

DECLARATION OF JUDGE BHANDARI

Humanitarian situation in Gaza — Present request for the indication of provisional measures — Court not deciding merits — Requirement for the existence of plausible rights — Consideration of factual evidence on the record — Relevance of conduct for plausibility finding.

1. I agree with the Court's reasoning supporting its Order. I make this declaration to add an additional element to this reasoning.

2. First, by way of background, the attacks on civilians in Israel on 7 October 2023 were acts of brutality that must be condemned in the strongest possible terms. It is estimated that 1,200 Israelis lost their lives and 5,500 were wounded and maimed in those attacks.

3. To date, however, more than 25,000 civilians in Gaza have reportedly lost their lives as a result of Israel's military campaign in response to those attacks, many of them women and children. Several thousands are reportedly still missing. Tens of thousands of others have reportedly been injured. Dwellings, businesses and places of worship have been destroyed. It is also reported by United Nations agencies that 26 hospitals and over 200 schools have been damaged. Approximately 85 per cent of Gaza's population has been displaced as a result of the conflict. The situation in Gaza has turned into a humanitarian catastrophe.

4. I note in this connection that, while the present request only concerns the Genocide Convention, other bodies of international law also apply in an armed conflict such as this one, including in particular international humanitarian law.

5. This is an Order granting provisional measures, in accordance with Article 41 (1) of the Statute and the jurisprudence of the Court. According to this provision, "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

6. Needless to say, the case has not been fully argued at this point, nor does the Court have before it anything even approaching a full factual record. For these reasons alone, it is clear that the Court is not, and cannot be, deciding South Africa's actual claims under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), as articulated in paragraph 110 of its Application instituting proceedings (the "Application"). Similarly, the Court is not, at this stage, deciding whether to grant any of the relief South Africa requests in paragraph 111 of its Application.

7. All the Court is doing is rendering a decision on South Africa's Request for the indication of provisional measures (the "Request"), which is a discrete request to the Court. In making a decision on the Request, different legal tests and thresholds apply. These are elementary points, but, in the particular context of this case, they bear repeating. It is against this background that one must read the Court's Order.

8. As part of its decision on whether to grant provisional measures, the Court must, in weighing the plausibility of the rights whose protection is claimed, consider such evidence as is before it at

this stage, preliminary though it might be. In particular, it must, in this case, take into account the widespread destruction in Gaza and loss of life that the population of Gaza has thus far endured. Article II of the Genocide Convention provides that an intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” is a constitutive element of genocide as defined under the Convention. Disputes with respect to the meaning of this requirement have, in the past, been before this Court, and the Court’s decisions have shed light on the requirements of this provision. According to the Court’s jurisprudence, “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question”¹. However, the Court need not, at a provisional measures stage, make a final determination on the existence of such intent. In its Order of 23 January 2020 indicating provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the Court stated that,

“[i]n view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent”.

It added that “all the facts and circumstances mentioned are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection . . . are plausible”².

9. Again, the Court is not at this point deciding whether, in fact, such intent existed or exists. All it is deciding is whether rights under the Genocide Convention are plausible. Here, the widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it — much of which is a matter of public record and has been ongoing since October 2023 — are by themselves capable of supporting a plausibility finding with respect to rights under Article II.

10. Taken together and, bearing in mind the lower standards that apply in respect of provisional measures as opposed to the merits, the evidence on the record at this stage in the proceedings is such that, in the circumstances of this case, the Court was justified in granting provisional measures in the terms it did.

11. Going further, though, all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt and that remaining hostages captured on 7 October 2023 are unconditionally released forthwith.

(Signed)

Dalveer BHANDARI.

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148.

² *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. 23, para. 56.