



# INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [X](#) [YouTube](#) [LinkedIn](#)

Summary

Unofficial

Summary 2024/1

26 January 2024

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

**Request for the indication of provisional measures**

The Court begins by recalling that, on 29 December 2023, South Africa filed in the Registry of the Court an Application instituting proceedings against Israel concerning alleged violations in the Gaza Strip of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention” or the “Convention”). The Application contained a Request for the indication of provisional measures, whereby South Africa, “request[ed] the Court, as a matter of extreme urgency, pending the Court’s determination of this case on the merits, to indicate the following provisional measures in relation to the Palestinian people as a group protected by the Genocide Convention”:

- “(1) The State of Israel shall immediately suspend its military operations in and against Gaza.
- (2) The State of Israel shall ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations referred to [in] point (1) above.
- (3) The Republic of South Africa and the State of Israel shall each, in accordance with their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people, take all reasonable measures within their power to prevent genocide.
- (4) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the Palestinian people as a group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention, in particular:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to the members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and

- (d) imposing measures intended to prevent births within the group.
- (5) The State of Israel shall, pursuant to point (4) (c) above, in relation to Palestinians, desist from, and take all measures within its power including the rescinding of relevant orders, of restrictions and/or of prohibitions to prevent:
- (a) the expulsion and forced displacement from their homes;
  - (b) the deprivation of:
    - (i) access to adequate food and water;
    - (ii) access to humanitarian assistance, including access to adequate fuel, shelter, clothes, hygiene and sanitation;
    - (iii) medical supplies and assistance; and
  - (c) the destruction of Palestinian life in Gaza.
- (6) The State of Israel shall, in relation to Palestinians, ensure that its military, as well as any irregular armed units or individuals which may be directed, supported or otherwise influenced by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in (4) and (5) above, or engage in direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide, or complicity in genocide, and insofar as they do engage therein, that steps are taken towards their punishment pursuant to Articles I, II, III and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.
- (7) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention of said evidence.
- (8) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one week, as from the date of this Order, and thereafter at such regular intervals as the Court shall order, until a final decision on the case is rendered by the Court.
- (9) The State of Israel shall refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

## I. INTRODUCTION (PARAS. 13-14)

The Court recalls the immediate context in which the present case came before it. On 7 October 2023, Hamas and other armed groups present in the Gaza Strip carried out an attack in Israel, killing more than 1,200 persons, injuring thousands and abducting some 240 people, many of whom continue to be held hostage. Following this attack, Israel launched a large-scale military operation in Gaza, by land, air and sea, which caused massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza. The Court is acutely aware of the extent of the human tragedy that is unfolding in the region and is deeply concerned about the continuing loss of life and human suffering.

The ongoing conflict in Gaza has been addressed in the framework of several organs and specialized agencies of the United Nations. In particular, resolutions have been adopted by the General Assembly of the United Nations (see resolution ES-10/21 adopted on 27 October 2023 and resolution ES-10/22 adopted on 12 December 2023) and the Security Council (see resolution 2712 adopted on 15 November 2023 and resolution 2720 adopted on 22 December 2023), referring to many aspects of the conflict. The scope of the present case submitted to the Court, however, is limited, as South Africa has instituted these proceedings under the Genocide Convention.

## **II. PRIMA FACIE JURISDICTION (PARAS. 15-32)**

### **1. Preliminary observations (paras. 15-18)**

The Court recalls that, in accordance with its jurisprudence, it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, South Africa seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. The Court must therefore first determine whether those provisions *prima facie* confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

The Court notes that South Africa and Israel are parties to the Genocide Convention and that neither of them has entered a reservation to Article IX or any other provision of the Convention.

### **2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 19-30)**

The Court recalls that Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. Since South Africa has invoked as the basis of the Court's jurisdiction the compromissory clause of the Genocide Convention, the Court must also ascertain whether it appears that the acts and omissions complained of by the Applicant are capable of falling within the scope of that convention *ratione materiae*.

The Court notes that South Africa issued public statements in various multilateral and bilateral settings in which it expressed its view that, in light of the nature, scope and extent of Israel's military operations in Gaza, Israel's actions amounted to violations of its obligations under the Genocide Convention. For instance, at the resumed 10th emergency special session of the United Nations General Assembly on 12 December 2023, at which Israel was represented, the South African representative to the United Nations stated that "the events of the past six weeks in Gaza have illustrated that Israel is acting contrary to its obligations in terms of the Genocide Convention". South Africa recalled this statement in its Note Verbale of 21 December 2023 to the Embassy of Israel in Pretoria.

