

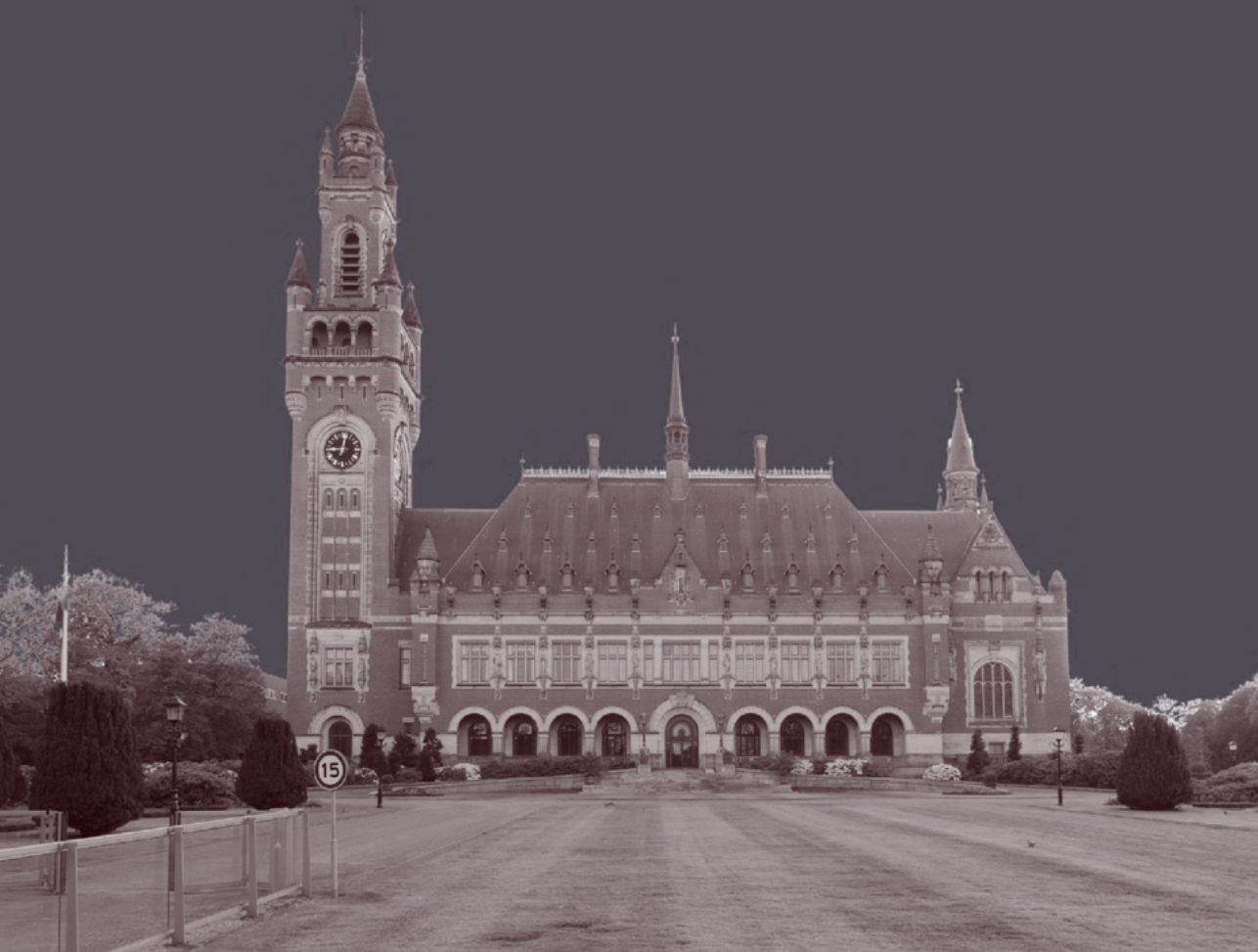


AL-HAQ

# Beyond the Orders

An Analysis of the ICJ's Decisions, Opinions,  
and Declarations in South Africa v. Israel

