the military operation, those developments did “not remove the risk entirely”<sup>275</sup>. Indeed, in *Georgia v. Russian Federation*, the Court made clear that it considers a “serious risk” to subsist where “the situation . . . is unstable and could rapidly change”. The Court considered that “given the ongoing tension and the absence of an overall settlement to the conflict in this region . . . populations also remain vulnerable”<sup>276</sup>.

25. Israel continues to deny that it is responsible for the humanitarian crisis it has created, even as Gaza starves<sup>277</sup>. The aid it has belatedly begun to allow in is wholly inadequate<sup>278</sup> and does not come anywhere close to the average 500 trucks being permitted daily before October 2023<sup>279</sup>, even under the blockade. Any unilateral undertakings Israel might seek to give about future aid would not

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<sup>272</sup> *Ibid.*, p. 649, para. 89.

<sup>273</sup> *Ibid.*, p. 650, para. 92.

<sup>274</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023*, para. 62.

<sup>275</sup> *Ibid.*, para. 64. See also in this respect, *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. 27, para. 73.

<sup>276</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, paras. 142-143.

<sup>277</sup> Ambassador Gilad Erdan גילעד ארדן, @giladerdan1, Tweet (7:14 p.m., Dec. 22, 2023), <https://twitter.com/giladerdan1/status/1738261699713433651>.

<sup>278</sup> OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #81” (30 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-81>; UN News, “Global Perspective Human Stories, UPDATED: Aid relief arriving in Gaza but ‘too little, too late’, warns WHO” (9 Jan. 2024), <https://news.un.org/en/story/2024/01/1145347>.

<sup>279</sup> OCHA, “Hostilities in the Gaza Strip and Israel - reported impact | Day 94” (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>; United Nations, “Humanitarian System for More than 2 Million Civilians in Gaza Facing Total Collapse, Secretary-General Warns, Once Again Urging Ceasefire, Aid Delivery at Scale Needed” (27 Oct. 2023), <https://press.un.org/en/2023/sgsm22010.doc.htm>.

remove the risk of irreparable prejudice, not least considering Israel's past and current conduct towards the Palestinian people, including the 16 years of brutal siege on Gaza<sup>280</sup>.

26. In any event, as the United Nations Secretary-General has made absolutely clear, it is “a mistake” to measure “the effectiveness of the humanitarian operation in Gaza *based on the number of trucks*” allowed in<sup>281</sup>. As he stressed, “[t]he real problem is that *the way Israel is conducting this offensive*” means that “the conditions for the effective delivery of humanitarian aid no longer exist”<sup>282</sup>. That would require “security, staff who can work in safety, logistical capacity, and the resumption of commercial activity. It requires electricity and steady communications. All of these remain absent”<sup>283</sup>. Indeed, only shortly after Israel opened the Kerem Shalom crossing to goods in late December 2023, it was struck in a drone attack, killing five Palestinians and leading to another temporary closure<sup>284</sup>. Nowhere and nobody is safe. As the United Nations Secretary-General and all its chiefs have made clear, without a halt to Israel's military operations, crossings, aid convoys and humanitarian workers<sup>285</sup> — like everyone and everything else in Gaza — remain at imminent risk of further irreparable prejudice. An unprecedented 148 United Nations staff have been killed to date<sup>286</sup>. Without a halt to Israel's military activity in Gaza, there will be no end to the extreme situation facing Palestinian civilians.

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<sup>280</sup> James Elder @lames\_elder, Tweet (2:48 p.m., 19 Dec. 2023), [https://twitter.com/lames\\_elder/status/1737107611089272902](https://twitter.com/lames_elder/status/1737107611089272902).

<sup>281</sup> OCHA, “Remarks to the media by the Secretary-General” (22 Dec. 2023), <https://www.ochaopt.org/content/remarks-media-secretary-general> (emphasis added).

<sup>282</sup> United Nations, “Secretary-General's opening remarks at press conference on the situation in the Middle East” (22 Dec. 2023), <https://www.un.org/sg/en/content/sg/speeches/2023-12-22/secretary-generals-opening-remarks-press-conference-the-situation-the-middle-east> (emphasis added); UN Secretary-General, “People of Gaza ‘Being Told to Move like Human Pinballs’, but Nowhere Is Safe, Secretary-General Tells Security Council, Pleading for Humanitarian Ceasefire” (8 Dec. 2023), <https://press.un.org/en/2023/sgsm22076.doc.htm>.

<sup>283</sup> United Nations, “Secretary-General's opening remarks at press conference on the situation in the Middle East” (22 Dec. 2023), <https://www.un.org/sg/en/content/sg/speeches/2023-12-22/secretary-generals-opening-remarks-press-conference-the-situation-the-middle-east> (emphasis added).

<sup>284</sup> OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #80” (29 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-80>.

