Corrigé
Corrected

CR 2024/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2024

Public sitting

held on Friday 12 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)**

VERBATIM RECORD

ANNÉE 2024

Audience publique

tenue le vendredi 12 janvier 2024, à 10 heures, au Palais de la Paix,

sous la présidence de M^me^ 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)**

COMPTE RENDU

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

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

M. Gautier, greffier

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

The Court meets this morning to hear the State of Israel present its single round of oral argument on the Request for the indication of provisional measures submitted by the Republic of South Africa on 29 December 2023 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)*.

I shall now give the floor to the Co-Agent of Israel, Mr Tal Becker. You have the floor, Excellency.

Mr BECKER:

CO-AGENT'S OPENING STATEMENT

1. Madam President, distinguished Members of the Court, it is an honour to appear before you again on behalf of the State of Israel. The State of Israel is singularly aware of why the Genocide Convention, which has been invoked in these proceedings, was adopted. Seared in our collective memory is the systematic murder of six million Jews as part of a pre-meditated and heinous programme for their total annihilation.

2. Given the Jewish people's history and its foundational texts, it is not surprising that Israel was among the first States to ratify the Genocide Convention, without reservation, and to incorporate its provisions in its domestic legislation. For some, the promise of "Never Again" for all peoples is a slogan; for Israel, it is the highest moral obligation.

3. Raphael Lemkin, a Polish Jew, who witnessed the unspeakable horrors of the Holocaust, is credited with coining the term genocide. He helped the world recognize that the existing legal lexicon was simply inadequate to capture the devastating evil that the Nazi Holocaust unleashed.

4. The Applicant has now sought to invoke this term in the context of Israel's conduct in a war it did not start and did not want. A war in which Israel is defending itself against Hamas, Palestinian Islamic Jihad and other terrorist organizations whose brutality knows no bounds.

5. The civilian suffering in this war, like in all wars, is tragic. It is heartbreaking. The harsh realities of the current hostilities are made especially agonizing for civilians given Hamas'

reprehensible strategy of seeking to maximize civilian harm to both Israelis and Palestinians, even as Israel seeks to minimize it.

6. But, as this Court has already made clear, the Genocide Convention was not designed to address the brutal impact of intensive hostilities on the civilian population, even when the use of force raises "very serious issues of international law" and involves "enormous suffering" and "continuing loss of life"[1]. The Convention was set apart to address a malevolent crime of the most exceptional severity.

7. We live at a time when words are cheap. In an age of social media and identity politics, the temptation to reach for the most outrageous term, to vilify and demonize, has become for many irresistible. But if there is a place where words should still matter, where truth should still matter, it is surely a court of law.

8. The Applicant has regrettably put before the Court a profoundly distorted factual and legal picture. The entirety of its case hinges on a deliberately curated, decontextualized and manipulative description of the reality of current hostilities.

9. South Africa purports to come to this Court in the lofty position of a guardian of the interest of humanity. But in delegitimizing Israel's 75-year existence in its opening presentation yesterday, that broad commitment to humanity rang hollow. And in its sweeping counterfactual description of the Israeli-Palestinian conflict, it seemed to erase both Jewish history and any Palestinian agency or responsibility. Indeed, the delegitimization of Israel since its very establishment in 1948 in the Applicant's submissions, sounded barely distinguishable from Hamas' own rejectionist rhetoric.

10. It is unsurprising, therefore, that, in the Applicant's telling, both Hamas' responsibility for the situation in Gaza and the very humanity of its Israeli victims are removed from view.

11. The attempt to weaponize the term genocide against Israel in the present context, does more than tell the Court a grossly distorted story, and it does more than empty the word of its unique force and special meaning. It subverts the object and purpose of the Convention itself — with ramifications for all States seeking to defend themselves against those who demonstrate total disdain for life and for the law.

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[1] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J Reports 1999 (I),* p. 132-133, paras. 16-17 and p. 138, para. 40.

12. Madam President, Members of the Court, on Saturday 7 October, a Jewish religious holiday, thousands of Hamas and other militants breached Israeli sovereign territory by sea, land and air, invading over 20 Israeli communities, bases and the site of a music festival. What proceeded, under the cover of thousands of rockets fired indiscriminately into Israel, was the wholesale massacre, mutilation, rape and abduction of as many citizens as the terrorists could find before Israel's forces repelled them. Openly displaying elation, they tortured children in front of parents, and parents in front of children, burned people, including infants, alive, and systematically raped and mutilated scores of women, men and children. All told, some 1,200 people were butchered that day, more than 5,500 maimed, and some 240 hostages abducted, including infants, entire families, persons with disabilities and Holocaust survivors, some of whom have since been executed; many of whom have been tortured, sexually abused and starved in captivity[2]. Representatives of the hostages' families are in this courtroom today and we acknowledge their presence and their boundless suffering.

13. We know of the brutality of 7 October not only from the harrowing testimonies of the survivors, the unmistakable proof of carnage and sadism left behind, and the forensic evidence taken at the scene. We know it because the assailants proudly filmed and broadcast their barbarism.

14. The events of that day are all but ignored in the Applicant's submissions. But we are compelled to share with the Court some fraction of its horror — the largest calculated mass murder of Jews in a single day since the Holocaust.

15. We do so not because these acts — however sadistic and systematic — release Israel of its obligations to uphold the law as it defends its citizens and territory. That is unquestionable. We do so because it is impossible to understand the armed conflict in Gaza, without appreciating the nature of the threat that Israel is facing, and the brutality and lawlessness of the armed force confronting it.

16. In the volume of materials submitted to Members of the Court, access has been provided to a portion of the raw footage for separate screening. But I am obliged to put before the Court today some small fragment of the scenes of unfathomable cruelty that took place in hundreds of locations on that horrible day[3].

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[2] Volume, tab 8.

[3] Volume, tab 17.

17. Johnny Siman Tov, a wheat farmer, and his wife Tamar, an activist for women's rights, lived in Kibbutz Nir Oz. When the rocket fire started, they hid in the safe room with their four-year-old son, Omer, and their six-year-old twins, Arbel and Shachar. During their rampage, Hamas militants set fire to their house. Johnny texted his sister Ranae: "They're here. They're burning us. We're suffocating." The whole family was burned alive, to ashes, making DNA identification especially difficult[4].

18. A survivor of the Nova music festival massacre testified to police to witnessing a Hamas militant brutally raping a young woman, as another militant cut off her breast and toyed with it. A second militant then raped her again, shooting her in the head while still inside her[5].

19. In one video recorded by a home surveillance system, a Hamas militant throws a grenade into a safe room, where a father and his two sons have rushed to hide. The father is killed; the two sons are injured and bleeding as a militant pulls them into the living room. One child can be heard screaming to his brother: "Why am I alive? I can't see anything. They're going to kill us." The militant casually opens the fridge, takes out a bottle and drinks[6].

20. And then there is this recording from kibbutz Mefalsim[7] [Screen clip 1].

21. As stated, none of these atrocities absolve Israel of its obligations under the law. But they do enable the Court to appreciate three core aspects of the present proceedings, which the Applicant has obscured from view.

22. *First*, that if there have been acts that may be characterized as genocidal, then they have been perpetrated against Israel. If there is a concern about the obligations of States under the Genocide Convention, then it is in relation to their responsibilities to act against Hamas' proudly declared agenda of annihilation, which is not a secret and is not in doubt.

23. The annihilationist language of Hamas' charter is repeated regularly by its leaders[8], with the goal, in the words of one member of Hamas' political bureau, of the "cleansing of Palestine of

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[4] Https://www.lbc.co.uk/news/theyre-burning-us-horrific-final-texts-family-killed-kibbutz/.

[5] Https://edition.cnn.com/2023/11/17/world/israel-investigates-sexual-violence-hamas/index.html.

[6] Https://www.cbsnews.com/news/israel-video-of-hamas-terror-attacks-war-in-gaza/.

[7] Https://www.timesofisrael.com/idf-publishes-audio-of-hamas-terrorist-calling-family-to-brag-of-killing-jews/.

[8] The Covenant of the Islamic Resistance Movement (HAMAS), 18 Aug. 1988, https://avalon.law.yale.edu/20th_century/hamas.asp (volume, tab 6A).

the filth of the Jews"[9]. It is expressed no less chillingly in the words of senior Hamas member, Ghazi Hamad, to Lebanese television on 24 October 2023, who refers to the 7 October attacks, what Hamas calls the "Al Aqsa Flood", as follows [Screen clip 2]. In the continuation of this interview, Hamad is asked: "Does that mean the annihilation of Israel?" "Yes, of course", he says, "the existence of Israel is illogical"; and then he says: "Nobody should blame us for the things we do. On October 7, October 10, October 1,000,0000 — everything we do is justified."[10] Given that on 7 October, before any military response by Israel, South Africa issued an official statement blaming Israel for "the recent conflagration"[11] — essentially blaming Israel for the murder of its own citizens — one wonders whether the Applicant agrees.

24. *Second*, it is in response to the slaughter of 7 October — which Hamas openly vows to repeat — and to the ongoing attacks against it from Gaza, that Israel has the inherent right to take all legitimate measures to defend its citizens and secure the release of the hostages. This right is also not in doubt. It has been acknowledged by States across the world[12].

25. Astonishingly, the Court has been requested to indicate a provisional measure calling on Israel to suspend its military operations. But this amounts to an attempt to deny Israel its ability to meet its obligations to the defence of its citizens, to the hostages and to over 110,000 internally displaced Israelis unable to safely return to their homes.

26. The Applicant in its submissions to the Court makes almost no mention of the ongoing humanitarian suffering of Israel's citizens at the hands of Hamas[13] and treats the hostages still held in captivity as barely an afterthought. But is there a reason these people on your screen are unworthy of protection? [Screen clip 3]

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[9] Https://www.memri.org/tv/hamas-political-bureau-member-fathi-hammad-at-gaza-rallies-cleanse-palestine-of-filth-cancer-of-the-jews (volume, tab 6A).

[10] Ghazi Hamad, Hamas Political Bureau, Interview to LBC TV, 24 October 2023, https://www.memri.org/reports/hamas-official-ghazi-hamad-we-will-repeat-october-7-attack-time-and-again-until-israel (volume, tab 6A).

[11] South Africa Department of International Relations and Cooperation official website, Statement of 7 October 2023, https://www.dirco.gov.za/south-africa-calls-for-the-immediate-cessation-of-violence-restraint-and-peace-between-israel-and-palestine/ (volume, tab 11).

[12] Volume, tab 12A.

[13] Volume, tab 7, 8.

27. Hamas is not a party to these proceedings. The Applicant, by its request, seeks to thwart Israel's inherent right to defend itself — to let Hamas not just get away with its murder, literally, but render Israel defenceless as Hamas continues to commit it.

28. Yesterday, counsel for the Applicant made the astonishing claim that Israel was denied this right and, as a matter of fact, should not be able to protect itself from Hamas' attacks. But allow me to draw attention to these words written by Professor Vaughan Lowe: "The source of the attack, whether a state or non-state actor, is irrelevant to the existence of the right" to defence. "Force may be used to avert a threat because no-one, and no state, is obliged by law passively to suffer the delivery of an attack"[14]. Israel agrees with these words, as I suspect would any sovereign State.

29. If the claim of the Applicant now is that in the armed conflict between Israel and Hamas, Israel must be denied the ability to defend its citizens — then the absurd upshot of South Africa's argument is this: under the guise of the allegation against Israel of genocide, this Court is asked to call for an end to operations against the ongoing attacks of an organization that pursues an *actual* genocidal agenda. An organization that has violated every past ceasefire and used it to rearm and plan new atrocities. An organization that declares its unequivocal resolve to advance its genocidal plans. That is an unconscionable request and it is respectfully submitted that it cannot stand.

30. *Third*, the Court is informed of the events of 7 October because if there are any provisional measures that should appropriately be indicated here, they are indeed with respect to South Africa.

31. It is a matter of public record that South Africa enjoys close relations with Hamas, despite its formal recognition as a terrorist organization by numerous States across the world[15]. These relations have continued unabated even *after* the 7 October atrocities[16]. South Africa has long hosted and celebrated its ties with Hamas figures, including a senior Hamas delegation that — incredibly — visited the country for a "solidarity gathering" just weeks after the massacre[17].

32. In justifying instituting these proceedings, South Africa makes much of its obligations under the Genocide Convention. It seems fitting, then, that it be instructed to comply with those

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[14] Chatham House, *Principles of International Law on the Use of Force by States in Self-Defence*, Vaughan Lowe, p. 22 (October 2005).

[15] Volume, tabs 11 and 6B.

[16] Volume, tab 11.

[17] Palestine Conference in Johannesburg Calls For True, Meaningful Liberation, *Palestine Chronicle,* 7 Dec. 2023, https://www.palestinechronicle.com/palestine-conference-in-johannesburg-calls-for-true-meaningful-liberation/.

obligations itself; to end its own language of de-legitimization of Israel's existence; end its support for Hamas; and use its influence with this organization so that Hamas permanently ends its campaign of genocidal terror and releases the hostages.

33. Madam President, Members of the Court, the hostilities between Israel and Hamas have exacted a terrible toll on both Israelis and Palestinians. But any genuine effort to understand the cause of this toll must take account of the horrendous reality created by Hamas within the Gaza Strip.

34. When Israel withdrew all its soldiers and civilians from Gaza in 2005, it left a coastal area with the potential to become a political and economic success story. Hamas' violent take-over in 2007 changed all that. Over the past 16 years of its rule, Hamas has smuggled countless weapons into Gaza, and has diverted billions in international aid, not to build schools, hospitals or shelters to protect its population from the dangers of the attacks it launched against Israel over many years, but rather to turn massive swathes of the civilian infrastructure into perhaps the most sophisticated terrorist stronghold in the history of urban warfare[18].

35. Remarkably, counsel for the Applicant described the suffering in Gaza as "unparalleled and unprecedented", as if they are unaware of the utter devastation wrought in wars that have raged just in recent years around the world. Sadly, the civilian suffering in warfare is not unique to Gaza. What is actually "unparalleled and unprecedented" is the degree to which Hamas has entrenched itself within the civilian population, and made Palestinian civilian suffering an integral part of its strategy.

36. Hamas has systematically and unlawfully embedded its military operations, militants and assets throughout Gaza within and beneath densely populated civilian areas. It has built an extensive warren of underground tunnels for its leaders and fighters, several hundred miles in length, throughout the Strip, with thousands of access points and terrorist hubs located in homes, mosques, United Nations facilities, schools and perhaps most shockingly hospitals[19].

37. This is not an occasional tactic. It is an integrated, pre-planned, extensive and abhorrent method of warfare. Purposely and methodically murdering civilians. Firing rockets indiscriminately. Systematically using civilians, sensitive sites and civilian objects as shields. Stealing and hoarding

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[18] Volume, tab 9.

