DISSENTING OPINION OF JUDGE SEBUTINDE

In my respectful dissenting opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist — It is not a legal dispute susceptible of judicial settlement by the Court —Some of the preconditions for the indication of provisional measures have not been met — South Africa has not demonstrated, even on a prima facie *basis, that the acts allegedly committed by Israel and of which the Applicant complains, were committed with the necessary genocidal intent, and that as a result, they are capable of falling within the scope of the Genocide Convention — Similarly, since the acts allegedly committed by Israel were not accompanied by a genocidal intent, the Applicant has not demonstrated that the rights it asserts and for which it seeks protection through the indication of provisional measures are plausible under the Genocide Convention — The provisional measures indicated by the Court in this Order are not warranted.*

I. INTRODUCTION: CONTEXT

A. Limited scope of the provisional measures Order

1. Given the unprecedented global interest and public scrutiny in this case, as can be gathered from, *inter alia*, media reports and global demonstrations, the reader of the present Order must be cautious not to assume or conclude that, by indicating provisional measures, the Court has already made a determination that the State of Israel ("Israel") has actually violated its obligations under the Genocide Convention. This is certainly not the case at this stage of the proceedings, since such a finding could only be made at the stage of the examination of the merits in this case (see Order, paragraph 30). Nor must one assume that the Court has definitively determined whether the rights that the Republic of South Africa ("South Africa") asserts, and for which the Applicant seeks protection *pendente lite*, actually exist. At this stage, the Court is only concerned with the preservation through the indication of provisional measures of those rights that the Court may subsequently adjudge to belong to either Party, pending its final decision in the case (see Order, paragraphs 35-36). In this regard, the Court has stated as follows:

> "The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. [The Court] cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures." (*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. 24-25, para. 66.)

2. Similarly, one should not make the mistaken assumption that the Court has already determined that it has jurisdiction to entertain South Africa's claims on the merits or that it has already found those claims to be admissible. Both of those issues are to be determined at a later phase of the case, after South Africa and Israel have each had an opportunity to submit arguments in relation thereto (see Order, paragraph 84).

B. The Court's jurisdiction is limited to the Genocide Convention and does not extend to grave breaches of international humanitarian law

3. In its Application instituting proceedings before the Court, South Africa invoked, as a basis for the Court's jurisdiction, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") and Article 36, paragraph (1), of the Statute of the Court. Both South Africa and Israel are parties to the Genocide Convention, without reservation (see Order, paragraph 18). Accordingly, for the purposes of the provisional measures Order, the Court's prima facie jurisdiction is limited to the Genocide Convention and does not extend to alleged breaches of international humanitarian law ("IHL"). Thus, while it is not inconceivable that grave violations of international humanitarian law amounting to war crimes or crimes against humanity could have been committed against the civilian populations both in Israel and in Gaza (a matter over which the Court has no jurisdiction in the present case), such grave violations do not, in and of themselves, constitute "acts of genocide" as defined in Article II of the Genocide Convention, unless it can be demonstrated that they were committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

C. The controversy between Israel and Palestine is historically a political one

4. Furthermore, I am also strongly of the view that the controversy or dispute between the State of Israel and the people of Palestine is essentially and historically a *political or territorial* (and, I dare say, ideological) one. It calls not only for a diplomatic or negotiated settlement, but also for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist. It is my considered opinion that the dispute or controversy is not a legal one calling for judicial settlement by the International Court of Justice. Unfortunately, the failure, reluctance or inability of States to resolve political controversies such as this one through effective diplomacy or negotiations may sometimes lead them to resort to a pretextual invocation of treaties like the Genocide Convention, in a desperate bid to force a case into the context of such a treaty, in order to foster its judicial settlement: rather like the proverbial "Cinderella's glass slipper". In my view, the present case falls in this category, and it is precisely for this, and other reasons articulated in this dissenting opinion, that I have voted against the provisional measures indicated by the Court in operative paragraph 86 of this Order. An appreciation of the historical controversy between the State of Israel and the people of Palestine is a necessary prerequisite to appreciating the context in which the Court is seised with the present case.

