

**THE GENOCIDE CONVENTION:
A MULTIPURPOSE INSTRUMENT OR THE KEY TO PROTECT HUMAN RIGHTS?**

**A CONVENÇÃO DO GENOCÍDIO:
UM INSTRUMENTO MULTIUSO OU A CHAVE PARA PROTEGER OS DIREITOS
HUMANOS?**

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ABSTRACT

BACKGROUND: Last 26 January the International Court of Justice delivered its order on precautionary measures requested by South Africa in the proceedings instituted against Israel for the alleged violation of the Genocide Convention in relation to Palestines in the Gaza Strip. This is the first of two articles in which we refer first, to the arguments of both parties to the conflict and the provisional decision of the Court, and a future one in which we will analyse the use of the Genocide Convention as the only means that States have to bring before the jurisdiction of the Court, States accused of committing any of the three major international crimes (war crimes, crimes against humanity and genocide). While forms of commission basically overlap, each of the crimes has a clearly defined normative status with its own principles. The work of the Court in recent years in which the Genocide Convention was invoked, involves protecting both the lives of affected civilians and the essence of the historic instrument. At this point, the proof of the special intent to destroy a conventional protected group becomes paramount.

RESULTS: Results have implications for the on-going processes at the International Court of Justice in which Myanmar, the Russia Federation, Syria and Israel are being accused of violating the Genocide Convention, as well as future situations in which civilians suffered allegedly criminal acts committed by States.

CONCLUSIONS: The case law that the Court is elaborating around the the proof of the special intent required, aa well about any precautionary measure requested, will be essential to distinguish the crime of genocide from other international instruments that are part of

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international humanitarian and criminal law, but do not provide - at the moment - access to the jurisdiction of the Court.

Keywords: human rights / genocide / provisional measures / responsibility of States

INTRODUCTION

On 29 December 2023, South Africa filed an Application instituting proceedings against Israel concerning alleged violations of Israel's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention hereafter), in relation to Palestinians in the Gaza Strip. The Application also contained a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the International Court of Justice (ICJ or the Court hereafter), and Articles 73, 74 and 75 of the Rules of Court. The Applicant requested the Court to indicate provisional measures in order to "*protect against further, severe and irreparable harm to the rights of the Palestinian people under the Genocide Convention*", and "*to ensure Israel's compliance with its obligations under the Genocide Convention not to engage in genocide, and to prevent and to punish genocide*".²

As underlined in General Assembly resolution 96 (I) of 11 December 1946,

"genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations".

As the ICJ stated, the Genocide Convention "*was manifestly adopted for a purely humanitarian and civilizing purpose*", since "*its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality*".³

² ICJ, South Africa Application Instituting Proceedings against Israel, 29 December 2023.

³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, p. 23).

I. JURISDICTION

South Africa and Israel are both Members of the United Nations and therefore bound by the Statute of the Court, including Article 36 (1), which provides that the Court’s jurisdiction “*comprises . . . all matters specially provided for . . . in treaties and conventions in force*”. South Africa and Israel are also parties to the Genocide Convention, whose Article IX provides:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Neither South Africa nor Israel has entered a reservation to Article IX or any other provision of the Convention. Israel signed the Genocide Convention on 17 August 1949 and deposited its instrument of ratification on 9 March 1950, and became a party when the Genocide Convention entered into force on 12 January 1951. South Africa deposited its instrument of accession on 10 December 1998. It became applicable between the parties on the 90 day thereafter, pursuant to Article XIII of the Convention. Therefore, pursuant to Article 36 (1) of the Court’s Statute and Article IX of the Genocide Convention, the Court decided on its order that it has *prima facie* jurisdiction to hear the claims submitted by South Africa against Israel.

II. THE ALLEGATIONS MADE BY SOUTH AFRICA

South Africa states that its Application concerns acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the wake of the attacks in Israel on 7 October 2023.

Even though the Applicant condemns all violations of international law, including the direct targeting of Israeli civilians and other nationals and hostage-taking by Hamas and other Palestinian armed groups, South Africa declares that no armed attack on a State’s territory no

matter how serious -even involving atrocity crimes-, can provide any possible justification for, or defence to, breaches of the Genocide Convention.⁴

According to the Application, the acts and omissions by Israel are genocidal in character because they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group who inhabits the Gaza Strip.

The acts in question include killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. The Applicant affirms that the acts are all attributable to Israel, which has failed to prevent genocide and is committing genocide in manifest violation of the Genocide Convention, and which has also violated and is continuing to violate its other fundamental obligations under the Genocide Convention, including by failing to prevent or punish the direct and public incitement to genocide by senior Israeli officials and others.

II. a. The context as set by the Applicant

South Africa introduces the facts within the broader context of what it states is Israel's conduct towards Palestinians,

“during its 75-year-long apartheid, its 56-yearlong belligerent occupation of Palestinian territory and its 16-year-long blockade of Gaza, including the serious and ongoing violations of international law associated therewith, including grave breaches of the Fourth Geneva Convention,⁵ and other war crimes and crimes against humanity.”⁶

Then, the applicant refers to the nature, scope and extent of Israel's military attacks on Gaza,

“which have involved the sustained bombardment over more than 11 weeks of one of the most densely populated places in the world, forcing the evacuation of 1.9 million people or 85% of the population of Gaza from their homes and herding them into ever smaller areas, without

⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287

⁶ ICJ, South Africa Application Instituting Proceedings, para. 2.

adequate shelter, in which they continue to be attacked, killed and harmed.”⁷

South Africa states that at the time of the application, Israel has killed

“in excess of 21,110 named Palestinians, including over 7,729 children - with over 7,780 others missing, presumed dead under the rubble-, and has injured over 55,243 other Palestinians, causing them severe bodily and mental harm, (sic), and has damaged or destroyed in excess of 355,000 Palestinian homes, alongside extensive tracts of agricultural land, bakeries, schools, universities, businesses, places of worship, cemeteries, cultural and archaeological sites, municipal and court buildings, and critical infrastructure, including water and sanitation facilities and electricity networks, while pursuing a relentless assault on the Palestinian medical and healthcare system.”⁸

The Application reminds that until 2005, Gaza was occupied by Israeli military forces on the ground. However in 2005, Israel unilaterally “disengaged” from Gaza, dismantling its military bases and relocating Israeli settlers from settlements in Gaza back to Israel, and into the occupied West Bank. Notwithstanding this disengagement, Israel continues to exercise control over the airspace, territorial waters, land crossings, water, electricity, electromagnetic sphere and civilian infrastructure in Gaza,⁹ as well as over key governmental functions, such as the management of the Palestinian population registry for Gaza.¹⁰ Given that continuing effective control by Israel over the territory, Gaza is still considered by the international community to be under belligerent occupation by Israel.¹¹

⁷ Ibidem 4, para. 4.

