

## DECLARATION OF JUDGE NOLTE

1. The circumstances of this case are heartbreaking. On 7 October 2023, persons associated with Hamas attacked Israel from the Gaza Strip. They committed atrocities during which more than 1,000 Israelis were killed and over 200 were taken hostage. Rockets continue to be fired into Israel. Israel has responded with a military operation in the Gaza Strip, as a result of which thousands of Palestinian civilians have been killed and wounded, a large majority of the Palestinians living in the Gaza Strip have been displaced, and a large percentage of all buildings for a population of some 2 million people have been destroyed (see paragraph 13 of the Order)<sup>1</sup>. This apocalyptic situation arises from a very complicated political and historical context. Many people around the world hold widely divergent views about who is responsible for the current situation, about various aspects of the larger conflict, and what needs to be done to resolve them.

### I.

2. The Court can play only a limited role in the present proceedings. South Africa has brought its Application against Israel based on the Genocide Convention alone. This means that the case concerns, first, only alleged violations of the Genocide Convention and, second, only alleged violations by Israel of that Convention. Thus, the case does not concern possible violations of other rules of international law, such as war crimes, and it does not concern possible violations of the Genocide Convention by persons associated with Hamas. While these limitations may be unsatisfactory, the Court is bound to respect them. I would like to recall, however, that persons associated with Hamas remain responsible for any acts of genocide that they may have committed. Also, both Israel and persons associated with Hamas remain legally responsible for any possible breaches by them of other rules of international law, including international humanitarian law. Any such responsibility can and should be determined through other legal procedures.

3. The Genocide Convention of 1948 is a very special treaty. It was concluded in 1948 in the wake of the Holocaust committed by Nazi Germany against the Jewish people in Europe. In its preamble, the Convention recognizes that “genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world”, and it expresses the commitment of humanity “to liberate mankind from such an odious scourge”. For this purpose, Article II of the Convention legally defines the crime of genocide as specific acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. I can understand that Israel, which was established in 1948 as a homeland offering protection to the Jewish people, including against another genocide, strongly rejects allegations that it has now violated the Genocide Convention.

4. However, the Court cannot dismiss South Africa’s Application on this ground. By acceding to the Genocide Convention, Israel has accepted the jurisdiction of the Court under Article IX thereof in “[d]isputes 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”.

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<sup>1</sup> See United Nations Office for the Coordination of Humanitarian Affairs, “Hostilities in the Gaza Strip and Israel — reported impact, Day 107” (22 January 2024), available at: <https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-reported-impact-day-107>. It should be noted that the United Nations adds a disclaimer which reads as follows: “The UN has so far not been able to produce independent, comprehensive, and verified casualty figures; the current numbers have been provided by the Ministry of Health or the Government Media Office in Gaza and the Israeli authorities and await further verification. Other yet-to-be verified figures are also sourced.”

5. The Court is not asked, in the present phase of the proceedings, to determine whether South Africa's allegations of genocide are well founded. At this stage, the Court may only examine whether the circumstances of the present case, as they have been presented to the Court, justify the ordering ("indication") of provisional measures to protect rights under the Genocide Convention which are at risk of being violated before the decision on the merits is rendered. For this examination, the Court need not address many well-known and controversial questions, such as those relating to the right to self-defence and the right of self-determination of peoples, or regarding territorial status. The Court must remain conscious that the Genocide Convention is not designed to regulate armed conflicts as such, even if they are conducted with an excessive use of force and result in mass casualties.

6. The limited scope of the present phase of the proceeding requires a summary assessment by the Court of certain widely divergent claims by the Parties. It is regrettable how much the Parties talked past each other during the oral proceedings. South Africa hardly mentioned the attack of 7 October 2023 and the ensuing massacre; Israel barely mentioned the United Nations reports on the humanitarian situation in the Gaza Strip. South Africa hardly mentioned the efforts by Israel to evacuate the civilian population from areas of hostilities; Israel did not satisfactorily address highly problematic forms of speech by some of its officials, including members of its military.

7. Facing the widely divergent presentations of the Parties, the Court needs to apply the existing legal standards. The present case is not the first in which a State has asked the Court to indicate provisional measures based on the Genocide Convention. The Court has already indicated such measures more than once, including in 2020 in the case between The Gambia and Myanmar. As extraordinary as the present case may be, the Court has the means to deal with it: its own jurisprudence. The present Order applies the standards developed in that jurisprudence, without, however, identifying relevant differences between this case and previous cases before the Court and specifying the relative importance of certain factors. I therefore wish to explain why I voted in favour of the Order.