<sup>285</sup> UN Secretary-General, Report on United Nations Security Council Resolution 2720 (5 Jan. 2024), <https://twitter.com/Raminho/status/1743694636697174388/photo/3> (advanced copy); see also Martin Griffiths, @UNReliefChief, Tweet (12:13 a.m., 29 Dec. 2023), <https://twitter.com/UNReliefChief/status/1740526522476191938>.

<sup>286</sup> OCHA, “Hostilities in the Gaza Strip and Israel - reported impact | Day 94” (9 Jan. 2024), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-94>.

### **Provisional measures and Gaza**

27. Madam President, Members of the Court, if the indication of provisional measures was justified on the facts in those cases I have cited, how could it not be here, in a situation of much greater severity, where the imminent risk of irreparable harm is so much greater? How could they not be justified in a situation that humanitarian veterans from crises spanning as far back as the killing fields of Cambodia<sup>287</sup> — “people who [in the words of the United Nations Secretary-General] have seen everything”<sup>288</sup> — if they say it is so utterly “unprecedented” that they are “out of words to describe” it<sup>289</sup>.

28. It would be a complete departure from the long and established line of jurisprudence that this Court has firmly established — and recently reconfirmed — for the Court not to order provisional measures in this case. The imminent risk of death, harm and destruction that Palestinians in Gaza face today, and that they risk every day during the pendency of these proceedings, on any view justifies — indeed compels — the indication of provisional measures. Some might say that the very reputation of international law — its ability and willingness to bind and to protect all peoples equally — hangs in the balance.

### **Elementary principles of morality**

29. But the Genocide Convention is about much more than legal precedent. It is also fundamentally about the “confirm[ation] and endorse[ment of] elementary principles of morality”<sup>290</sup>. The Court recalled the 1946 General Assembly resolution on the crime of genocide, which made clear that:

“Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity

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<sup>287</sup> Interview with UN Relief Chief Martin Griffiths on CNN, <22 Nov. 2023, in Christiane Amanpour, @amanpour, Tweet (4:08 p.m., 22 Nov. 2023), <https://twitter.com/amanpour/status/1727343309486542926>.

<sup>288</sup> United Nations, “Press Conference by Secretary-General António Guterres at United Nations Headquarters” (22 Dec. 2023), <https://press.un.org/en/2023/sgsm22095.doc.htm>.

<sup>289</sup> UNRWA, “Remarks of UNRWA Commissioner-General Philippe Lazzarini at the Global Refugee Forum” (13 Dec. 2023), <https://www.unrwa.org/newsroom/official-statements/statement-unrwa-commissioner-general-philippe-lazzarini-global-refugee>; UNRWA, @UNRWA, Tweet (2:46 p.m., 12 Dec. 2023), <https://twitter.com/UNRWA/status/1734585541591486755>.

<sup>290</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. 27, para. 69, citing *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 23.

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.”<sup>291</sup>

30. Notwithstanding the Genocide Convention’s recognition of the need to rid the world of the “odious scourge” of genocide, the international community has repeatedly failed. It “failed” the people of Rwanda<sup>292</sup>. It had failed the Bosnian people and the Rohingya, prompting this Court to take action<sup>293</sup>. It failed again by ignoring the early warnings of the “grave risk of genocide to the Palestinian people” sounded by international experts since 19 October of last year<sup>294</sup>.

31. The international community continues to fail the Palestinian people, despite the overt dehumanizing genocidal rhetoric by Israeli governmental and military officials, matched by the Israeli army’s actions on the ground; despite the horror of the genocide against the Palestinian people being livestreamed from Gaza to our mobile phones, computers and television screens — the first genocide in history where its victims are broadcasting their own destruction in real time in the desperate — so far vain — hope that the world might do something. Gaza represents nothing short of a “moral failure”, as described by the usually circumspect International Committee of the Red Cross<sup>295</sup>. As underscored by United Nations chiefs, that failure has “repercussions not just for the people of Gaza . . . but for the generations to come who will never forget these [over] 90 days of hell and of assaults on the most basic precepts of humanity”<sup>296</sup>. As stated by a United Nations

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<sup>291</sup> UNGA res. 96, The Crime of Genocide, A/RES/96 (11 Dec. 1946), preamble, as cited in *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, para. 69.

<sup>292</sup> UN News, “Rwanda genocide ‘must leave us always with a sense of bitter regret and abiding sorrow’, says Secretary-General to New York memorial conference” (26 Mar. 2004), <https://press.un.org/en/2004/sgsm9223.doc.htm>.

<sup>293</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 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.