[19] *Ibid.*

humanitarian supplies — allowing those under its control to suffer, so that it can fuel its fighters and terrorist campaign.

38. The appalling suffering of civilians — both Israeli and Palestinian — is first and foremost the result of this despicable strategy; the horrible cost of Hamas not only failing to protect its civilians but actively sacrificing them for its own propaganda and military benefit. And if Hamas abandons this strategy, releases the hostages and lays down its arms, the hostilities and suffering would end.

39. Madam President, Members of the Court, there are many distortions in the Applicant's submission to the Court, but as shall be demonstrated by counsel, there is one that overshadows them all. In the Applicant's telling, it is almost as if there is no intensive armed conflict taking place between two parties at all, no grave threat to Israel and its citizens, only an Israeli assault on Gaza.

40. The Court is told of widespread damage to buildings, but it is not told, for example, how many thousands of those buildings were destroyed because they were booby-trapped by Hamas, how many became legitimate targets because of the strategy of using civilian objects and protected sites for military purposes, how many buildings were struck by over 2,000 indiscriminate terrorist rockets that misfired and landed in Gaza itself.

41. The Court is told of over 23,000 casualties, as the Applicant repeats; as many have, unverified statistics provided by Hamas itself — hardly a reliable source[20]. Every civilian casualty in this conflict is a human tragedy that demands our compassion. But the Court is not told how many thousands of casualties are in fact militants, how many were killed by Hamas fire, how many were civilians taking direct part in hostilities, and just how many are the result of legitimate and proportionate use of force against military targets[21], even if tragic.

42. And the Court is also told of the dire humanitarian situation in Gaza, but it is not told of Hamas' practice of stealing and hoarding aid[22], it is not told of the extensive Israeli efforts to mitigate civilian harm[23], of the humanitarian initiatives being undertaken to enable the flow of supplies and provide medical attention to the wounded[24].

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[20] Volume, tab 13.

[21] Volume, tab 13.

[22] Volume, tab 10.

[23] Volume, tab 4.

[24] Volume, tab 5.

43. The Applicant purports to describe the reality in Gaza. But it is as if Hamas, and its total contempt for civilian life, just do not exist as a direct cause of *that* reality. Hamas is widely estimated to have over 30,000 fighters and is known to bring minors no older than 15 or 16 into its ranks. They are coming for us. But, in South Africa's telling, they have all but disappeared. There are no explosives in mosques and schools and children's bedrooms, no ambulances used to transport fighters, no tunnels and terrorist hubs under sensitive sites, no fighters dressed as civilians, no commandeering of aid trucks, no firing from civilian homes, United Nations facilities and even safe zones. There is only Israel acting in Gaza.

44. The Applicant is essentially asking the Court to substitute the lens of armed conflict between a State and a lawless terrorist organization, with the lens of a so-called genocide of a State against a civilian population. But it is not offering the Court a lens, it is offering it a blindfold.

45. Madam President, Members of the Court, the nightmarish environment created by Hamas has been concealed by the Applicant, but it is the environment in which Israel is compelled to operate. Israel is committed, as it must be, to comply with the law, but it does so in the face of Hamas' utter contempt for the law. It is committed, as it must be, to demonstrate humanity, but it does so in the face of Hamas' utter inhumanity.

46. As will be presented by counsel, these commitments are a matter of express government policy, military directives and procedures[25]. They are also an expression of Israel's core values. And, as shall also be shown, they are matched by genuine measures on the ground to mitigate civilian harm under the unprecedented and excruciating conditions of warfare created by Hamas[26].

47. It is plainly inconceivable — under the terms set by this very Court — that a State conducting itself in this way, in these circumstances, may be said to be engaged in genocide, not even prima facie.

48. The key component of genocide — the intention to destroy a people in whole or in part — is totally lacking. What Israel seeks by operating in Gaza is not to destroy a people, but to protect a people, its people, who are under attack on multiple fronts, and to do so in accordance with the law, even as it faces a heartless enemy determined to use that very commitment against it.

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[25] Volume, tab 1.

[26] Volume, tabs 4-9.

49. As will be detailed by counsel, Israel's lawful aims in Gaza have been clearly and repeatedly articulated by its Prime Minister, its Defence Minister, and all members of the War Cabinet. As the Prime Minister reiterated yet again this week: "Israel is fighting Hamas terrorists, not the civilian population."[27]

50. Israel aims to ensure that Gaza can never again be used as a launch pad for terrorism. As the Prime Minister reaffirms, Israel seeks neither to permanently occupy Gaza or to displace its civilian population[28]. It wants to create a better future for Israelis and Palestinians alike, where both can live in peace, thrive and prosper, and where the Palestinian people have all the power to govern themselves, but not the capacity to threaten Israel.

51. If there is a threat to that vision — if there is a humanitarian threat to the Palestinian civilians of Gaza — it stems primarily from the fact that they have lived under the control of a genocidal terrorist organization that has total disregard for their life and well-being. That organization, Hamas, and its sponsors, seek to deny Israel, Palestinians and Arab States across the region, the ability to advance a common future of peace, co-existence, security, and prosperity. Israel is in a war of defence against Hamas — not against the Palestinian people — to ensure that they do not succeed.

52. In these circumstances, there can hardly be a charge more false and more malevolent than the allegation against Israel of genocide[29].

53. The Applicant has, regrettably, engaged in a transparent attempt to abuse the Convention's compulsory jurisdiction mechanism, and in particular the provisional measures phase of proceedings, to bring under the purview of the Court matters over which, in truth, it lacks jurisdiction.

54. Madam President, Members of the Court, the Genocide Convention was a solemn promise made to the Jewish people, and to all peoples, of "never again". The Applicant, in effect, invites the Court to betray that promise. If the term "genocide" can be so diminished in the way that it advocates, if provisional measures can be triggered in the way that it suggests, the Convention becomes an

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[27] Benjamin Netanyahu, Prime Minister of Israel (@IsraeliPM, on X (9:49 p.m., 10 Jan. 2024), https://twitter.com/IsraeliPM/status/1745186120109846710.

[28] *Ibid.*

[29] Volume, tab 12B.

aggressor's charter. It will reward, indeed encourage, the terrorists who hide behind civilians, at the expense of the States seeking to defend against them.

55. To maintain the integrity of the Genocide Convention, to maintain its promise, and the Court's own role as its guardian, it is respectfully submitted that the Application and Request should be dismissed for what they are — a libel, designed to deny Israel the right to defend itself according to the law from the unprecedented terrorist onslaught it continues to face, and to free the 136 hostages Hamas still holds.

56. I thank you for your kind attention. May I ask, Madam President, that you call Professor Shaw to the podium.

The PRESIDENT: I thank the Co-Agent of Israel for his statement and I now invite Professor Malcolm Shaw to take the floor. You have the floor, Professor Shaw.

Mr SHAW:

PRIMA FACIE JURISDICTION AND THE PRESERVATION OF THE RIGHTS OF THE PARTIES

1. Madam President and Members of the Court, it is a great honour to appear before you again and a privilege to appear on behalf of the State of Israel. It is my task today to address the issues falling within the general categories of prima facie jurisdiction and the preservation of alleged rights sought to be protected. However, I would like, first, to make a preliminary comment about the key question of context, which constitutes the framework for the consideration of this request for the grant of provisional measures.

I. The context

2. South Africa casts its net widely. In its Application it uses the word "context" many times[30]. In particular, it declares that: "it is important to place the acts of genocide in the broader context of Israel's conduct towards [the] Palestinians during its 75-year-long apartheid"[31]. Leaving aside the outrageous nature of that statement, why stop at 75 years? Why not refer to 1922 and the approval

[30] See e.g. Application, paras. 2, 3, 39, 43, 53 and 139.

[31] Application, para. 2.

by the Council of the League of Nations of the British Mandate? Or 1917, the proclamation of the Balfour Declaration? Maybe also include the entry into the land of Israel of the Israelite tribes some 3,500 years ago?

3. No, the immediate and proximate context for the specific allegations of genocide claimed by South Africa lies in the events of 7 October, when Hamas militants and other armed groups and individuals stormed into the internationally recognized sovereign territory of Israel and committed acts of barely credible atrocity[32]. It was these events that truly constitute the real context for South Africa's allegations. Indeed, such acts may be seen as the real genocide in this situation.

4. As the President of the European Commission put it on 19 October:

> "There was no limit to the blood Hamas terrorists wanted to spill. They went home by home. They burned people alive. They mutilated children and even babies. Why? Because they were Jews. Because they were living in the State of Israel. And Hamas' explicit goal is to eradicate Jewish life from the Holy Land. These terrorists, supported by their friends in Tehran, will never stop. And so, Israel has the right to defend itself in line with humanitarian law."[33] [Slide 1]

5. Of course, these atrocities do not justify violations of the law in reply, still less genocide. But they do justify — mandate, even — the exercise of the legitimate and inherent right of a State to defend itself, as enshrined in the United Nations Charter and under customary international law, to put an end to the continuing attacks against it and to prevent them from succeeding. A threat that has been made explicitly by Hamas, and repeated, and it is thus real and imminent[34].

6. This context is critical for it shows that the true nature of the situation as it has unfolded particularly since 7 October is that of an armed conflict. A heavily armed militia and its allies precipitated egregious hostilities and the consequences lie everywhere. The point is this. Armed conflict, even when fully justified and conducted lawfully, is brutal and costs lives, particularly when the militia in question specifically targets civilians and civilian facilities and when it is patently unconcerned about causing civilian casualties on its own side. The conflict is also regulated by law. The rules and principles of international humanitarian law under the Hague Regulations, the Geneva

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[32] Volume, tab 8A.

[33] Https://ec.europa.eu/commission/presscorner/detail/en/speech_23_5162 (volume, tab 12A).

[34] See e.g. https://twitter.com/MEMRIReports/status/1719662664090075199 (volume, tab 6A).

Conventions of 1949 and customary international law. These are well developed and applicable and are fully respected by Israel.

7. Such rules cover permitted activities under international humanitarian law, where civilian damage and loss — always to be regretted — are caused in the legitimate pursuit of military objectives through to the violations of the law, being grave breaches of the Geneva Conventions and up to war crimes and crimes against humanity. However, the only category before this Court is genocide. Not every conflict is genocidal. The crime of genocide in international law, and under the Genocide Convention and international law, is a uniquely malicious manifestation. It stands alone amongst the violations of international law as the epitome and zenith of evil. It has been described correctly as the "crime of crimes"[35], the ultimate in wickedness.

8. Indeed, the Court itself emphasized in its Order of 2 June 1999 that the threat or use of force cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention, and particularly instanced bombings as lacking the element of intent in the circumstances[36].

9. To put it another way, if claims of genocide were to become the common currency of armed conflict, whenever and wherever that occurred, the essence of this crime would be diluted and lost.

10.I turn now to the question of the prima facie jurisdiction of the Court in the matter before us.

II. Prima facie jurisdiction

(i) The existence of a dispute under the Convention

11. Article IX of the Genocide Convention, to which both States are parties without reservation, makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention and the relevant date for determining the existence of such a dispute is the date on which the application is submitted to the Court[37].

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[35] W. Schabas, *Genocide: The Crime of Crimes*, 2nd ed., 2009, Cambridge University Press (CUP).

[36] *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 138, para. 40.

[37] *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. 10, para. 20. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 39.

12. Whether or not a dispute in these terms exists at the time of the filing of the Application is a matter for objective determination by the Court, "it is a matter of substance, and not a question of form or procedure". The Court will "take into account in particular any statements or documents exchanged between the Parties as well as any exchanges made in multilateral settings"[38], the Court has said. The key point here is the use of the term "exchange" between the parties. Unilateral assertion does not suffice. There needs to be some element of engagement between the parties. The element of interchange and bilateral interaction is required. A dispute is a reciprocal phenomenon. This point has been consistently noted by the Court.

13. For example, the Court reaffirmed in the *Myanmar* case[39], the view that it had expressed earlier that in order for a dispute in the sense of Article IX of the Convention to exist, "[i]t must be shown that the claim of one party is *positively opposed* by the other"[40].

14. The Court further referred in the *Marshall Islands* cases to the need that the Respondent should not "be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct"[41]. Where a State makes an assertion concerning the conduct of another State, it must thus give the latter a reasonable opportunity to respond before resorting to litigation. Particularly in a matter of such severity as an accusation of genocide and particularly before a court of this standing. And it behooves that State to provide supporting evidence of some credibility.

15. Here, South Africa cites only a couple of general public statements by Israel referencing merely a press report by Reuters and a publicity release from the Israeli Ministry of Foreign Affairs[42]. These responses were not addressed directly or even indirectly to South Africa. There is no evidence of "positive opposition" as required by the Court.

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[38] *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. 12, para. 26 and *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 (II),* p. 220, para. 35.

[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 502, para. 63.

[40] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328 (emphasis added). See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 85, para. 31.

[41] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 851, para. 43.

[42] Application, para. 14.

16. Further, South Africa cites no relevant exchange between the Parties, which would be the normal fashion for the expression and determination of a dispute between States. This actually typifies how South Africa has approached this matter. It seems to believe that it does not take two to tango. It is sufficient if one State determines there is a dispute, leaving the other party flummoxed.

17. Professor Dugard explains that South Africa had voiced its concerns in the Security Council and in public statements, and had further referred the matter to the International Criminal Court[43]. At that point, he says, it became clear there was a serious dispute between the two States[44]. The Court has emphasized that in the case of statements made by one State in a multilateral forum, the Court must give particular attention, *inter alia*, to the content of a party's statement and to the identity of the intended addressees, in order to determine whether that statement, together with any reaction thereto, shows that the parties before it held "clearly opposite views"[45]. South Africa's actions were insufficient.

18. Indeed, in the *Marshall Islands* cases, the Court referring specifically to a statement made at a conference noted that it did not call for a specific reaction by the United Kingdom and thus "no opposition of views can be inferred from the absence of any such reaction"[46]. *Specific* reaction.

19. It is thus disingenuous for Professor Dugard to conclude that "Israel must have been aware from South Africa's public statements, démarche and referral to the International Criminal Court of Israel's genocidal acts that a dispute existed between the two States"[47]. This is not a dispute, it is a "unispute" — a one-sided clapping of hands. Professor Dugard perhaps tries to retrieve the situation by declaring that "special considerations" apply to the existence of disputes concerning Article IX of the Genocide Convention, without telling us what those conditions could possibly be[48].

20. We come now to the rather bizarre story of the exchange of Notes Verbales. Professor Dugard would have us believe that such exchanges are merely a matter of courtesy of little

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[43] CR 2024/1, paras. 7-8 (Dugard).

[44] CR 2024/1, para. 8 (Dugard).

[45] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 853, para. 48.

[46] *Ibid.*, p. 854, para. 50.

[47] CR 2024/01, p. 47, para. 16 (Dugard).