⁸ Ibidem, para. 4 in fine.

⁹ GOV.UK, Guidance Overseas business risk: The Occupied Palestinian Territories (22 February 2022), <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-theoccupied-palestinian-territories>, para. 2.5

¹⁰ Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/50/21 (9 May 2022), para. 16.

¹¹ See e.g., Security Council resolution 1860, S/RES/1860 (2009) (8 January 2009), where the Security Council stressed “that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state,” <https://digitallibrary.un.org/record/645525?ln=en#record-files-collapse-header>. Recently reaffirmed in General Assembly Resolution 77/30, Assistance to the Palestinian People, A/RES/77/30 (6 December 2022), <https://documents-ddsny.un.org/doc/UNDOC/GEN/N22/729/08/PDF/N2272908.pdf?OpenElement>. See also, Human Rights Council, Human rights situation in Palestine and the other occupied Arab territories, Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian

Entry and exit by air and sea to Gaza has been prohibited since the early 1990s, with Israel operating only two crossing points -Erez (pedestrian) and Kerem Shalom (goods)-.¹² Between 2008 and 2021, the World Health Organization recorded that 839 Palestinians from Gaza had died while waiting for medical permits to leave Gaza for urgent medical treatment.¹³ The majority of permits were for day labourers and agricultural traders, primarily to undertake low-skilled work in Israel and on Israeli settlements in the West Bank.¹⁴ Between 2007 and 2010, Israel regulated food imports into Gaza in accordance with calories consumed per person, to limit the transfers of food to a humanitarian minimum, without causing hunger or malnutrition.¹⁵

The Application affirms that Israel made fishing extremely hazardous for Palestinians, who have not had full access to the fishing zone of 20 nautical miles stipulated in the Oslo Accords -interim agreements concluded between the PLO and Israel in the early 1990s-.

In 2020, the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, described the impact of Israel's blockade on Gaza as having turned Gaza *“from a low-income society with modest but growing export ties to the regional and international economy to an impoverished ghetto with a decimated economy and a collapsing social service system”*.¹⁶ In 2022, he described the situation as follows:

“In Gaza, the apparent strategy of Israel is the indefinite warehousing of an unwanted population of 2 million Palestinians, whom it has confined to a narrow strip of land through its comprehensive 15-year-old air, land

Territory, A/HRC/40/CRP.2 (18 March 2019), https://www.un.org/unispal/wp-content/uploads/2019/06/A.HRC_40.CPR_2.pdf. Security Council resolution 2720 (2023), adopted on 22 December 2023, stresses that “the Gaza Strip constitutes an integral part of the territory occupied in 1967” and reiterates “the vision of the two-State solution, with the Gaza Strip as part of the Palestinian State,” <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/424/87/PDF/N2342487.pdf?OpenElement>.

¹² Egypt operates a third crossing – the Rafah Crossing – between Gaza and Egypt. UNCTAD, Economic costs of the Israeli occupation for the Palestinian people: the Gaza Strip under closure and restrictions (13 August 2020), https://unctad.org/system/files/official-document/a75d310_en_1.pdf, paras. 6, 8.

¹³ World Health Organisation, Fifteen Years of Gaza Blockade and Barriers to Health Access (2022), https://www.emro.who.int/images/stories/palestine/15_Years_Gaza_Blockade_Factsheet.jpg?ua=1.

¹⁴ UNCTAD, Developments in the economy of the Occupied Palestinian Territory (2023) (11 September), TD/B/EX(74)/2, https://unctad.org/system/files/official-document/tdbex74d2_en.pdf, para. 38; UN OCHA, Movement in and out of Gaza: update covering July 2023 (15 August 2023), <https://www.ochaopt.org/content/movement-and-out-gaza-update-covering-july-2023>.

¹⁵ United Nations Economic and Social Commission for Western Asia (‘ESCWA’), Palestine Under Occupation III Mapping Israel’s Policies and Practices and their Economic Repercussions in the Occupied Palestinian Territory, E/ESCWA/CL6.GCP/2021/3 (2022), https://www.un.org/unispal/wp-content/uploads/2022/07/E.ESCWA_CL6_GCP_2021.3_220722.pdf, p. 38.

¹⁶ Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/44/60 (15 July 2020), https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_60.pdf, para. 54

*and sea blockade (with further restrictions by Egypt on the southern border of Gaza). [The former UN Secretary General] Ban Ki-moon has called this political quarantining of the population a collective punishment, which is a serious breach of international law.*¹⁷

II. b. Facts as exposed by South Africa

South Africa states that since 7 October 2023, Israel has engaged in a large-scale military assault by land, air and sea, on the Gaza Strip, a narrow strip of land of approximately 365 square kilometres, one of the most densely populated places in the world.¹⁸ Gaza which is home to approximately 2.3 million people -almost half of them children-, has been subjected by Israel to what has been described as one of the “*heaviest conventional bombing campaigns*” in the history of modern warfare.¹⁹ By 29 October 2023 alone, it was estimated that 6,000 bombs per week had been dropped on the tiny enclave.²⁰ In just over two months, Israel’s military attacks had “*wreaked more destruction than the razing of Syria’s Aleppo between 2012 and 2016, Ukraine’s Mariupol, or proportionally, the Allied bombing of Germany in World War II.*”²¹

The Applicant mentions that the United Nations General Assembly has expressed “*grave concern over the catastrophic humanitarian situation in the Gaza Strip and the suffering of the*

¹⁷ General Assembly, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, A/HRC/49/87 (12 August 2022), <https://www.un.org/unispal/document/report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-palestinian-territories-occupied-since-1967-report-a-hrc-49-87-advance-unedited-version/>, para. 45.

¹⁸ UN OCHA, Hostilities in the Gaza Strip - Reported Impact (5 December 2023), https://www.ochaopt.org/sites/default/files/Gaza_casualties_info-graphic_5_Dec_2023%20final.pdf.

¹⁹ Rathbone, John Paul. Israel’s Gaza attack ‘one of history’s heaviest conventional bombing campaigns’, The Irish Times (6 December 2023), <https://www.irishtimes.com/world/middle-east/2023/12/06/israels-gaza-attack-one-of-historys-heaviestconventional-bombing-campaigns/>.

