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International Court of Justice — Provisional measures — Alleged violations of Convention on the Prevention and Punishment of the Crime of Genocide, 1948 — Prima facie jurisdiction — Whether a dispute between the Parties — Exchanges in multilateral fora — Whether Israel's acts falling within scope of Genocide Convention — Whether Israel's acts being governed by international humanitarian law — Standing — Obligations *erga omnes partes* — Plausibility — Whether South Africa's claimed rights existing under international law — Whether Israel's acts carried out with requisite intent — Link — Real and imminent risk of irreparable prejudice — Vulnerability of civilians — Reports of United Nations agencies on Gaza — Whether steps taken by Israel removing risk of irreparable prejudice — Measures to be adopted — Power to indicate measures different in whole or in part from those requested — Binding character of measures indicated

International Court of Justice — Modification of provisional measures — Whether there being change in the situation — Whether change in the situation justifying modification of provisional measures — Prima facie jurisdiction affirmed — Plausibility affirmed — Real and imminent risk of irreparable prejudice — Starvation of civilians — Provision of humanitarian assistance — Whether Israel doing enough to prevent irreparable prejudice — Measures to be adopted — Power to indicate measures different in whole or in part from those requested — Binding character of measures indicated

International Court of Justice — Modification of provisional measures — Whether there being change in the situation — Whether change in the situation justifying modification of provisional measures — Whether military incursion into Rafah being a change in the situation — Prima facie jurisdiction affirmed — Plausibility affirmed — Real and imminent risk of irreparable prejudice — Power to indicate measures different in whole or in part from those requested — Whether provisional measures already indicated covering the situation in Rafah — Binding character of measures indicated

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Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip

(South Africa *v.* Israel)

International Court of Justice

Provisional Measures. 26 *January* 2024[1]

(Donoghue, *President*; Gevorgian, *Vice-President*; Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant, *Judges*; Barak, Moseneke, *Judges ad hoc*)[2]

Request for the Modification of Provisional Measures. 28 *March* 2024[3]

(Salam, *President*; Sebutinde, *Vice-President*; Tomka, Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, *Judges*; Barak, *Judge ad hoc*)[4]

Request for the Modification of the Order of 28 March 2024. 24 *May* 2024[5]

(Salam, *President*; Sebutinde, *Vice-President*; Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi, *Judges*; Barak, *Judge ad hoc*)[6]

Summary:[7] *The facts*:—On 29 December 2023, South Africa filed with the International Court of Justice ("the Court") an application instituting proceedings against Israel for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide

[1] A list of counsel participating in the proceedings appears at para. 10 of the order.
[2] Judges ad hoc Barak and Moseneke were appointed, respectively, by Israel and South Africa under Article 31 of the Statute of the Court, 1945.
[3] This order was made on written submissions only. The order did not list counsel for the Parties.
[4] Following the election to the Court of Judge Dire Tladi, a South African national, with effect from 6 February 2024, Mr Moseneke ceased to sit as judge in the case, in accordance with Article 35, paragraph 6, of the Rules of the Court.
[5] A list of counsel participating in the proceedings appears at para. 16 of the order.
[6] Judges ad hoc Barak and Moseneke were appointed, respectively, by Israel and South Africa under Article 31 of the Statute of the Court, 1945.
[7] Prepared by Dr M. Lando.

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Convention"). South Africa's application arose from the events taking place in the Gaza Strip starting on 7 October 2023, which escalated into an armed conflict between Hamas and Israel's armed forces. South Africa founded the Court's jurisdiction on Article IX of the Genocide Convention to which neither Party had made reservations. Alongside its application, South Africa filed a request for the indication of provisional measures. The Court indicated provisional measures by order of 26 January 2024 ("the January order").

Order on Provisional Measures (26 January 2024)

On prima facie jurisdiction, South Africa argued that there was a dispute falling within the scope of the Genocide Convention, pointing at numerous statements in multilateral fora concerning the disagreement as to Israel's implementation of the Genocide Convention. South Africa added that the acts of which it complained fell within the scope of the Genocide Convention, since they could amount to acts within the meaning of its Articles II-IV. Israel replied that there was no dispute between the Parties as South Africa had not given it a reasonable opportunity to respond to the allegations that it had breached its obligations under the Genocide Convention. Israel stated that the acts of which South Africa complained did not fall within the provisions of the Genocide Convention because it was not proved, even prima facie, that they had been carried out with the requisite intent. Israel did not challenge South Africa's standing.

