

DECLARATION OF JUDGE NOLTE

Function of the International Court of Justice — Conditions for the modification of provisional measures — Extraordinary situation resulting from the Israeli military offensive in Rafah.

1. More than seven months after the attack by Hamas against Israel on 7 October 2023 and the start of the Israeli military operation in response, the situation in the Gaza Strip remains catastrophic. As there is still no sign of a political solution, the Court has been approached once again by South Africa. Within five months, the Court has been called upon to indicate provisional measures four times. It has indicated provisional measures twice and refused to do so once¹.

2. The Court can play only a limited role in resolving the situation. It must be careful not to overstep the limits of what it can and should do. The Court must be guided by the mandate conferred on it by the Charter of the United Nations², its Statute³ and the Genocide Convention⁴. More than ever, it is important not to lose sight of the Court's basic function:

“the Court as the principal judicial organ of the United Nations . . . acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way.”⁵

3. With this in mind, it was only after considerable hesitation that I voted in favour of the present Order. I can only outline briefly the reasons for my hesitation and my ultimate support for the Order.

Conditions for the modification of provisional measures

4. Article 76, paragraph 1, of the Rules of Court provides that “the Court may . . . modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such . . . modification”.

5. For the Court to modify provisional measures pursuant to Article 76, paragraph 1, three conditions must be met⁶. First, the Court must ascertain whether “the situation that warranted the

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024; ibid.*, decision of the Court on South Africa's request for additional provisional measures, 16 February 2024, press release No. 2024/16; *ibid.*, *Request for the modification of the Order of 26 January 2024 indicating provisional measures, Order of 28 March 2024.*

² Hereinafter the “United Nations Charter”.

³ Hereinafter the “ICJ Statute” or “the Statute”.

⁴ Hereinafter the “Genocide Convention”.

⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 23, para. 29.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 14; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 581, para. 12.

indication of certain provisional measures . . . has changed since that time”⁷. Secondly, it must consider whether the “the provisional measures indicated . . . do not fully address the consequences arising from the changes in the situation”⁸ and thus justify a modification. Finally, the Court “must . . . satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation”⁹.

6. As to the first condition, it is not obvious that the current military offensive in Rafah constitutes “some change in the situation” not previously considered. Indeed, the Court has already referred to the deteriorating situation in Rafah in its letter to the Parties of 16 February 2024¹⁰ and in its Order of 28 March 2024¹¹. In particular, in its letter of 16 February, the Court assessed the risk resulting from military activity in Rafah at a time when a very large number of internally displaced Palestinians were already present in Rafah and when there also appeared to be no other safe areas to go to¹². Thus, as horrifying as the situation is and remains, it was essentially the same situation with which the Court was confronted when it was seised of similar requests in January, February and March. One may therefore doubt whether there is indeed “some change in the situation”, in the sense of Article 76, paragraph 1, of the Rules of Court.

7. It is equally doubtful that the second condition is met. When the Court considered the situation in Rafah in February and March 2024, it estimated that the measures it had indicated on 26 January 2024 were sufficient to address the possibility of a military operation by the Israeli armed forces in Rafah¹³.

8. I remain of the view that the Court should not set “problematic precedent[s]” that “would consist in signaling to the parties in this and other cases that the Court considers that the threshold for modifying, adding or specifying a provisional measure is low”¹⁴. The Court should also avoid the risk of prejudicing a finding on the merits that an order has been violated. Moreover, the “purpose of

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 14.

⁸ *Ibid.*, para. 23.

⁹ *Ibid.*

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, decision of the Court on South Africa’s request for additional provisional measures, 16 February 2024, press release No. 2024/16.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, paras. 6-7, 18, 46.

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, decision of the Court on South Africa’s request for additional provisional measures, 16 February 2024, press release No. 2024/16:

“The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, ‘would exponentially increase what is already a humanitarian nightmare with untold regional consequences’, as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).

This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures”.

¹³ *Ibid.*

¹⁴ *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 5.

a modification of provisional measures is not normally the implementation of provisional measures already indicated”¹⁵.

9. This latter concern manifestly arises in the present case. South Africa has openly stated that it expects the Court to act in order to render its own previous Orders “effective”, to prevent them from becoming “worthless” and to step in for the United Nations Security Council and General Assembly, which, according to South Africa, are not fulfilling their mandate in the present case¹⁶.

10. The Security Council of the United Nations has the “primary responsibility for the maintenance of international peace and security” (Article 24, paragraph 1, of the United Nations Charter). It is the Security Council that shall “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security” (Article 39 of the United Nations Charter), and thus to prevent the violation of related rules of international law, including those arising from the Genocide Convention.