[48] CR 2024/01, p. 47, para. 18 (Dugard).

real consequence[49]. This is not the normal understanding of such Notes and their importance in international relations. But he says this for a reason as we shall see.

21. South Africa instituted proceedings against Israel on 29 December 2023. In its long recital, the Application notes that on 21 December, South Africa sent a Note Verbale to Israel raising its concerns about genocide in Gaza[50]. The Application further states that "Israel has not responded directly to South Africa's Note Verbale"[51]. This is incorrect. Israel did indeed respond that very day, informing South Africa that the Note Verbale "has been forwarded to capital" and that a response was expected shortly[52]. South Africa confirmed the next day that it had received the message. On 26 December, the Director General of Israel's Ministry of Foreign Affairs proposed to his counterpart in the Department of International Relations and Cooperation of South Africa — by text — to schedule a meeting "at his earliest convenience in order to discuss the issues raised".

22. On 27 December, the Embassy sent to South Africa by email a Note Verbale suggesting a meeting of respective Directors General at the earliest convenience in order to discuss the issues raised[53]. An attempt by the Embassy to hand deliver the Note was refused due to a national holiday and the South African Department of International Relations specifically advised the Embassy on 28 December to hand deliver the Note on 2 January. The Application was instituted on 29 December.

23. This was an attempt by the State of Israel in good faith to open a dialogue and discuss South Africa's concerns. However, not only was this ignored at the relevant time, but South Africa proceeded to institute proceedings the following day and declared in its Application that no reply had been received to its Note Verbale, which was patently not the case.

24. Perhaps realizing the effect of this, South Africa with some haste sent a Note Verbale on 4 January 2024 which essentially just repeated the contents of the Note of 21 December, but it explained the following day in a letter to the Registrar that the Israeli Note had not been received by the appropriate team. Israel has proof of receipt. It also stated that "the dispute is plainly not capable of resolution by way of a bilateral meeting". Nevertheless, it suggested to hold a meeting the next

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[49] CR 2024/1, p. 47, para. 10 (Dugard).

[50] Application, para. 13.

[51] Application, para. 14.

[52] Volume, tab 14.

[53] Volume, tab 14.

morning[54]. Israel replied the next morning, expressing surprise that South Africa had instituted proceedings without taking up the sincerely made offer to hold consultations and conveying its wish for discussions to be held following the close of these oral hearings. South Africa in a Note dated 10 January — summarily and surprisingly in the circumstances — said there was no point in such a meeting[55]. Curious indeed.

25. South Africa decided unilaterally that a dispute existed, irrespective of Israel's conciliatory and friendly response, since repeated. Perhaps had South Africa taken up this offer at the time proffered as a result of its own Note, the Parties may have decided there was no dispute as such to place before the Court under the Genocide Convention and that South Africa's expressed concerns over the genocide allegation would have been assuaged. We may never know. South Africa's precipitate institution of proceeding foreclosed that option.

26. It is a point worth underlining. South Africa did not give Israel a reasonable opportunity to engage with it on the matters under consideration before filing its no doubt long-prepared Application. One wonders whether South Africa at the very last moment suddenly realized that it needed to show the existence of a dispute under the terms of the Genocide Convention and proceeded to hastily formulate and dispatch a flurry of Notes.

27. The Court can grant orders for provisional measures only where the provisions relied upon by the Applicant "appear, prima facie, to afford a basis on which its jurisdiction could be founded", although it need not satisfy in itself, in a definitive manner, that it has jurisdiction as regards the merits of the case[56].

(ii) A prima facie case

28. It is not an easy matter to determine whether a prima facie case exists. It rests between full proof and complete absence of proof and is intended to ensure that the Court functions effectively

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[54] Volume, tab 14.

[55] Volume, tab 14.

[56] *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; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 217, para. 24; and *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. 630, para. 24.

and efficiently. But there has to be something tangible in terms of the provisions in question. The provisional measures procedure is a complex instrument in that the Court has to decide upon the basis of certain assumptions which may or may not be disproved at a later stage of the proceedings. This is particularly difficult in such an egregious matter as an allegation of genocide, where the standard of proof at the merits stage is high, the Court having made it clear that, "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive"[57]. That is not the case, of course, at the provisional measures stage but it is also not negligible.

29. The Court is asked to grant in this case a number of measures that, in effect, assume that the Party in question is committing genocide, as Mr Staker will show later this morning. Mud is thrown at a stage before conclusive proof and it may stick even if the accusation is comprehensively disproved at the merits phase as we expect. A serious political and security price may be paid by the grantee of such measures, even though it may later be shown to be completely unwarranted. This must surely require that the Court acts with caution and understanding, particularly in evaluating the components of the allegation in law. Provisional measures are intended to constitute a shield and not a sword. To preserve not undermine rights.

(iii) Intent

30. We have shown that one element of Article IX, that of the need to demonstrate the existence of a dispute as understood by the Court in the light of its case law, is lacking. The second element concerns the question as to whether the acts complained of by the applicant can be seen as falling within the provisions of the Convention. The Court has noted that only at the merits stage can it be determined whether the provisions in question of the Convention have been violated. To accomplish this, the necessary specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" has to be proved. However, this cannot be read as a complete rejection of consideration of the intent criterion for current purposes. The Court in the *Myanmar* case

[57] *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I),* p. 129, para. 209.

noted that a finding of violations at the merits stage "notably depends" on the existence of intent[58]. "Notably", not exclusively.

31. *Myanmar* is not a ruling that intent is irrelevant in a consideration of prima facie jurisdiction. It is a ruling that a conclusion as to whether or not violations have actually occurred is a matter for the merits which "notably depends" on an assessment of intent. This clearly leaves open the possibility that intent is indeed a factor in determining prima facie jurisdiction in provisional measures proceedings. This also comports with the logic of the situation.

32. The "acts" element of the definition of genocide are listed in Article II and for present purposes there is no need to go through them. The issue is this. What determines the existence of the crime of genocide is the intention to destroy, in whole or in part, a particular group, as such. That is what distinguishes genocide from other international law crimes, such as war crimes or crimes against humanity. To consider the acts alone as listed in Article II, with no reference at all to the intent criterion, is thus to denude the crime of its very essence: Hamlet without the Prince; a car without an engine.

33. We are at the provisional measures phase of this case. South Africa does not have to prove that genocidal acts have been or are being committed, but it does have to show that the Genocide Convention is in play. After all, this Court has no jurisdiction to consider any other alleged crimes, however serious. We are only concerned with genocide. It is indeed a difficult balance for the Court.

34. The Court has stated that what is required at this stage is to "to establish whether the acts complained of . . .are capable of falling within the provisions of the Genocide Convention"[59]. But "the acts complained of" may only be capable of falling within the provisions of the Genocide Convention if the intent is present, otherwise such acts cannot constitute genocide. The factor of intent colours the whole question of Article II acts. In other words, that there is prima facie evidence that the acts that may fall within the Convention, necessarily importing the intent element, have been established as such.

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[58] *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.

[59] *Ibid.*

35. South Africa accepts the need to demonstrate intent. It referred to the concept of specific intent in its Application both generally[60] and in the specific context of its discussion of the Court's prima facie jurisdiction in provisional measures proceedings[61]. Indeed, South Africa placed a considerable emphasis upon intent in its pleadings yesterday by Ms Hassim[62]. Mr Ngcukaitobi devoted his whole pleading to this requirement.

36. As far as the acts are concerned in this case, there is little beyond random assertions to demonstrate that Israel has or has had the specific intent to destroy, in whole or in part, the Palestinian people, as such. The intention, faced with the 7 October atrocities and the continuing rocket fire and incarceration of the hostages, on the part of Israel to act in order to defend itself so as to terminate the threats against it and to rescue the hostages, certainly exists. The intent to deal with the armed militants of Hamas and the other such groups is undeniable. Were it the case — which we deny — that Israeli forces have transgressed some of the rules of conflict, then the matter would be tackled at the appropriate time by Israel's robust and independent legal system.

37. But that is not the intent to destroy all or part of a people as such. Israel's actions in restricting its targeting practices to attack military personnel or objectives in accordance with international humanitarian law in a proportionate manner in each case, as well as its practice of mitigating civilian harm — such as by forewarning civilians of impending action by the unprecedented and extensive use of telephone calls, leafletting and so forth — coupled with the facilitation of humanitarian assistance, all demonstrate the precise opposite of any possible genocidal intent[63].

38. South Africa, in seeking to discover the necessary intent, presents a distorted picture. It misunderstands the nature and provenance of certain comments made by some Israeli politicians[64]. Let me try and explain the big picture.

39. Israel possesses a clear and effective structure of authority with regard to governmental decision. The war against Hamas is managed on behalf of the Government by two central organs:

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[60] Application, para. 2. See also para. 101.

[61] Application, para. 127.

[62] e.g. CR 2024/1, p. 30, para. 36 (Hassim).

[63] Volume, tabs 4 and 5.

[64] Application, paras. 101 and following.

the Ministerial Committee on National Security Affairs and the "War Cabinet", the latter established for the purpose of managing the war by the former. These bodies make the relevant decisions regarding the war's conduct and according to Israeli law, the decisions of the Government and its committees obligate the ministers of the Government in accordance with the principle of collective responsibility. It is the collective decisions of these bodies which are the binding provisions in question. The Prime Minister stands at the head of these organs, decides on the agenda of their meetings, steers their activity and summarizes the meetings and the instructions issued therein.

40. To make it clear, in order to determine the policy and intentions of the Government of Israel, it is necessary to examine the decisions of the Ministerial Committee on National Security Affairs and the War Cabinet, and to examine whether the particular comments expressed conform, or not, with the policies and decisions made. Thus, to produce random quotes that are not in conformity with government policy is described as misleading at best. Such as the statement by the Minister of Heritage[65], for example, who is completely outside the policy- and decision-making processes in the war. In any event, his statement was immediately repudiated by members of the War Cabinet and other ministers, including the Prime Minister[66].

41. In tab 1A of the volume which Israel has submitted to the Court, one may find numerous excerpts from internal cabinet decisions that attest to Israel's true intent throughout this war. For example, one finds the instructions from the Prime Minister in a meeting of the Ministerial Committee on National Security Affairs, from 29 October, stating the following:

(i) "The Prime Minister stated time and again . . . we must prevent a humanitarian disaster".

(ii) "The Prime Minister indicated the possible sorts of solutions that will ensure required supply of water, food and medicine: increasing the amount of trucks entering, [with] the necessary inspections".

(iii) "[P]romoting the construction of field hospitals in the south of the Gaza Strip".

42. To re-emphasize, this is a directive to authorities. Nothing less. Tab 1A contains a considerable number of similar directives, emphasizing the need to avoid harm to civilians and to facilitate humanitarian aid. Genocidal intent?

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[65] Application, para. 101, fns. 460-462.

[66] See volume, tab 2.

43. Let me turn to the Israel Defense Forces (IDF). This, like every army, is a hierarchical body that operates by way of orders from superiors and is headed by the Chief of the General Staff. Remarks or actions of a soldier do not and cannot reflect policy. In tab 1B, one may find a daily operational directive — which I understand is repeated day by day — issued by the Operations Directorate of the IDF, stating that "[a]ttacks will be solely directed towards military targets, while adhering to the principles of distinction, proportionality and the obligation taking precautions in attacks in order to reduce collateral damage".

44. This is a directive that binds all IDF forces. It continues by stating that "the laws of armed conflict allow destruction to civilian property only when there is a military necessity to do so, and prohibit harm to property for deterrence purposes only or for the purpose of punishment (individual or collective)". It emphasizes that it "is necessary to treat enemy civilians with respect, they should not be treated in a humiliating manner and civilians should not be used for the purpose of performing activities that might put them under risk to their life or their body". This is a mandatory instruction effective since the start of the war. Tab 1B contains many similar provisions, which are themselves only an illustration of many other such directives, orders and procedures.

45. Further on 28 October, the Prime Minister publicly declared that "the IDF is doing everything possible to avoid harming those not involved", while on 18 November, he declared that "first of all, and above all else, Israel acts according to the laws of war. This is how our army works."[67]

46. The Minister of Defence publicly stated on 29 October that "we are not fighting the Palestinian multitude and the Palestinian people in Gaza" and declared on 13 November that "[o]ur war is against the Hamas terrorist organization, not the people of Gaza". Again, the President of Israel declared on 12 October that "we are working, operating militarily according to rules of international law. Period. Unequivocally." We have collated numerous such statements by the President, by the Prime Minister, by the Minister of Defence, by the IDF spokesperson and others in tab 2 of our volume.

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[67] Volume, tab 1A.

47. Since this is such a critical part of South Africa's thesis, permit me to refer to two further statements by the Prime Minister. I start with the most recent:

(i) 10 January:

> "Israel has no intention of permanently occupying Gaza or displacing its civilian population.
>
> Israel is fighting Hamas terrorists, not the Palestinian population, and we are doing so in full compliance with international law.
>
> The IDF is doing its utmost to minimize civilian casualties, while Hamas is doing its utmost to maximize them by using Palestinian civilians as human shields.
>
> The IDF urges Palestinian civilians to leave war zones by disseminating leaflets, making phone calls, providing safe passage corridors, while Hamas prevents Palestinians from leaving at gunpoint and often, with gunfire.
>
> Our goal is to rid Gaza of Hamas terrorists and free our hostages. Once this is achieved Gaza can be demilitarized and deradicalized, thereby creating a possibility for a better future for Israel and Palestinians alike."

(ii) On 23 November, Prime Minister Netanyahu declared that:

> "Any civilian death is a tragedy. Any one. And to avoid them, what you do is first, you try to get the civilians out of harm's way. And that's exactly what we did."[68]. [Slide 2]

48. There are many more of the same. Any careful review of the official and binding policy decisions made by the relevant authorities in Israel since the outbreak of the war clearly evidence that such decisions lack any genocidal intent. The contrary is true: they are indicative of the consistent and relentless commitment of Israeli relevant authorities to mitigate civilian harm and alleviate civilian suffering in Gaza.

49. Some of the comments to which South Africa refers are clearly rhetorical, made in the immediate aftermath of an event which severely traumatized Israel, but which cannot be seen as demanding genocide[69]. They express anguish and the necessity to restore control over Israel's own territory under severe threat and safety to its citizens. As Judge Tomka has noted, sometimes statements are made which are "nothing more than a part of the recent war-time rhetoric intending

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[68] Judges' folder, tab 2B; volume, tab 2.

[69] Volume, tab 2.

to put the blame and shame on the other side"[70]. Not to be totally ignored, but not to be ascribed an importance which belies how and when they were made, nor of legal significance.