## II.

8. It is important to bear in mind that "the essential characteristic of genocide", distinguishing it from other criminal acts (e.g. crimes against humanity and war crimes), is the existence of an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"<sup>2</sup>. The Court has established a high threshold for the definite determination of genocidal intent at the stage of the merits. In the absence of a "general plan to this effect", the "intent to destroy, in whole or in part, a protected group" can only be inferred from "a pattern of conduct" if this is the "only reasonable inference that can be drawn" therefrom<sup>3</sup>.

9. At this stage of the proceedings, the Court is not called upon to determine definitively whether there have been violations of the rights under the Genocide Convention which South Africa

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<sup>2</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 62 and 64, paras. 132 and 138-139.

<sup>3</sup> *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; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373.

wishes to see protected, but only whether these rights are “plausible” and whether there is a “real and imminent risk of irreparable injury” to them before the Court renders its judgment on the merits<sup>4</sup>.

10. The jurisprudence of the Court is not entirely clear as to what “plausibility” entails<sup>5</sup>. Recent jurisprudence suggests that any request for the indication of provisional measures must provide some level of evidence supporting its allegations<sup>6</sup>, including indications for the presence of any essential mental elements<sup>7</sup>. In the present Order, the Court has noted the importance of the specific genocidal intent without, however, specifying its plausibility in the present case (see paragraphs 44 and 78).

11. Given the crucial role of genocidal intent for rights under the Genocide Convention and for the distinction between genocidal acts and other criminal acts, the plausibility of this mental element is, in my view, indispensable at the provisional measures stage of proceedings involving allegations of genocide. This is confirmed by the Court’s Order of 23 January 2020 in *The Gambia v. Myanmar*. It is true that the Court stated in paragraph 56 of that Order 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. In the Court’s view, all the facts and circumstances mentioned above (see paragraphs 53-55) are sufficient to conclude that the rights . . . are plausible.”

12. However, this does not preclude that such intent must be shown to be plausible under the circumstances. Indeed, the same paragraph 56 confirms that the Order must be read as being based on the facts and circumstances referred to in the preceding paragraphs. There, the Court considered detailed reports by the Independent International Fact-Finding Mission on Myanmar<sup>8</sup>. Each of these reports examines at length — and eventually declares plausible — the existence of genocidal intent<sup>9</sup>. In paragraph 55 of the above-mentioned Order, the Court explicitly takes note of the conclusion drawn in the reports that “on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present”. It was based on these findings regarding genocidal intent that the Court considered the rights under the Genocide Convention to be plausible. The Order of 23 January 2020

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<sup>4</sup> *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*, pp. 27-28, paras. 74-75.

<sup>5</sup> K. Oellers-Frahm and A. Zimmermann, “Article 41”, in A. Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (3rd ed.), (OUP 2019), pp. 1157-1158.

<sup>6</sup> *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, pp. 242-243, para. 45; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 427, para. 54.

<sup>7</sup> See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, paras. 75-76.

<sup>8</sup> *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. 22, para. 55, citing United Nations, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/64, 12 September 2018; United Nations, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2, 17 September 2018; and United Nations, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/50, 8 August 2019.

<sup>9</sup> See, IIFFMM (12 September 2018), paras. 84-87; IIFFMM (17 September 2018), paras. 1411-1441; IIFFMM (8 August 2019), para. 90. See further FFM report (16 September 2019), paras. 220-225, 238, which was cited in other paragraphs of the Order.

thus confirms that the existence of genocidal intent must be plausible for the indication of provisional measures based on the Genocide Convention.

13. Bearing these considerations in mind, I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent. The evidence provided by South Africa regarding the Israeli military operation differs fundamentally from that contained in the reports by the United Nations fact-finding mission on Myanmar's so-called "clearance operation" in 2016 and 2017 which led the Court to adopt its Order of 23 January 2020 in *The Gambia v. Myanmar*. These reports provided detailed indications of the involvement of military and security forces in atrocities committed against the Rohingya group<sup>10</sup>. Having considered various other possible inferences from the available information, in particular security considerations<sup>11</sup>, the report found that "[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list [of genocidal intent]", concluding "on reasonable grounds, that the factors allowing the inference of genocidal intent are present"<sup>12</sup>. Based on this information, the Court considered that, under the circumstances, the rights of the Rohingya group deriving from Article II (a) to (d) of the Genocide Convention, as alleged by The Gambia, were plausible.