²⁰ Albanese, Francesca. UN Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967, an interview with UN News, 29 October 2023, <https://news.un.org/en/story/2023/10/1142952>; see also: Natasha Bertrand and Katie Bo Lillis, “Exclusive: Nearly half of the Israeli munitions dropped on Gaza are imprecise ‘dumb bombs’, US intelligence assessment finds”, CNN (14 December 2023), <https://edition.cnn.com/2023/12/13/politics/intelligenceassessment-dumb-bombs-israel-gaza/index.html>; “Why is Israel using so many dumb bombs in Gaza”, The Economist (16 December 2023), <https://www.economist.com/interactive/middle-east-and-africa/2023/12/16/why-is-israel-using-so-manydumb-bombs-in-gaza>.

²¹ Frankel, Julia. Israel’s military campaign in Gaza seen as among the most destructive in history, experts say, AP News (21 December 2023), <https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope419488c511f83c85baea22458472a796>.

Palestinian civilian population”,²² with the United Nations Security Council noting in particular “*the disproportionate effect on children*”.²³

II. c. Genocidal acts allegedly attributed to Israel by the Applicant

South Africa claims that information as it was available at December 2023, establishes that Israel:

- (i) is engaged in killing Palestinians in Gaza -including children- in large numbers;
- (ii) is causing serious bodily and mental harm to Palestinians in Gaza, including Palestinian children; and is inflicting on them conditions of life intended to bring about their destruction as a group. Those conditions include:
 - (iii) expulsions from homes and mass displacement, alongside the large-scale destruction of homes and residential areas;
 - (iv) deprivation of access to adequate food, water, and medical care;
 - (v) deprivation of access to adequate shelter, clothes, hygiene and sanitation; and
 - (vi) the destruction of the life of the Palestinian people in Gaza; and
 - (vii) imposing measures intended to prevent Palestinian births.

Then South Africa gives examples of each of the ways of performing genocide mentioned above.

As a general statement, South Africa introduces sayings from the United Nations Secretary-General -and other United Nations experts-, who made clear that “Nowhere is safe in Gaza”.²⁴ It claims that:

“Palestinians in Gaza have been killed in their homes, in places where they sought shelter, in hospitals, in UNWRA schools, in churches, in

²² General Assembly resolution ES-10/22, Protection of civilians and upholding legal and humanitarian obligations, A/RES/ES-10/22, (12 December 2023), <https://www.un.org/unispal/wp-content/uploads/2023/12/N2339709.pdf>; General Assembly resolution ES-10/21, Protection of civilians and upholding legal and humanitarian obligations, A/RES/ES-10/21, (30 October 2023), <https://www.un.org/unispal/document/protection-of-civilians-and-upholding-legal-and-humanitarianobligations-ga-resolution-a-res-es-10-21/>.

²³ Security Council resolution 2712, The situation in the Middle East, including the Palestinian Question, S/RES/2712 (15 November 2023), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/359/02/PDF/N2335902.pdf?OpenElement>.

²⁴ Letter by the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter, (6 December 2023), https://www.un.org/sites/un2.un.org/files/sg_letter_of_6_december_gaza.pdf; UNICEF, A dystopic scene that seemed to stretch on endlessly (November 2023), <https://www.unicef.org.uk/what-we-do/emergencies/no-safety-forchildren-ingaza/#:~:text=%E2%80%9CUnless%20those%20conditions%20are%20met,need%20a%20humanitarian%20ceasefire%20now.%E2%80%9D>; ICRC, Israel and the occupied territories: De-escalate now to prevent further human suffering (28 October 2023), <https://www.icrc.org/en/document/israel-and-occupied-territories-deescalate-now-prevent-further-humansuffering>.

*mosques, and as they tried to find food and water for their families. They have been killed if they failed to evacuate, in the places to which they fled, and even while they attempted to flee along Israeli declared safe routes”.*²⁵

At the time of the application, South Africa states that over 55,243 Palestinians had been wounded in Israel’s military attacks on Gaza since 7 October 2023, the majority of them women and children.²⁶ Burns and amputations are typical injuries,²⁷ with an estimated 1,000 children having lost one or both legs.²⁸ It is estimated that over 1.9 million Palestinians out of Gaza’s population of 2.3 million people -which totals around 85 % of the population-, have been forced from their homes.²⁹ For many Palestinians, the forced evacuation from their homes is necessarily permanent since Israel has damaged or destroyed an estimated 355,000 Palestinian homes, which amounts to 60 % of the entire housing stock in Gaza. South Africa believes that the forced displacements in Gaza are genocidal, in that they are taking place in circumstances calculated to bring about the physical destruction of Palestinians in Gaza.³⁰

The Applicant continues stating that on 9 October 2023, Israel declared a “complete siege” on Gaza, allowing no electricity, no food, no water and no fuel to enter the strip.³¹ The siege has been partially alleviated since then, with some aid trucks being permitted in, since 21 October 2023, while this remains “*wholly insufficient, and well below the pre-October 2023*

²⁵ UN OHCHR, UN Human Rights has “grave fears” about toll on civilians in Gaza (17 October 2023), <https://www.ohchr.org/en/press-briefing-notes/2023/10/un-human-rights-has-grave-fears-about-toll-civilians-gaza>; “Gaza civilians afraid to leave home after bombing of ‘safe routes’”, The Guardian (15 October 2023), <https://www.theguardian.com/world/2023/oct/14/gaza-civilians-afraid-to-leave-home-after-bombing-of-safe-routes>; ICRC, The ICRC urges protection for Gaza civilians evacuating and staying behind (13 November 2023), <https://blogs.icrc.org/ir/en/2023/11/the-icrc-urges-protection-for-gaza-civilians-evacuating-and-staying-behind/>.

²⁶ UN OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #78 (27 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-78>.

²⁷ WHO, WHO leads very high-risk joint humanitarian mission to Al-Shifa Hospital in Gaza (18 November 2023), <https://www.who.int/news/item/18-11-2023-who-leads-very-high-risk-joint-humanitarian-mission-to-al-shifa-hospital-ingaza>.

²⁸ UN News, Ten weeks of hell for children in Gaza: UNICEF (19 December 2023), <https://news.un.org/en/story/2023/12/1144927>.

²⁹ UN OCHA, Hostilities in the Gaza Strip and Israel – reported impact | Day #82 (27 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82>.

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p.71-72, para. 163.