11. This does not mean that the responsibility of the Security Council is exclusive¹⁷. As the “principal judicial organ of the United Nations” (Article 92 of the United Nations Charter), the Court is tasked with contributing to the maintenance of international peace and security through the judicial settlement of legal disputes (Article 33, paragraph 1, of the United Nations Charter). However, “[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions”¹⁸. The Security Council and the Court “therefore perform their separate but complementary functions with respect to the same events”¹⁹. In the present case, the Court’s jurisdiction is limited to the Genocide Convention. In contrast to the Security Council, it is not tasked with the monitoring or enforcement of the Genocide Convention, but only with the settlement of disputes over the “interpretation, application or fulfilment” of that Convention²⁰. Its incidental jurisdiction under Article 41 of the Statute does not transform the Court into a monitoring body or even an enforcement organ.

SPECIFICATION OF THE COURT’S PREVIOUS ORDERS IN THE PRESENT CASE

12. Does this mean that the Court could not, or should not, have rendered the present Order? Article 76, paragraph 1, does not explicitly address the question whether the Court may indicate new measures when it anticipated a certain contingency in the abstract in its original order, but when specific subsequent circumstances raise questions as to how the original measure should be interpreted.

13. Article 76, paragraph 1, of the Rules of Court is not formulated in strict terms. The Court may modify an order “if, *in its opinion* [emphasis added], some change in the situation justifies such revocation or modification”. With this self-imposed rule²¹, the Court has given itself a guideline

¹⁵ See *ibid.*, paras. 3 and 5.

¹⁶ CR 2024/27, p. 13, paras. 4-5 (Lowe) and p. 61, paras. 24-25 (Ní Ghrálaigh).

¹⁷ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163.

¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95.

¹⁹ *Ibid.*

²⁰ See Articles VIII and IX of the 1948 Genocide Convention.

²¹ See Article 30, para. 1, of the ICJ Statute.

rather than a strict limitation on the exercise of its power under Article 41 of its Statute. In any event, Article 76, paragraph 1, of the Rules of Court cannot be read as limiting the Court's power under Article 41 of its Statute. The Court is inherently competent under this provision to interpret, and thus to specify (or clarify), the measures it has previously indicated to ensure the sound administration of justice²².

14. Every specification (clarification) requires a modification of the terms of the original order, even if its substance remains the same. The Court's power to interpret and thus to specify the terms suggests that "some change in the situation" may also consist of subsequent developments which the Court had generally anticipated as a possibility, but with respect to which significant uncertainties arise as to how the previous order applies to them.

15. Of course, the possibility that new developments may give rise to more specific provisional measures risks encouraging parties to come back to the Court unnecessarily, for political purposes. While the Court should remain vigilant not to allow much room for repeated requests of this kind, I now recognize that it cannot be excluded that there may be situations in which, "in its opinion", a specification of a previous order is exceptionally warranted²³.

16. In the present case, I agree that the extraordinarily dramatic humanitarian situation in and around Rafah, resulting from the Israeli military offensive which started on 7 May 2024, and the lack of clarity concerning what Israel calls "designated humanitarian areas" justify a specification of the existing measures of 26 January and 28 March 2024, according to which

"[t]he State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip"²⁴;

and

"[t]he State of Israel shall . . . [t]ake all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary"²⁵.

In my view, the first measure indicated today specifies these previous measures by stating that

"The State of Israel shall . . . [i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in

²² See *mutatis mutandis Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16.

²³ See *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 5.

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024*, para. 86 (4).

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51 (2) (a).

Gaza conditions of life that could bring about its physical destruction in whole or in part”.

17. To arrive at this specification, it is not necessary to find that it is plausible that the current military offensive in Rafah, or the military operation in the Gaza Strip more generally, as such is being pursued with genocidal intent. Indeed, I remain unconvinced that the evidence presented to the Court provides plausible indications that the military operation undertaken by Israel as such is being pursued with genocidal intent²⁶

18. The reason for today’s measure is, in my view, that Israel has not sufficiently demonstrated that it can “enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians” without limiting its current military offensive in Rafah (see, in particular, paragraph 46 of the Order).

19. To find that Israel’s “obligation to prevent, and the corresponding duty to act”²⁷, plausibly exist, it is not necessary to find that Israel has violated its obligations under the Genocide Convention. For the obligation of prevention under the Genocide Convention to arise, a serious risk of conduct falling within the scope of Article III of the Genocide Convention and the knowledge of a State of such a risk is sufficient²⁸. At the present stage of provisional measures, it is sufficient that a risk of conduct falling within the scope of Article III of the Genocide Convention and the knowledge of Israel of such a risk is plausible.

