



INTERNATIONAL COURT OF JUSTICE

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Summary

Unofficial

Summary 2024/6

24 May 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 modification of the Order of 28 March 2024

It is recalled 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 obligations under 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 submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court. By an Order of 26 January 2024, the Court indicated provisional measures (see press release No. 2024/6). By a letter dated 12 February 2024, South Africa, referring to “the developing circumstances in Rafah”, called upon the Court urgently to exercise its power under Article 75, paragraph 1, of the Rules of Court. By letters dated 16 February 2024, the Registrar informed the Parties of the decision taken by the Court in response to South Africa’s communication (see press release No. 2024/16). On 6 March 2024, South Africa requested the Court “to indicate further provisional measures and/or to modify its provisional measures indicated on 26 January 2024”, with reference to Article 41 of the Statute of the Court, as well as Articles 75, paragraphs 1 and 3, and 76 of the Rules of Court (see press release No. 2024/21). By an Order of 28 March 2024, the Court reaffirmed the provisional measures indicated in its Order of 26 January 2024 and indicated additional provisional measures (see press release No. 2024/26).

On 10 May 2024, South Africa submitted to the Court an “urgent Request for the modification and indication of provisional measures” pursuant to Article 41 of the Statute and Articles 75 and 76 of the Rules of Court. At the end of its oral observations on that Request, South Africa asked the Court to indicate the following provisional measures:

“South Africa respectfully requests the Court to order the State of Israel, as a State party to the Genocide Convention and as a [P]arty to these proceedings, to:

- (1) *immediately, and further to its obligations under the Court’s previous Orders of 26 January 2024 and 28 March 2024, cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip;*
- (2) *immediately, and further to its obligations under provisional measure 4 of the Court’s 26 January 2024 Order and provisional measures 2 (a) and 2 (b) of the Court’s 28 March 2024 Order, take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the*

provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies and/or officials, investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence; and ensure that its military does not act to prevent such access, provision, preservation or retention;

- (3) submit an open report to the Court (a) on all measures taken to give effect to these provisional measures within one week as from the date of this Order; and (b) on all measures taken to give effect to all previous provisional measures indicated by the Court within one month as from the date of this Order.”

I. GENERAL OBSERVATIONS (PARAS. 20-30)

In the view of the Court, South Africa’s present Request is a request for the modification of the Order of 28 March 2024. For this reason, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

“At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.”

The Court must first 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 that warranted the decision set out in its Order of 28 March 2024 has changed since that time. If the Court finds that there was a change in the situation since the delivery of its earlier Order, it will then have to consider whether such a change justifies a modification of its earlier decision concerning provisional measures. Any such modification would be appropriate only if the general conditions laid down in Article 41 of the Statute of the Court were also met in this instance.

The Court thus begins by determining whether there has been a change in the situation that warranted the decision set out in its Order of 28 March 2024.

The Court recalls that, in its Order of 26 January 2024, it noted that the military operation conducted by Israel following the attack of 7 October 2023 had 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”. In its decision communicated to the Parties by letters of 16 February 2024, the Court noted, quoting the United Nations Secretary-General, that the developments in the Gaza Strip, and in Rafah in particular, “would exponentially increase what [wa]s already a humanitarian nightmare with untold regional consequences”. The Court further recalls that, in its Order of 28 March 2024, it observed with regret that the catastrophic living conditions of the Palestinians in the Gaza Strip had deteriorated further since January 2024, especially in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip had been subjected.

The Court notes that the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024. In this regard, the Court observes that the concerns that it expressed in its decision communicated to the Parties on 16 February 2024 with respect to the developments in Rafah have materialized, and that the humanitarian situation is now to be characterized as disastrous. After weeks of intensification of military bombardments of

Rafah, where more than a million Palestinians had fled as a result of Israeli evacuation orders covering more than three quarters of Gaza's entire territory, on 6 May 2024, nearly 100,000 Palestinians were ordered by Israel to evacuate the eastern portion of Rafah and to relocate to the Al-Mawasi and Khan Younis areas ahead of a planned military offensive. The military ground offensive in Rafah, which Israel started on 7 May 2024, is still ongoing and has led to new evacuation orders. As a result, according to United Nations reports, nearly 800,000 people have been displaced from Rafah as at 18 May 2024.

The Court considers that the above-mentioned developments, which are exceptionally grave, in particular the military offensive in Rafah and the resulting repeated large-scale displacement of the already extremely vulnerable Palestinian population in the Gaza Strip, constitute a change in the situation within the meaning of Article 76 of the Rules of Court.