³¹ Statement by Yoav Gallant, 9 October 2023, <https://www.youtube.com/watch?v=1nxvS9VY-t0>. Translation by Emmanuel Fabian, “Defense minister announces ‘complete siege’ of Gaza: No power, food or fuel”, The Times of Israel (9 October 2023), https://www.timesofisrael.com/liveblog_entry/defense-minister-announces-complete-siege-of-gaza-nopower-food-or-fuel/. Gaza’s only power plant is no longer operational, Israel having reportedly threatened to target the plant if it resumes operation: UN OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #6 (12 October 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-6>.

average of approximately 500 trucks per day”.³² By doing this, in the argumentation of South Africa, Israel has pushed the Palestinian population in Gaza to the brink of famine, with international agencies as the World Food Programme warning that “*the risk of famine is real*”, and that it is “*increasing each day*”, according to Integrated Food Security Phase Classification.³³

The Application denounces that water is also severely depleted, while Israel continues to cut off piped water for the North of Gaza,³⁴ and the North’s water desalination plant is non-functioning.³⁵ The lack of water is severely impacting lactating women, in particular, who, even if undertaking only a moderate amount of exercise, require a supply of 7.5 litres of water a day for drinking, sanitation and hygiene to keep themselves and their babies healthy.³⁶

The majority of the 1.9 million displaced Palestinians in Gaza are seeking shelter in UNRWA facilities, which primarily consist of schools and tents.³⁷ These locations are themselves not safe: at the time of the Application -and despite Israel having been provided with the coordinates of all United Nations facilities-³⁸ hundreds of Palestinian men, women and children seeking shelter in UNRWA facilities were killed, and over a thousand were injured.³⁹

South Africa states that Israel’s military assault on Gaza has been an attack on Gaza’s medical healthcare system, indispensable to the life and survival of the Palestinians in Gaza, declaring “*an unrelenting war on the health system in Gaza*”, as observed by the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard

³² World Health Organization, WHO Director-General’s remarks at the Emergency Meeting of the United Nations Security Council – 10 November 2023 (10 November 2023), <https://www.who.int/director-general/speeches/detail/who-directorgeneral-s-remarks-at-the-emergency-meeting-of-the-united-nations-security-council---10-november-2023>.

³³ WFP Media, @WFP_Media, Tweet (10:35 pm, December 9, 2023), https://twitter.com/WFP_Media/status/1733616413636530607; and Integrated Food Security Phase Classification, Gaza Strip: Acute Food Insecurity Situation for 24 November - 7 December 2023 and Projection for 8 December 2023 - 7 February 2024 (21 December 2023), <https://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1156749/?iso3=PSE>.

³⁴ 8 UN OCHA, Hostilities in the Gaza Strip and Israel – reported impact | Day #82 (27 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82>.

³⁵ UN OCHA, Hostilities in the Gaza Strip and Israel | Flash Update #66 (11 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-66>.

³⁶ UNDP, Human Development Report 2006 - Beyond scarcity: power, poverty and the global water crisis (14 December 2012), <https://www.undp.org/libya/publications/human-development-report-2006-beyond-scarcity-power-poverty-andglobal-water-crisis>.

³⁷ UN OCHA, Hostilities in the Gaza Strip and Israel - reported impact | Day 82 (27 December 2023), <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-82>; UNRWA Situation Report #56 On the Situation in the Gaza Strip and the West Bank, including East Jerusalem (22 December 2023), <https://www.unrwa.org/resources/reports/unrwa-situation-report-56-situation-gaza-strip-and-west-bank-including-eastJerusalem>.

³⁸ UNRWA, Gaza: UNRWA school sheltering displaced families hit (17 October 2023), <https://www.unrwa.org/newsroom/official-statements/gaza-unrwa-school-sheltering-displaced-families-hit>.

³⁹ UNRWA Situation Report #56 On the Situation in the Gaza Strip and the West Bank, including East Jerusalem (22 December 2023), <https://www.unrwa.org/resources/reports/unrwa-situation-report-56-situation-gaza-strip-and-west-bankincluding-east-Jerusalem>.

of physical and mental health, who in a statement issued on 7 December 2023, noted that “[t]he healthcare infrastructure in the Gaza strip has been completely obliterated” and that “[w]e bear witness to a shameful war on healthcare workers”.⁴⁰

In a letter to the United Nations Security Council on 4 December 2023, the International President of Médecins Sans Frontières said:

*“Israel has shown a blatant and total disregard for the protection of Gaza’s medical facilities. We are watching as hospitals are turned into morgues and ruins. These supposedly protected facilities are being bombed, are being shot at by tanks and guns, encircled and raided, killing patients and medical staff. The World Health Organization has documented 203 attacks on health care that have led to at least 22 fatalities and 59 injuries of health workers on duty.”*⁴¹

On 16 November 2023, United Nations Special Rapporteurs and 21 members of United Nations Working Groups, warning of a “genocide in the making” in Gaza, and observed that the level of destruction that had by then taken place of “housing units, as well as hospitals, schools, mosques, bakeries, water pipes, sewage and electricity networks . . . threatens to make the continuation of Palestinian life in Gaza impossible”.⁴²

The Applicant mentions that Israel has targeted the Palace of Justice, which houses the Palestinian Supreme Court, the Constitutional Court, the Court of Appeal, the Court of First Instance, the Administrative Court and the Magistrates’ Court, as well as an archive of court records and other historical files, and has also significantly damaged the Palestinian Legislative Council complex.⁴³ It has targeted Gaza City’s Central Archive building, containing thousands of historical documents and national records dating back over 100 years, and forming an essential archive of Palestinian history, as well as more modern records for Gaza City’s urban

⁴⁰ UN OHCHR, Gaza: UN expert condemns ‘unrelenting war’ on health system amid airstrikes on hospitals and health workers (7 December 2023) <https://www.ohchr.org/en/press-releases/2023/12/gaza-un-expert-condemns-unrelenting-warhealth-system-amid-airstrikes>.

⁴¹ Médecins Sans Frontières (MSF), Gaza: “It must all stop now”, Letter to UN Security Council (4 December 2023), <https://www.msf.org/letter-gaza-un-security-council>.

⁴² UN OHCHR, Gaza: UN experts call on international community to prevent genocide against the Palestinian people (16 November 2023), <https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-preventgenocide-against>.

⁴³ Holder, Josh. Gaza After Nine Weeks of War, The New York Times (12 December 2023), <https://www.nytimes.com/interactive/2023/12/12/world/middleeast/gaza-strip-satellite-images-israel-invasion.html>.

development.⁴⁴ The Applicant states that Israel has left Gaza City's main public library in ruins,⁴⁵ damaged or destroyed countless bookshops, publishing houses, libraries,⁴⁶ and hundreds of educational facilities,⁴⁷ targeting all Gaza's four universities.⁴⁸

With respect to the impact on Palestinian women and children in Gaza, the Applicant affirms that they have suffered severely, with 70 % of those killed estimated to be women and children. Two mothers are estimated to be killed every hour in Gaza. Over 7,729 children were estimated to have been killed by 11 December 2023 alone.⁴⁹ By 22 November 2023 the United Nations Special Rapporteur on violence against women and girls, its causes and consequences, has expressly warned that:

*“[T]he reproductive violence inflicted by Israel on Palestinian women, newborn babies, infants, and children could be qualified as... acts of genocide under Article 2 of the Convention on the Prevention of Genocide ... including “imposing measures intended to prevent births within a group”. She stressed that “States must prevent and punish such acts in accordance with their responsibilities under the Genocide Convention.”*⁵⁰

Last, on 8 December 2023, ahead of the United Nations Security Council ceasefire resolution vote vetoed by the United States, 22 United Nations Special Rapporteurs and 28

⁴⁴ International Council on Archives, Statement of the International Council on Archives on the Destruction of the Central Archives of the Municipality of Gaza (13 December 2023), <https://www.ica.org/en/statement-of-the-international-council-onarchives-on-the-destruction-of-the-central-archives-of-the>.