II. Political context of the Israeli-Palestinian conflict

5. The United Nations has been heavily involved in the Israeli-Palestinian conflict throughout its history. In 1947, only two years after the founding of the United Nations, the General Assembly recommended a plan of partition regarding the government of the Mandate of Palestine. That plan provided for the creation of two independent States — one Jewish and one Arab — in recognition of the dual rights of self-determination by the Jewish and Arab inhabitants of the land (General Assembly resolution 181 (II) of 29 November 1947). This laid the foundation for the creation of the State of Israel in May 1948. Unfortunately, the rejection of the partition plan by certain Arab leaders and the outbreak of war in 1948 prevented the realization of the laudable goal of two States for two peoples. Since that time, and in particular since the Israeli seizure of the West Bank and Gaza Strip in the 1967 Arab-Israeli war, the United Nations has remained seised of the conflict.

6. In 1967, the Security Council in its resolution 242 affirmed that "the establishment of a just and lasting peace in the Middle East" required the fulfilment of the two interdependent conditions of

Israeli withdrawal from territories it had seized in the conflict and recognition of Israel's sovereignty, territorial integrity and "right to live in peace within secure and recognized boundaries free from threats or acts of force" (Security Council resolution 242 of 22 November 1967). In 1973, in resolution 338, which called for a ceasefire in the 1973 Arab-Israeli war, the Security Council again decided that "immediately and concurrently with the ceasefire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East" (Security Council resolution 338 of 22 October 1973). This emphasis on the importance of the Israeli-Palestinian and broader Arab-Israeli peace process was subsequently affirmed by the General Assembly, which has emphasized the need to achieve a "just and comprehensive settlement of the Arab-Israeli conflict" (General Assembly resolution 47/64 (D) of 11 December 1992).

7. The international community's focus on encouraging negotiation between the parties has borne fruit, including the 1979 peace treaty between Israel and Egypt and 1994 peace agreement between Israel and Jordan. Most notably, the 1993 Oslo Accords resulted in the recognition by the Palestinian Liberation Organization ("PLO") of the State of Israel and the recognition by Israel of the PLO as the representative of the Palestinian people. The Declaration of Principles on Interim Self-Government Arrangements, signed by representatives of both parties, endorsed the framework set out in Security Council resolutions 242 and 338 and expressed the parties' agreement on the need to "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process" (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993). Although the Oslo Accords have not yet been fully implemented, they continue to bind the parties concerned and to provide a framework for allocating responsibilities between Israeli and Palestinian authorities and informing future negotiations.

8. Since that time, the United Nations has repeatedly affirmed the need for negotiations aimed at achieving a two-State solution and resolving the dispute between Israel and Palestine. In 2003, the Security Council, in resolution 1515, "[e]ndorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" (the Quartet was composed of representatives of the United States, European Union, Russian Federation and United Nations) (Security Council resolution 1515 of 19 November 2003). In that resolution, the Security Council "[c]all[ed] on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security" (*ibid.*). Similarly, the Security Council in 2008 declared its support for negotiations between the parties and "support[ed] the parties' agreed principles for the bilateral negotiating process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues" (Security Council resolution 1850 of 16 December 2008). In 2016, the Security Council again recalled both parties' obligations and "[c]alled upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on all final status issues in the Middle East peace process" (Security Council resolution 2334 of 23 December 2016). In this regard, the Security Council "urg[ed] . . . the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving without delay a comprehensive, just and lasting peace in the Middle East" (*ibid.*).

9. The General Assembly has likewise regularly recalled the Oslo Accords and the Quartet Roadmap in its resolutions regarding the Israeli-Palestinian Conflict. For example, the General Assembly has:

> "[r]eiterate[d] its call for the achievement, without delay, of a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions,

> including Security Council resolution 2334 (2016), the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map, and an end to the Israeli occupation that began in 1967, including of East Jerusalem, and reaffirms in this regard its unwavering support, in accordance with international law, for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders". (See General Assembly resolution 77/25 of 6 December 2022; General Assembly resolution 76/10 of 1 December 2021; General Assembly resolution 75/22 of 2 December 2020.)