With regard to plausibility, South Africa argued that it sought to protect the rights of the Palestinians in Gaza to be free from genocidal acts, as well as its own rights under the Genocide Convention to see obligations thereunder respected. According to South Africa, the rights for which it sought protection were plausible because they were grounded in a possible interpretation of the Genocide Convention. South Africa maintained that the evidence was sufficient for a plausible showing that Israel was violating its obligations under the Genocide Convention. Israel responded that the correct legal framework within which to assess its conduct was not the Genocide Convention, but international humanitarian law, because situations of urban warfare were to be seen through the lens of the law of armed conflict. Israel also stated that there was no evidence to allow a plausible inference that there was the requisite genocidal intent. South Africa contended that the measures it requested were linked to the rights for which it sought protection, while Israel replied that those measures went beyond what was necessary to protect rights on an interim basis.

As to irreparable prejudice and urgency, South Africa argued that there was a risk of such prejudice where serious risks arose for human life or fundamental rights. South Africa provided statistics as to the number of civilian casualties and the impairment of provisions of humanitarian aid to Gaza. Israel stated that there was no risk of irreparable prejudice as it took, and continued to take, measures to ensure that the rights of Gaza's civilian population were respected. Measures included the provision of humanitarian

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assistance, such as allowing the entry of medical personnel and the shipment of foodstuffs into Gaza.

Held:—(1) (by fifteen votes to two, Judge Sebutinde and Judge ad hoc Barak dissenting) In relation to Palestinians in Gaza, Israel had to take all measures within its power to prevent the commission of all acts within the scope of Article II of the Genocide Convention, in particular (a) killing members of the group; (b) causing serious bodily harm 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 (para. 86(1)).

(2) (by fifteen votes to two, Judge Sebutinde and Judge ad hoc Barak dissenting) Israel had to ensure with immediate effect that its military did not commit any acts described in point 1 above (para. 86(2)).

(3) (by sixteen votes to one, Judge Sebutinde dissenting) Israel had to 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 (para. 86(3)).

(4) (by sixteen votes to one, Judge Sebutinde dissenting) Israel had to 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 (para. 86(4)).

(5) (by fifteen votes to two, Judge Sebutinde and Judge ad hoc Barak dissenting) Israel had to take effective measures to prevent the destruction, and ensure the preservation, of evidence related to allegations of acts within the scope of Articles II-III of the Genocide Convention against members of the Palestinian group in the Gaza Strip (para. 86(5)).

(6) (by fifteen votes to two, Judge Sebutinde and Judge ad hoc Barak dissenting) Israel had to submit a report to the Court on all measures taken within one month from the date of the order (para. 86(6)).

(a) South Africa had issued public statements in various international fora setting out how, and to what extent, it considered that Israel's military operations in Gaza breached the Genocide Convention. Israel had denied these accusations in a document made public on 6 December 2023. On this basis, the Parties clearly held opposite views as to Israel's compliance with obligations under the Genocide Convention, which was sufficient to establish prima facie the existence of a dispute between them on the interpretation or application of the Genocide Convention. Furthermore, at least some of the acts of which South Africa complained appeared capable of falling within the provisions of the Genocide Convention. Because the Court had prima facie jurisdiction, Israel's request to strike the case from the General List had to be rejected. The obligations under the Genocide Convention were obligations *erga omnes partes*, so that any State Party was entitled to invoke the responsibility of other Parties. South Africa thus had standing to bring a case against Israel (paras. 25-34).

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(b) There was a connection between the rights of members of groups protected under the Genocide Convention, the obligations of States Parties to that Convention and the right of a State Party to seek compliance by another State Party. For acts to fall within Article II of the Genocide Convention, there had to be specific intent to destroy at least a substantial part of a particular group. Palestinians were such a group. Several United Nations ("UN") reports showed the scale of killing and wounding since 7 October 2023. Israeli officials had made statements concerning Israel's aims in the Gaza offensive. Based on these materials, it appeared that at least some of the rights claimed by South Africa were plausible. By their very nature, some of the measures requested by South Africa were aimed at preserving those rights (paras. 41-55 and 58-9).

(c) The object of the Genocide Convention was to protect the very existence of certain human groups. The civilian population in Gaza remained extremely vulnerable, with Israel's Prime Minister stating that the war could continue for months. The catastrophic humanitarian situation was likely further to deteriorate before the Court's final judgment in the case. The steps taken by Israel to address the humanitarian concerns relating to Gaza were to be encouraged, but did not remove the risk of irreparable prejudice to the rights claimed by South Africa (paras. 65-74).