⁴⁵ Mohamad El Chamaa, Gazans mourn loss of their libraries: Cultural beacons and communal spaces, The Washington Post (1 December 2023), <https://www.washingtonpost.com/world/2023/11/30/gaza-library-palestinian-culture/>.

⁴⁶ Laila Hussein Moustafa, Opinion: When libraries like Gaza's are destroyed, what's lost is far more than books, Los Angeles Times (12 December 2023), <https://www.latimes.com/opinion/story/2023-12-12/gaza-library-bombing>.

⁴⁷ UNICEF, UNICEF in the State of Palestine Escalation Humanitarian Situation Report No. 10 (14 December 2023), <https://www.unicef.org/media/150141/file/SoP-Humanitarian-SitRep-14-December-2023.pdf>.

⁴⁸ O'Malley, Brendan and Sawahel, Wagdy. Israel bombs Gaza university, alleging use by military, University World News (12 October 2023), <https://www.universityworldnews.com/post.php?story=20231012162739531>.

⁴⁹ UNICEF, Joint Statement by UNICEF, UNDP, UNFPA, WFP and WHO on Humanitarian Supplies Crossing into Gaza (4 November 2023), <https://www.unicef.org.uk/press-releases/joint-statement-by-unicef-undp-unfpa-wfp-and-who-onhumanitarian-supplies-crossing-into-gaza/>; UN Women, Facts and figures: Women and girls during the war in Gaza (22 December 2023), <https://www.unwomen.org/en/news-stories/feature-story/2023/10/facts-and-figures-women-and-girlsduring-the-war-in-gaza>.

⁵⁰ UN Press Release, Women bearing the brunt of Israel-Gaza conflict: UN expert (20 November 2023), <https://www.ohchr.org/en/press-releases/2023/11/women-bearing-brunt-israel-gaza-conflict-un-expert> (emphasis added).

Members of United Nations Working Groups reiterated their previous statement “warning against the commission of genocide”.⁵¹

In brief, South Africa submits that the evidence before the Court “*shows incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts*”. According to the Applicant, genocidal intent is evident from the way in which Israel’s military attack is being conducted, from the clear pattern of conduct of Israel in Gaza and from the statements made by Israeli officials in relation to the military operation in the Gaza Strip. South Africa stresses that any stated intention by Israel to destroy Hamas does not preclude genocidal intent by Israel towards the whole or part of the Palestinian people in Gaza.

As a final statement, South Africa remarks that

*“across Gaza, Israel has targeted the infrastructure and foundations of Palestinian life, deliberately creating conditions of life calculated to bring about the physical destruction of Palestinian people. In addition to the attacks previously cited on homes, neighbourhoods, hospitals, water systems, agricultural lands, bakeries and mills, Israel has also targeted the foundational civil system in Gaza.”*⁵²

III. CLAIMS AND REQUEST FOR PROVISIONAL MEASURES

⁵¹ UN OHCHR, UN experts urge States to unite for peace and push for ceasefire in Gaza (8 December 2023), available at <https://www.ohchr.org/en/press-releases/2023/12/un-experts-urge-states-unite-peace-and-push-ceasefire-gaza> (emphasis added). The statement was made by the above Special Rapporteurs on safe drinking water; the Palestinian Territory; violence against women and girls; internally displaced persons; development; extreme poverty; food; freedom of opinion and expression; human rights defenders; physical and mental health; trafficking in persons; contemporary forms of slavery; adequate housing; independence of judges and lawyers; countering terrorism; education; and racism; as well as David Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Beatriz Miranda Galarza, Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members; Clément Nyaletsossi Voule, Special Rapporteur on the rights to freedom of peaceful assembly and of association; Francisco Cali Tzay, Special Rapporteur on the rights of indigenous peoples; and Alexandra Xanthaki, Special Rapporteur in the field of cultural rights; as well as by the above members of the working group on People of African Descent; discrimination against women and girls; the use of mercenaries; human rights and transnational corporations and other business enterprises; and Aua Baldé (Chair-Rapporteur), Gabriella Citroni (Vice-Chair), Angkhana Neelapaijit, Grażyna Baranowska, Ana Lorena Delgadillo Perez, Working Group on enforced or involuntary disappearances; as well as the above Independent Expert on the enjoyment of all human rights by older persons; Cecilia Bailliet, Independent Expert on human rights and international solidarity; Graeme Reid, Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity; and Attiya Waris, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.

⁵² Diakonia International Humanitarian Law Centre, 2023 Hostilities And Escalating Violence In The OPT. Account of Events (13 December 2023), <https://www.diakonia.se/ihl/news/2023-hostilities-in-gaza-and-israel-factual-account-of-events/>.

Based on the facts and comments summed up above, South Africa considers that the conduct of Israel -through its State organs, agents, and other persons and entities acting on its instructions or under its direction, control or influence-, in relation to Palestinians in Gaza, is in violation of its obligations under the Genocide Convention, including Articles I, III, IV, V and VI, read in conjunction with Article II. Those violations of the Genocide Convention include, but are not limited to:

- (a) failing to prevent genocide in violation of Article I;
- (b) committing genocide in violation of Article III (a);
- (c) conspiring to commit genocide in violation of Article III (b);
- (d) direct and public incitement to commit genocide in violation of Article III (c);
- (e) attempting to commit genocide in violation of Article III (d);
- (f) complicity in genocide in violation of Article III (e);
- (g) failing to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, in violation of Articles I, III, IV and VI;
- (h) failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide, conspiracy to commit genocide, incitement to genocide, attempted genocide, and complicity in genocide, in violation of Article V; and
- (i) failing to allow and/or directly or indirectly impeding the investigation by competent international bodies or fact-finding missions of genocidal acts committed against Palestinians in Gaza, including those Palestinians removed by Israeli State agents or forces to Israel, as a necessary and corollary obligation pursuant to Articles I, III, IV, V and VI.