<sup>294</sup> OHCHR, “Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide” (19 Oct. 2023), <https://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitals-and-schools-crimes-against-humanity>; OHCHR, “Gaza is ‘running out of time’ UN experts warn, demanding a ceasefire to prevent genocide” (2 Nov. 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-running-out-time-un-experts-warn-demanding-ceasefire-prevent-genocide>; OHCHR, “Gaza: UN experts call on international community to prevent genocide against the Palestinian people” (16 Nov. 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against>.

<sup>295</sup> ICRC, “Gaza: ICRC president calls for the protection of civilians in the face of ‘moral failure’” (4 Dec. 2023), <https://www.icrcnewsroom.org/story/en/2075/gaza-icrc-president-calls-for-the-protection-of-civilians-in-the-face-of-moral-failure>; ICRC, “Israel and the occupied territories: President of the ICRC arrives in Gaza, calls for the protection of civilians” (4 Dec. 2023), <https://www.icrc.org/en/document/israel-and-occupied-territories-president-icrc-arrives-gaza>.

<sup>296</sup> OCHA, “The war in Gaza must end - Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, 5 January 2024” (5 Jan. 2024), <https://reliefweb.int/report/occupied-palestinian-territory/war-gaza-must-end-statement-martin-griffiths-under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-5-january-2024-enhear>.

spokesperson in Gaza last week, at the site of a hospital clearly marked with the symbol of the Red Crescent, where five Palestinians — including a five-day-old baby — had just been killed: “The world should be absolutely horrified. The world should be absolutely outraged . . . There is no safe space in Gaza and the world should be ashamed”<sup>297</sup>.

### Conclusion

32. Madam President, Members of the Court, in conclusion I share with you two photographs. The first is of a whiteboard at a hospital — in northern Gaza<sup>298</sup> — one of the many Palestinian hospitals targeted, besieged and bombed by Israel over the course of the past three brutal months. The whiteboard is wiped clean of no longer possible surgical cases, leaving only a hand-written message by a Médecins Sans Frontières doctor which reads: “We did what we could. Remember us.”

33. The second photograph is of the same whiteboard, after an Israeli strike on the hospital on 21 November that killed the author of the message, Dr Mahmoud Abu Nujaila, along with two of his colleagues<sup>299</sup>.

34. Just over a month later, in a powerful sermon, delivered from a church in Bethlehem on Christmas Day — the same day Israel had killed 250 Palestinians<sup>300</sup>, including at least 86 people, many from the same family, massacred in a single strike on Maghazi refugee camp<sup>301</sup> — Palestinian Pastor Munther Isaac addressed his congregation and the world. And he said:

“Gaza as we know it no longer exists. This is an annihilation. This is a genocide. We will rise. We will stand up again from the midst of destruction, as we have always done as Palestinians, although this is by far maybe the biggest blow we have received.”

But he said:

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<sup>297</sup> Gemma Connell, Team Leader of OCHA, in UN Humanitarian, @UNOCHA, Tweet (9:09 p.m., 2 Jan. 2024), <https://twitter.com/UNOCHA/status/1742276915707211811?s=20>.

<sup>298</sup> Médecins sans frontières (MSF), “Gaza: “It must all stop now”, Letter to UN Security Council” (4 Dec. 2023), <https://www.msf.org/letter-gaza-un-security-council>; MSF UK, @MSF\_uk, Tweet (3:16 p.m., 6 Dec. 2023), [https://twitter.com/MSF\\_uk/status/1732403598007435695](https://twitter.com/MSF_uk/status/1732403598007435695).

<sup>299</sup> MSF, “Gaza: MSF doctors killed in strike on Al-Awda Hospital” (21 Nov. 2023), <https://www.doctorswithoutborders.org/latest/gaza-msf-doctors-killed-strike-al-awda-hospital>; MSF, “Gaza: “It must all stop now”, Letter to UN Security Council” (4 Dec. 2023), <https://www.msf.org/letter-gaza-un-security-council>.

<sup>300</sup> Gaza Ministry of Health, Facebook Post (25 Dec. 2023), <https://www.facebook.com/MOHGaza1994/>; OCHA, “Hostilities in the Gaza Strip and Israel | Flash Update #77” (26 Dec. 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-77>.

<sup>301</sup> OHCHR, “Comment by UN Human Rights Office spokesperson Seif Magango on continued bombardment of Middle Gaza” (26 Dec. 2023), <https://www.un.org/unispal/document/un-human-rights-office-is-gravely-concerned-about-the-continued-bombardment-of-middle-gaza-ohchr-press-release/>.



“No apologies will be accepted after the genocide . . . What has been done has been done. I want you to look at the mirror and ask, ‘where was I when Gaza was going through a genocide’.”<sup>302</sup>

35. South Africa is here before this Court, in the Peace Palace. It has done what it could. It is doing what it can, by initiating these proceedings, by seeking interim measures against *itself* as well as against Israel.