20. Based on the information before the Court, I consider that this is the case for three reasons.

First, the situation in the areas to which Palestinians are fleeing remains highly precarious. I recognize that Israel has submitted a response to the question put to it regarding the conditions prevailing in the designated humanitarian areas, in which it has demonstrated substantial efforts to mitigate the humanitarian situation resulting from its military offensive in Rafah²⁹. However, even by Israel’s own account, the dwellings, including tents, available and set up in the designated humanitarian areas are clearly insufficient for sheltering the hundreds of thousands of Palestinians who have been called by Israel to leave Rafah or who have been prompted by the current military offensive to flee³⁰. I take seriously Israel’s assertion that the people arriving in the designated humanitarian areas, including in Al-Mawasi, have sufficient water at their disposal³¹, and I note that Israel has made efforts to enable humanitarian organizations to deliver sufficient food, water, and other basic humanitarian necessities, including through a newly established pier³². However, the various recent statements by representatives of different United Nations agencies and other international organizations which are quoted in South Africa’s response leave me with strong doubts as to whether Israel is able and willing to simultaneously conduct its current military offensive in Rafah and ensure the most basic conditions for the survival of Palestinians who have arrived, and

²⁶ See *Order of 26 January 2024*, declaration of Judge Nolte, para. 13

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 221-222, para. 431.

²⁸ *Ibid.*

²⁹ See the response of Israel to the question posed by Judge Nolte, 18 May 2024.

³⁰ *Ibid.*, paras. 26-31.

³¹ *Ibid.*, paras. 22-25.

³² *Ibid.*, para. 14.

who are expected to arrive, in the designated humanitarian areas, including the delivery of sufficient food and other basic humanitarian necessities³³.

21. I also have serious doubts whether Israel's public commitment and its efforts to enable the delivery of food and other humanitarian goods can give the Court enough confidence to assume that "urgently needed basic services and humanitarian assistance" will sustainably be provided in time to the people who have left and will leave Rafah, and to those who remain there despite the ongoing military offensive. My doubts that Israel will follow up on its public commitments result not least from the repeated interruptions of humanitarian aid deliveries by private Israeli citizens, which the police and the military have not prevented³⁴.

22. Finally, and relatedly, I am concerned by reports about continuing significant incendiary public speech in Israel, including by senior Israeli officials. When the Court adopted its first Order on 26 January 2024, I wrote separately that "such statements may contribute to a 'serious risk' that acts of genocide other than direct and public incitement may be committed, giving rise to Israel's obligation to prevent genocide"³⁵. Unfortunately, significant incendiary speech has continued and, in some cases, has even been accompanied by open support for denying humanitarian aid and assistance to the population in Gaza.

23. I am not referring to speech which can be interpreted as only being directed against Hamas, but, for example, to a statement by the Israeli Minister of Finance, Mr Bezalel Smotrich — a member of the Security Cabinet — who reportedly stated at the end of April 2024: "[T]here are no half measures. Rafah, Deir al-Balah, Nuseirat — total annihilation"³⁶; and to a statement by the Vice Chair of the international arm of the ruling Likud Party of 3 May 2024 on Israeli television, who reportedly declared: "I think we needed to invade Rafah yesterday . . . There are no uninvolved . . . [We] need to go in and kill and kill and kill"³⁷. Even if those statements come from persons who do not have immediate responsibility for Israel's conduct in Gaza, they are at least serious indications of a volatile political context, which gives rise to doubts as to whether the State of Israel will uphold its public commitments regarding the delivery of humanitarian aid and assistance to the Palestinians in Gaza, particularly those who have fled, and will continue to flee, to Rafah. My concerns are reinforced by reports about utterances by senior Israeli officials publicly opposing the delivery of humanitarian aid by international organizations and openly supporting

³³ See written comments of South Africa on the reply of Israel to the question addressed to it by Judge Nolte, 20 May 2024.