The Court is also of the view that the provisional measures indicated in its Order of 28 March 2024, as well as those reaffirmed therein, do not fully address the consequences arising from the change in the situation explained above, thus justifying the modification of these measures. However, in order to modify its earlier decision concerning provisional measures, the Court must still satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation.

II. CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES (PARAS. 31-47)

The Court recalls that, in its Order of 26 January 2024 indicating provisional measures in the present case, it concluded that "prima facie, it ha[d] jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case". In its Order of 28 March 2024, the Court stated that it saw no reason to revisit that conclusion. The Court likewise sees no reason to do so for the purposes of deciding on the present Request.

In the Order of 26 January 2024, the Court also found that at least some of the rights claimed by South Africa under the Genocide Convention and for which it was seeking protection were plausible, 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 that Convention. The Court saw no reason to revisit that conclusion in its Order of 28 March 2024. The Court likewise sees no reason to do so for the purposes of deciding on the present Request. It further considers that, by their very nature, at least some of the provisional measures sought pursuant to the present Request are aimed at preserving the rights claimed by the Applicant that the Court has found to be plausible.

The Court then considers whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed by South Africa and whether there is urgency.

The Court recalls in this regard that it has previously concluded that, in view of the fundamental values sought to be protected by the Genocide Convention, the plausible rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm.

The Court recalls that, on 7 May 2024, Israel began a military offensive in Rafah, following weeks of intensified bombardment, and that, as a result, approximately 800,000 Palestinians were displaced from Rafah as at 18 May 2024. It notes that senior United Nations officials have consistently underscored the immense risks associated with a military offensive in Rafah. It further notes that United Nations sources indicate that the above-mentioned risks have started to materialize and will intensify even further if the operation continues. On the basis of the information before it, the Court is not convinced that the evacuation efforts and related measures that Israel affirms to have undertaken to enhance the security of civilians in the Gaza Strip, and in particular those recently

displaced from the Rafah Governorate, are sufficient to alleviate the immense risk to which the Palestinian population is exposed as a result of the military offensive in Rafah.

In light of the considerations set out above, and taking account of the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, the Court finds that the current situation arising from Israel's military offensive in Rafah entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision.

III. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 48-55)

The Court concludes, on the basis of the above considerations, that the circumstances of the case require it to modify its decision set out in its Order of 28 March 2024.

The Court considers that, in conformity with its obligations under the Genocide Convention, Israel must immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.

The Court recalls that, in its Order of 26 January 2024, it ordered Israel, *inter alia*, to “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]”. In the present circumstances, the Court is also of the view that, in order to preserve evidence related to allegations of acts falling within the scope of Article II and Article III of the Genocide Convention, Israel must take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide.

The Court also considers that the catastrophic situation in Gaza confirms the need for the immediate and effective implementation of the measures indicated in its Orders of 26 January 2024 and 28 March 2024, which are applicable throughout the Gaza Strip, including in Rafah. In these circumstances, the Court finds it necessary to reaffirm the measures indicated in those Orders. In so doing, the Court wishes to emphasize that the measure indicated in paragraph 51 (2) (a) of its Order of 28 March 2024, requiring the “unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance”, necessitates that the Respondent maintain open land crossing points, and in particular the Rafah crossing.

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 will then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

The Court underlines that the present Order is without prejudice to any findings concerning the Respondent's compliance with the Orders of 26 January 2024 and 28 March 2024.

In its Orders of 26 January 2024 and 28 March 2024, the Court expressed its grave concern over the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and called for their immediate and unconditional release. The Court finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release.

IV. OPERATIVE CLAUSE (PARA. 57)

For these reasons,

THE COURT,

(1) By thirteen votes to two,

Reaffirms the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which should be immediately and effectively implemented;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge ad hoc* Barak;

(2) *Indicates* the following provisional measures:

The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:

(a) By thirteen votes to two,

Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge ad hoc* Barak;

(b) By thirteen votes to two,

Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge ad hoc* Barak;

(c) By thirteen votes to two,

Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide;

IN FAVOUR: *President* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge ad hoc* Barak;

(3) By thirteen votes to two,

Decides that 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* Salam; *Judges* Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;

AGAINST: *Vice-President* Sebutinde; *Judge ad hoc* Barak.

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Vice-President SEBUTINDE appends a dissenting opinion to the Order of the Court; Judges NOLTE, AURESCU and TLADI append declarations to the Order of the Court; Judge *ad hoc* BARAK appends a dissenting opinion to the Order of the Court.