10. Finally, the Court has itself previously pronounced on the importance of continued negotiations. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explained:

> "Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 200-201, para. 162.)

11. As can be seen from the above history, it is clear that a permanent solution to the Israeli-Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. This context must be kept in mind in assessing South Africa's Application and Request for the indication of provisional measures.

III. THE EVENTS OF 7 OCTOBER 2023

12. On 7 October 2023, thousands of members of the *Harakat al-Muqawama al-Islamiya* ("Islamic Resistance Movement" or "Hamas"), a Palestinian Sunni Islamic political and military organization governing the Gaza Strip, invaded the territory of the State of Israel under cover of thousands of rockets fired indiscriminately into Israel and committed massacres, mutilations, rapes and abductions of hundreds of Israeli civilians, including men, women and children. (Israel reports that over 1,200 people were murdered that day, more than 5,500 maimed, and over 240 hostages abducted, including infants, entire families, the elderly, the disabled, as well as Holocaust survivors.) According to Israel, most of the hostages remain in captivity or are simply unaccounted for and many have been tortured, sexually abused, starved or killed while in captivity.

13. Soon after the 7 October attack, Israel, in exercise of what it describes as "its right to defend itself", launched a "military operation" into the Gaza Strip whose objective was, *first*, to defeat Hamas and its network and, *secondly*, to rescue the Israeli hostages. South Africa claims that as a result of the armed conflict that ensued between Israel and Hamas over the past 11 weeks, 1.9 million Palestinians living in Gaza (85 per cent of the population) have been internally displaced; over 22,000 Palestinians, including over 7,729 children, have been killed; over 7,780 are missing and/or presumed dead under the rubble; over 55,243 are severely injured or have suffered mental harm; and vast areas of Gaza, including entire neighbourhoods have been destroyed including 355,000 homes, places of worship, cemeteries, cultural and archaeological sites, hospitals and other critical infrastructure.

14. On 28 December 2023, South Africa filed an Application with the Registry instituting proceedings against Israel concerning alleged violations of the Genocide Convention. South Africa alleges that the acts taken by Israel against the Palestinian people in the wake of the attacks in Israel of 7 October 2023 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 in the Gaza Strip" (Application, para. 1). In South Africa's view, Israel has violated its obligations under the Genocide Convention in several respects, including by failing to prevent genocide; committing genocide; and failing to prevent or punish the direct and public incitement to genocide. The requests of South Africa are accurately rehearsed in paragraph 2 of the Application.

15. In addition to the Application, South Africa has requested that the Court indicate provisional measures. The provisional measures requested by the Applicant at the end of its oral observations are accurately rehearsed in paragraph 11 of the Application. For its part, Israel, whilst acknowledging that the events of 7 October 2023 and the ensuing war between Hamas and Israel have wracked untold suffering on innocent Israeli and Palestinian civilians, including unprecedented loss of life, protests the Applicant's description of Israel's conduct during this war as "genocide". Israel argues that not every conflict is genocidal, nor does the threat or use of force necessarily constitute an act of genocide within the meaning of Article II of the Genocide Convention. Israel maintains that, in view of the ongoing threat, brutality and lawlessness of Hamas that it continues to face, it has an inherent and legitimate duty to protect the Israeli people and territory, in accordance with international humanitarian law, from attack by an armed group or groups that have openly declared their intention to annihilate the Jewish State. In Israel's view, South Africa's present request for the indication of provisional measures is tantamount to an attempt to deny Israel its ability to meet its legal obligation to defend its citizens, rescue its hostages still in Hamas custody and to enable the over 110,000 internally displaced Israelis to safely return to their homes. In its oral observations, Israel requests the Court to reject South Africa's Request for the indication of provisional measures and to remove the case from the General List.

IV. SOME OF THE CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES HAVE NOT BEEN MET

16. The Court has, through its jurisprudence, progressively developed legal standards or criteria to determine whether it should exercise its power under Article 41 of its Statute to indicate provisional measures. In the present case, the Court should determine (1) whether it has prima facie jurisdiction to entertain the alleged dispute between the Parties (*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. 217, para. 24; *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. 9-17, paras. 16-42); (2) whether the rights asserted by South Africa are plausible and have a link with the requested measures (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations,*

and Consular Rights (Islamic Republic of Iran v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 638, para. 53); and (3) whether the situation is urgent and presents a risk of irreparable prejudice to the rights asserted (*ibid.*, pp. 645-646, paras. 77-78).