The Court notes that Israel dismissed any accusation of genocide in the context of the conflict in Gaza in a document published by the Israeli Ministry of Foreign Affairs on 6 December 2023 which was subsequently updated and reproduced on the website of the Israel Defense Forces on 15 December 2023 under the title "The War Against Hamas: Answering Your Most Pressing Questions", stating that "[t]he accusation of genocide against Israel is not only wholly unfounded as a matter of fact and law, it is morally repugnant". In the document, Israel also stated that "[t]he accusation of genocide . . . is not just legally and factually incoherent, it is obscene" and that there was "no . . . valid basis, in fact or law, for the outrageous charge of genocide".

In light of the above, the Court considers that the Parties appear to hold clearly opposite views as to whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention. The Court finds that the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

As to whether the acts and omissions complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention, the Court recalls that South Africa considers Israel to be responsible for committing genocide in Gaza and for failing to prevent and punish genocidal acts. South Africa contends that Israel has also violated other obligations under the Genocide Convention, including those concerning “conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide”.

In the Court’s view, at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.

### **3. Conclusion as to *prima facie* jurisdiction (paras. 31-32)**

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case and that, consequently, it cannot accede to Israel’s request that the case be removed from the General List.

### **III. STANDING OF SOUTH AFRICA (PARAS. 33-34)**

The Court notes that Israel did not challenge the standing of South Africa in the present proceedings. It recalls that all the States parties to the Genocide Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bring that failure to an end.

The Court concludes, *prima facie*, that South Africa has standing to submit to it the dispute with Israel concerning alleged violations of obligations under the Genocide Convention.

### **IV. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 35-59)**

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court recalls that, in accordance with Article I of the Convention, all States parties thereto have undertaken “to prevent and to punish” the crime of genocide, that is to say any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group (Article II, para. (a)); causing serious bodily or mental harm to members of the group (Article II, para. (b)); deliberately inflicting on the group conditions

of life calculated to bring about its physical destruction in whole or in part (Article II, para. (c)); imposing measures intended to prevent births within the group (Article II, para. (d)); forcibly transferring children of the group to another group (Article II, para. (e)). Pursuant to Article III of the Genocide Convention, the following acts are also prohibited by the Convention: conspiracy to commit genocide (Article III, para. (b)), direct and public incitement to commit genocide (Article III, para. (c)), attempt to commit genocide (Article III, para. (d)) and complicity in genocide (Article III, para. (e)).

The Court notes that the provisions of the Convention are intended to protect the members of a national, ethnical, racial or religious group from acts of genocide or any other punishable acts enumerated in Article III. It considers that there is a correlation between the rights of members of groups protected under the Genocide Convention, the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party. In the Court's view, the Palestinians appear to constitute a distinct "national, ethnical, racial or religious group", and hence a protected group within the meaning of Article II of the Genocide Convention.

The Court observes that the military operation being conducted by Israel following the attack of 7 October 2023 has resulted in a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure. While figures relating to the Gaza Strip cannot be independently verified, recent information indicates that 25,700 Palestinians have been killed, over 63,000 injuries have been reported, over 360,000 housing units have been destroyed or partially damaged and approximately 1.7 million persons have been internally displaced. Palestinians in the Gaza Strip have been deprived access to water, food, fuel, electricity and other essentials of life, as well as to medical care and medical supplies.

In this regard, the Court takes note of a statement made on 5 January 2024 by the United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, a report of 21 December 2023 by the World Health Organization following a mission to North Gaza, and a statement issued on 13 January 2024 by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

The Court also refers to the statement by the UNRWA Commissioner-General that the crisis in Gaza is "compounded by dehumanizing language". In this regard, the Court has taken note of a number of statements made by senior Israeli officials. It calls attention, in particular, to the following examples: statements made by Mr Yoav Gallant, Defence Minister of Israel, on 9 and 10 October 2023, by Mr Isaac Herzog, President of Israel, on 12 October 2023, and by Mr Israel Katz, then Minister of Energy and Infrastructure of Israel, on 13 October 2023. The Court also takes note of a press release of 16 November 2023, in which 37 Special Rapporteurs, Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council voiced alarm over "discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials". Concerns were also expressed on 27 October 2023 by the United Nations Committee on the Elimination of Racial Discrimination about "the sharp increase in racist hate speech and dehumanization directed at Palestinians since 7 October".