Therefore, South Africa requested the Court to adjudge and declare:

(1) that the Republic of South Africa and the State of Israel each have a duty to act in accordance with their obligations under the Genocide Convention in relation to the members of the Palestinian group, to take all reasonable measures within their power to prevent genocide; and

(2) that the State of Israel: (a) has breached and continues to breach its obligations under the Genocide Convention; (b) must cease forthwith any acts and measures in breach of those obligations; (c) must ensure that persons committing genocide, conspiring to commit genocide, directly and publicly inciting genocide, attempting to commit genocide and complicit in genocide are punished by a competent national or international tribunal; (d) to that end and in furtherance of those obligations arising under Articles I, IV, V and VI, must collect and conserve

evidence and ensure, allow and/or not inhibit directly or indirectly the collection and conservation of evidence of genocidal acts committed against Palestinians in Gaza; (e) must perform the obligations of reparation in the interest of Palestinian victims, including but not limited to allowing the safe and dignified return of forcibly displaced and/or abducted Palestinians to their homes, respect for their full human rights and protection against further discrimination, persecution, and other related acts, and provide for the reconstruction of what it has destroyed in Gaza, consistent with the obligation to prevent genocide under Article I; and (f) must offer assurances and guarantees of non-repetition.

IV. ISRAEL'S POSITION

As a general introduction, Israel states that the reality described by the Applicant forgets Hamas and its total contempt for civilian life. It affirms that Hamas is estimated to have over 30,000 fighters including minors “*no older than 15 or 16 into its ranks*”.⁵³ In the words of Israel agents, South Africa also forgot to mention the explosives in mosques and schools and children’s bedrooms, ambulances used to transport fighters, tunnels and terrorist hubs under sensitive sites, fighters dressed as civilians, commandeering of aid trucks, firing from civilian homes, United Nations facilities and even safe zones.

According to Israel, in the aftermath of the atrocities committed on 7 October 2023, facing indiscriminate rocket attacks by Hamas against Israel, it acted with the intention to defend itself, to terminate the threats against it and to rescue the hostages. Israel claims that its operation in Gaza aims at protecting people, “*who are under attack on multiple fronts, and to do so in accordance with the law*”.⁵⁴ The military operation of Israel, as its Prime Minister said, is to fight “*Hamas terrorists, not the civilian population.*”⁵⁵

Israel agents pointed out three aspects of reality on the ground that were ignored or misrepresented: “*First, Hamas’ military tactics and strategy. Second, Israel’s efforts to mitigate civilian harm during operational activity. And third, Israel’s efforts to address humanitarian hardship in Gaza, despite Hamas’ attempts at obstruction.*”⁵⁶ These three aspects destroy the

⁵³ Public sitting held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, President Donoghue presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), para.43.

⁵⁴ Ibidem, para. 48.

⁵⁵ Netanyahu, Benjamin, Prime Minister of Israel (@IsraeliPM, on X (9:49 p.m., 10 Jan. 2024), <https://twitter.com/IsraeliPM/status/1745186120109846710>.

⁵⁶ Public sitting held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, President Donoghue presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), p. 41.

necessary element of special intent which must be present to qualify crimes as genocide. Then, the agents gave examples. As regards Hamas' tactics, urban warfare developed by the terrorist group will always result in tragic deaths, harm and damage, even more if they are the desired outcomes of Hamas. With respect to efforts to mitigate harm to civilians, Israel provides effective advance warnings of attacks where circumstances permit. It mentions that it

*“has dropped millions of leaflets over areas of expected attacks with instructions to evacuate and how to do so, broadcast countless messages over radio and through social media warning civilians to distance themselves from Hamas operations, and made over 70,000 individual phone calls.”*⁵⁷

The Respondent says that it also provides an Arabic Twitter account, providing information for civilians to evacuate specific areas, including the location of shelters nearby. As a conclusion, *“far from being the only inference that could reasonably be drawn from Israel's pattern of conduct, intent to commit genocide is not even a plausible inference.”*⁵⁸

Then, the Respondent's agents refer to the application for provisional measures. They affirm the general principle that states that any goal of provisional measures is to make safe the rights of each party to the conflict. Then they elaborate on the requisites of risk of irreparable harm and urgency. According to Israel, the number of trucks specifically carrying food was 70 trucks a day entering Gaza before the war, and 109 trucks a day over the last two weeks of December 2023.⁵⁹ Israel states that it continues to supply its own water to Gaza by two pipelines. It also facilitates the delivery of bottled water in large quantities, and the same happens with the access to medical supplies and services. The Respondent states that it has facilitated the establishment of four field hospitals and two floating hospitals. The constant delivery of fuel and cooking gas is also facilitated. According to Israel official data, *“from 8 December, the amount of fuel entering Gaza has doubled, and currently stands at 180,000 litres a day.”*⁶⁰ The Respondent State affirms that it no doubt meets the legal test of concrete measures aimed specifically at recognizing and ensuring the rights of the Palestinian civilians in Gaza to exist.

As regards the requisite of urgency, Israel affirms firstly, that the scope and intensity of the hostilities has been decreasing, and secondly, that the United Nations Security Council has

⁵⁷ Ibidem, p. 45.

⁵⁸ Ibidem, p. 49.

⁵⁹ Judges' folder, tab 4B.

⁶⁰ Volume, tab 5B.

only recently adopted a resolution for the specific purpose of alleviating the humanitarian situation. They mentioned the Aegean Sea case, in which the Court found that it was not necessary to indicate provisional measures where the government in question showed willingness to act in accordance with the recommendations of the Security Council concerning the matter before the Court.⁶¹ Finally, the lack of urgency within the meaning of the Court's case law, is demonstrated by assurances provided by Israel's co-agents, when they state that Israel remains bound, at all times, by its international legal obligations.

Israel mentions that the requested measures seek to reverse the Bosnia case before the ICJ. When provisional measures were ordered in that case, the armed conflict was still in progress and the allegations were similar to those made in the present case.⁶² Bosnia and Herzegovina specifically requested a provisional measure requiring Yugoslavia to "*cease and desist from any and all types of military or paramilitary activities . . . against the People, State and Government of Bosnia and Herzegovina*".⁶³ But the Court did not grant it⁶⁴, even though unlike in this case -according to Israel-, an on-going genocide was said to be in progress on the territory of the very State seeking provisional measures and both parties to the conflict were parties to the case. The argument of the Court was that such a measure would be for the protection of a right that could not form the basis of a judgment in exercise of jurisdiction under the Genocide Convention.⁶⁵ In Israel's view, there was no reason to depart from that case law.

As a first conclusion of the Respondent, the standard of irreparable harm and urgency is not met, since Israel is constantly taking concrete steps to address the humanitarian situation in Gaza.