50. Let me refer to one further matter of some biblical moment. Yesterday, the Applicant referred time and again to two Statements by the Israeli Prime Minister where he said: "Remember what Amalek did to you", and attached great importance to it as part of the argument that Israel has demonstrated a genocidal intent. There is no need here for a theological discussion on the meaning of Amalek in Judaism, which was indeed not understood by the Applicant. Let me just turn to the Prime Minister's statement of 28 October, which was partially and misleadingly quoted yesterday. He said:

> "We are now entering the second phase of the war, which its objectives are clear: *destruction of the military and governmental capabilities of Hamas* and the return of the hostages back home . . . In the last couple of days, I have met with our soldiers in the bases, in the field, in the north and in the south. *Remember what Amalek has done to you*. We remember, and we are fighting. In front of our brave and hero soldiers there is one prior mission: *to defeat the murderous enemy* and secure our existence in our land . . . The IDF is the most moral army in the world, *the IDF does everything to avoid harming the uninvolved* . . ."[71]. [Slide 3]

51. Tab 3 lists and addresses additional examples of misleading quotes by the Applicant regarding Israel's policy.

52. It is thus our conclusion that South Africa has failed to demonstrate the prima facie jurisdiction of the Court. I turn to the next issue.

III. The rights whose protection is sought

53. As the Court has noted, its power to grant provisional measures "has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits". At the provisional measures stage, the Court does not need to determine that such rights do actually exist in a definitive manner, but it must establish that such rights are plausible[72]. South Africa yesterday dealt with this rather lightly.

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[70] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, declaration of Vice-President Tomka, p. 182.

[71] Volume, tab 3 (emphasis added).

[72] *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; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 223, para. 50; *Application of the International*

54. We can safely say that plausibility is an elusive concept. Simply declaring that claimed rights are plausible is insufficient. The issue was addressed by Judge Greenwood in the *Border Area* case[73], when he emphasized that "[w]hat is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right it claims exists as a matter of law and will be adjudged to apply to that party's case". He later discussed this in terms of a reasonable prospect of success[74].

55. What is clear is that the Court has sought to tie plausibility to particular treaty provisions[75] or to general rules of international law. The Court has also considered claims of fact in this context as well as law, such as the finding as to whether Equatorial Guinea plausibly used the building at 42 avenue Foch for diplomatic purposes[76]. In this case, the Court did not limit itself to considering whether the Applicant plausibly held the rights in question under international law but extended the field of enquiry to include consideration as to whether it was plausible that the Respondent had breached the rights in question.

56. This approach appears also in *Ukraine* v. *Russia* [77] where the Court concluded that "on the basis of the evidence presented . . . by the Parties, it appears that some of the acts complained of by Ukraine fulfil this condition of plausibility"[78]. In other words, the Court was prepared to consider not only the question of the plausibility of rights but also the question of the possible breach of such rights.

Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. *Azerbaijan), Provisional Measures, Order of 22 February 2023,* paras. 31-32, and *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023*, paras. 52-53.

[73] *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)*, declaration of Judge Greenwood, p. 47, para. 4.

[74] *Ibid.,* pp. 47-48. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 138, para. 4, and p. 140-141, para. 10.

[75] *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.

[76] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1167, para. 79.

[77] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 130-132, paras. 73-75.

[78] *Ibid.*, p. 135, para. 83.

57. Indeed, in the *Jadhav* case, the Court was prepared to examine evidence as to the existence of asserted rights and whether as a matter of fact the violations had plausibly happened.[79]

58. The final point to be made in this section of my pleading is simply to underline the obvious point that the Court needs to consider the relevant respective rights of both Parties, Respondent as well as the Applicant. Article 41 of the Statute provides that the purpose of the provisional measures is "to preserve the rights of either party".

59. I would note the Court's Order of 16 March 2022 in *Ukraine* v. *Russia*, stating that

> "[t]he power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party."[80]

And further quote the comment in the *Myanmar* case that "the function of provisional measures . . . is to protect the respective rights of either party pending its final decision".[81]

60. This mutual protection or balancing criterion in the light of the rights of both parties is intended to prevent either party being placed in a situation of disadvantage and to ensure that irreparable prejudice will not be caused to either party.

61. I will look briefly at the relevant rights of both parties here.

(a) The Applicant

62. As regards the Applicant, I make three simple and brief points. First, South Africa has presented a confusing and a partial recital of the facts. This will be discussed later this morning by Ms Raguan. Secondly, that the appropriate legal framework for this tragic situation is that of international humanitarian law. Thirdly, that Israel's efforts both to mitigate harm when conducting operations as well as its efforts to alleviate suffering through humanitarian activities have gone relatively unnoticed and dispel or at the very least mitigate against any allegation of genocidal intent.

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[79] *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, pp. 242-243, paras. 44-45.

[80] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 223, para. 50.

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

63. As from Israel's withdrawal of its civilian and military presence from Gaza in 2005, which brought an end to its belligerent occupation, and the violent coming to power of Hamas in 2007, a situation of conflict has existed with Hamas firing rockets at Israeli towns and villages unceasingly.

64. However, the attack on Israel on 7 October was qualitatively different from all that went before. The truth is that if there has been any genocidal activity in this situation, it was the events of 7 October. Acts and intent can and have been adequately demonstrated[82]. But, Hamas, recognized as a terrorist group by at least 41 States, including the United States, the United Kingdom, all members of the European Union, Canada, Australia, Saudi Arabia, Japan and Colombia[83], is not before the Court. Only South Africa, a third party, that is not involved in the armed conflict appears. Nevertheless, as South Africa has pointed out, complicity in genocide is in play[84]. States that supported, condoned, praised or glorified the events of 7 October — both at the time and later — stand guilty of a violation of Article III *(e)* of the Convention as being complicit in genocide and indeed of the duty to prevent genocide under Article 1. And as the Agent has pointed out, South Africa has given succour and support to Hamas[85]. At the least.

65. Clearly of relevance to a discussion of the situation is the facilitation of humanitarian assistance, something that hardly sits well with accusations of genocidal intent. As my colleagues will demonstrate, Israel's activities in this area need to be addressed and not swept aside as South Africa seeks to do.

***(b)* The Respondent**

66. Prime amongst the rights of the Respondent that are critical to any legal evaluation of the situation is the inherent right of any State to defend itself. Embedded in customary international law and enshrined in the United Nations Charter, this right afforded to States reaffirms and underlines the responsibility of all States towards their citizens and marks the acceptance by the international community of the political reality and legal confirmation that States, when attacked, may legitimately respond in a forceful and proportionate manner.

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[82] Volume, tabs 8A and 6A.

[83] Volume, tab 6B.

[84] Application, paras. 110 and 133.

[85] Volume, tab 11.

67. Professor Lowe yesterday sought to maintain that Israel has no right to self-defence in this situation. How could anyone possibly argue that Israel could not defend itself, faced with the 7 October atrocities and the incessant attacks against its civilians since? Indeed, a very wide range of States has acknowledged the right of self-defence here, ranging from the United Kingdom to the United States, France, Germany, Italy, Canada, Japan, Ghana and Guatemala and others[86].

68. Israel bears the responsibility to exercise its protection over its citizens, not only those constantly subjected to bombardment from Gaza but also, and critically, with regard to those captured and held hostage as a result of the 7 October outrage[87].

69. These rights exist and cannot be disregarded. Of course, Israel does not have any right to violate the law, still less to commit genocide — and indeed it does not — but it does have every right to act to defend itself in accordance with the rules and principles of international law. And so it has done.

70. A link has to be established between the rights asserted and the provisional measures requested[88]. This issue will be addressed by Mr Staker. He will show that the measures proposed go far beyond the protection of the rights asserted.

IV. Conclusion

71. Madam President, Members of the Court, this is an important case. Allegations have been made which verge on the outrageous. The attack by Hamas on 7 October, with its deliberate commission of atrocities, clearly falls within the statutory definition of genocide. Israel's response was and remains legitimate and necessary. It acted and continues to act in a manner consistent with international law. It does so not in an unrestrained manner, but in investing unprecedented efforts in mitigating civilian harm, at cost to its operations, as well as alleviating hardship and suffering, with investment of resources and effort. There is no genocidal intent here. This is no genocide.

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[86] Volume, tab 12A.

[87] Volume, tab 8B.

[88] *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)*, pp. 421-422, para. 43; *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; *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. 224, para. 51.

72. South Africa tells us only half the story. Israel is guilty of genocide, we cannot deal with Hamas. Only Israel must be stopped from protecting its citizenry and eliminating the egregious threat that is Hamas. We cannot deal with Hamas. Meanwhile, we must bind the arms of the State of Israel. Hamas is for some other body.

73. I conclude. First, the core of genocide is intent. Without intent, there can be no genocide in law. That is true for the merits, it is equally true for provisional measures. Any prima facie consideration of intent even at this preliminary stage will only demonstrate its absence from Israel's activities. Second, there is here no dispute under the Genocide Convention as at the time of submission of the Application as alleged by South Africa and as required for prima facie jurisdiction. Indeed, South Africa's own precipitate activities with Notes over recent weeks demonstrates the lack of its confidence in this respect. And that is telling. Thirdly, the rights to be protected in the provisional measures procedure cover not just the Applicant but also the Respondent, and chief amongst these rights is that of the right and obligation to act to defend itself and its citizens. This must be considered and weighed by the Court as against the false accusations levelled at Israel.

74. Madam President, Members of the Court, thank you for your kind attention. I would ask you to call Ms Raguan at your convenience.

The PRESIDENT: Thank you, Professor Shaw. 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 11.30 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. The sitting is resumed and I now give the floor to Ms Galit Raguan. You have the floor, Madam.

Ms RAGUAN:

FACTS ON THE GROUND

1. Madam President, Members of the Court, it is an honour to appear before you on behalf of the State of Israel. As Professor Shaw noted, at this stage, South Africa does not need to prove that

genocidal acts have been or are being committed. But it does have to show that the Genocide Convention is actually relevant.

2. It has to show *some* level of acts and *some* level of intent. Professor Shaw has spoken to the issue of express intent. It is my task to speak to the circumstances of Israel's actions.

3. Israel cannot possibly comprehensively address today all of the allegations made in South Africa's Application in this regard. The Applicant paints a dire picture. But it is a partial and deeply flawed picture.

4. The Application is so distorted in its descriptions that it prevents the Court from properly assessing the plausibility of the rights asserted by South Africa. Plausibility cannot be determined based on the unsubstantiated allegations of one party to the proceedings alone, if Article 41 of the Court's Statute is to have any meaning.

5. In the time available, I will address three aspects of reality on the ground that the Applicant has either ignored or misrepresented. First, Hamas' military tactics and strategy. Second, Israel's efforts to mitigate civilian harm during operational activity. And third, Israel's efforts to address humanitarian hardship in Gaza, despite Hamas' attempts at obstruction.

6. With respect to Hamas' military tactics and strategy, it is astounding that in yesterday's hearing, Hamas was mentioned only in passing, and only in reference to the 7 October massacre in Israel. Listening to the presentation by the Applicant, it was as if Israel is operating in Gaza against no armed adversary. But the same Hamas that carried out the 7 October attacks in Israel is the governing authority in Gaza. And the same Hamas has built a military strategy founded on embedding its assets and operatives in and amongst the civilian population.

7. Urban warfare will always result in tragic deaths, harm and damage. But in Gaza, these undesired outcomes are exacerbated because they are the desired outcomes of Hamas.

8. In urban warfare, civilian casualties may be the unintended, but lawful, result of attacks on lawful military objectives. International humanitarian law recognizes this reality and provides a framework for balancing military necessity with humanitarian considerations. These do not constitute genocidal acts.

9. In the current conflict, many civilian deaths are directly caused by Hamas. Booby-trapped homes detonate and kill indiscriminately. Mines in alleyways collapse structures around them. And over 2,000 rockets misfired by Hamas have landed inside Gaza, causing untold levels of harm.

10. One telling example is a blast at the Al Ahli Hospital on 17 October. Hamas claimed that the IDF attacked the hospital; headlines around the world rushed to repeat this claim. The IDF later proved, and United States intelligence and other national security intelligence agencies independently confirmed, that the blast was the result of a failed rocket launch from within Gaza. It was not, as Hamas claimed, the fault of the IDF[89].

11. Damage to civilian structures is another fact claimed by South Africa as evidence of genocide. But South Africa does not consider the sheer extent to which Hamas uses ostensibly civilian structures for military purposes. Houses, schools, mosques, United Nations facilities and shelters are all abused for military purposes by Hamas, including as rocket launching sites. Hundreds of kilometres of tunnels dug by Hamas under populated areas in Gaza often cause structures above to collapse.

12. In the slides before you, you can see a militant priming projectiles for launch on IDF forces in Gaza. You can see the holes in the residential house to hide and launch them.

13. Here you can see projectiles discovered underneath a bed in a child's bedroom.

14. Here, a rocket being fired from a school. The launch site is circled in red.

15. Here you can see militants firing from a United Nations school. You can see letters "UN" on the roof and the fire is circled in red.

16. Here, long-range rocket launchers hidden inside a Scouts club building.

17. Finally you can see part of a tunnel that runs for four kilometres, including nearby the Erez Crossing, which is adjacent to Israel.

18. Gaza's infrastructure has certainly been harmed during the conflict. However, South Africa would have the Court believe that Israel is deliberately and unlawfully destroying homes without cause. But harm caused to lawful military objectives, and harm caused as a result of Hamas' actions, is not evidence of genocide.

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[89] See volume, tab 13, p. 36.

19. South Africa also alleges that Israel has waged an assault on Gaza's health system. What South Africa has neglected to bring before the Court, however, is the *overwhelming evidence* of Hamas' military use of such hospitals.

20. Hamas militants retreated to Rantissi Hospital in Gaza on 7 October with hostages from Israel, whom they then held in the basement.

21. In the slide before you, you will see a militant going into Quds Hospital with an RPG. Hamas fired at IDF forces from near, and from within, Quds Hospital. At Shifa Hospital, Gaza's largest, Hamas managed operations from a closed-off area.

22. Here you can see an opening to the tunnel that ran for hundreds of metres directly under the hospital.

23. Here, you can see the weapons found in different wings of the hospital.

24. Here, CCTV footage showing armed militants bringing hostages into the hospital's lobby.

25. More than 80 militants hiding inside another hospital, the Adwan Hospital, surrendered themselves to the IDF.

26. Here you can see a weapon that IDF forces discovered hidden *inside* incubators at the hospital.

27. The director of the hospital has admitted that numerous members of hospital staff belong to Hamas' military wing.

28. In the Indonesian hospital in the neighbourhood of Jabalya, Hamas forces managed their operations from that hospital until the IDF reached it. IDF forces recovered the bodies of five murdered hostages from a tunnel dug underneath the hospital.

29. The list goes on. In every single hospital that the IDF has searched in Gaza, it has found evidence of Hamas military use.

30. Israel is acutely aware that because of Hamas' use of hospitals as shields for its military operations, in grave violations of international humanitarian law, patients and staff are at risk. This is why the IDF has reached out to *every* hospital and offered assistance in relocating patients and staff to safer areas.