36. South Africa now respectfully and humbly calls on this honourable Court to do what is in its power to do, to indicate the provisional measures that are so urgently required to prevent further irreparable harm to the Palestinian people in Gaza, whose hopes — including for their very survival — are now vested in this Court.

37. Madame la présidente, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention. Je vous invite à demander au professeur Lowe, KC, de prendre le podium pour décrire les mesures conservatoires revendiquées par l’Afrique du Sud de la part du peuple palestinien.

The PRESIDENT: I thank Ms Ní Ghrálaigh, and I now invite Professor Vaughan Lowe to address the Court. You have the floor, Professor.

Mr LOWE:

#### **THE PROVISIONAL MEASURES SOUGHT**

1. Madam President, Members of the Court: it is a privilege to appear before you, and an honour to do so on behalf of the Republic of South Africa.

#### **Introduction**

2. This case is brought under Article IX of the Genocide Convention, which entitles any Contracting Party to the Convention to submit to the Court disputes relating to the interpretation, application or fulfilment of the Convention.

3. The Court does not at this stage have to determine whether or not Israel has or has not acted contrary to its obligations under the Genocide Convention. That can only be done at the merits stage.

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<sup>302</sup> “‘Christ in the Rubble’: Watch Palestinian Pastor Deliver Powerful Christmas Sermon from Bethlehem”, Democracy Now (26 Dec. 2023), [https://www.democracynow.org/2023/12/26/christ\\_in\\_the\\_rubble\\_christmas\\_sermon](https://www.democracynow.org/2023/12/26/christ_in_the_rubble_christmas_sermon).

It is concerned now only with the question of what provisional measures are required pending the Court's final decision on the merits.

### **The Court's requirements for the ordering of provisional measures**

4. The Court's jurisprudence points to five requirements for the ordering of provisional measures.

5. The first is that there should be prima facie jurisdiction<sup>303</sup>. That was addressed by Professor Dugard.

6. The second is that there should be a link between the measures requested and the rights underlying the main claim<sup>304</sup>. This requirement is plainly satisfied. The measures request an Order that Israel does not violate the very rights secured by the Genocide Convention, as set out in South Africa's Application.

7. The third is the plausibility of the rights that are claimed<sup>305</sup>. Professor du Plessis explained that this is clearly satisfied. The rights claimed are the very core of the Convention: notably the right not to be killed or seriously harmed, and the right of the group not to be physically destroyed.

8. Fourth and fifth, there must be a risk of irreparable prejudice capable of arising prior to the final determination of the dispute, and there must be urgency<sup>306</sup>. Ms Ní Grálaigh addressed those points. Israel has for over three months been mounting a continuous siege and bombardment of Gaza of a ferocity and duration that can only be seen as an attempt to destroy Gaza and its citizens; and it

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<sup>303</sup> Arbitral Award of 3 October 1899 (*Guyana v. Venezuela*), Order - Provisional Measures, 1 December 2023, para. 17; *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; *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. 9, para. 16.

<sup>304</sup> Arbitral Award of 3 October 1899 (*Guyana v. Venezuela*), Order - Provisional Measures, 1 December 2023, para. 20; *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, p. 20, para. 51.

<sup>305</sup> See e.g. *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Provisional Measures, Order of 1 December 2023, para. 19; *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 242, para. 42.

<sup>306</sup> *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Provisional Measures, Order of 1 December 2023, para. 28; *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. 226-227, para. 66.

is publicly asserting that it will continue to do so<sup>307</sup>. You are aware of the scale of the death and the scale of the destruction. And it is continuing at this very minute.

9. The Court has said that

“a State’s obligation to prevent [sc., genocide], and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent . . . , it is under a duty to make such use of these means as the circumstances permit.”<sup>308</sup>

That is what South Africa has done by making this Application.

### **The Court’s approach to provisional measures: protection of individuals**

10. In cases such as *LaGrand*<sup>309</sup>, *Avena*<sup>310</sup> and *Jadhav*<sup>311</sup> this Court has exercised its power to order provisional measures having regard to the impact not only of provisional measures on the States parties to a case, but also to the impact on the individuals directly affected and *their* rights<sup>312</sup>. It has issued Orders to restrain States from killing individuals in a manner alleged to violate international law. And that is what South Africa is requesting, after more than 22,000 individuals have already been killed in the siege and bombardment of Gaza, the overwhelming majority of them innocent men, women and children.

### **The Court’s approach to provisional measures: protecting the integrity of the Court’s procedures**

11. The Court also issues Orders to safeguard the integrity of its proceedings and the efficacy of its final ruling. In the *Bosnia Genocide* case, for example, you ordered that the parties “not take any action and . . . ensure that no action is taken which may aggravate or extend the existing dispute

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<sup>307</sup> “Israel’s war in Gaza will go on for months, warns Netanyahu”, *Financial Times*, 31 Dec. 2023.