Dissenting opinion of Vice-President Sebutinde

Vice-President Sebutinde has voted against the Order of the Court because of her firm belief that the provisional measures previously indicated and reaffirmed by the Court adequately address the current situation in the Gaza Strip, including Rafah. She considers that the situation in Rafah does not constitute a “new fact” that would necessitate modifying the existing measures under Article 76, paragraph 1, of the Rules of Court and regrets that South Africa has again invited the Court to micromanage the conduct of hostilities between Israel and Hamas. She firmly believes that Israel has the right to defend itself against its enemies, including Hamas, and to continue efforts to rescue its missing hostages. In her view, these rights are not incompatible with Israel’s obligations under the Genocide Convention. Vice-President Sebutinde considers that the Court should have taken into consideration the broader context of the existential threats faced by Israel from multiple actors and multiple fronts. She is also of the view that the responsibility for the suffering of the Palestinians of Gaza does not lie only with Israel and nor is it correct to say that Israel has failed to act to alleviate that suffering, in light of evidence of steps taken by Israel to improve the humanitarian situation. She takes the position that the measures indicated by the Court are unnecessary, already covered by the Court’s previous Orders, and are inconsistent with the factual situation on the ground and the Court’s prior practice. She would therefore have rejected South Africa’s request in its entirety. Finally, she notes her serious concerns regarding the manner in which the request and oral hearings were managed, which bear upon the procedural equality between the Parties and the good administration of justice by the Court.

Declaration of Judge Nolte

Judge Nolte notes that he voted in favour of the Order of 24 May 2024 only after considerable hesitation. He observes that the Court can play only a limited role in resolving the catastrophic situation in the Gaza Strip. He notes that the Court must be careful not to overstep the limits of the mandate conferred on it by the Charter of the United Nations, its Statute, and the Genocide Convention.

He expresses doubts as to whether the current military offensive in Rafah constitutes “some change in the situation” that was not previously considered, given that the Court has already referred to the deteriorating situation in Rafah in its letter to the Parties of 16 February 2024 and in its Order of 28 March 2024, and that the previous measures were insufficient to address the consequences arising from a military operation by the Israeli armed forces in Rafah. He reiterates that the Court should not signal 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. Moreover, he emphasizes that its incidental jurisdiction under Article 41 of the Statute does not transform the Court into a monitoring body or even an enforcement organ.

However, in Judge Nolte’s view, the Court is competent under this provision to interpret, and thus to specify (or clarify), the measures it has previously indicated. Accordingly, the Court’s power to specify the terms of previous measures 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.

Judge Nolte is of the view that the extraordinarily dramatic humanitarian situation in and around Rafah justifies a specification of the existing measures of 26 January and 28 March 2024. He reiterates that, to arrive at this conclusion, 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. He also remains unconvinced that the evidence presented to the Court at this stage provides plausible indications that the military operation undertaken by Israel as such is being pursued with genocidal intent.

In his view, the reason for the measure indicated is 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. Based on the information before the Court, he comes to the conclusion that statements made by high-ranking Israeli officials, interrupted and delayed deliveries of humanitarian aid and assistance, and the highly precarious situation in Al-Mawasi and other designated humanitarian areas plausibly contribute to a risk for access to urgently needed humanitarian aid for the survival of the Palestinian people in Gaza, and plausibly give rise to Israel’s duty to prevent acts that are prohibited under the Genocide Convention.

Judge Nolte also states that the Court’s Order does not address military operations outside Rafah and that 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.