A. There are no indicators of a genocidal intent on the part of Israel

17. I am not convinced that all the above criteria for the indication of provisional measures have been met in the present case. In particular, South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel, and of which the Applicant complains, were committed with the necessary genocidal intent and that, as a result, they are capable of falling within the scope of the Genocide Convention. Similarly, when it comes to the rights that the Applicant asserts and for which South Africa seeks protection through the indication of provisional measures, there is no indication that the acts allegedly committed by Israel were accompanied by a genocidal intent and that, as a result, the rights asserted by the Applicant are plausible under the Genocide Convention. What distinguishes the crime of genocide from other grave violations of international human rights law (including those enumerated in Article II, paragraphs *(a)* to *(d)*, of the Genocide Convention) is the existence of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Accordingly, the acts complained of by South Africa, as well as the rights correlated to those acts, can only be capable of "falling within the scope of the said Convention" if a genocidal intent is present, otherwise such acts simply constitute grave violations of international humanitarian law and not genocide as such.

18. Thus, even at this preliminary stage of provisional measures, the Court should have examined the evidence put before it to determine whether there are indicators of a genocidal intent (even if it is not the only inference to be drawn from the available evidence at this stage), in order for the Court to conclude that the acts complained of by the Applicant are, prima facie, capable of falling within the scope of the Genocide Convention. Similarly, for purposes of determining plausibility of rights, it is not sufficient for the Court to only look at allegations of the grave breaches enumerated in paragraphs *(a)* to *(d)* of Article II of the Convention. The rights must be shown to plausibly derive from the Genocide Convention.

19. In the present case, South Africa claims that at least some of the acts it has complained of are capable of falling within the scope of the Genocide Convention. These include (1) the killing of Palestinians in Gaza (in violation of Article II *(a)*); (2) causing serious bodily or mental harm to the Palestinians in Gaza (in violation of Article II *(b)*); (3) deliberately inflicting upon the Palestinians in Gaza conditions of life calculated to bring about their physical destruction as a group, in whole or in part (in violation of Article II *(c)*); and (4) imposing measures intended to prevent births within the group (in violation of Article II *(d)*). South Africa further claims that Israel has employed methods of war that continue to target infrastructure essential for survival and that have resulted in the destruction of the Palestinian people as a group, including by depriving them of food, water, medical care, shelter, clothing, lack of hygiene, systematic expulsion from homes or displacement (in violation of Article II *(c)*) (see Application, paras. 125-127). South Africa also claims that certain Israeli officials and politicians have, through their statements, publicly incited the Israeli Defense Force ("IDF") to commit genocide (in violation of Article III *(c)*) and that Israel has failed to punish those responsible for the above violations. To demonstrate a genocidal intent, South Africa referred to the "systematic manner" in which Israel's military operation in Gaza is carried out, resulting in the acts enumerated in Article II of the Convention, as well as to statements of various Israeli officials and politicians that, in the Applicant's view, communicate State policy of Israel and contain genocidal rhetoric against Palestinians in Gaza, including statements by the Israeli Prime Minister, the Deputy Speaker of the Israeli Parliament (Knesset), the Defense Minister, the Minister of Energy and Infrastructure, the Heritage Minister, the President and the Minister for National Security.

20. Israel contests that it is committing acts of genocide in Gaza or that it has a specific intent to destroy, in whole or in part, the Palestinian people, as such. Israel emphasized that its war is not against the Palestinian people as such, but rather is against Hamas, the terrorist organization in control of Gaza that is bent on annihilating the State of Israel. Israel states that the sole objectives of its military operation in Gaza are the rescue of Israeli hostages abducted on 7 October 2023 and the protection of the Israeli people from displacement and from any future attacks by Hamas, including by neutralizing Hamas' command structures and machinery. The Respondent further argues that any genocidal intent alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. Israel also argues that the statements relied upon by South Africa as containing genocidal rhetoric were all taken out of context and in fact were made in reference to Hamas, not the Palestinian people as such. Moreover, Israel argued that any other persons who might have made statements containing genocidal rhetoric were completely outside the policy and decision-making processes of the State of Israel.