<sup>308</sup> *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. 222, para. 431.

<sup>309</sup> *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, *I.C.J. Reports 1999 (I)*, p. 16, para. 29.

<sup>310</sup> *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, Order of 5 February 2003, *I.C.J. Reports 2003*, pp. 91-92, para. 59.

<sup>311</sup> *Jadhav (India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 246, para. 61.

<sup>312</sup> *Ibid.*, p. 243, para. 48: “The Court considers that these measures are aimed at preserving the rights of India and of Mr. Jadhav under Article 36, paragraph 1, of the Vienna Convention. Therefore, a link exists between the rights claimed by India and the provisional measures being sought.” (Emphasis added.)

over the prevention or punishment of the crime of genocide, or render it more difficult of solution”<sup>313</sup>. Without such non-aggravation orders, there is a real risk that a respondent will rush to complete its unlawful conduct before the Court’s final ruling, thus rendering the ruling, and the Court, an irrelevance.

### **The limited scope of South Africa’s request for provisional measures**

12. South Africa has kept its Application in this case within the scope of the Convention.

13. First, some will ask why South Africa does not seek any Court order against Hamas. This case concerns Israel’s actions in Gaza, which is territory that, three weeks ago in resolution 2720, the United Nations Security Council stressed is “an integral part of the territory occupied in 1967” by Israel. As the Court will understand, Hamas is not a State and cannot be a party to the Genocide Convention; and cannot be a party to these proceedings. There are other bodies and processes that can address the questions of steps to be taken in respect of past atrocities and against other actors; and they are no doubt considering what they should do. But as a matter of law, under the Convention, South Africa cannot request an Order from this Court against Hamas.

14. Secondly, South Africa understands that not all violence constitutes genocide. Acts of ethnic cleansing, collective punishment, the targeting of civilians, attacks on hospitals, and other war crimes are all unlawful: but they do not always violate the Genocide Convention. Genocide requires an intent to destroy, in whole or in part, a national, ethnical, racial or religious group. But the fact that what Israel is doing in Gaza may *also* constitute war crimes or crimes against humanity is no defence and no bar to a charge of genocide.

15. South Africa has set out its request for relief in paragraph 111 of its Application, and its Request for provisional measures in paragraph 144.

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<sup>313</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 24, para. 52 (2) B. Cf. e.g. 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. 63 and pp. 230-231, para. 86; 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. 434, p. 79.*

### **The specific provisional measures requested by South Africa**

16. The reasoning behind the requests is pragmatic. The first two paragraphs of the provisional measures request call for the suspension of Israel's military operations in and against Gaza.

17. Israel's continuing operation in Gaza since the 7 October attack is the focus of this case. Minister Lamola has recalled the fact that South Africa has condemned the 7 October attack<sup>314</sup>. Israel says that Palestine and Palestinians are not its target, and that its aim is to destroy Hamas<sup>315</sup>. But months of continuous bombing, flattening entire residential blocks and cutting off food and water and electricity and communications to an entire population, cannot credibly be argued to be a manhunt for members of Hamas. It is an indiscriminate attack, killing, maiming and terrorizing the entire population of Gaza with no regard to questions of innocence or guilt, obliterating the homes and cities in which they live, and destroying any practical possibility of their return to make their homes amidst the rubble<sup>316</sup>.

18. Israel's actions both attack Palestinians in Gaza directly and also prevent humanitarian relief reaching them. Palestinians face death from continuing bombardments and shootings, and death from starvation and disease, which is even more indiscriminate, but usually slower.

19. In recent days the United States has said again that far too many civilians are being killed<sup>317</sup>; and the United Nations Secretary General<sup>318</sup>, the United Nations Under-Secretary-General

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<sup>314</sup> Application, para 1.

<sup>315</sup> Israeli Defense Forces (IDF) Press Releases Regarding the Hamas-Israel War, English Briefing by Major (Res) Keren Hajioff, (13 Dec. 2023) <https://www.idf.il/en/mini-sites/idf-press-releases-regarding-the-hamas-israel-war/december-23-pr/english-briefing-by-major-res-keren-hajioff/>.

<sup>316</sup> *The Washington Post*, "How Israel pushed over a million Palestinians into a tiny corner of Gaza", (22 Dec. 2023) <https://www.washingtonpost.com/world/interactive/2023/gaza-palestine-displacement-rafah-maps-photos/>.

<sup>317</sup> US Department of State, Secretary Antony J. Blinken Remarks to the Press, (6 Jan. 2024) <https://www.state.gov/secretary-antony-j-blinken-remarks-to-the-press-19/>; *Times of Israel*, "Blinken says 'far too many Palestinians have been killed' in Israel-Hamas war" (11 Nov. 2023) <https://www.timesofisrael.com/blinken-says-far-too-many-palestinians-have-been-killed-in-israel-hamas-war/>.