14. The information provided by South Africa regarding Israel's military operation is not comparable to the evidence before the Court in *The Gambia v. Myanmar* in 2020. While the Applicant cannot now be expected to provide the Court with detailed reports of an international fact-finding mission, it is not sufficient for South Africa to point to the terrible death and destruction that Israel's military operation has brought about and is continuing to bring about. The Applicant must be expected to engage not only with the stated purpose of the operation, namely to "destroy Hamas" and to liberate the hostages, but also with other manifest circumstances, such as the calls to the civilian population to evacuate, an official policy and orders to soldiers not to target civilians, the way in which the opposing forces are confronting each other on the ground, as well as the enabling of the delivery of a certain amount of humanitarian aid, all of which may give rise to other plausible inferences from an alleged "pattern of conduct" than genocidal intent. Rather, these measures by Israel, while not conclusive, make it at least plausible that its military operation is not being conducted with genocidal intent. South Africa has not called these underlying circumstances into question and has, in my view, not sufficiently engaged with their implications for the plausibility of the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention.

15. Even though I do not find it plausible that the military operation is being conducted with genocidal intent, I voted in favour of the measures indicated by the Court. To indicate those measures, it is not necessary for the Court to find that the military operation as such implicates plausible rights of Palestinians in the Gaza Strip. My decision to vote in favour of the measures indicated rests on the plausible claim by South Africa that certain statements by Israeli State officials, including members of its military, give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention (see paragraphs 50-52 of the Order). At the present stage of the proceedings, it is not necessary to determine whether such statements should be characterized as acts of "[d]irect and public incitement to commit genocide" within the meaning of Article III (c) of the Genocide Convention. It is true that some of these statements can be read as referring exclusively to Hamas and other armed groups in the Gaza Strip. However, these statements are at least highly ambiguous in their use of dehumanizing and indiscriminate language against Palestinians in the Gaza Strip as a group. Since they were made by high-ranking officials, who thereby also

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<sup>10</sup> UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 1394-1395 and 1406.

<sup>11</sup> *Ibid.*, paras. 1434-1438.

<sup>12</sup> *Ibid.*, paras. 1440-1441.

addressed soldiers involved in hostilities in the Gaza Strip, I cannot plausibly exclude that such statements contribute to a potential failure by Israel to prevent and punish acts of public and direct incitement to genocide. Indeed, South Africa has provided evidence, not contradicted by Israel, that inflammatory parts of relevant statements have been echoed in a threatening way by members of the Israeli armed forces<sup>13</sup>. This confirms that such statements may contribute to a “serious risk” that acts of genocide other than direct and public incitement may be committed, giving rise to Israel’s obligation to prevent genocide<sup>14</sup>.

16. Statements by Israel and by United Nations agencies regarding the access of Palestinians in the Gaza Strip to adequate food, water and other forms of humanitarian assistance differ significantly<sup>15</sup>. United Nations agencies claim that there is a desperate lack of food and other goods necessary for the survival of the population<sup>16</sup>. Their statements raise the question whether the Israeli authorities are unjustifiably restricting the delivery of food and other necessary goods to the entire civilian population in the Gaza Strip, or at least to substantial parts of the population<sup>17</sup>. Under the circumstances and at the provisional measures stage, I think that weight must be given to the respective assessments of United Nations agencies regarding the circumstances of the existentially threatening situation of the group of Palestinians in the Gaza Strip. I have therefore also voted in favour of measure (4).

### III.

17. South Africa has, in my view, shown that some, but not all, of the rights which it has alleged are plausible at the present preliminary stage of the proceedings (see paragraph 54 of the Order). I view the measures indicated by the Court today as responding to certain plausible risks for the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention, and as reminding Israel of its obligations under that Convention.

(Signed) Georg NOLTE.

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<sup>13</sup> CR 2024/1, p. 36, para. 21 (Ngcukaitobi).

<sup>14</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 221-222, para. 431.

<sup>15</sup> CR 2024/2, p. 32, para. 41 (Shaw); pp. 46-49, paras. 51-77 (Raguan); pp. 50-52, paras. 9-13 (Sender); Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths’ briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, ‘Humanitarian aid’ (11 January 2024), available at: <https://news.un.org/en/story/2024/01/1145422>.

<sup>16</sup> Letter from the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter (6 December 2023), available at: [https://www.un.org/sites/un2.un.org/files/sg\\_letter\\_of\\_6\\_december\\_gaza.pdf](https://www.un.org/sites/un2.un.org/files/sg_letter_of_6_december_gaza.pdf).

<sup>17</sup> Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths’ briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, ‘Humanitarian aid’ (11 January 2024), available at: <https://news.un.org/en/story/2024/01/1145422>.