31. Hospitals have not been bombed; rather, the IDF sends soldiers to search and dismantle military infrastructure, reducing damage and disruption. Indeed, the tunnel that sat directly under the

main building in Shifa Hospital was exploded without damaging the building above. The IDF then withdrew from the hospital.

32. Yes — damage and harm have occurred, as a result of hostilities in hospitals' vicinity; sometimes by IDF fire, sometimes by Hamas. But always as a direct result of Hamas' abhorrent method of warfare.

33. Israel has published plenty of evidence of the extensive misuse by Hamas of medical facilities in direct violations of international humanitarian law. It has brought journalists to see first-hand. It has recorded calls with hospital staff to co-ordinate assistance[90]. None of that is mentioned in the Application. In fact, the Applicant describes the result and asks the Court to attribute malicious intent to Israel. But that is only a possible conclusion if one obscures, as the Applicant has, Hamas' strategy of turning hospitals into terrorist compounds.

34. The Applicant also made much of the fact that force has been even used in humanitarian zones. What the Applicant neglected to inform the Court, however, was that Hamas has — in its contempt for Palestinian civil life — regularly and deliberately fired from such zones, turning areas of relief into zones of conflict.

35. Here, before you, you can see one example of a launch site adjacent to the humanitarian zone, both amplified in larger pictures.

36. And in the next slide you can see evidence of a rocket launched from next to Gaza's water desalination facility.

37. I now would like to address briefly the second issue: Israel's efforts at mitigation of civilian harm. Here, too, the Applicant tells not just a partial story, but a false one. For example, the Application presents Israel's call to civilians to evacuate areas of intensive hostilities "as an act calculated to bring about its physical destruction". This is a particularly egregious allegation that is completely disconnected from the governing legal framework of international humanitarian law.

38. Evacuation of civilians is recognized under international humanitarian law as one of the measures that may be implemented to protect civilians from the effects of ongoing hostilities. Indeed, such evacuation may even amount to a *duty* that the party to the conflict has toward civilians.

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[90] See volume, tab 5.

39. While temporary evacuation undoubtedly involves hardship and suffering, it is preferable to remaining in areas of intensive hostilities, all the more so when one party makes a concerted effort to use those civilians as shields.

40. The IDF maintains a Civilian Harm Mitigation Unit to undertake this task. It works full-time to provide advance notice of areas in which the IDF intends to intensify its activities, co-ordinate travel routes for civilians and secure these routes.

41. This unit has developed a detailed map so that specific areas can be temporarily evacuated, instead of evacuating entire areas.

42. On the slide before you, you can see that map, divided into areas, as well as a screenshot of a video explaining the system in Arabic so civilians may understand it.

43. The IDF also enacts localized pauses in its operations to allow civilians to move. It does this even though Hamas does not agree to do the same and has even attacked IDF forces securing humanitarian corridors.

The PRESIDENT: Excuse me. I have a request from the interpreters that you slow down the pace of your speaking. Could you please do that? Thank you.

Ms RAGUAN: Of course.

44. Yesterday, South Africa stated that the IDF gave 24 hours' notice to civilians in northern Gaza to evacuate. In fact, the IDF urged civilians to evacuate to southern Gaza *for over three weeks* before it started its ground operation. Three weeks that provided Hamas with advance knowledge of where and when the IDF would be operating. This three-week period for temporary evacuation is a matter of common knowledge. And the Applicant's misrepresentation of this fact is, at best, an unfamiliarity with the events and, at worst, a desire to tailor its story to a pre-existing narrative.

45. The IDF employs a range of additional measures in accordance with the obligation to take precautionary measures under international humanitarian law. For example, it provides effective advance warnings of attacks where circumstances permit. To date, the IDF has dropped millions of leaflets over areas of expected attacks with instructions to evacuate and how to do so, broadcast countless messages over radio and through social media warning civilians to distance themselves from Hamas operations, and made over 70,000 individual phone calls, including to occupants of the

targets, warning them of impending attacks. This requires time. It requires resources and intelligence — and the IDF invests all of these to save civilian lives.

46. Here you can see the IDF's Arabic Twitter account, providing information for civilians to evacuate specific areas, including the location of shelters nearby.

47. Yet the Applicant astonishingly claims that these efforts are in themselves genocidal. In other words, a measure intended to mitigate harm to the civilian population, sometimes exceeding the requirements of international humanitarian law, is proof — according to the Applicant —of Israel's intent to commit genocide, when in fact, it proves the exact opposite.

48. My third topic, with respect to the humanitarian situation. Much attention was given by South Africa to this situation. Despite Israel's efforts to mitigate harm, there is no question that many civilians in Gaza are suffering as a result of the war that Hamas began.

49. While Israel is seeking to minimize civilian harm, Hamas is doing everything in its power to use the civilian population and civilian infrastructure for its own protection, thwarting humanitarian efforts aimed at alleviating the distress of the civilian population. Further illustration on Hamas' tactics and Israel's efforts can be found in tabs 4 and 9 of the volume provided to the Court.

50. I now turn to describe just some of the humanitarian co-ordination efforts that Israel has been engaged in and Mr Sender will further expand on this.

51. Israel maintains a dedicated military unit, called COGAT, responsible for routine co-ordination with international organizations in Gaza with respect to various humanitarian aspects. It is COGAT that mans and operates the crossings between Israel and Gaza. This includes the Erez Crossing, through which prior to 7 October, almost 20,000 Gazans passed through into Israel daily for work.

52. South Africa showed a map yesterday, with the Erez Crossing marked "closed". What it failed to note is that the crossing was attacked on 7 October by Hamas, which murdered and kidnapped COGAT staff and caused significant damage.

53. Here you can see some of that damage.

54. Nevertheless, COGAT works around the clock to fulfil its role. Its large professional staff run numerous initiatives, of which I will only mention a few.

55. First, COGAT manages a mechanism by which it maintains an up-to-date picture of the needs in Gaza. It does this with the United Nations, other international organizations and States, whose representatives sit in COGAT's offices. COGAT uses this monitoring to help donor States and organizations prioritize their aid efforts to fit the evolving situation on the ground.

56. Second, COGAT facilitates the entry of aid into Gaza. Israel has publicly stated repeatedly that *there is no limit* on the amount of food, water, shelter or medical supplies that can be brought into Gaza.

57. To increase capacity, COGAT has re-opened the Kerem Shalom crossing, as acknowledged by the Security Council in resolution 2720, despite Hamas putting it under fire.

58. Israel has offered to extend operating hours at the crossing if there is a capacity to receive the goods by international organizations on the Gazan side.

59. Third, COGAT works to reinforce and strengthen medical services. COGAT has facilitated the huge logistical challenge of establishing four field hospitals in Gaza, and more are being set up, and two floating hospitals. It has facilitated the entry of new ambulances into Gaza. And Israel has even co-ordinated airdrops of aid over Gaza by Jordan, co-ordinating these flights with the Israel Air Force operating in Gaza.

60. This, of course, is not to say that nothing more can be done, or that there are no challenges to the humanitarian situation in Gaza. Such challenges exist and change according to the evolving circumstances of the conflict. But it is to say that the charge of genocide, in the face of these extensive efforts, is frankly untenable.

61. It is an inconvenient truth for the Applicant's case, but one of the most significant challenges is the fact that Hamas commandeers consignments into Gaza and controls their distribution. Gazan residents have reported that Hamas is regularly stealing aid, at the expense of its own population, for the benefit of its fighters.

62. This is a tweet stating that fuel and medical equipment was stolen by purported Hamas members from an UNRWA warehouse. UNRWA later deleted the tweet, perhaps under pressure from the authorities.

63. Here you can see Hamas commandeering an aid truck.

64. And here is another example.

65. Because Hamas for years has used aid consignments to smuggle weapons, security checks of all goods going into Gaza are required, as acknowledged by international humanitarian law. Hamas has time and again hoarded fuel, including during the current conflict, which it uses for military purposes, to sustain ventilation in its expansive underground tunnel network, and for its continued attacks against Israel. Nevertheless, in co-ordination with the United Nations, Israel enables fuel to enter Gaza to service essential infrastructure, such as sewage treatment, desalination plants, water pumps and hospitals, and cellular infrastructure for maintaining communication.

66. Israel remains committed to helping international organizations and States involved in the aid effort to overcome these hurdles, and consistently increase the amount of aid and services available to the population in Gaza, as will be further described by Mr Sender.

67. Here, a picture of incubators the IDF provided to Shifa hospital.

68. Here, a picture of an ambulance convoy co-ordinated by COGAT.

69. A picture of consignments.

70. A picture of ambulances, the entry of which was co-ordinated by COGAT.

71. And finally, more consignments waiting to enter Gaza.

72. Madam President, Members of the Court, in the time allotted I have been able to describe only some of Israel's efforts to mitigate civilian harm and to address the humanitarian situation in Gaza. But even this mere fraction is enough to demonstrate how tendentious and partial the Applicant's presentations of these facts are, and certainly enough to conclude that the allegation of intent to commit genocide is baseless.

73. If Israel had such intent, would it delay a ground manoeuvre for weeks, urging civilians to seek safer space and, in doing so, sacrificing operational advantage?

74. Would it invest massive resources to provide civilians with details about where to go, when to go, how to go, to leave areas of intensive fighting?

75. Would it maintain a dedicated unit, staffed with experts, whose sole role is to facilitate aid? And who continued to do so, despite having their staff killed and kidnapped?

76. When a population is ruled by a terrorist organization that cares more about wiping out its neighbour than about protecting its own civilians, there are acute challenges in protecting the civilian population. Those challenges are exacerbated by the dynamic and evolving nature of intense

hostilities in an urban area, where the enemy exploits hospitals, shelters and critical infrastructure. Would Israel work continuously with international organizations and States, even reaching out to them on its own initiative, to find solutions to these challenges if it were seeking to destroy the population?

77. Israel's efforts to mitigate the ravages of this war on civilians are the very opposite of intent to destroy them. Under these circumstances, far from being the only inference that could reasonably be drawn from Israel's pattern of conduct, intent to commit genocide is not even a *plausible* inference.

Madam President, Members of the Court, that concludes my statement. I thank you for your kind attention and I ask that you now invite Mr Sender to the podium.

The PRESIDENT: I thank Ms Raguan and I invite Mr Omri Sender to address the Court. You have the floor, Sir.

Mr SENDER:

LACK OF RISK OF IRREPARABLE PREJUDICE AND URGENCY

1. Madam President, Members of the Court, it is an honour to appear before you today on behalf of the State of Israel.

2. It falls to me to address the condition of risk of irreparable harm and urgency.

3. This third condition is, of course, dependent on the two preceding ones. Professor Shaw and Ms Raguan have already shown that the provisions relied upon by the Applicant do not afford, even prima facie, a basis on which this Court's jurisdiction could be founded. They also showed that the rights asserted by the Applicant cannot be regarded as plausible. It follows that irreparable consequences cannot, in the present case, be caused by the alleged disregard of rights under the Genocide Convention.

4. Again, this is not at all to say that the humanitarian situation arising from the present armed conflict is not grave. Civilians have been severely affected by the hostilities instigated by Hamas. Its systematic strategy of prosecuting war from under, and within, the civilian population exposes

civilians to great risk — and it has brought about great suffering. Israel has done — and is doing — a great deal to alleviate this suffering in very challenging circumstances.

5. In this regard, the factual account provided by the Applicant is once again entirely one-sided. The Application and Request run to no less than 84 pages, but they make hardly any mention of the extraordinary efforts undertaken by Israel — and by a host of other States and international actors — to improve the humanitarian situation. We again heard virtually nothing from the Applicant on this issue yesterday. But this is a critical factor in the Request before you. As Ms Raguan has shown, it frustrates any attempt to establish the necessary special intent for genocide. It also bears upon the third condition established in your case law.

6. Madam President, Members of the Court, we know from your case law that the power of the Court to indicate provisional measures will be exercised only in exceptional circumstances. There needs to be, as you have said, "a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision"[91].

7. Your Order in the *Myanmar* case, in which the Genocide Convention was also invoked, suggests that the adoption of "concrete measures aimed specifically at recognizing and ensuring the right" of the group in question to exist would mean that irreparable harm and urgency cannot be established[92].

8. Precisely such concrete measures have been taken by Israel, which has been facilitating the provision of more and more humanitarian assistance for people in need throughout the Gaza Strip. These steps have not only been increasing so as to meet the developing situation on the ground. They are continuously undertaken specifically in order to prevent harm to the civilian population.

9. These efforts have had an impact. Just last week, for example, with the assistance of the World Food Programme, a dozen bakeries re-opened with the capacity to produce more than two million breads a day. The World Food Programme has said that the delivery of flour, salt, sugar and yeast continues, so as to enable more bakeries to re-open, "increasing accessibility and affordability"

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[91] See e.g. *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*, para. 65.

[92] *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.

for thousands of families[93]. And since the Applicant mentioned yesterday the number of trucks entering Gaza each day before and after the war, the accurate average number for trucks specifically carrying food is 70 trucks a day before the war and 109 trucks a day over the last two weeks[94]. All this information may be found in your judges' folder.

10. Access to water has also been a priority. As with food supplies, there is no restriction on the amount of water that may enter Gaza. Israel continues to supply its own water to Gaza by two pipelines; it facilitates the delivery of bottled water in large quantities; and it repairs — and indeed expands — water infrastructure that has been damaged by the fighting[95]. An additional water pipe bringing water into southern Gaza from Egypt began operating a few weeks ago[96].

11. Access to medical supplies and services is also growing. Israel has so far facilitated the establishment of four field hospitals and two floating hospitals. The establishment of two more hospitals is underway[97]. Israel is facilitating the entry of medical teams into Gaza, as also of vaccinations, including in co-operation with UNICEF[98]. Ill and wounded persons are being evacuated through the Rafah border crossing to Egypt, the United Arab Emirates, Türkiye, Qatar and Jordan. Tents and winter equipment are being distributed as well[99].

12. The constant delivery of fuel and cooking gas is also facilitated. According to official data, again in your judges' folders, from 8 December, the amount of fuel entering Gaza has doubled, and currently stands at 180,000 litres a day[100]. This is a target amount requested by the United Nations itself[101]. Since 21 December, the amount of cooking gas entering Gaza has also doubled, now standing at an average of 90 tons per day[102]. Details of this kind, concerning the various ongoing humanitarian efforts, are updated every single day on a designated English website of COGAT, the

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[93] Judges' folder, tab 4A.

[94] Judges' folder, tab 4B.

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] Volume, tab 5B.

[101] *Ibid.*

[102] *Ibid.*

unit in the Ministry of Defence in charge of monitoring the humanitarian situation[103]. When pressing needs are identified, solutions are soon co-ordinated.