<sup>318</sup> Letter by the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter (6 Dec. 2023), <https://www.un.org/en/situation-in-occupied-palestine-and-israel/sg-sc-article99-06-dec-2023>; cf, <https://press.un.org/en/2023/db231208.doc.htm>.

for Humanitarian Affairs<sup>319</sup> and the Commissioner-General of UN Relief and Works Agency<sup>320</sup> have asserted that it is imperative to halt military operations in order to enable the effective delivery of humanitarian relief.

20. That is why South Africa has requested an Order for the immediate suspension of Israel's military operations in and against Gaza. It is the only way to secure the humanitarian response and avoid yet more unnecessary death and destruction.

21. There is a point to emphasize. It is no use Israel saying that it does whatever it can to minimize the deaths of innocent men, women and children. The use of two-thousand-pound bunker-busting bombs and dumb bombs in residential areas, and the relentless bombardment of Gaza<sup>321</sup>, and even of so-called "safe areas" to which Palestinians have been directed by Israel<sup>322</sup>, tell another story. But that is not the only point. It is not just a question of scale and of indiscriminate killing. It is also a question of intention.

22. If *any* military operation, no matter how carefully it is carried out, is carried out pursuant to an intention to destroy a "people", in whole or in part, it violates the Genocide Convention and it

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<sup>319</sup> OCHA, "The war in Gaza must end — Statement by Martin Griffiths, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator", (5 Jan. 2024) <https://www.unocha.org/publications/report/occupied-palestinian-territory/war-gaza-must-end-statement-martin-griffiths-under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-5-january-2024-enhear>. OCHA, "Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Martin Griffiths, Remarks at the International Humanitarian Conference for the Civilian Population in Gaza", (9 Nov. 2023) <https://www.unocha.org/publications/report/occupied-palestinian-territory/under-secretary-general-humanitarian-affairs-and-emergency-relief-coordinator-martin-griffiths-remarks-international-humanitarian-conference-civilian-population-gaza-paris-9-november-2023>.

<sup>320</sup> UNRWA, "Remarks by UNRWA Commissioner-General Philippe Lazzarini at Geneva Press Conference", (14 Dec. 2023), <https://www.unrwa.org/newsroom/official-statements/remarks-unrwa-commissioner-general-philippe-lazzarini-geneva-press>. UNRWA, Letter from UNRWA Commissioner-General Philippe Lazzarini to the UN General Assembly President Mr Dennis Francis, (7 Dec. 2023), <https://www.unrwa.org/resources/un-unrwa/letter-unrwa-commissioner-general-philippe-lazzarini-un-general-assembly>.

<sup>321</sup> See e.g. CNN, "'Not seen since Vietnam': Israel dropped hundreds of 2,000-pound bombs on Gaza, analysis shows" (22 Dec. 2023), <https://edition.cnn.com/gaza-israel-big-bombs/index.html>; CNN, "Exclusive: Nearly half of the Israeli munitions dropped on Gaza are imprecise 'dumb bombs,' US intelligence assessment finds" (14 Dec. 2023), <https://edition.cnn.com/2023/12/13/politics/intelligence-assessment-dumb-bombs-israel-gaza/index.html>; Associated Press, "Israel's military campaign in Gaza seen as among the most destructive in recent history, experts say" (22 Dec. 2023), <https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope-419488c511f83c85baea22458472a796>; Doha News, "US wants Israel to stop striking designated safe areas as UN warns 'not possible' to create 'safe zones' in Gaza" (5 Dec. 2023), <https://dohanews.co/us-wants-israel-to-stop-striking-designated-safe-areas-as-un-warns-not-possible-to-create-safe-zones-in-gaza/>.

<sup>322</sup> See e.g. CNN, "Israel struck some areas it directed civilians to in Gaza, CNN analysis shows" (21 Dec. 2023), <https://edition.cnn.com/2023/12/21/middleeast/israel-strikes-evacuation-zones-gaza-intl-cmd/index.html>; *The Guardian*, "'The buildings are now ashes': nowhere feels safe from Israeli bombs in Gaza" (12 Oct. 2023), <https://www.theguardian.com/world/2023/oct/12/the-buildings-are-now-ashes-gazans-feel-nowhere-is-safe-from-israeli-bombs>; Sky News, "Israel said Gazans could flee to this neighbourhood — then it was hit" (22 Dec. 2023), <https://news.sky.com/story/israel-said-gazans-could-flee-to-this-neighbourhood-then-it-was-hit-13034936>.

must stop. That is why *all* military operations capable of violating the Genocide Convention must cease.

23. The third request is for an order that both Israel and South Africa, in accordance with their obligations under the Genocide Convention in relation to the Palestinian people, take all reasonable measures to *prevent* genocide.