(d) In the circumstances, the Court could indicate measures different, in whole or in part, from those requested by South Africa. Beyond respecting its obligations under the Genocide Convention, Israel had to ensure that humanitarian assistance was provided to civilians in Gaza and that any evidence likely to be useful in deciding the case would be preserved. Israel also had to provide the Court with a report on the implementation of the measures indicated within one month of the date of the order (paras. 75-82).

Declaration of Judge Xue: The question of Palestine had been on the UN's agenda since the inception of the organization. Therefore, the UN, including the Court as its principal judicial organ, had the responsibility to ensure that the Palestinian people were protected under international law. The gravity of the situation in Gaza threatened the very existence of the Palestinians as a people. Questions of standing remained open, but the international community had an interest in ensuring the protection of the Palestinian people. This type of case was the one in which the Court had to recognize the standing to bring a case for alleged violation of obligations *erga omnes partes* (paras. 1-5).

Dissenting Opinion of Judge Sebutinde: (1) In its order, the Court had not decided that it had jurisdiction, nor had it decided that South Africa's claimed rights existed or that Israel had breached them. The Court's jurisdiction was limited to alleged breaches of the Genocide Convention, not of international humanitarian law. Moreover, the underlying dispute between Israel and Palestine was a political one, not amenable to judicial settlement. In the complex history of this dispute, several UN agencies and organs were seized

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of various matters arising from it. The settlement of the dispute could only take place through good-faith negotiations between the Parties to it, and could not be imposed from the outside, even by judicial settlement (paras. 1-15).

(2) South Africa had not shown that it was plausible that Israel had committed the relevant acts with the requisite genocidal intent. Even at the provisional measures stage, the Court had to look into the evidence to determine whether there were indicators of genocidal intent. There were no such indicators, especially considering Israel's restricted attacks upon legitimate military targets in Gaza, Israel's mitigation of civilian harm by warning civilians and Israel's facilitation of humanitarian assistance. Statements of Israeli top officials, on which South Africa relied to show genocidal intent, did not concern the destruction of the Palestinian people but of Hamas. There was also no link between the measures requested and the rights that South Africa sought to protect. The measures requested aimed to stop Israel's military operations altogether, but Israel's targeting of Hamas did not trigger obligations under the Genocide Convention and, thus, there was no link between those measures and the rights sought to be protected. Other measures simply reiterated Israel's obligations under the Genocide Convention and thus were redundant. There was also no basis to determine that Israel was engaged in the destruction of evidence, so there was no link between this measure and the rights claimed by South Africa. One of the Parties to the Gaza conflict was a non-State actor, over which the Court had no jurisdiction, so that it was unsound to impose non-aggravation measures only on one Party to the conflict (paras. 16-32).

(3) The measures imposed by the Court were not warranted in the circumstances. It was not clear how South Africa could contribute to defusing the conflict in Gaza, despite being the applicant in the case before the Court. One way to do so was for South Africa to leverage its cordial relationship with Hamas' leadership to ensure the release of hostages (paras. 33-5).

Declaration of Judge Bhandari: The situation in Gaza was a humanitarian catastrophe. Various bodies of international law applied to this situation, notably international humanitarian law. The Court's order had to be read with the understanding that, at this stage of the proceedings, the Court was not making any final findings as to the facts or the law underlying South Africa's claim. In any case, it was necessary for all parties to the conflict to halt hostilities immediately and to proceed to the release of the hostages taken (paras. 1-11).

Declaration of Judge Nolte: (1) In the context of the Gaza conflict, the Court could only play a limited role, as South Africa had brought its case under the Genocide Convention. Given the origins of the Genocide Convention, one could understand why Israel firmly rejected allegations that it had breached its obligations under that treaty, but the Court could not dismiss South Africa's claims on that ground alone. It was unsurprising, given the stage of the

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proceedings, that the Parties had not fully analysed certain critical aspects of the case (paras. 1-7).

(2) Genocide was characterized by its mental element, so that a plausible showing that such intention existed was essential. South Africa had not shown that Israel's military operations were plausibly carried out with the requisite genocidal intent. In fact, Israel's measures made it at least plausible that its operations were not conducted with the requisite intent. Nonetheless, the Court was right to indicate provisional measures in view of the clear existence of an imminent risk of irreparable prejudice to the rights of the Palestinians under the Genocide Convention (paras. 8-17).