Declaration of Judge Aurescu

Judge Aurescu reiterates his support for the decision to indicate provisional measures and offers his views on certain issues related to the Order. First, he interprets the second provisional measure as indicating as well the halt of the Israeli military offensive to the extent that it “may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part”, not only “any other action” which may inflict such conditions should be stopped. Judge Aurescu also considers that it would have been consistent and clearer, from the perspective of the connection of this second provisional measure with the Genocide Convention, for its text to use the terminology “Palestinians in Gaza as a protected group under the Genocide Convention”, as in the Court’s Order of 28 March 2024. Second, in his view, the Court could have considered explaining that the provisional measures already in force cover and apply to the present situation in the Gaza Strip, its degree of aggravation being foreseen when the previous two Orders were adopted. Third, Judge Aurescu believes that the Court could have developed that the measures indicated, including the halt of the military offensive, do not affect the right of Israel to conduct operations, which should be undertaken in conformity with international law, including in a manner responding to the criteria of proportionality and necessity, to protect its civilian citizens and to free the hostages still held in the Rafah area by armed groups. Fourth, he offers remarks about the developments of the requirement for a “change in the situation” in order to revoke or modify a provisional measure. Since recently, it can be interpreted as also encompassing the aggravation of an already existing situation. Finally, Judge Aurescu believes that the Court could have used the opportunity to include in the *dispositif* a measure by which it could have asked Israel to make demarches to implement with immediate effect Security Council resolution 2728 (2024), including its provision on a “lasting sustainable ceasefire”. In his view, such a measure, an innovation in the Court’s jurisprudence, would have had the advantage of underscoring the distribution and sharing of the role of maintaining international peace and security between the Security Council and the Court, and of extending to the relevant provisions of the mentioned Security Council resolution the legal force of the provisional measures indicated by the Court, thus inaugurating new co-operation avenues between the two principal organs of the United Nations.

Declaration of Judge Tladi

In his declaration, Judge Tladi elaborates on two main points, namely, the Court’s approach to modifying previous decisions and the security and self-defence argument of Israel.

Regarding the first point, Judge Tladi considers that the focus should not be on whether there is “some change in the situation”, but rather on whether the circumstances presented justify indicating new measures or modifying an existing order. According to Judge Tladi, this is because Article 41

of the Statute, which allows the Court to issue provisional measures if it deems the circumstances necessary, should be the guiding principle.

Regarding the second point, Judge Tladi notes the disproportion between the harms Israel complains of and the statistics of loss and devastation on the Palestinian side resulting from the Israeli military operations. Judge Tladi points out that legitimate defensive actions, *within the strict confines of international law*, to repel *specific attacks*, would be consistent with the Court's Order, but that the Order does not permit the continuation of the military operation in Rafah, and elsewhere in the Gaza Strip, whose consequences for the rights of the Palestinian people, protected under the Convention on the Prevention and Punishment of Genocide, has been devastating.

Dissenting opinion of Judge *ad hoc* Barak

1. In his opinion, Judge *ad hoc* Barak explains that the Court has once again rejected South Africa's main contention and refrained from ordering Israel to "cease its military operations in the Gaza Strip . . . and . . . withdraw the Israeli army from the entirety of the Gaza Strip". In his view, the first additional measure indicated by the Court requires Israel to halt its military offensive in the Rafah Governorate *only* in so far as is necessary to comply with Israel's obligations under the Genocide Convention. In this sense, it merely reaffirms Israel's existing obligations under the Convention. Judge *ad hoc* Barak explains that since the measure indicated by the Court contains an explicit link to Israel's existing obligations under the Genocide Convention, Israel is not prevented from carrying out its military operation in Rafah as long as it fulfils its treaty obligations. As a result, the measure is a qualified one, which preserves Israel's right to prevent and repel threats and attacks by Hamas, defend itself and its citizens, and free the hostages.

2. He notes that, despite the limited nature of the measures indicated by the Court, he was unable to vote in favour of the operative clause because the military offensive in Rafah does not plausibly raise questions under the Genocide Convention. In particular, there is no evidence of intent. Judge *ad hoc* Barak also points out that the Court's decision takes account of the immediate context in which Israel decided to undertake the military operation: the attacks of 7 October 2023 by Hamas, which continues to pose an existential threat to Israel, and the abduction of hundreds of Israeli citizens and other foreign nationals to Gaza. Against this background, the Court understood that it cannot order one party to stop, while the other is free to continue.

The situation in Rafah and Al-Mawasi

3. In his opinion, Judge *ad hoc* Barak notes that Israel's military operation in the Gaza Strip cannot be understood — in fact, would not exist — without the existential threat posed by Hamas and the ongoing captivity of more than one hundred hostages. In his view, for years, Rafah has been, and still is, the stronghold of Hamas. He further states that the indiscriminate threats and attacks by Hamas against Israel have not ceased for a single day.

4. According to Judge *ad hoc* Barak, in order to prevent and repel the threat posed by Hamas and free the hostages, Israel has to carry out military operations in Rafah and in the entirety of the Gaza Strip. Judge *ad hoc* Barak recalls that Israel's highest authorities have reiterated that their aim is only one: to defeat Hamas and bring the hostages back to Israel.

5. With regard to Al-Mawasi, Judge *ad hoc* Barak explains that Israel has taken measures to establish humanitarian zones where the civilian population may safely evacuate.