24. The fourth and fifth measures then spell out these general obligations in terms of the specific instances of offences listed in Articles I, II and III of the Convention.

25. The sixth requested measure addresses the fact that, aside from its own acts, the Government of Israel is legally bound to prevent and punish others who engage in or incite or actively support conduct that violates the Genocide Convention<sup>323</sup>. Until the reported intervention of the Attorney General 36 hours ago<sup>324</sup>, Israeli authorities appear to have done practically nothing to stop the flow of genocidal rhetoric, including statements emanating from the ranks of public officials. Indeed, the toleration, even normalization, of such incitement has become a matter of concern within Israel itself<sup>325</sup>. That is why this measure is sought.

26. This case is important. Lives are at stake. Israel's credibility and reputation are at stake. Yet evidence that could determine whether or not particular acts violate the Genocide Convention is being lost or destroyed<sup>326</sup>, while fact-finders and foreign journalists are unable to report freely from Gaza. Hence the seventh request, which is for an order directing the preservation of evidence.

27. Finally, South Africa asks that the Court require specific reports from Israel on what it is doing to implement the order. General assurances are not enough. Reports, published via the Court, are an essential element of accountability.

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<sup>323</sup> *The Guardian*, "Israeli public figures accuse judiciary of ignoring incitement to genocide in Gaza" (3 Jan. 2024), <https://www.theguardian.com/world/2024/jan/03/israeli-public-figures-accuse-judiciary-of-ignoring-incitement-to-genocide-in-gaza>; *Haaretz*, "It's Clear to Everyone Gazans Must Be Destroyed, Israeli Lawmaker Says" (3 Jan. 2024), <https://www.haaretz.com/israel-news/2024-01-03/ty-article/its-clear-to-everyone-gazans-must-be-destroyed-israeli-lawmaker-says/0000018c-ce57-ddba-abad-cef736e40000>.

<sup>324</sup> YNetNews.com, "Israel mulls investigating lawmakers over calls to harm Gazan civilians" (9 Jan. 2024), <https://www.ynetnews.com/article/h1tnwvjdj>.

<sup>325</sup> *Ibid.*, fn. 22.

<sup>326</sup> Application, para. 119.

**The exercise of the right of self-defence cannot justify  
or be a defence to genocide**

28. I should address the question of self-defence. In its Advisory Opinion in the *Wall* case, the Court noted that the threat that Israel had argued justified the construction of the wall was not imputable to a foreign State, but emanated from territory — the Occupied Palestinian Territory — over which Israel itself exercises control<sup>327</sup>. For those reasons, the Court decided that as a matter of international law the right of self-defence under Article 51 of the United Nations Charter had no relevance in such circumstances.

29. Twenty days ago, the Security Council affirmed yet again that Gaza is occupied territory<sup>328</sup>. Though Israel refers to a complete withdrawal *from* Gaza, it has retained control *over* Gaza — over access by land, sea and air, and over key governmental functions and supplies of water and electricity<sup>329</sup>. The tightness of its grip may have varied; but no one can doubt the continuous reality of Israel's grip on Gaza. The Court's legal holding from 2004 remains good.

30. A similar point is to be made here. What is Israel doing in Gaza, it is doing in territory under its own control. Its actions are enforcing its occupation. The law on self-defence under Article 51 of the United Nations Charter has no application. But that is not the main point.

31. The main point is much simpler. It is that no matter how monstrous or appalling an attack or provocation, genocide is *never* a permitted response. *Every* use of force, whether used in self-defence, or in enforcing an occupation, or in policing operations, or otherwise, *must* stay within the limits set by international law, including the explicit duty in Article I of the Convention to *prevent* genocide.

32. South Africa believes that the publicly available evidence of the scale of the destruction resulting from the bombardment of Gaza and the deliberate restriction of food, water, medicines and electricity available to the population of Gaza demonstrates that the Government of Israel — not Jewish people or Israeli citizens: the *Government* of Israel and its military — is intent on destroying

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<sup>327</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 194, para. 139. *Id.*, Kooijmans S.O., para. 36.

<sup>328</sup> UN Security Council resolution 2720 (22 Dec. 2023), <http://unscr.com/en/resolutions/2720>.

<sup>329</sup> HRC, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN doc. A/HRC/50/21, para. 16.



the Palestinians in Gaza as a group, and is doing nothing to prevent or punish the actions of others who support that aim.