Separate Opinion of Judge ad hoc Barak: (1) The provisional measures indicated by the Court were significantly narrower in scope than those requested by South Africa. Because of the Jewish people's experience during the Holocaust, the State of Israel was founded on the respect of human rights. Israel was a democratic State, too. The necessity to balance different needs within a democracy led the Supreme Court of Israel to issue decisions favourable to the Palestinians and less favourable to the State of Israel, upholding international humanitarian law and the respect of human rights (paras. 1-14).

(2) It was doubtful that South Africa had brought this case in good faith. While Israel had offered to hold consultations with South Africa, the latter had filed an application with the Court. The other difficulty in the case was that a belligerent, Hamas, was a non-State actor over which the Court had no jurisdiction (paras. 15-16).

(3) The overview of the events of 7 October 2023 was incomplete. The Court did not detail the suffering caused by Hamas and its *modus operandi*, which was the basis to grasp Israel's reaction to the attack on it perpetrated on 7 October 2023. However, South Africa's application was brought within the wrong legal framework to assess the events unfolding since that day. The appropriate legal framework to do so was the one provided by international humanitarian law, not the Genocide Convention. Within the context of the Genocide Convention, it was necessary for South Africa to show that there was some evidence of specific intent to commit genocide, although there was no need conclusively to show that such intent existed. The Court's approach to plausibility was erroneous when compared to the one in the case between the Gambia and Myanmar under the Genocide Convention. In that case, there had been convincing evidence to show that it was plausible that Myanmar had the specific intent to commit genocide. In this case, there was no comparable evidence. Although claims of genocide were not plausible, the Court was correct to indicate the third and fourth measures concerning the prevention of incitement to genocide and the provision of humanitarian aid to Gaza. Regrettably, the Court did not indicate that South Africa had to take measures to facilitate the release of hostages held by Hamas. The measures concerning the preservation of evidence were unnecessary, as South Africa had not shown that Israel was doing anything to destroy evidence (paras. 17-49).

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Order on Request for the Modification of Provisional Measures (28 March 2024)

South Africa argued that the developments in the situation in Gaza constituted changes within the meaning of Article 76 of the Rules of Court. South Africa pointed to the starvation of Palestinians and the blocking, by Israel, of humanitarian deliveries, including by the UN Relief and Works Agency ("UNRWA"). Israel contended that the Court had already taken into account, in its January order, the situation relating to food insecurity in Gaza. According to Israel, the situation since the Court's January order had not changed so as to justify a modification of the provisional measures indicated.

Held:—(1) (by fourteen votes to two, Judge Sebutinde and Judge ad hoc Barak dissenting) The provisional measures indicated by the January Order were reaffirmed (para. 51(1)).

(2) (unanimously) Israel had to take all necessary and effective measures to ensure, without delay, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary (para. 51(2)(a)).

(3) (by fifteen votes to one, Judge ad hoc Barak dissenting) Israel had to ensure with immediate effect that its military did not commit acts violating any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance (para. 51(2)(b)).

(4) (by fifteen votes to one, Judge ad hoc Barak dissenting) Israel had to submit a report to the Court on all measures taken within one month as from the date of the order (para. 51(3)).

(a) South Africa's request was one for the modification of provisional measures. Therefore, that request had to meet the requirement under Article 76 of the Rules of Court, namely that the situation had to have changed since the January order, that the change justified the modification of provisional measures and that the conditions for the indication of such measures were satisfied (paras. 13-15).

(b) Since the January order, the living conditions of the Palestinians in Gaza had deteriorated, especially due to the continued deprivation of food and other basic necessities. There was also evidence of famine. These developments were a change within the meaning of Article 76 of the Rules of Court. The provisional measures in the January order did not address all consequences arising from these changes (paras. 18-23).

(c)(i) In the January order, the Court found that it had prima facie jurisdiction and that some of the rights claimed by South Africa were

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plausible. There was no reason to revisit these findings. The question was whether the changed situation showed that there was a real and imminent risk of irreparable prejudice to the rights claimed by South Africa (paras. 24-7).

(ii) In the weeks since the January order, there was increasing food insecurity and increased risk of epidemics in Gaza. This was confirmed by UN authorities and agencies. While using sea and air routes to deliver aid to Gaza was useful, there was no real substitute to entry points by land. There was an urgent need to open more such entry points. Since the January order, Israel's actions in Gaza had resulted in an estimated further 6,600 deaths and 11,000 injuries. In this changed situation, there was a real and imminent risk of irreparable prejudice to South Africa's rights (paras. 30-40).