21. As stated above, the tragic events of 7 October 2023 as well as the ensuing war in Gaza are symptoms of a more deeply engrained political controversy between the State of Israel and the people of Palestine. Having examined the evidence put forward by each of the Parties, I am not convinced that a prima facie showing of a genocidal intent, by way of indicators, has been made out against Israel. The war was not started by Israel but rather by Hamas who attacked Israel on 7 October 2023 thereby sparking off the military operation in Israel's defence and in a bid to rescue its hostages. I also must agree that any "genocidal intent" alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. A careful examination of Israel's war policy and of the full statements of the responsible government officials further demonstrates the absence of a genocidal intent. Here I must hasten to add that Israel is expected to conduct its military operation in accordance with international humanitarian law but violations of IHL cannot be the subject of these proceedings which are purely pursuant to the Genocide Convention. Unfortunately, the scale of suffering and death experienced in Gaza is exacerbated not by genocidal intent, but rather by several factors, including the tactics of the Hamas organization itself which often entails its forces embedding amongst the civilian population and installations, rendering them vulnerable to legitimate military attack.

22. Regarding the statements of Israeli top officials and politicians that South Africa cited as containing genocidal rhetoric, a careful examination of those statements, read in their proper and full context, shows that South Africa has either placed the quotations out of context or simply misunderstood the statements of those officials. The vast majority of the statements referred to the destruction of Hamas and not the Palestinian people as such. Certain renegade statements by officials who are not charged with prosecuting Israel's military operations were subsequently highly criticized by the Israeli Government itself. More importantly, the official war policy of the Israeli Government, as presented to the Court, contains no indicators of a genocidal intent. In my assessment, there are also no indicators of incitement to commit genocide.

23. In sum, I am not convinced that the acts complained of by the Applicant are capable of falling within the scope of the Genocide Convention, in particular because it has not been shown, even on a prima facie basis, that Israel's conduct in Gaza is accompanied by the necessary genocidal intent. Furthermore, the rights asserted by South Africa are not plausible and the Court should not order the provisional measures requested. But in light of the Court's Order, I will proceed to consider the other criteria required for the indication of provisional measures. This brings me to another

criterion which I also find has not been met, namely that there is no link between the rights asserted by South Africa and the provisional measures sought.

B. There is no link between the asserted rights and the provisional measures requested by South Africa

24. The next issue is the link between the asserted rights and the measures requested. South Africa has requested the Court to indicate nine types of measures: The requested measures can be divided into several categories.

1. First and second measures

25. The first and second requested measures concern Israel's ongoing military operations in Gaza. They would not merely require Israel to cease all alleged acts of genocide under Article II and III of the Convention — but would require the suspension of all military operations in Gaza, regardless of whether Hamas, an organization not party to these proceedings, continues to attack Israel or continues to hold Israeli hostages. In this respect, Israel would be required to unilaterally cease hostilities, a prospect I consider unrealistic. These two requested measures appear overly broad and are not clearly linked with the rights asserted by South Africa. Israel is currently engaged in an armed conflict with Hamas in response to the Hamas attack on Israeli military and civilian targets on 7 October 2023. Israeli military operations that target members of Hamas and other armed groups operating in Gaza — as opposed to conduct intended to cause harm to the civilian populace of Gaza — would not appear to fall within the scope of Israel's obligations under the Genocide Convention. This is particularly the case for Israeli military operations that comply with international humanitarian law. Accordingly, the first and second measures do not appear to have a sufficient link with the asserted rights. A rejection of the first and second requested measures would be consistent with the Court's approach in *Bosnia* v. *Serbia* and *The Gambia* v. *Myanmar,* where the Court indicated provisional measures but, in doing so, did not bar either Serbia or Myanmar from continuing their military operations more generally (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Provisional Measures*, *Order of 8 April 1993, I.C.J. Reports 1993*, p. 24, para. 52; *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. 30, para. 86). The measures indicated were restricted to the commission of acts of genocide.