33. The point is not simply that Israel is acting “disproportionately”: the point is that the prohibition on genocide is an absolute, peremptory rule of law. *Nothing can ever justify genocide.* No matter what some individuals within the group of Palestinians in Gaza may have done and no matter how great the threat to Israeli citizens might be, *genocidal* attacks on the whole of Gaza and the whole of its population with the intent of destroying them *cannot be justified.*

34. And no exception can be made in a provisional measures order to allow a State to engage in actions that are capable of violating its obligations under the Genocide Convention. It is unthinkable that a court would ever do such a thing. That is the simple point in this case: *genocide can never be justified in any circumstances.*

35. Israel’s actions will be examined closely and methodically at the merits stage, when the Court will want to hear what Israel has to say in its defence. What matters now is that the evidence indicates that Israel’s actions have violated its obligations under the Genocide Convention, that they continue to violate them and that Israel has asserted that it intends to continue them.

### **Unilateral undertakings are not enough**

36. Israel may say that it will comply with all of its obligations under the Genocide Convention and that Orders from the Court are not necessary. But in previous cases the Court has held that such unilateral statements do not remove the risk of irreparable prejudice or obviate the need for a Court Order<sup>330</sup>.

37. In this case, one reason for doubting the efficacy of any such unilateral undertaking is Israel’s apparent inability to see that it has done *anything* wrong in grinding Gaza and its people into the dust.

38. Another reason is that a departure from or reinterpretation of any unilateral undertaking by Israel may lead to consequences so appalling that the risk simply cannot be taken.

39. But there is a third reason. As was noted during the submissions to this Court in the case concerning the *Reservations to the Genocide Convention* in 1951, “the obligation to submit disputes

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<sup>330</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 17 November 2023*, para. 64.

concerning the interpretation or execution of the Convention to the International Court of Justice was regarded as one of the prime guarantees of the due fulfilment of the basic obligation to prevent and punish the crime of genocide”<sup>331</sup>. The role of the Court which, unusually, extends not only to the interpretation and application of the Convention, but also to its *fulfilment*, is pivotal. In addition to their substantive obligations under the Convention it is vitally important that States respect the Court and their procedural obligations.

40. This is not a moment for the Court to sit back and be silent. It is necessary that it assert its authority, and itself order compliance with the obligations under the Genocide Convention. Indeed, it is hard to think of a case in recent history which has been so important for the future of international law, and of this Court.

41. Madam President, Members of the Court, that concludes my submission. I thank you for your attention and, unless I can help you further, I ask that you call on South Africa’s Agent to read out the request for relief.

The PRESIDENT: I thank Professor Lowe, and I now invite the Agent of South Africa, His Excellency Mr Vusimuzi Madonsela, to address the Court. You have the floor, Excellency.

Mr MADONSELA:

#### FINAL SUBMISSIONS

1. Madam President, it remains my honour to read to Your Excellencies the provisional measures that South Africa requests from the Court.

2. You have heard the reasons set out which justify the measures being sought. To sum up, the indication of provisional measures is, we recognize, without prejudice to the merits of the underlying claim. Yet the evidence at this stage indicates grave violence and genocidal acts against the Palestinians in Gaza, in flagrant contravention of the Genocide Convention and in breach of their rights.

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<sup>331</sup> Sir Hartley Shawcross, counsel for the United Kingdom, Reservations to the Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28th, 1951, *Pleadings, Oral Arguments, Documents*, Part II, Oral Statements, p. 380.

3. South Africa has come to this Court to prevent genocide and to do so in the discharge of the international obligation that rests on South Africa and all other States under the Convention. The consequences of not indicating clear and particularized, specific, provisional measures — and not taking steps to intervene while Israel disregards its international obligations before our eyes — would, we fear, be very grave indeed: for the Palestinians in Gaza, who remain at real risk of further genocidal acts; for the integrity of the Convention; for the rights of South Africa; and for the reputation of this Court, which is equipped with and must exercise its powers to afford an effective realization of the rights under the Convention.

4. That means, we respectfully submit, indicating the provisional measures being sought by South Africa, as well as any others in addition which the Court might deem appropriate. Justice, and equal respect for the rights of Palestinians, points overwhelmingly in favour of these critically required provisional measures.

5. Madam President, I now proceed to read the measures requested by South Africa. On the basis of the facts set forth above:

“South Africa, as a State party to the Convention on the Prevention and Punishment of the Crime of Genocide, respectfully requests the Court, as a matter of extreme urgency, pending the Court’s determination of this case on the merits, to indicate the following provisional measures in relation to the Palestinian people as a group protected by the Genocide Convention. These measures are directly linked to the rights that form the subject matter of South Africa’s dispute with Israel:

- (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 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.”

Thank you, Madam President, and distinguished Members of the Court. That concludes South Africa’s address.

The PRESIDENT: I thank the Agent of South Africa, whose statement brings to an end the single round of oral argument of South Africa, as well as this morning's sitting. The Court will meet again tomorrow, 12 January 2024, at 10 a.m., to hear the single round of oral argument of Israel. The sitting is adjourned.

*The Court rose at 1.20 p.m.*

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