13. A great effort is indeed invested in eliminating bottlenecks so as to improve the entrance and distribution of aid — notwithstanding Hamas constantly stealing it. As you have heard, a joint operations room involving Israel, Egypt, the United States and the United Nations operates daily to solve, in real-time, logistical difficulties[104]. Israel also co-ordinates with various United Nations agencies and the ICRC to address their own needs[105]. On 15 December, Israel decided to open its crossing at Kerem Shalom with the express intention to "improve and upgrade" the delivery of humanitarian assistance to Palestinian civilians in Gaza[106]. That part of the Government's decision is in your judges' folder as well. This has eased congestion at the Rafah crossing and helped facilitate the provision of greater amounts of aid. Israel facilitates air routes as well, for parachuting aid directly into Gaza[107]. Facilitating a maritime corridor is currently being considered with other States.

14. Madam President, Members of the Court, again these are just some examples. But they show that Israel no doubt meets the legal test of "concrete measures aimed specifically at recognizing and ensuring" the rights of the Palestinian civilians in Gaza to exist. It has been the daily work of numerous Israeli officials, of various agencies, to ensure that these and other steps are effectively carried out, at a time when they and their families are themselves under constant attack. A determination that the multilateral large-scale humanitarian effort is lacking, or that scaling up access of humanitarian relief to Gaza would be of no avail[108], as the Applicant would have you believe, should not be made lightly.

15. Madam President, Members of the Court, two additional elements warrant your careful attention. They too suggest that the condition of urgency is not as easily met as the Applicant would have you believe.

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[103] See https://govextra.gov.il/cogat/humanitarian-efforts/home/.

[104] Judges' folder, tab 4B; volume, tab 5B.

[105] *Ibid.*

[106] Judges' folder, tab 4C; volume, tab 5.

[107] Volume, tab 5B.

[108] CR 2024/1, p. 67, para. 23 (Ní Ghrálaigh).

16. *First*, the scope and intensity of the hostilities has been decreasing. Israel's Defence Minister said last week that Israeli forces would be shifting from the "intense maneuvering phase of the war" toward "different types of special operations". This statement, made in an interview to international media, is found at tab 16-A of the Volume submitted.

17. This week, on 8 January 2024, the spokesperson for the Israeli military confirmed that the Israeli campaign had already started a transition to fewer ground troops and fewer airstrikes. "The war shifted a stage", he said. As you will see in tab 16-B of the Volume, he spoke of a new and less intense phase of fighting. He specifically mentioned that Israel will continue to reduce the number of troops in Gaza. Five brigades, consisting of thousands of soldiers, have already been withdrawn from the territory.

18. *Second*, the United Nations Security Council has only recently adopted a resolution for the specific purpose of alleviating the humanitarian situation. By resolution 2720 of 22 December 2023, which is found at tab 16-C of the Volume, the Council demanded the immediate and unconditional release of all hostages, as well as the delivery of humanitarian assistance at scale directly to the Palestinian civilian population throughout the Gaza Strip. More specifically still, the Council requested the Secretary-General to appoint a Senior Coordinator in order to establish a United Nations mechanism for accelerating the provision of humanitarian relief consignments to Gaza. Contrary to what we heard yesterday, this resolution does not "remain unimplemented"[109]. A Senior Coordinator has been appointed and indeed began her work; the Council remains actively seised of the matter.

19. Israel, for its part, is already working with the Senior Coordinator. And it has just this week co-ordinated the entrance of a United Nations delegation into northern Gaza in order to evaluate the situation and map the needs for a future return of Palestinian civilians. I recall in this connection that in the *Aegean Sea* case, the Court found that it was not necessary to indicate provisional measures where the government in question showed willingness to act in accordance with the recommendations of the Security Council concerning the matter before the Court[110].

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[109] CR 2024/1, p. 62, para. 10 (Ní Ghrálaigh).

[110] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 12-13, paras. 38-41.

20. All these recent developments indicate that the facts as they presently exist do not call for awarding interim relief. They also suggest that the difference between the present case, and earlier cases that have come before you, are very clear.

21. Finally, the lack of urgency within the meaning of the Court's case law is further demonstrated by assurances provided before you today by Israel's Co-Agents. They could not be clearer in stating that Israel remains bound, at all times, by its international legal obligations. Needless to say, this includes Israel's obligations as a State party to the Genocide Convention. The Applicant will have this Court say that it cannot take the word of a State[111]. That would be not only unfortunate; it would also be contrary to the law on unilateral declarations of States. Unsurprisingly, your consistent case law suggests that assurances of the kind offered by Israel may well render the indication of provisional measures unnecessary[112].

22. Madam President, Members of the Court, the conclusion is that the condition of irreparable prejudice and urgency cannot be met. It is Israel and its citizens who would risk irreparable harm if the Request of South Africa were to be granted.

23. Madam President, distinguished Members of the Court, that concludes my statement. I thank you for your kind attention; and I ask that you now invite Mr Staker to the podium.

The PRESIDENT: I thank Mr Sender. I now invite Mr Christopher Staker to take the floor. You have the floor, Sir.

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[111] CR 2024/1, p. 79, para. 27; p. 78, para. 21 (Lowe).

[112] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 27, para. 73; *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. 155, paras. 71-72; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 18, para. 27; *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, p. 112.

Mr STAKER:

THE PROVISIONAL MEASURES REQUESTED BY SOUTH AFRICA ARE UNWARRANTED AND PREJUDICIAL

Introduction

1. Madam President, Mr Vice-President, Members of the Court, it is an honour to appear before you again and to represent the State of Israel.

2. You have now been addressed on why the conditions for provisional measures are not met. That being so, there is no need to examine the nine particular measures that South Africa requests[113].

3. Nonetheless, for completeness, I will address each in turn and show that their terms are unwarranted in any event. They go beyond what is necessary to protect rights on an interim basis and therefore also have no link with the rights sought to be protected.

The first and second requested provisional measures

4. I start with the first and second requested measures.

5. These would require immediate suspension of Israel's military operations in Gaza[114].

6. This request is frankly astonishing. A request is made by a State not party to an ongoing conflict, for provisional measures requiring unilateral suspension of military operations by one party to the conflict only, leaving the other party free to continue attacks, which it has a stated intention to do.

7. South Africa cannot argue that similar measures were granted in the *Russia Genocide* case[115]. That case was fundamentally different.

8. In the *Russia* case, the legality of the military operation itself was in issue by reference to the Genocide Convention. Russia had claimed that its military operation was to prevent and punish genocide being committed in Ukraine. The Court found it doubtful that the Genocide Convention authorizes a unilateral use of force in the territory of another State and plausible that Ukraine had a

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[113] Application, para. 144.

[114] Application, paras. 144 (1) and (2).

[115] *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*, pp. 230-231, para. 86 (1)-(2) (*dispositif*).

right not to be subjected to military operations by Russia for that purpose[116]. The result: provisional measures could protect that plausible right not to be subjected to military operations.

9. In this case, Israel does not rely on the Genocide Convention or prevention of genocide to justify its operations. The lawfulness of the operations themselves does not involve any interpretation, application or fulfilment of the Convention over which the Court could have jurisdiction. As jurisdiction in this case is based solely on Article IX of the Convention, the Court cannot find that South Africa or Palestinians in Gaza have a plausible right of the kind in the *Russia* case.

10. Article 41 of the Statute empowers only such provisional measures as "the circumstances . . . require", "to preserve the respective rights of either party". In the *Russia* case, a suspension of military operations might have been necessary to preserve a right not to be subjected to military operations. But in this case, the right in issue is South Africa's claimed right to ensure observance of the Genocide Convention. It is absurd to suggest that the only way to ensure observance of the Genocide Convention in a military operation is to prevent the operation from being conducted at all, in order, according to South Africa, "to secure the humanitarian response and avoid yet more unnecessary death and destruction"[117]. That goes beyond preventing genocide.

11. South Africa appears to argue that the military operations as such are genocidal. But how has South Africa established a plausible claim that this is so? Ms Hassim argued only that it is plausible that "at least some, if not all, of these [alleged] acts fall within the Convention's provisions"[118]. How does "at least some . . . acts" turn into "the military operations as such"? The pictures shown yesterday of various individual incidents, whatever they may or may not say about those incidents, are not evidence of the intent of the military operations as a whole. Professor Shaw has addressed you on why the statements of holders of official positions relied on by South Africa

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[116] *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, paras. 59-60.

[117] CR 2024/1, p. 78, para. 20 (Lowe).

[118] CR 2024/1, p. 22, para. 6 (Hassim). See also Application, para. 7, last sentence ("At least some of the acts alleged by South Africa are clearly capable of falling within those provisions.") and para. 125, first sentence ("At least some of the acts alleged by South Africa are plainly 'capable of falling within the provisions of the Convention'").

do not establish a plausible claim of genocidal intent. The inevitable fatalities and human suffering of any conflict is not of itself a "pattern of conduct"[119] that plausibly shows genocidal intent.

12. These provisional measures are therefore not within the Court's power under Article 41 of the Statute. They go well beyond anything required to preserve the specific rights in issue, namely the observance of the Convention in military operations. They seek instead to shut down the military operations themselves.

13. The requested measures seek to reverse the *Bosnia* case. When provisional measures were ordered in that case, the armed conflict was still in progress. The allegations in that case were similar to those made in this case[120]. Bosnia and Herzegovina specifically requested a provisional measure requiring Yugoslavia to "cease and desist from any and all types of military or paramilitary activities . . . against the People, State and Government of Bosnia and Herzegovina"[121]. But the Court did not grant it[122], even though, unlike in this case, an ongoing genocide was said to be in progress on the territory of the very State seeking provisional measures and both parties to the conflict were parties to the case. The Court said expressly that it refused because such a measure would be for the protection of a right that could not form the basis of a judgment in exercise of jurisdiction under the Genocide Convention[123]. There is no reason to depart from that case law.

14. In any event, provisional measures cannot be indicated if, as in this case, they would cause irreparable prejudice to the respondent or are out of proportion with the protection that they are intended to give to the applicant.

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[119] CR 2024/1, pp. 21, 30, paras. 2, 36, 37 (Hassim); p. 32, para. 6 (Ngcukaitobi), p. 51, para. 12 (Du Plessis).

[120] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Application instituting proceedings submitted by the Republic of Bosnia and Herzegovina, 20 March 1993, https://www.icj-cij.org/sites/default/files/case-related/91/13275.pdf.

[121] *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. 8, para. 3 (3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, Request for the indication of provisional measures of protection submitted by the Government of the Republic of Bosnia and Herzegovina, 20 March 1993, para. 14 (3) (see also para. 14 (1) and (2)), https://www.icj-cij.org/sites/default/files/case-related/91/13275.pdf.

[122] *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. 24-25, para. 52 (*dispositif*).

[123] *Ibid.*, p. 19, para. 35; *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. 346, para. 43.

15. The fact is that provisional measures impose burdens on the party to which they are addressed, in order to protect potentially non-existent rights of another party. It would be contrary to the sovereign equality of States for such burdens to be imposed without regard to their effects on the State to which they are addressed.

16. As Judge Abraham said in the *Pulp Mills* case, in a request for provisional measures, the Court is faced with conflicting rights claimed by the respective parties and "cannot avoid weighing those rights against each other"[124].

17. In the *Financing of Terrorism Convention* case, Judge Tomka said that the Court, when considering requests for provisional measures, "is expected to weigh and balance the respective rights of the parties"[125]. He went on to note, citing specific examples, that this requirement has been observed in the Court's practice[126].

18. The Court has made clear in other provisional measures Orders that it must preserve the respective rights of *both* parties[127]. Its established jurisprudence is that Article 41 of the Statute "has as its object the preservation of the respective rights claimed by the parties", that is to say, both

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[124] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 139, para. 6.

[125] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, declaration of Judge Tomka, p. 152, para. 6.

[126] *Ibid.*, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, pp. 154-155, 157-158, paras. 33, 36, 42, and 46; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 130-131, paras. 66 and 67; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 16, para. 16; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, pp. 16-17, paras. 22-24.

[127] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 27; *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, para. 94; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, para. 41; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, separate opinion of Judge Donoghue, p. 212, paras. 19-20, dissenting opinion of Judge Greenwood, pp. 195-197, 206, paras. 5, 7 and 28. See also Maurice Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction" (1972-1973), *British Yearbook of International Law* 259, 313, 321: "The Court must weigh up the risks to both parties and try to achieve the fairest solution . . . Article 41 of the Statute . . . obliges the Court to assess, in each particular case, the likelihood of prejudice to each of the parties from the grant, or refusal of, interim protection".

parties[128]. The respective rights to be preserved are thus not only the plausible but yet to be determined rights claimed by the applicant, but also the plausible and yet to be determined rights of the respondent to engage in conduct that provisional measures would restrain.

[128] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 402, para. 15; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 70, para. 71; *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; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 418, para. 41; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 375, para. 44; *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. 223, para. 50; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan),* Order of 22 February 2023, para. 27; *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. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Order of 17 November 2023*, para. 31; *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 1 December 2023*, para. 19.

19. Other international dispute settlement fora also balance the interests of both parties when ordering provisional measures[129].

20. Already a century ago, a Mixed Arbitral Tribunal recognized a principle that the possible injury to the addressee of provisional measures "must not be out of proportion with the advantage which the claimant hopes to derive from them"[130]. The Institute of International Law has now recognized a general principle of law that international and national courts and tribunals may grant interim relief and, as a requirement for such measures, that the risk of injury to the applicant must

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[129] International Tribunal for the Law of the Sea: *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, pp. 164-165, paras. 96, 99-102 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/23_published_texts/2015_23_Ord_25_Avr_2015-E.pdf. See also Rüdiger Wolfrum, The Charles H. Stockton Distinguished Essay: Proportionality: Reconsidering the Application of an Established Principle in International Law, 99 INT'L L. STUD. 686 (2022) (referring to *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf): "The tribunal had to weigh the interest of Japan in the fishing of southern bluefin tuna, in particular since the ordinary season for fishing was imminent, as well as the interests of New Zealand and Australia in fishing, and the interest of the international community in the preservation of that stock". Permanent Court of Arbitration: PCA Case No. *2015*-28, *The "Enrica Lexie" Incident (Italy* v. *India), Order on Request for Provisional Measures, 29 April 2016,* pp. 26-28, para. 102, https://pcacases.com/web/sendAttach/1707: "In the present case, the Arbitral Tribunal must consider whether there is a risk of irreparable prejudice to Italy's rights [if the requested provisional measure is not granted], and whether India's rights are unduly affected if [it is]. The Arbitral Tribunal must ensure that the respective rights of the Parties are preserved in this respect in the most appropriate manner if the Arbitral Tribunal decides to prescribe provisional measures". See also *ibid*., p. 27, para. 107, and p. 33, para. 132 (dispositif). ICSID investment treaty arbitration tribunals: *Saipem SpA* v. *People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 175, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C52/DC529_En.pdf: "a tribunal enjoys broad discretion when ruling on provisional measures, but should not recommend provisional measures lightly and should weigh the parties' divergent interests in the light of all the circumstances of the case". Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1, 29 June 2009, para. 81, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C300/DC2776_En.pdf. *PNG Sustainable Development Program Ltd.* v. *Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015, para. 117, https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3264/DC5412_En.pdf: "The Tribunal will . . . take into account both the seriousness of the harm and the balance of injuries that would be suffered by both parties if provisional measures are (or are not) ordered." *Gerald International Limited* v. *Republic of Sierra Leone*, ICSID Case No. ARB/19/31, Procedural Order No. 2, Decision on the Claimant's Request for Provisional Measures, 28 July 2020, paras. 181-182, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8133/DS14713_En.pdf: "the requested measures need to be proportional . . . proportionality requires that an arbitral tribunal 'must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated.'" See now ICSID Arbitration Rules (2022), Rule 47(3)(b), https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf. ICSID Additional Facility Arbitration Rules (2022), Rule 57 (3) (b), https://icsid.worldbank.org/sites/default/files/Additional_Facility_Arbitration_Rules.pdf (both requiring consideration of "the effect that the measures may have on each party").