In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.

The Court then turns to the condition of the link between the plausible rights claimed by South Africa and the provisional measures requested.

The Court considers that, by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving the plausible rights it asserts on the basis of the Genocide Convention in the present case, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention. Therefore, a link exists between the rights claimed by South Africa that the Court has found to be plausible, and at least some of the provisional measures requested.

#### **V. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 60-74)**

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision.

In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the plausible rights in question in these proceedings, namely the right of the Palestinian group in the Gaza Strip to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention, are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court considers that the civilian population in the Gaza Strip remains extremely vulnerable. It recalls that the military operation conducted by Israel since 7 October 2023 has resulted, *inter alia*, in tens of thousands of deaths and injuries and the destruction of homes, schools, medical facilities and other vital infrastructure, as well as displacement on a massive scale. The Court notes that the operation is ongoing and that the Prime Minister of Israel announced on 18 January 2024 that the war "will take many more long months". At present, many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. The World Health Organization has estimated that 15 per cent of the women giving birth in the Gaza Strip are likely to experience complications, and indicates that maternal and newborn death rates are expected to increase due to the lack of access to medical care. In these circumstances, the Court considers that the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment.

The Court takes note of Israel's statement that it has taken certain steps to address and alleviate the conditions faced by the population in the Gaza Strip. The Court further notes that the Attorney General of Israel recently stated that a call for intentional harm to civilians may amount to a criminal offence, including that of incitement, and that several such cases are being examined by Israeli law enforcement authorities. According to the Court, while steps such as these are to be encouraged, they are insufficient to remove the risk that irreparable prejudice will be caused before the Court issues its final decision in the case.

In light of the considerations set out above, the Court considers that there is a real and imminent risk of irreparable prejudice to the plausible rights invoked by South Africa, as specified by the Court.

## VI. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 75-84)

The Court concludes on the basis of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by South Africa that the Court has found to be plausible. In the present case, having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such. The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.

The Court is also of the view that Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip.

The Court further considers that Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip.

Israel must also take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Genocide Convention against members of the Palestinian group in the Gaza Strip.

Finally, in view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order. The report so provided shall then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

\*

The Court deems it necessary to emphasize that all parties to the conflict in the Gaza Strip are bound by international humanitarian law. It is gravely concerned about the fate of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release.

**OPERATIVE CLAUSE (PARA. 86)**

The full text of the operative clause of the Order reads as follows:

“For these reasons,

THE COURT,

*Indicates* the following provisional measures:

(1) By fifteen votes to two,

The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- (d) imposing measures intended to prevent births within the group;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge ad hoc* Moseneke;

AGAINST: *Judge* Sebutinde; *Judge ad hoc* Barak;

(2) By fifteen votes to two,

The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge ad hoc* Moseneke;

AGAINST: *Judge* Sebutinde; *Judge ad hoc* Barak;

(3) By sixteen votes to one,

The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judges ad hoc* Barak, Moseneke;

AGAINST: *Judge* Sebutinde;



(4) By sixteen votes to one,

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

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judges ad hoc* Barak, Moseneke;

AGAINST: *Judge* Sebutinde;

(5) By fifteen votes to two,

The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge ad hoc* Moseneke;

AGAINST: *Judge* Sebutinde; *Judge ad hoc* Barak;

(6) By fifteen votes to two,

The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge ad hoc* Moseneke;

AGAINST: *Judge* Sebutinde; *Judge ad hoc* Barak.”

\*

Judge XUE appends a declaration to the Order of the Court; Judge SEBUTINDE appends a dissenting opinion to the Order of the Court; Judges BHANDARI and NOLTE append declarations to the Order of the Court; Judge *ad hoc* BARAK appends a separate opinion to the Order of the Court.

---

### **Declaration of Judge Xue**

Judge Xue concurs with her colleagues in upholding South Africa's standing, on a prima facie basis, in instituting proceedings against Israel for breach of its obligations under the Genocide Convention. In explaining her position, she notes that the question of Palestine has been on the agenda of the United Nations since the inception of the Organization and that the people of Palestine, including the Palestinians in the Gaza Strip, are not yet able to exercise their right to self-determination. She recalls the relevant United Nations resolutions where it is stated that "the United Nations has a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy". In Judge Xue's view, this responsibility requires that the United Nations, including its principal judicial organ, ensures that the Palestinian people are protected under international law, particularly protected from the gravest crime — genocide.