No place for the indication of new measures

6. Judge *ad hoc* Barak is of the view that the military operation in Rafah is not a *new* military campaign. It forms part of Israel's ongoing military operation throughout the Gaza Strip, which began in October 2023. It is an integral part of its overall effort to prevent and repel ongoing threats and attacks by Hamas and free the hostages in captivity. Furthermore, he notes that the Court explicitly referred to the deteriorating situation in Rafah in its previous Orders.

7. In any case, according to Judge *ad hoc* Barak, any consequences that may arise from Israel's actions in Rafah are already covered by the Court's two previous Orders. In this sense, the Court's previous Orders already restrict Israel's military operation in Rafah in such a way that they protect any plausible rights found by the Court under the Genocide Convention.

8. Judge *ad hoc* Barak then explains why he considers that the conditions for the indication of provisional measures are not met. In particular, he is of the view that the intent required by the Genocide Convention is lacking. In his view, the conduct of a State can only create a risk of irreparable prejudice to rights under the Genocide Convention, if such conduct falls within the scope of the Convention. For this to be the case, the specific intent to commit genocide (*dolus specialis*) must be present. If the *dolus specialis* of genocide is absent, the conduct does not fall within the scope of the Convention and, consequently, the rights under the Genocide Convention are not implicated. According to Judge *ad hoc* Barak, South Africa has not produced any evidence that would allow the Court to draw this conclusion; not even on the basis of a plausibility standard.

9. In particular, Judge *ad hoc* Barak recalls that the stated purpose of its military operation in Rafah is to prevent and repel the threat posed by Hamas, to defend Israel and its citizens, and to free the hostages. He also mentions that the IDF has called on eastern Rafah residents to evacuate, and has taken measures to mitigate the harm suffered by the Palestinians displaced from Rafah to the humanitarian area established in Al-Mawasi.

10. Judge *ad hoc* Barak finds it difficult to understand why the Court failed to acknowledge, even in a sentence, that there has been an increase of humanitarian aid and assistance entering the Gaza Strip. He stresses that according to the UN Senior Humanitarian Coordinator Sigrid Kaag and Israel's reports submitted to the Court, there has been a significant increase in the amount of humanitarian aid delivered to Gaza.

The limited nature of the measures indicated by the Court

11. With regard to the first additional measure indicated by the Court, Judge *ad hoc* Barak considers that it merely reiterates an obligation that already exists for Israel under the Genocide Convention. The Court's measure does not require Israel to refrain from its military operation in Rafah altogether. In his view, it is not an unconditional obligation to halt the military operation, but, rather, specifies that Israel must, in accordance with its obligations under the Genocide Convention, conduct its military offensive in a way that does not deprive the Palestinian civilian population of its essential means of existence.

12. Regarding the second additional measure indicated by the Court, Judge *ad hoc* Barak notes that it specifies the measure indicated in paragraph 86, subparagraph 4, of the Order of 26 January 2024, and paragraph 51, subparagraph 2 (a), of the Order of 28 March 2024. He explains that he voted in favour of those measures in the past, but cannot support this new specification because it is targeted at the Rafah crossing. According to Judge *ad hoc* Barak, the Court did not have a single

piece of evidence regarding the situation of the Rafah crossing. More importantly, the Rafah crossing can only operate if both Egypt and Israel agree.

13. Judge *ad hoc* Barak states that the third additional measure indicated by the Court reaffirms Israel's existing obligations under the first two Orders, which provide that Israel must preserve evidence. He explains that he voted against this measure because South Africa has not provided evidence that additional measures are required for the preservation of evidence.

14. With regard to the fourth additional measure, Judge *ad hoc* Barak notes that he voted against because the reporting obligations have not served a meaningful purpose.

Concluding remarks

15. Judge *ad hoc* Barak concludes his opinion reiterating that he sincerely hopes that this war comes to an end as quickly as possible, and that the hostages will return to Israel immediately. He emphasizes that, like every State, Israel has the fundamental right to protect its citizens and itself. This right receives a special dimension in the case of the hostages, in the sense that it imposes a duty on the State to do everything in its power to bring them back to Israel. The fulfilment of this duty is not in conflict with Israel's obligations under the Genocide Convention because it stems from Israel's intent to protect its citizens and not from an intent to commit acts prohibited under the Genocide Convention.

16. Judge *ad hoc* Barak also notes that the Court is in a difficult position and facing great pressure. Even so, in his view, the Court cannot be bothered by political, military or public policy troubles. It can only be concerned with legal troubles, since it is a court of law and not one of public opinion.