[130] Belgian-Bulgarian Mixed Arbitral Tribunal, *Cie d'Électricité de Sofia et de Bulgarie* (1923) 2 *T.A.M.* 924, pp. 926-927, quoted in Helene Ruiz Fabri, Michel Erpelding (eds.), *The Mixed Arbitral Tribunals, 1919-1939: An Experiment in the International Adjudication of Private Rights*, Studies of the Max Planck Institute Luxemburg for International, European and Regulatory Procedural Law, Vol. 25 (2023), p. 416. https://www.nomos-elibrary.de/10.5771/9783748939719.pdf?download_full_pdf=1.

outweigh the risk of injury to the respondent[131]. This principle is also recognized by other international dispute settlement mechanisms[132].

21. Other principles applied when indicating provisional measures are that none of the parties can be put at a disadvantage, that measures should not go beyond what is necessary to achieve their end[133], that the measures must not cause irreparable prejudice to the rights of the respondent, and that any impression of bias must be avoided[134].

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[131] Institute of International Law, Hyderabad Session 2017, Final Resolution on Provisional Measures, 8 September 2017, paras. 1-2, https://www.idi-iil.org/app/uploads/2019/06/Annexe-1bis-Compilation-Resolutions-EN.pdf.

[132] UNCITRAL: UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006), Article 17A(1)(a), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_
e_ebook.pdf: "The party requesting an interim measure . . . shall satisfy the arbitral tribunal that: . . . Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and *such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted*" (emphasis added). UNCITRAL Arbitration Rules (2021), Article 26 (3) (a), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf: "The party requesting an interim measure . . . shall satisfy the arbitral tribunal that: . . . Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and *such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted*" (emphasis added). See also Arbitration under the UNCITRAL Rules, *Sergei Paushok et al.* v. *Government of Mongolia, Order on Interim Measures*, 2 September 2008, paras. 79-91, esp. para. 79, https://icsid.worldbank.org/sites/default/files/parties_publications/C9734/B%20-%20Request%20for%20Interim%20Measures%20–%2012.14.2021/Claimants%27%20Legal%20Authorities/CL-0007-ENG%2C%20Sergei%20Paushok%20v.%20Mongolia.pdf: "Under proportionality, the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties". ICSID investment treaty arbitration tribunals: *Quiborax S.A. and Non-Metallic Minerals S.A.* v. *Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on provisional measures, 26 February 2010, para. 156, https://www.italaw.com/sites/default/files/case-documents/ita0698.pdf: "The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated". *Burimi S.R.L. and Eagle Games SH.A.* v. *Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 2 on Provisional Measures Concerning Security for Costs, 3 May 2012, para. 35, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1660/DC3613_En.pdf: "In assessing necessity, tribunals usually weigh the interests of both parties and order the measure only if the harm spared the petitioner 'exceeds greatly the damage caused to the party affected' by it'." *Hydro S.r.l. and others* v. *Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, para. 3.37, https://www.italaw.com/sites/default/files/case-documents/italaw7167.pdf: "In granting provisional measures, the Tribunal must consider the proportionality of the provisional measures requested. Specifically, the Tribunal must balance the harm caused to the Claimants by the criminal proceedings and the harm that would be caused to the Respondent if those proceedings were stayed". *Eskosol S.p.A. in liquidazione* v. *Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, para. 36, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5106/DC10635_En.pdf: "Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them". *Nova Group Investments, B.V.* v. *Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures, 29 March 2018, para. 237, https://www.italaw.com/sites/default/files/case-documents/italaw9338.pdf: "the measures must be "proportionate, in the sense that they do not impose undue burdens on the other party as to outweigh, in the balance of equities, the justification for granting them". *Lao Holdings N.V.* v. *Lao People's Democratic Republic (II)*, ICSID Case No. ARB(AF)/16/2, Procedural Order No. 6 (Decision on Respondent's Application for Security for Costs of 29 June 2018), 26 July 2018, para. 36, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5526/DS11317_En.pdf: "Tribunals also should ensure that the particular measures requested are *proportionate*, in the sense that they do not impose such undue burdens on the other party as to outweigh, in a balance of equities, the justification for granting them".

[133] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, dissenting opinion of Judge Greenwood, pp. 195-196, para. 5; Cameron A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017), pp. 304-305.

[134] K. Oellers-Frahm and A. Zimmermann, "Article 41", in A. Zimmermann and C. J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edn., 2019), p. 1145, margin no. 20.

22. These principles are all aspects of the most basic and elementary duty of the Court to ensure equality between the parties[135]. Article 41 of the Statute states that provisional measures are "to preserve the respective rights of *either party*". It does not refer solely to the rights of the applicant for provisional measures.

23. Not to apply such principles would be absurd. Suppose that the Genocide Convention and the Court had already been in existence during World War II, and that the Allied powers were all parties to the Convention without reservation, while the Axis powers were not. Suppose that a neutral State had brought proceedings against the Allied Powers alleging breaches of the Genocide Convention in their conduct of hostilities, and requesting provisional measures requiring the Allies to cease hostilities immediately — invoking pictures of civilian fatalities and suffering in the War as a plausible claim.

24. Such provisional measures would have required the Allies to surrender to the Axis powers, even though the case against them might later have been held to be wholly unfounded, without any consideration by the Court of whether genocide was being committed by the Axis powers.

25. Provisional measures must have their limits. Could a provisional measure require a State to change its government? Or to vote in a particular way in the General Assembly? The answer must be no. Can provisional measures require a State to refrain from exercising a plausible right to defend itself? The answer must be the same.

26. In this case, the balancing of interests must take into account the following.

27. First, Hamas is considered to be a terrorist organization by Israel and other States[136].

28. Second, it is undisputed that on 7 October, Hamas committed on Israeli territory a large-scale terrorist attack. This is continuing.

29. Third, Israel's right to conduct the military operations in exercise of its right to defend itself has been recognized internationally[137].

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[135] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, pp. 26, 40, 41, paras. 31, 59, 65.

[136] See volume, tab 6B.

[137] See volume, tab 12A.

30. Fourth, Israel is committed to complying with international humanitarian law, and fifth, Israel is taking steps to alleviate the humanitarian situation. The Co-Agents and other counsel have and will address you on this.

31. Sixth, this is not a case where provisional measures could require both parties to a conflict to exercise mutual restraint. They would not be binding on Hamas.

32. Seventh, Hamas has made clear its intention to carry out continuing attacks against Israel and its citizens[138].

33. Eighth, provisional measures would deprive Israel of the ability to contend with this security threat against it. More rockets could be fired into its territory, more of its citizens could be taken hostage, raped and tortured, and further atrocities could be conducted from across the Gazan border, but provisional measures would prevent Israel from doing anything.

34. Ninth, provisional measures would end attempts to rescue those already taken hostage.

35. Tenth, suspension of military operations would give Hamas space to preserve and build its capabilities, enabling it to pose an even greater threat and to use remaining hostages as bargaining chips.

36. If granted, the result would be this. An organization recognized internationally as terrorist has committed a terrorist atrocity in the territory of a State and a third State now seeks an order from this Court that would prevent the attacked State from responding, but which would impose no obligation on those responsible for the attack. The requested measures would not put an end to the conflict, but only to military operations by one party to the conflict. These measures would assist the other party and encourage the commission of further terrorist attacks. In this respect also, the *Russia* case is fundamentally distinguishable from this case.

37. Provisional measures should be a temporary shield, to preserve claimed but as yet unproven rights pending a decision on the merits. Instead, they are being used here as a sword, to give an advantage to one party in a conflict over another. The irreparable prejudice to Israel is obvious. So is the lack of proportionality.

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[138] See volume, tab 6A.

38. Madam President, Members of the Court, Israel's position is that there is no conceivable basis on which the first two provisional measures could be ordered.

The third requested provisional measure

39. I turn then to the third requested measure[139]. This would require Israel to take all reasonable measures to prevent genocide.

40. This is analogous to the first provisional measure in both the *Bosnia* case[140] and the *Myanmar* case[141].

41. There are two further objections to this measure.

42. First, its wording is not confined to the current military operations in Gaza. It is expressed to apply "in relation to the Palestinian people" generally. This opens the possibility to later claims that actions by Israel having nothing to do with Gaza are in breach of this provisional measure.

43. While the Convention obligation to prevent genocide may not be confined to current operations in Gaza, the subject-matter of this case is. There is no justification for the provisional measure to extend beyond the claim itself.

44. This particular objection applies also to the fourth to seventh requested measures.

45. A second objection is that this third provisional measure would impose the same obligation on South Africa as well. No reason is given for this. The other requested provisional measures do not apply to South Africa. Why this one? Is South Africa saying that it might fail to comply with its obligation to prevent genocide if not compelled to do so by a provisional measure? Unlikely.

46. Rather, through this provisional measure, South Africa appears to seek a special mandate from the Court to act internationally in relation to Palestinian issues, on the basis that it seeks to prevent genocide. Indeed, if South Africa's right to bring these proceedings was disputed, South Africa might argue that this provisional measure gives it the right.

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[139] Application, para. 144 (3).

[140] *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. 24-25, para. 52 A (1).

[141] *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 (1).

47. However, provisional measures cannot confer special mandates on States and no justification for doing so is established in any event.

48. The third provisional measure should therefore not be granted.

The fourth requested provisional measure

49. I move on to the fourth requested measure[142]. This would require Israel to "desist" from committing acts within the scope of Article II of the Convention.

50. There are fundamental objections to this measure.

51. First, it has no counterpart in the provisional measures ordered in the *Bosnia* and *Myanmar* cases. What is the need for this special novel measure? No explanation is given.

52. Second, it uses the word "desist", which implies that violations of the Convention by Israel are occurring. It seeks an implied ruling on the merits. In the *Bosnia* case, you declined to grant a provisional measure requested by Bosnia and Herzegovina that Yugoslavia must "cease and desist from all acts of genocide"[143]. You should also refuse this request.

53. It is one thing to call on a State to comply with its obligations under the Convention. It is quite another to imply that a State has failed to do so. While provisional measures are without prejudice to the merits, such an implied finding will tarnish the reputation of the respondent State, which is not only unprincipled, but also unnecessary within the meaning of Article 41 of the Statute to protect claimed rights on an interim basis.

54. Third, this measure refers to "acts within the scope of Article II of the Convention". Although an act is not within the scope of Article II unless it is committed with genocidal intent, the proposed wording leaves scope for South Africa subsequently to argue that the words mean only the acts themselves, whether committed with genocidal intent or not.

55. On that interpretation, the effect would be to shut down Israel's military operation. Every killing or wounding of an opposing combatant by Israeli forces, every collateral civilian casualty, no matter how lawful under international humanitarian law, would be a breach of this provisional

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[142] Application, para. 144 (4).

[143] *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. 8, para. 3 (1) (request for provisional measures) and pp. 24-25, para. 52 (*dispositif* not containing the requested measure); see also para. 13 above.

measure. Even security checks by Israeli forces of humanitarian aid entering Gaza, in accordance with international humanitarian law, as recognized by Security Council resolution 2720[144], might be argued to be a breach. The request for this measure should be rejected for the same reasons as the first and second measures.

The fifth requested provisional measure

56. I next address the fifth requested measure[145]. This specifies types of acts to be regarded as "deliberately inflicting . . . conditions of life . . . calculated to bring about . . . physical destruction" for purposes of the fourth provisional measure.

57. This measure is also objectionable.

58. First, it is not a free-standing measure, but an elaboration of paragraph *(c)* of the fourth measure. If the fourth measure is not granted, then the fifth measure falls away.

59. Second, no analogous provision is found in the provisional measures orders in the *Bosnia* and *Myanmar* cases, and no special need for such a new measure is established.

60. Third, it again uses the word "desist".

61. Fourth, it seeks further impermissible implied rulings on the merits. For instance, it refers to so-called "expulsion and forced displacement [of Palestinians] from their homes". This is an apparent reference to Israel's practice of issuing calls for civilians to temporarily evacuate areas of intense hostilities[146], which is in fact a measure to mitigate harm to civilians. This measure thus seeks the Court's ruling that evacuation calls amount to "expulsion and forced displacement [of Palestinians] from their homes". Does South Africa suggest that Israel should cease giving warnings to civilians before military operations? How would that protect the rights that South Africa claims?

62. Similarly, paragraph *(c)* of this measure seeks the Court's ruling that damage to buildings in miliary operations, presumably even when lawful under international humanitarian law, amounts to "the destruction of Palestinian life in Gaza".

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[144] Security Council resolution 2720 (2023), 22 Dec. 2023, tenth preambular paragraph: "emphasizing the need to continue working closely with all relevant parties to expand the delivery and distribution of humanitarian assistance, while confirming its humanitarian nature and ensuring that it reaches its civilian destination".

[145] Application, para. 144 (5).

[146] See Application, heading above para. 55 and paras. 55-56.

63. Overall, paragraphs *(a)* to *(c)* of this measure — read together with paragraph *(c)* of the fourth measure — seek the Court's ruling on the merits that the evacuation calls, the current humanitarian situation and the damage to buildings, all amount to "deliberately inflicting on the group conditions of life", within the meaning of Article II *(c)* of the Convention.

64. The reality is that the conflict and the humanitarian situation cannot be resolved overnight. This provisional measure seems designed to ensure that Israel will be in breach of it as soon as it is made. Its sole purpose seems to be to prejudice the merits, not to preserve rights on an interim basis.

65. It should also not be granted.

The sixth requested provisional measure

66. The sixth requested measure[147] incorporates two separate measures.

67. The first of these would require Israel to ensure that its military, and organizations and persons subject to its control, do not commit acts falling within Articles II or III of the Convention. It is analogous to the second provisional measure in the *Bosnia* and *Myanmar* cases respectively.