⁶¹ Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, pp. 12-13, paras. 38-41.

⁶² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Application instituting proceedings submitted by the Republic of Bosnia and Herzegovina, 20 March 1993, <https://www.icj-cij.org/sites/default/files/case-related/91/13275.pdf>.

⁶³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Request for the indication of provisional measures of protection submitted by the Government of the Republic of Bosnia and Herzegovina, 20 March 1993, para. 14 (3) (see also para. 14 (1) and (2)), <https://www.icj-cij.org/sites/default/files/case-related/91/13275.pdf>.

⁶⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, pp. 24-25, para. 52 (dispositif).

⁶⁵ Ibid., p. 19, para. 35; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 346, para. 43.

IV. a. Israel's arguments

The first central argument of Israel intends to destroy the existence of the special genocidal intent, which would make the Genocide Convention inapplicable. Being the key component of genocide, the intention to destroy a people in whole or in part, Israel's main argument aims to demonstrate its absolute lacking of intention. Therefore, the Genocide Convention is not applicable, and the Court lacks jurisdiction to hear the case. If any crimes are committed, they do not come under the jurisdiction of the Court: "*Were it the case -which Israel deny- that Israeli forces have transgressed some of the rules of conflict, then the matter would be tackled at the appropriate time by Israel's robust and independent legal system.*"⁶⁶

According to Israel, it restricts its targeting practices to attack military personnel or objectives "*in accordance with international humanitarian law in a proportionate manner, as well as its practice of mitigating civilian harm such as by forewarning civilians of impending action by the unprecedented and extensive use of telephone calls, leafleting and so forth, coupled with the facilitation of humanitarian assistance.*"⁶⁷ All these actions demonstrate the opposite of any possible genocidal intent.

In the view of Israel, its response was and remains legitimate and necessary, since the State acted and continues to act in a manner consistent with international law. It does so investing unprecedented efforts "*in mitigating civilian harm, at cost to its operations, as well as alleviating hardship and suffering, with investment of resources and effort.*"⁶⁸ While there is no genocidal intent, the crime of genocide was never committed.

In sum, -according to Israel-, the reality is that the events which are the subject of the proceedings, are occurring in the framework of a war instigated by Hamas, and are governed by the legal framework of international humanitarian law, not falling within the remit of the Genocide Convention.

A second central argument of Israel's position, affirms the need to restrict the use of the Genocide Convention, only for true situations in which it occurs. In effect, the Genocide Convention becomes the only key that States have to bring before the jurisdiction of the ICJ those alleged States that perpetrate international crimes. In situations of armed conflict, the overlap that can occur between criminal acts that constitute any of the three major crimes -crimes of war, crimes against humanity and genocide-, is only resolved with the invocation of the

⁶⁶ Ibidem note 52, para. 36.

⁶⁷ Ibidem note 52, para. 37.

⁶⁸ Ibidem note 52, para. 71.

violation of the Genocide Convention. The other two crimes have no international binding instruments that oblige States to accept the Court's Jurisdiction. In this sense, Israel's agents points out that "*if claims of genocide were to become the common currency of armed conflict, whenever and wherever that occurred, the essence of this crime would be diluted and lost.*"⁶⁹ Thus -they reason-, "*to maintain the integrity of the Genocide Convention, to maintain its promise, and the Court's own role as its guardian, it is respectfully submitted that the Application and Request should be dismissed.*"⁷⁰ Consequently, if the essence of the crime is to be preserved, it is advisable not to invoke it during armed conflicts.

Israel submits that the appropriate legal framework for the conflict in Gaza is that of international humanitarian law and not the Genocide Convention. It argues that, in situations of urban warfare, civilian casualties may be an unintended consequence of lawful use of force against military objects, and do not constitute genocidal acts.⁷¹

Israel emphasises that it bears the responsibility to protect its citizens, including those captured and held hostage as a result of the attack that took place on 7 October 2023. As a consequence, it claims that its right to self-defence is critical to any evaluation of the present situation. In the view of Israel, an inevitable tension would arise between the inherent right of self-defence of sovereign States and the Genocide Convention, if every resort to force in self-defence against an enemy hiding behind civilians can be portrayed as genocide and trigger provisional measures.

V. THE DECISION OF THE COURT OF 26 JANUARY

First, the ICJ asserts its *prima facie* jurisdiction in the case, even though it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.⁷² Second, the Court ascertained that the acts and omissions complained of by the Applicant are capable of falling within the scope of the Genocide Convention -at the current stage of the proceedings-.⁷³ The Court exercises its power to indicate provisional measures (Article 41 of the

⁶⁹ Ibidem note 52, para. 9, public hearings day 2.

⁷⁰ Ibidem, not 52, para. 55.

⁷¹ ICJ Order 26th January 2024, Application of the Convention on the Prevention and Punishment of the crime of Genocide in the Gaza Strip (South Africa v. Israel), para. 40

⁷² See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, ICJ Reports 2022 (I), pp. 217-218, para. 24).

⁷³ See Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), p. 219, para. 29).

Statute), only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.⁷⁴ Third, the Court considered 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 Israel of its obligations under the Genocide Convention. In this sense, the Court found that the elements mentioned in the Application and the public oral hearings are sufficient to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

According to its decision of 26 January 2024, the Court regarded all these four conditions as being met:

- (i) there was a link between the measures requested and the rights whose protection is sought;⁷⁵
- (ii) the case is at least plausible;
- (iii) there would be irreparable harm to the case if measures were not ordered; and
- (iv) the matter is urgent.

The Court found 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.⁷⁶

The Court then analyses the situation raised and the acts allegedly being committed by Israel. Transcending the contrasting visions presented by the Israeli and South African lawyers, the Court relied on statements by UN officials to describe the appalling deaths, injuries, displacement, starvation, deprivation of healthcare and trauma. The suffering could get a whole lot worse -the Court noted-, if it did not intervene.

The Court notes 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. As the Court's Order states, while figures relating to the Gaza Strip cannot be independently verified, recent information indicates that 25,700

⁷⁴ See, for example, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), p. 223, para. 50).

⁷⁵ See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), p. 224, para. 51).

⁷⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), pp. 516-517, paras. 107-108 and 112).