2. Third measure

26. Although the Applicant requests this measure to apply to both Parties, it is not clear how South Africa, which is not a party to the conflict in Gaza, would contribute to preserving the rights of Palestinians in Gaza, much less "prevent genocide". In reality this measure would apply only to Israel. That said, to require Israel to "take all reasonable measures within their powers to prevent genocide" in Gaza would simply be to repeat the obligation already incumbent upon Israel and any other State party under the Genocide Convention. This measure appears to be redundant.

3. Fourth and fifth measures

27. The fourth requested measure requires Israel to refrain from specific actions that South Africa considers to be linked with its obligation to desist from committing any of the acts referred to in Article II, paragraphs *(a)* to *(d)* of the Convention. In my view, this measure, like the first and second, in effect requires Israel to unilaterally stop hostilities with Hamas, which is the only way of guaranteeing that none of the acts stipulated take place. However, as previously stated, this measure,

when removed from the requirement of a genocidal intent, merely amounts to a requirement for Israel to abide by IHL, rather than by its obligations under the Genocide Convention. Similarly, the Fifth measure, which requires Israel to refrain from deliberately inflicting on Palestinians in Gaza conditions of life calculated to bring about their destruction in whole or in part, outside the context of the requirement of a genocidal intent, is tantamount to requiring Israel to comply with its obligations under IHL, rather than under the Genocide Convention. Thus, while the expulsion and forced displacement of Palestinians in Gaza from their homes could amount to violations of IHL, the Court has previously determined in the *Bosnia Genocide* case that such conduct does not, as such, constitute genocide. The Court explained that

> "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement"(*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*, p. 123, para. 190).

However, such forced displacement, or other forms of "ethnic cleansing" may constitute genocide if intended to bring about the physical destruction of the group.

28. Similarly, the deprivation of necessary humanitarian supplies would only constitute genocide if taken with the requisite special intent. As discussed above, I do not consider that such special intent exists in this case. Therefore, such a measure is not warranted. The third component of the fifth measure refers to "the destruction of Palestinian life in Gaza". This requested measure is extremely vague and would appear to essentially fall within the requirement for Israel to refrain from deliberately inflicting conditions of life calculated to bring about the physical destruction of the Palestinian population of Gaza. It is therefore unclear what would be accomplished by separately indicating this measure. Accordingly, the Fourth and Fifth measures appear not to be linked to the rights asserted by the Applicant under the Genocide Convention.

4. Sixth measure

29. The sixth measure is written in such a way that it simply repeats the prohibitions mentioned in the Fourth and Fifth measures and is therefore not linked to rights asserted by South Africa.

5. Seventh measure

30. The seventh requested measure relates to the preservation of evidence. Although the Court found the existence of such a link with respect to a similar measure requested and indicated in *Gambia* v. *Myanmar (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. 24, para. 61), in the present case there is no evidentiary basis for concluding that Israel is engaged in the deliberate destruction of evidence relating to genocide. Moreover, to the extent the requested measure concerns the requirement that Israel allow fact-finding missions and other bodies *access to Gaza*, it would appear to go beyond Israel's obligations under the Genocide Convention. As part of its duties to the Court and to South Africa, Israel may only be required to preserve evidence *under its control*. However, a requirement to allow access to Gaza by third parties does not appear linked with South Africa's asserted rights. Notably, the Court rejected a similar request for access by independent monitoring mechanisms made by Canada and the Netherlands in

Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023*, paras. 13 and 83).

6. Eighth and ninth measures

31. With respect to the eighth and ninth requested measures, as previously noted by the Court:

> "the question of their link with the rights for which [the Applicant] seeks protection does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance by the Parties with any specific provisional measure indicated by the Court".

