SEPARATE OPINION OF JUDGE *AD HOC* BARAK

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

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

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

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

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

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

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

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

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

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

I stand by every word.

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

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

II. THE SHORTCOMINGS OF THE COURT'S ORDER

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

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

12. The Court's task is to ascertain whether the situation that warranted the indication of provisional measures on 26 January 2024 has changed. In making this determination, the Court has to take account both of the circumstances that existed when it issued its earlier Order and of the changes that are alleged to have taken place. If the Court finds that there has been a change in the

situation since the delivery of its original Order, it will then have to consider whether such a change justifies a modification of the measures previously indicated[1].

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

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

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

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

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

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

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

19. To modify provisional measures, the Court needs to be satisfied that plausible intent is present in the "new" situation in Gaza. Israel, in its written observations, presented concrete evidence

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

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

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

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

3. The Court's inadequate treatment of evidence

22. The Court's overall treatment of evidence is problematic. The Court's conclusions are grounded in several declarations by United Nations officials and reports by intergovernmental organizations that were not submitted by either Party. Furthermore, Israel and South Africa did not have the opportunity to comment on any of the evidence relied upon by the Court.

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

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

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

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

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

27. Furthermore, the Court recalls that there have been over 6,600 fatalities and almost 11,000 injuries in the Gaza Strip since 26 January 2024, based on a report by OCHA (Order, para. 39). It, however, fails to mention that those numbers come from the Hamas-run Ministry of Health and refer to the total number of fatalities and injuries, without distinguishing between civilians and combatants. Furthermore, they are general figures concerning the armed conflict and say nothing about the existence of famine or shortage of humanitarian aid.

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

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

III. THE MEASURES INDICATED BY THE COURT

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

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

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

international law. It is only in this sense that I have supported it. I have been guided by moral reasons, hoping that it will alleviate the consequences of the armed conflict for the most vulnerable.

31. I feel compelled to recall, however, that the situation on the ground concerning the provision of humanitarian aid is more difficult than it appears. Israel is not the only responsible party. In most cases, Hamas quickly takes control of the aid when it enters Gaza or prevents it from being delivered to those who need it the most. In other instances, when the aid reaches civilians, it triggers mass movements of people and creates a high-risk environment for humanitarian workers. Even if one would want much more to be done for the delivery of aid, the process is not without complications. The power vacuum that is emerging in Gaza, particularly in the north, makes it more difficult to provide aid effectively. We have now seen efforts to deliver aid from the air, which Israel has supported, and the United States is considering the establishment of a floating port. Israel has agreed to help all of these initiatives. The main problems today are, *inter alia*, the unloading, storage and distribution of aid, and, most of all, securing all of these stages from acts of looting.

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

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

IV. CONCLUDING REMARKS

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

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

> "This is the destiny of a democracy — it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its

[4] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States Intervening), Preliminary Objections, Judgment of 2 February 2024,* para. 146; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430.

> understanding of security. At the end of the day, they strengthen its spirit, and this strength allows it to overcome its difficulties."[5]

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

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

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

(Signed) Aharon BARAK.

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