In view of the humanitarian disaster in Gaza over the past one hundred and nine days, Judge Xue expresses her deep concern over the humanitarian situation in Gaza. She considers that, as a result of the Israeli military actions, the very existence of the Palestinian people in Gaza is at stake, which challenges the most elementary principles of humanity and morality. Judge Xue recalls that, over sixty years ago, when Ethiopia and Liberia instituted legal proceedings before the Court against South Africa for breach of its obligations as the Mandatory Power in South West Africa, the Court rejected the standing of those applicants for lack of legal interest. This gave rise to strong indignation of the Member States of the United Nations against the Court, severely tarnishing its reputation. In the *Barcelona Traction* case, the Court recognized that there are certain international legal obligations owed to the international community as a whole; by the very nature of their importance all States have a legal interest in their protection. They are characterized as obligations *erga omnes*. The Court, however, did not touch on the question of standing in that judgment. While the law and practice are still evolving, for a protected group such as the Palestinian people Judge Xue considers it least controversial that the international community has a common interest in its protection. In her view, this is the very type of case where the Court should recognize the legal standing of a State party to the Genocide Convention to institute proceedings on the basis of *erga omnes partes* to invoke the responsibility of another State party for the breach of its obligations under the Genocide Convention.

In light of the foregoing considerations and for the reasons contained in the Order of the Court, Judge Xue agrees that the provisional measures indicated in this Order are warranted under the circumstances.

### **Dissenting opinion of Judge Sebutinde**

Judge Sebutinde respectfully dissents from the majority in this Order, arguing that the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist. In her opinion, this is not a legal dispute susceptible of judicial settlement by the Court. Judge Sebutinde also argues that some of the preconditions for the indication of provisional measures have not been met — namely that South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel and of which the Applicant complains were committed with the necessary genocidal intent and that, as a result, they are capable of falling within the scope of the Genocide Convention. Furthermore, she argues that the rights asserted by South Africa are not plausible under the Genocide Convention. Judge Sebutinde considers that the provisional measures indicated by the Court in the Order are not warranted.

### **Declaration of Judge Bhandari**

In his declaration, Judge Bhandari states that the attacks on civilians in Israel on 7 October 2023 must be condemned but notes that Israel's military campaign in response to those attacks has led to a humanitarian catastrophe in Gaza.

Judge Bhandari recalls that the case has not been fully argued and that the Court does not have before it a full factual record. He further recalls that, in deciding a request for the indication of provisional measures, the Court is not deciding South Africa's claims or deciding whether to grant the requested relief.

Judge Bhandari states that the Court, in weighing the plausibility of the rights protection of which South Africa claims, must consider such evidence as is before it at this stage. It must take into account the widespread destruction in Gaza and loss of life that the population of Gaza has thus far endured. In determining the plausibility of these rights at the provisional measures stage, the Court need not make a final determination on the existence of intent under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In Judge Bhandari's view, the widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it, are by themselves capable of supporting a plausibility finding with respect to rights under Article II. The Court was justified in granting provisional measures in the terms it did.

Finally, Judge Bhandari states that all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt and that remaining hostages captured on 7 October 2023 are unconditionally released.

### **Declaration of Judge Nolte**

Judge Nolte submits a declaration in which he sets out the reasons for his agreement with the Court's decision to indicate provisional measures in respect of the Convention on the Prevention and Punishment of the Crime of Genocide. In his view, the measures indicated rest primarily on the plausible claim by South Africa that certain statements by Israeli State officials, including members of its military, give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention.

### **Separate opinion of Judge *ad hoc* Barak**

1. In his opinion Judge *ad hoc* Barak explains that the Court rejected South Africa's main contention, which concerns the suspension of the military operations in the Gaza Strip. Instead, the Court adopted measures that recall Israel's existing obligations under the Genocide Convention. In his view, the Court has reaffirmed Israel's right to defend its citizens and emphasized the importance of providing humanitarian aid to the population of Gaza. Judge *ad hoc* Barak states that the provisional measures indicated by the Court are of a significantly narrower scope than those requested by South Africa.

2. In the present case, the Court has emphasized that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law", which includes Hamas. The Court has also stated that it "is gravely concerned about the fate of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release".

3. Judge *ad hoc* Barak recalls that the Genocide Convention holds a very special place in the heart and history of the Jewish people, both within and beyond the State of Israel. Through an autobiographical remark, he explains that genocide is more than just a word for him; it represents calculated destruction and human behaviour at its very worst. It is the gravest possible accusation and is deeply intertwined with his life experience.