³⁴ Daily Press Briefing by the Office of the Spokesperson for the Secretary-General of 14 May 2024, (<https://press.un.org/en/2024/db240514.doc.htm>); Eden Solomon, Josh Breiner and Bar Peleg, "Two Trucks With Humanitarian Aid Bound for Gaza Set on Fire in the West Bank", *Haaretz*, 14 May 2024, <https://www.haaretz.com/israel-news/2024-05-14/ty-article/.premium/two-trucks-with-humanitarian-aid-bound-for-gaza-set-on-fire-in-the-west-bank/0000018f-75f7-ddbe-addf-77ff80bb0000>; see also Lorenzo Tondo and Quique Kierszenbaum, "Israeli soldiers and police tipping off groups that attack Gaza aid trucks", *The Guardian*, 21 May 2024, <https://www.theguardian.com/world/article/2024/may/21/israeli-soldiers-and-police-tipping-off-groups-that-attack-gaza-aid-trucks>; Felix Pope, "Activists who attacked Gaza aid truck claim Israeli police tipped them off", *The Jewish Chronicle*, 21 May 2024, available at: <https://www.thejc.com/news/israel/activists-who-attacked-gaza-aid-claim-israeli-police-tipped-them-off-ohrioh5q>.

³⁵ *Order of 26 January 2024*, declaration of Judge Nolte, para. 15.

³⁶ "Israel's Far-right Minister Smotrich Calls for 'No Half Measures' in the 'Total Annihilation' of Gaza", *Haaretz*, 30 April 2024, <https://www.haaretz.com/israel-news/2024-04-30/ty-article/.premium/smotrich-calls-for-no-half-measures-in-the-total-annihilation-of-gaza/0000018f-2f4c-d9c3-abcf-7f7d25460000>.

³⁷ Mohammad Alsaafin, "It's Clearer Than Ever: Israel's War Has Failed Catastrophically", *The Nation*, 9 May 2024, <https://www.thenation.com/article/archive/rafah-invasion-israel-failure/>.

attacks on aid trucks destined for Gaza³⁸. In this regard, I note that the Minister of National Security, Mr Itamar Ben Gvir, when asked about recent attacks in Israel on humanitarian convoys, reportedly stated that “it’s the cabinet that should be stopping the trucks”³⁹.

24. Based on this information, I am of the view that statements made by high-ranking Israeli officials, interrupted, and delayed, deliveries of humanitarian aid and assistance, and the still highly precarious situation in Al-Mawasi and other evacuation areas, contribute to a risk for access to humanitarian aid urgently needed to ensure the survival of the Palestinian people in Gaza⁴⁰.

25. For this reason, I considered it justified that the Court specify that the Orders indicated on 26 January and 28 March 2024 limit the current military offensive in Rafah as far as it could endanger the rights of the Palestinian people under the Genocide Convention, notably their access to basic humanitarian needs. The Court’s Order does not address military operations outside Rafah and the measure obliging Israel to halt the current military offensive in Rafah is conditioned by the need to prevent “conditions of life that could bring about [the] physical destruction in whole or in part” of the Palestinian group in Gaza. Thus, this measure does not concern other actions of Israel which do not give rise to such a risk.

CONCLUSION

26. I understand that, in the present case, the Court has exercised its discretion under Article 41 of its Statute and Article 76 of the Rules of Court in order to specify general measures indicated on 26 January and 28 March 2024, with a view to providing more guidance for the specific situation resulting from the current offensive by Israel in Rafah. While I maintain my general concerns regarding the risk of the Court overstepping its mandate under the Genocide Convention and its own Statute by being drawn into implementing its own orders⁴¹, I ultimately decided to agree to this measure, which is justified by the extraordinary situation resulting from the Israeli military offensive in Rafah which started on 7 May 2024.

(Signed) Georg NOLTE.

³⁸ N. Zilber, “Israel calls UN a ‘terror organisation’ as tensions escalate over Gaza war”, *The Financial Times*, 15 May 2024, <https://www.ft.com/content/f0945f3c-e4ab-4c04-8e1e-1e6f8397cb2c>; see also “‘Why Are My Cops Here?’ Itamar Ben-Gvir Rages at Israel’s Police Chief for Protecting Gaza Aid Convoys”, *Haaretz*, 20 May 2024, available at: <https://www.haaretz.com/israel-news/2024-05-20/ty-article/.premium/itamar-ben-gvir-rages-at-israels-police-chief-for-protecting-gaza-aid-convoys/0000018f-91ed-d17a-a9df-91fd3b670000>.

³⁹ “Ben Gvir: The cabinet should be stopping Gaza aid trucks — not protesters”, *The Times of Israel*, 19 May 2024, https://www.timesofisrael.com/liveblog_entry/ben-gvir-the-cabinet-should-be-stopping-gaza-aid-trucks-not-protesters/.

⁴⁰ See in particular Article II (c) of the Genocide Convention.

⁴¹ See *Order of 28 March 2024*, separate opinion of Judge Nolte, para. 3.