As previously observed, this case is complicated by the fact that in the context of an ongoing war with Hamas, which is not a party to these proceedings, it would be unrealistic to put limitations upon one of the belligerent parties but not the other. Israel would justifiably assert its right to defend itself from Hamas, which would most probably "aggravate the situation in Gaza". For all the above reasons, I am of the view that the provisional measures requested by South Africa do not appear to have a link with South Africa's asserted rights, and that this criterion for the indication of provisional measures is also not met.

32. In conclusion, I am not convinced that the rights asserted by South Africa are plausible under the Genocide Convention, in so far as the acts complained of by the Applicant do not appear to fall within the scope of that Convention. While those acts may amount to grave violations of IHL, they are prima facie, not accompanied by the necessary genocidal intent. I also am of the view that the provisional measures requested by South Africa and not linked to the asserted rights. However, I would also like to express my opinion regarding the provisional measures actually indicated by the Court, which in my view are also unwarranted for the reasons stated in this dissenting opinion.

V. THE PROVISIONAL MEASURES INDICATED BY THE COURT ARE NOT WARRANTED

33. In my view, the *First measure* obligating Israel to "take all measures within its power to prevent the commission of all acts within the scope of Article II of [the Genocide] Convention" effectively mirrors the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention and is therefore redundant. The *Second measure* obligating Israel to ensure "with immediate effect that its military does not commit any acts described in point 1 above" also seems redundant as it is either already covered under the first measure or is a mirror of the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention. The *Third measure* obligating Israel to "take all measures within its power to prevent and punish the direct and public incitement to commit genocide" also mirrors the obligation already incumbent upon Israel under Articles I and III of the Genocide Convention and is therefore redundant. The *Fourth measure* obligating Israel 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" has no link with any of the rights purportedly claimed under the Genocide Convention. In other words, under that Convention, a State party has no duty to provide or to enable the provision of, humanitarian assistance, as such. There may be an equivalent duty under IHL but not the Genocide Convention. Besides, there is evidence before the Court that the provision of humanitarian assistance is already taking place with the involvement of Israel and other international organizations, notwithstanding the continuing military operation. The evidence also

points to an improvement in the provision of basic needs in the affected areas. This measure too seems unnecessary in the circumstances. Regarding the *Fifth measure* obligating Israel 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 and III of the [Genocide] Convention", there does not seem to be any evidentiary basis for assuming that Israel is engaged in the deliberate destruction of evidence as such. Any destruction of infrastructure is not attributable to the deliberate efforts of Israel to destroy evidence but rather to the exigencies of an ongoing conflict with Hamas, which is not a party to these proceedings. It is difficult to envisage how one of the belligerent parties can be expected to unilaterally "prevent the destruction of evidence" while leaving the other one free to carry on unabated. Finally, in respect of the *Sixth measure*, given that the other measures are not warranted, there is no reason for Israel to be required to "submit a report to the Court on all measures taken to give effect to th[e] Order".

34. Lastly, a word about the Israeli hostages that remain in the custody of their captors and their families. I join the majority in expressing the Court's grave concern about the fate of the hostages (including children, babies, women, the elderly and sometimes entire families) still held in custody by Hamas and other armed groups following the attack on Israel of 7 October 2023, and in calling for their "immediate and unconditional release" (See Order, paragraph 85). I would only add the following observation. In its Request for provisional measures, South Africa emphasised that both Parties to these proceedings have a duty to act in accordance with their obligations under the Genocide Convention in relation to the situation in Gaza, leaving one wondering what positive contribution the Applicant could make towards defusing the ongoing conflict there. During the oral proceedings in the present case, it was brought to the attention of the Court that South Africa, and in particular certain organs of government, have enjoyed and continue to enjoy a cordial relationship with the leadership of Hamas. If that is the case, then one would encourage South Africa as a party to these proceedings and to the Genocide Convention, to use whatever influence they might wield, to try and persuade Hamas to immediately and unconditionally release the remaining hostages, as a good will gesture. I have no doubt that such a gesture of good will would go a very long way in defusing the current conflict in Gaza.

VI. CONCLUSION

35. For all the above reasons, I do not believe that the provisional measures indicated by the Court in this Order are warranted and have accordingly voted against them. I reiterate that in my respectful opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist.

(Signed) Julia SEBUTINDE.