(d) The circumstances required the Court to modify its January order. The Court had the power to indicate measures different, in whole or in part, from those requested. The Court could not indicate measures aimed at States or entities not Parties to the proceedings. Israel had to make sure that humanitarian assistance reached Gaza, including by increasing the entry points into Gaza, and had to ensure that its military did not perpetrate any acts that could violate the rights of the Palestinians as a protected group under the Genocide Convention. It was also for Israel to submit an implementation report within one month of the date of the order. The provisional measures indicated in the January order were reaffirmed (paras. 41-9).

Declaration of President Salam: The situation of the Palestinians in Gaza was tragic. The risk of famine that was hypothetical at the time of the January order was now real. This situation was likely to deteriorate further and was such as to bring about their total or partial destruction as a group. The new measures indicated by the Court could take full effect only if there was an immediate ceasefire, as called for by UN Security Council Resolution 2728 (2024) (paras. 1-12).

Declaration of Judge Yusuf: The situation in Gaza had changed, with Palestinians now also succumbing to starvation and disease. There was no need for the Court to determine whether there was genocidal intent at this stage of the proceedings. The Court had to look at the objective *indicia* of the possible commission of genocide. If such *indicia* existed, the Court had to take action to preserve the group concerned. The very existence of the Palestinians as a group was subject to a real and imminent risk of irreparable prejudice. The only way to implement the Court's measures was for Israel to suspend all military operations in Gaza (paras. 1-13).

Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi: It was regrettable that the measures indicated by the Court did not require Israel to cease its military operations in Gaza. Nonetheless, this order was an improvement on the January order, as it required Israel to "ensure" the provision of humanitarian aid in line with Articles 55-6 of the Fourth Geneva Convention,

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1949. Israel's assurances were to be appreciated, but the question for the Court was not whether Israel had made substantial efforts but whether Palestinians in Gaza were able to receive basic necessities. Israel's control over Gaza was the reason why Israel bore the primary responsibility to ensure the delivery of humanitarian assistance. Suspending all military operations was necessary to discharge that responsibility (paras. 1-8).

Separate Opinion of Judge Nolte: In its jurisprudence, the Court did not easily reach the conclusion that a change of circumstances had taken place. That jurisprudence suggested that requests to modify provisional measures were not attempts at implementing provisional measures earlier indicated. It was for the Court to determine, in the final judgment, whether a Party was responsible for not complying with an order on provisional measures. Using the procedure under Article 76 of the Rules of Court for that purpose meant that the Court could prejudge a point that properly belonged to the merits. The situation in Gaza would not exist if Israel had complied with the January order. Against this background, it could seem that the order of 28 March 2024 did not impose new measures, but specified existing ones. If read in this manner, this order would make a problematic precedent signalling that the threshold to modify provisional measures was low. Yet, in its order of 28 March 2024 the Court did not merely specify existing measures, but took stock of the exceptionally grave situation which had materialized since its January order (paras. 1-6).

Declaration of Judge Charlesworth: Paragraph 2(b) of the operative clause was drafted in such opaque terms as to give no real guidance to the Parties. The humanitarian situation in Gaza was quickly deteriorating, posing a threat to the existence of the Palestinians as a group protected under the Genocide Convention. While the Court could not order a ceasefire, it would indicate measures directed to the Parties and aimed to mitigate the situation in Gaza. Paragraph 2(b) of the operative clause was elliptical, while the Court had to indicate that Israel had to suspend all military operations in Gaza (paras. 1-8).

Separate Opinion of Judge ad hoc Barak: (1) The provisional measures indicated in the order of 28 March 2024 were of a much narrower scope than those requested by South Africa. Nonetheless, the Court's accession to South Africa's requests entangled it in an armed conflict. This was problematic as the Court could not regulate the conduct of hostilities, considering that its jurisdiction was limited to the Genocide Convention. Moreover, the Court was embroiled in an armed conflict in which one party, Hamas, was not before it, making the other party, Israel, the only one bound by its decisions. The Court's approach was worrying, as it was leaving the land of law and entering the land of politics (paras. 1-10).

(2) First, while the situation in Gaza had worsened, it was not a "change of circumstances" within the meaning of Article 76 of the Rules of Court.

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