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.⁷⁷

The ICJ took note of some of several statements made by the United Nations officials and agencies as regards the dramatic situation. For instance, the statement issued by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Mr. Philippe Lazzarini, on 13 January 2024:

“It’s been 100 days since the devastating war started, killing and displacing people in Gaza, following the horrific attacks that Hamas and other groups carried out against people in Israel. It’s been 100 days of ordeal and anxiety for hostages and their families. In the past 100 days, sustained bombardment across the Gaza Strip caused the mass displacement of a population that is in a state of flux constantly uprooted and forced to leave overnight, only to move to places which are just as unsafe. This has been the largest displacement of the Palestinian people since 1948.”⁷⁸

The Court also took note of a press release of 16 November 2023, issued by 37 Special Rapporteurs, Independent Experts and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council, in which they voiced alarm over *“discernibly genocidal and dehumanising rhetoric coming from senior Israeli government officials”*.⁷⁹

In the same sense, the Court considered a number of statements made by senior Israeli officials. It mentioned some examples, one of them was made on 12 October 2023, by Mr. Isaac Herzog, President of Israel, who referring to Gaza, stated:

“We are working, operating militarily according to rules of international law. Unequivocally. It is an entire nation out there that is responsible. It is not true this rhetoric about civilians not aware, not involved. It is absolutely not true. They could have risen up. They could have fought

⁷⁷ Ibidem 71, para.46. See United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Hostilities in the Gaza Strip and Israel reported impact, Day 109 (24 Jan. 2024)).

⁷⁸ Ibidem 71, para. 49.

⁷⁹ Ibidem 71, para. 53.

against that evil regime which took over Gaza in a coup d'état. But we are at war. We are at war. We are at war. We are defending our homes. We are protecting our homes. That's the truth. And when a nation protects its home, it fights. And we will fight until we'll break their backbone."

As a conclusion, the Court found that it is necessary, pending its final decision, to indicate certain measures in order to protect the rights claimed by South Africa that the Court has found to be plausible by a majority of 15 votes to 2. These provisional measures are needed to avoid irreparable damage under the Genocide Convention. Having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court found that the measures to be indicated need not be identical to those requested, as it has also done in the past.⁸⁰

First, the Court considered (by 15 votes to 2) that, with regard to the situation described, 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 the 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.

Second (by 16 votes to 1), the Court is 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. It is relevant to note that in this and the following order, the Israeli ad-hoc judge, the prestigious former President of the Supreme Israeli Court, Aharon Barak voted with the majority, even though he wrote a separate opinion.

Third (by 16 votes to 1), the Court considered 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.

⁸⁰ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 28, para. 77).

Fourth (by 15 votes to 2), 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.

And fifth and final (by 15 votes to 2), the Court considered that Israel must submit a report to the Court on all measures taken to give effect to the Court Order within one month, as from the date of the 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.

VI. FINAL REMARKS

Without addressing the complexity of the historic situation between Israel and Palestine, some final remarks may be made as regards the case under analysis and the provisional measures ordered by the Court.

South Africa presents its complaint about the commission of alleged acts and omissions of genocide in the larger context of what constitutes -in its opinion-, an apartheid regime that has existed for 75 years and that has worsened during the 21 century. Even though the jurisdiction of the Court is restricted exclusively to comparing the denounced facts with the state responsibility of Israel only in relation to its obligations under the Genocide Convention, the plaintiff's argument involves referring to the genocide as the last step of the policy of apartheid, which attempts - if successful - to wipe out the population of the Gaza Strip, a people with national, religious and ethnical characteristics, protected by the Genocide Convention.

In order to prove the plausibility of the requested measures, as well as the urgency and necessity, it cites a highly convincing number of bodies and authorities of the United Nations and other international organisations that have expressed themselves, based on documented facts about the situation of the Palestinian population in Gaza, especially children, women and sick people.

The requested precautionary measures do not bind the ICJ, which in fact may provide other unrequested measures, if it considers that they are appropriate for the purposes of protecting rights, and denied others like the Court did with the requested immediate cessation of hostilities on behalf of Israel.

The basis of Israel's defence involves denying the commission of the criminal acts, blaming the terrorist organisation of Hamas for the current situation and if deaths are occurring, stating that they do not fall within the scope of the Genocide Convention. This is a key element of the respondent argumentation: the denial of the existence of genocidal intent that characterises

the crime of genocide. Without the commission of genocide, the Court lacks jurisdiction. Even if some facts were proven, without the existence of that special intention, alleged crimes would fall within other statutes belonging to international human rights law or international humanitarian law, in both cases, outside the jurisdiction of the ICJ.

The key element of this order -as well as any other precautionary measure taken by the Court in the last years regarding cases of alleged genocide-, will be enforcement.

As the ICJ stressed, its ruling is “binding”, but for any coercive measure, it would need a resolution of the UN Security Council, which requires contending with any of the big five government’s veto. Another pressure for compliance could come from the International Criminal Court. If the order were to be ignored, that would be an added spur for the ICC prosecutor, Karim Khan, to act.⁸¹

Here is where the political side of the conflict emerges, as in any other interstate dispute. When it cannot be solved by any other peaceful means, it could come -if there is a legal basis-, before the jurisdiction of the Court. It is difficult to understand the reasoning of the dissenting opinion of ICJ Judge Julia Sebutinde who expressed that the conflict “*is essentially and historically a political one, calling for a diplomatic or negotiated settlement*” and “*not a legal dispute susceptible of judicial settlement by the Court*”.⁸² She simply ignored the object of the application and also South Africa's legal standing to appear before the Court, since she mentioned that the conflict was between a State -Israel- and a population -the Palestine people-.⁸³ Her *extra petita* opinion -which delegitimizes the role of ICJ judges-, is later complemented with the assertion that the Applicant has not proven the genocidal intent, nor demonstrated that the rights for which it seeks protection are plausible. And so, she is the only judge to vote against every measure ordered and in her dissenting vote, she advanced his future vote on the merits of the case.

In brief, the ICJ order Israel to take all measures within its power to halt acts that contribute to genocide, to allow sufficient humanitarian aid into Gaza to end the suffering among Palestinian civilians, and to prevent and punish the public statements of incitement made by senior Israeli officials. Israel must report back to the court in a month on the steps it has taken. That the ICJ did not order a ceasefire was a step that was unlikely, because the Court addresses only disputes between States, Hamas would never be a party to the proceedings and Israeli

⁸¹ Roth, Kenneth. The ICJ ruling is a repudiation of Israel and its western backers. The Guardian, 27/01/24. Available at <https://www.theguardian.com/commentisfree/2024/jan/26/icj-ruling-israel-western-backers> .

⁸² ICJ Order of 26 January 2024, Dissenting Opinion of Judge Sebutinde.

⁸³ Ibidem note 82.

civilian population would be at risk of Hamas' terrorist acts as it was in the past. A ceasefire imposed on only one side to an on-going armed conflict is not plausible.

Much is still unresolved, but at the beginning of 2024, the world's leading judicial institution spoke. Any Court's decision should be a small but important step towards a more lawful world and a contribution to a permanent solution for Israeli and Palestine peoples.

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