68. An objection to this is the reference to "any irregular armed units or individuals which may be directed, supported or otherwise influenced by [Israel]".

69. This wording has simply been copied from the second provisional measure in the *Bosnia* and *Myanmar* cases. However, in those cases, the applications instituting proceedings expressly alleged the existence of irregular armed units. The reference is inappropriate in this case. There is no suggestion of forces other than the Israel Defense Forces, on whose commitment to international humanitarian law you have and will be addressed today.

70. The second part of the sixth provisional measure contains an obligation to punish genocide. No such provision was included in the *Bosnia* or *Myanmar* provisional measures Orders[148]. Punishment of genocide is not something that needs to be done urgently in order to protect claimed rights on a provisional basis.

71. This measure should also not be granted.

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[147] Application, para. 144 (6).

[148] *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. 24-25, 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*, pp. 30-31, para. 86.

The seventh requested provisional measure

72. The seventh provisional measure also comprises two separate measures[149].

73. The first would require Israel to take measures to prevent destruction of evidence.

74. The Court has indicated such a measure on two recent occasions[150]. But it declined to do so on two other recent occasions, despite a specific request by the applicant[151].

75. In the cases where it was granted, the application for provisional measures specifically alleged that evidence was being destroyed or concealed[152]. In this case, South Africa makes just a bare assertion that there are "serious concerns about the destruction of evidence and its effect on future investigation into crimes" and a "hampering [of] scrutiny of Israel's actions"[153]. South Africa appears to suggest that the effects of the military operations themselves amounts to destruction of evidence, making this yet a further provisional measure effectively seeking a suspension of military operations[154].

76. The granting of this measure would imply that there is some reason to suspect concealment of evidence, when in fact none has been identified. This again would be an unprincipled and unnecessary tarnishing of reputation.

77. The second part of this measure would require Israel not to impede access to Gaza by fact-finding missions, international mandates and other bodies.

78. However, it is noted, first, that access to Gaza from Egypt is under the control of Egypt.

79. Secondly, Israel has no obligation under international law to allow access from its territory into Gaza.

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[149] Application, para. 144 (7).

[150] *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. 6, para. 5 *(c)*, p. 8, para. 12 *(c)*, p. 29, para. 81, and p. 30, para. 86 (3); *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. 83 (2).

[151] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 392, para. 95; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 430, para. 73.

[152] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar),* Application instituting proceedings of The Gambia, paras. 117-118; *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republ*ic), Request for the indication of provisional measures of Canada and the Netherlands, 8 June 2023, para. 5.

[153] Application, para. 119.

[154] *Ibid.*: "[Israel] is also destroying evidence of its wrongdoing: the mass demolition and clearance of vast areas of Gaza, and the prevention of the return of internally displaced Palestinians to their homes".

80. Thirdly, a provisional measure to this effect was requested by the applicant in the *Myanmar* case and it was not granted by the Court[155].

81. The need for this measure has not been established.

The eighth requested provisional measure

82. The eighth requested measure would require Israel to submit regular reports to the Court on measures taken to give effect to the provisional measures[156].

83. Provisions for such reports were made in two recent provisional measures Orders[157]. But on four other occasions, it was refused despite being specifically requested by the applicant[158].

84. This shows that such measures are not routinely granted. They have been granted occasionally when specific action has been indicated[159]. In *Armenia* v. *Azerbaijan*, the Court said that a report was necessary "[i]n view of the specific provisional measures it has decided to indicate, and in light of the undertakings made by the Agent of Azerbaijan"[160].

85. South Africa does not justify the inclusion of such a measure. There is no shortage of publicly available Israeli material and reports about the present situation in Gaza.

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[155] *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. 8, para. 12 *(f)*, pp. 30-31, para. 86.

[156] Application, para. 144 (8), CR 2024/1, p. 84, para. (8) (Madonsela, final submissions of South Africa).

[157] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Order of 17 November 2023*, para. 74 (3); *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. 31, para. 86 (4).

[158] *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republ*ic*), Order of 16 November 2023*, para. 5 *(g)* (request for the provisional measure) and para. 83 (*dispositif* not containing the requested measure); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 392, para. 95; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 430, para. 73; *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*, p. 626, para. 5 *(c)* and p. and 628, para. 14 *(c)* (request for the provisional measure), and pp. 652-653, para. 102 (*dispositif* not containing the requested measure).

[159] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 92, para. 59 (I) *(b)*; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 258, para. 41 (I); *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)*, p. 28, para. 86 (4); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 370, para. 59 (3).

[160] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Order of 17 November 2023*, para. 71.

The ninth requested provisional measure

86. Finally, the ninth requested measure is a non-aggravation measure[161].

87. On two recent occasions, such a measure was specifically requested by the applicant, but not granted by the Court[162]. Again, such a measure is not the norm and again, South Africa does not justify its necessity.

88. Provisional measures for non-aggravation have been indicated in cases where both parties have been directly involved as actors in the facts of the case and the provisional measures have always applied equally to both parties[163].

89. Thus, in *Myanmar*, the Court declined to grant such a measure.

90. An obligation of non-aggravation cannot fairly be imposed on only one party to a case, or only one party to a conflict. If the proposed measure was granted, South Africa would remain free to aggravate its claimed dispute with Israel, and Hamas would not be impeded from escalating the conflict with Israel. The only purpose of this provisional measure appears to be to prevent Israel from responding to any such escalations.

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[161] Application, para. 144 (9).

[162] *Application of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands* v. *Syrian Arab Republ*ic*), Order of 16 November 2023*, paras. 5 *(f)* and 13 *(f)* (noting that the request was specifically made) and para. 83 (setting out the *dispositif* which includes no provisional measure to this effect); *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. 6, para. 5 *(d)*, and p. 8, para. 12 *(d)* (noting that the request was specifically made), and p. 29, para. 83 (in which the Court declines to make this order).

[163] In particular *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Order of 1 December 2023*, para. 45 (2); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 584, para. 23 (2); *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. 231, para. 86 (3); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 431, para. 76 (2); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 393, para. 98 (2); *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 (II), I.C.J. Reports 2018*, p. 652, para. 102 (3); *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, para. 79 (2); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 140-141, para. 106 (2); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Requests for the Modification of the Order Indicating Provisional Measures of 8 March 2011, Order of 16 July 2013, I.C.J. Reports 2013*, p. 241, para. 40 (2); *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, pp. 555-556, para. 69 (4); *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)*, p. 27, para. 86 (3); *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. 399, para. 149 C.

91. Again, there is no justification for this measure.

Conclusion

92. Madam President, Members of the Court, that concludes my arguments on the inappropriateness of the specific measures requested by South Africa. I thank you for your careful attention. I invite you to call on Mr Noam, Co-Agent of Israel, to conclude Israel's arguments.

The PRESIDENT: I thank Mr Staker and I now invite the Co-Agent of Israel, Mr Gilad Noam, to address the Court. You have the floor, Sir.

Mr NOAM:

1. Madam President, Members of the Court, counsel have shown that the Applicant has failed to make the case for the indication of provisional measures. More specifically:

(1) The Court lacks prima facie jurisdiction, as the Applicant has not shown any dispute between itself and the Respondent at the time the Application was submitted. Indeed, it tried to mislead the Court into believing that one had existed.

(2) The Applicant has failed to meet the condition of plausible rights to be protected in the present circumstances.

(3) The simple reality is that the events which are the subject of these proceedings are occurring in the framework of a war instigated by Hamas, governed by the legal framework of international humanitarian law. They do not fall within the remit of the Genocide Convention.

(4) The standard of irreparable harm and urgency is not met either. Israel is constantly taking concrete steps, together with others, to address the humanitarian situation in Gaza.

(5) Finally, we have shown that each of the provisional measures sought are unwarranted and prejudicial.

2. All this requires that we give attention to two fundamental matters arising from these proceedings.

3. The first is that the Applicant seeks to portray an image of Israel as a lawless State, that regards itself as "beyond and above the law". The Applicant paints an image of Israel as a State in which the entire public service, military, and society have in concert discarded Israel's long-standing

commitment to law and morality and become singularly consumed with destroying an entire population. That is patently false.

4. I can attest to that first-hand, as the Deputy Attorney General for International Law.

5. In this position, I regularly advise the Government on issues of international law, including humanitarian law. This has not changed since 7 October.

6. The conflict with Hamas poses serious operational and legal challenges[164]: in conducting close-quarter urban combat, while mitigating harm to the surroundings; in seeking to put a stop to Hamas' military use of hospitals, while minimizing disruption of medical services; in helping civilians leave areas of the most intense fighting, while Hamas forces them to stay in the line of fire; in facilitating the provision of aid, when that aid is constantly stolen by Hamas, to sustain its military efforts; in balancing humanitarian considerations with the need to act forcefully against an adversary that still fires rockets deep into our country and holds our citizens hostage.

7. As the authority responsible for international law advice to Israel's Government and Cabinet, I can attest that in contending with these challenges, Israel remains committed to international law.

8. When the cannons roar in Gaza, the law is not silent.

9. This has been the case since Israel's establishment in 1948, the same year the Genocide Convention was adopted. Israel's commitment to the rule of law has remained steadfast throughout our history, despite the complex challenges we face as a nation. It reflects the commitments made at the time the State was established, as reflected in our Declaration of Independence, which makes express reference to "the principles of the Charter of the United Nations".

10. In 1948, too, Israel was at war, forced upon it. Yet despite being engaged in a war for its survival, the young State gave great importance to immediately establishing an effective, independent and impartial legal system. Indeed, one of the first steps the newly formed IDF took, in the midst of a war, was to establish a military justice system. This system has evolved into an integral part of the institutional structure of the IDF.

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[164] See in tab 9 in the volume.

11. Thus, the IDF Military Advocate General holds the highest rank in the IDF, save the chief of staff, and is institutionally independent from the military chain of command. Her staff, including international law experts, are interwoven into all aspects of the military's activities. They provide legal training and education. They are involved in the drafting and preparation of military plans and doctrines. And they provide ongoing legal advice on a range of issues, including targeting, weaponry and obligations towards the enemy's civilian population. This remains the case in the current conflict.

12. The civilian legal system, including my department in the Ministry of Justice, serves as an avenue of review for the military legal system. The Attorney General stands at the head of the civilian legal system. In this position, she too enjoys full institutional independence.

13. At all times, the doors to Israel's courts, including Israel's Supreme Court, remain open. This Court is widely acknowledged for its willingness to consider issues pertaining to the conduct of hostilities, including ongoing hostilities. Indeed, during the current conflict, the Court has already considered petitions on different aspects of the war.

14. Israel's legal system also ensures accountability. The IDF has a robust law enforcement system. It also maintains an independent mechanism for examining and investigating alleged violations of international humanitarian law. This mechanism is subject to review and oversight by the civilian justice system, including the Supreme Court. This system has been structurally strengthened over the past decade, including by consultations with like-minded States and international experts. Assessing incidents in large-scale hostilities outside of a State's territory requires expertise. Our system is provided with substantial resources and authority to fulfil its mission. The military mechanism is already reviewing incidents relating to the current conflict.

15. The rule of law remains a foundational pillar of the State of Israel. The Applicant defames not only Israel's leadership, but also Israeli society, misrepresenting a selective assortment of statements to suggest genocidal intentions and the abdication of core moral values. Israel's counsel, Professor Shaw, addressed this claim. The shock, anxiety and deep pain that have affected Israeli society since 7 October, naturally lead to harsh statements regarding the enemy, that is committed to — indeed, driven by — destruction of Jews and Israelis.

16. But our legal system knows how to draw a line between statements that may be troubling, and even obscene, but fall within the right of freedom of speech in a democratic society, and those

statements which go beyond that right. As the Attorney General reaffirmed publicly recently, any statement calling for intentional harm to civilians contradicts the policy of the State of Israel and may amount to a criminal offence, including the offence of incitement. Several such cases are currently being examined by Israeli law enforcement authorities. You will find this statement in tab 16D in the Volume.

17. Madam President, Members of the Court, a second general matter we alluded to is the broader implications of this Application for Israel and the wider international community.

18. As we have shown, this case concerns a large-scale armed conflict, with tragic consequences for civilians on both sides. Yes, there is a heart-wrenching armed conflict, but the attempt to classify it as genocide and trigger provisional measures is not just unfounded in law, it has far-reaching and negative implications that extend well beyond the case before you.

19. Ultimately, entertaining the Applicant's request will not strengthen the commitment to prevent and punish genocide, but weaken it. It will turn an instrument adopted by the international community to prevent horrors of the kind that shocked the conscience of humanity during the Holocaust into a weapon in the hands of terrorist groups who have no regard for humanity or for the law.

20. If every resort to force in self-defence against an enemy hiding behind civilians can be portrayed as genocide and trigger provisional measures, an inevitable tension will be created between the Genocide Convention and States defending themselves against the ever-increasing capacities of terrorist organizations.

21. Doing so would also signal to terrorist organizations that they can commit war crimes and crimes against humanity, and then exploit this Court to obtain protection.

22. For us, provisional measures would lead to a perverse situation. It would effectively allow Hamas to continue attacking the citizens of Israel, to hold 136 hostages in unbearable conditions, to keep tens of thousands of displaced Israelis from returning to their homes and essentially to promote its plan to massacre as many Israelis and Jews as it can.

23. Madam President, Members of the Court, in living memory of the atrocities that gave birth to the term genocide — in the aftermath of which the State of Israel was founded — we are witness to a concerted and cynical effort to pervert the meaning of the term "genocide" itself. The Genocide

Convention is too important a foundation in humanity's aspiration to defeat barbarism and evil to be belittled in this way. And the faith that has been placed in international law and its institutions is too cherished an asset to be squandered.

24. We appeal to this Court not to be taken down that dangerous road.

25. Madam President, Members of the Court, for all the above reasons, Israel requests the Court:

> "In accordance with Article 60, paragraph 2, of the Rules of Court, for the reasons given during the hearing of 12 January, 2024 and any other reasons the Court might deem appropriate, the State of Israel hereby requests the Court to:
>
> (1) Reject the request for the indication of provisional measures submitted by South Africa; and
>
> (2) Remove the case from the General List."

26. Madam President and Members of the Court, that concludes Israel's observations. Thank you for your kind attention.

The PRESIDENT: I thank the Co-Agent of Israel, whose statement brings to an end the single round of oral argument of Israel, as well as the present series of sittings. In accordance with the usual practice, I shall request the Agents of both Parties to remain at the Court's disposal to provide any additional information the Court may require. The Court will render its Order on the Request for the indication of provisional measures submitted by South Africa as soon as possible. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver the Order in a public sitting. Since the Court has no other business before it today, the sitting is declared closed.

The Court rose at 1.10 p.m.

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