4. According to Judge *ad hoc* Barak, Israel is a democracy with a strong legal system and an independent judicial system. In his view, whenever there is tension between national security and human rights, the former must be attained without compromising the protection of the latter. He further explains that international law is an integral part of the conduct of the Israeli State and army, and that the holdings of the Israeli Supreme Court demonstrate a commitment to the rule of law and human life.

5. With regard to the Court's *prima facie* jurisdiction, Judge *ad hoc* Barak is doubtful whether South Africa brought this dispute in good faith. After South Africa sent a Note Verbale to Israel on 21 December 2023, concerning the situation in Gaza, Israel replied with an offer to engage in consultations at the earliest possible opportunity. South Africa, instead of accepting this offer, which could have led to fruitful diplomatic talks, decided to institute proceedings against Israel before this Court. He regrets that Israel's attempt to open a dialogue was met with the filing of an application.

6. In the view of Judge *ad hoc* Barak, the present case involves an additional difficulty because the other belligerent in the armed conflict, Hamas, is not a party to the present proceedings. While this does not prevent the Court from exercising its jurisdiction, it is an essential matter to be considered when determining the appropriate measures or remedies in this case.

7. Judge *ad hoc* Barak considers that the Court failed to give a complete account of the immediate context in which the present case came before it. He recalls that on 7 October 2023, over 3,000 Hamas terrorists invaded Israeli territory by land, air and sea. He further recalls that over 1,200 innocent civilians, including infants and the elderly, were murdered.

Judge *ad hoc* Barak also explains that Hamas places its military apparatus within and below civilian infrastructure to immunize it, intentionally putting its own population at risk. Furthermore, he refers to the fate of the hostages, an agony which has been ongoing for over 100 days, and the deaths and destruction taking place in Gaza.

8. According to Judge *ad hoc* Barak, the appropriate legal framework for analysing the situation in Gaza is international humanitarian law, and not the Genocide Convention.

9. Regarding the Genocide Convention, Judge *ad hoc* Barak explains that central to the crime of genocide is the element of intent, namely the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group *as such*. In his view, this intent is not present. Not even under the standard of plausibility required for the indication of provisional measures. For this reason, Judge *ad hoc* Barak disagrees with the Court's approach regarding the plausibility of rights, comparing the present case with *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. In his view, the evidence presented by South Africa is not comparable to that available to the Court in the *Gambia* case. He recalls that Israel argued that it has adopted several measures to minimize the impact of hostilities on civilians. In his view, it is surprising that the Court took note of Israel's statements explaining the steps it has taken to alleviate the conditions faced by the population in Gaza, but then completely failed to draw conclusions from these statements when examining the existence of intent. It is even more surprising

that the Court did not view any of these measures and statements as sufficient to rule out the existence of a plausible intent to commit genocide.

10. Judge *ad hoc* Barak also recalls that the Court has not made any findings with regard to South Africa's claims under the Genocide Convention. The conclusions reached by the Court in this preliminary stage do not prejudge in any way the claims brought by South Africa, which in his view, remain wholly unproven.

11. With regard to the specific measures indicated by the Court, Judge *ad hoc* Barak explains that he voted against the first and second provisional measures because he was not persuaded by South Africa's arguments on the plausibility of rights. Nevertheless, he points out that the first and second measures indicated by the Court merely restate obligations that Israel already has under Articles I and II of the Genocide Convention.

12. Regarding the third measure, which concerns acts of public incitement, he voted in favour in the hope that the measure will help to decrease tensions and discourage damaging rhetoric. He notes the concerning statements made by some authorities.

Regarding the fourth measure, he voted in favour, guided by deep humanitarian convictions and the hope that this will alleviate the consequences of the armed conflict for the most vulnerable. In his view, through this measure, the Court reminds Israel of obligations arising out of international humanitarian law, which already present in the DNA of the Israeli military.

13. According to Judge *ad hoc* Barak, it is regretful that the Court was unable to order South Africa to take measures to protect the rights of the hostages and to facilitate their release by Hamas. In his view, these measures are based on international humanitarian law, as are those enabling the provision of humanitarian aid. Moreover, the fate of the hostages is an integral part of the military operation in Gaza. By taking measures to facilitate the release of the hostages, South Africa could play a positive role in bringing the conflict to an end.

14. Finally, with regard to the fifth provisional measure, he explains that he voted against because South Africa has not shown that Israel has destroyed or concealed evidence.

---