**Gaza's Urgent Need for Implementation**





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## Preface

The drafting of this legal report was completed by mid-September 2025. On 11 October 2025, a so-called “ceasefire agreement” was reached. Details of this US ultimatum, presented as a “ceasefire” reached by two equal parties, which fails to centre the inalienable rights of the Palestinian people to self-determination and return; allows Israel maintain control over the Palestinian territory; ignores the need for accountability; and entrenches perpetual foreign occupation, are not included. This is because the “ceasefire” does not end Israel’s genocide against Palestinians in Gaza. Israel has continued to target the Gaza Strip and kill Palestinian men, women and children, breaching the terms of the “ceasefire” hundreds of times within the first month alone. Israel has opened just three land crossings into Gaza – despite this being the safest, most efficient way of distributing aid – and refused to allow the unimpeded entry of lifesaving humanitarian aid. It has further breached the “ceasefire” by refusing entry to the agreed-upon 600 trucks per day – an amount already vastly insufficient for the dire needs of the population.

Al-Haq welcomes all genuine efforts to end the genocide and Israel’s unlawful occupation and apartheid in Gaza. However, the “ceasefire” agreed to as part of the US ultimatum will not achieve these aims. Israel has no intent to end its ongoing Nakba and destruction of the Palestinian people. Urgent concrete action to vindicate their right to self-determination remains critical.

Al-Haq calls on Third States to ensure Israel finally abides by the provisional measures indicated by the International Court of Justice in *South Africa v. Israel* in each of its three Orders in January, March and May of 2024. Third States must immediately:

1. Impose a full arms embargo against Israel;
2. Sever all diplomatic, trade and economic relations with its settler-colonial apartheid regime;
3. Impose comprehensive sanctions against Israeli officials, settlers, institutions, and organisations;
4. Break the siege and support a humanitarian presence in Gaza to ensure the full, unhindered access of lifesaving aid and services;
5. Pursue accountability for Israel’s crimes and demand the full withdrawal of the Israeli military from the Occupied Palestinian Territory.

## Introduction

On 29 December, South Africa instituted proceedings against Israel at the International Court of Justice ('ICJ' or 'the Court'), in accordance with Articles 36 (1) and 40 of the Statute of the Court and Article 38 of the Rules of Court, on the basis of alleged breaches of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'Convention').<sup>1</sup> The application contained a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court, to protect the rights invoked from imminent and irreparable loss. Since South Africa's application, the Court has issued three Provisional Measures Orders ('PMOs').

In the time since the Court issued its most recent Order in indicating provisional measures on 24 May 2024, close to a dozen reports have been released by United Nations ('UN') bodies and experts on Israel's commission of international crimes in the Gaza Strip, including by the and the UN Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, and a *Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide* by the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel.<sup>2</sup> In July 2024 the ICJ issued its authoritative Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, in which it confirmed the illegality of Israel's presence in the Occupied Palestinian Territory ('OPT') and affirmed that Israel must immediately cease all new settlement activities, evacuate all settlers and fully withdraw from the entirety of the OPT as

1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>>.

2 For example, see UN OHCHR, 'UN Special Committee finds Israel's warfare methods in Gaza consistent with genocide, including use of starvation as weapon of war' (14 November 2024) <<https://www.ohchr.org/en/press-releases/2024/11/un-special-committee-finds-israels-warfare-methods-gaza-consistent-genocide>>; UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories* (20 September 2024) UN Doc. A/79/363 <<https://docs.un.org/en/A/79/363>>; UN DP, 'New UN report: Impacts of war have set back development in Gaza by as much as 69 years' (22 October 2024) <<https://www.undp.org/press-releases/new-un-report-impacts-war-have-set-back-development-gaza-much-69-years>>; UN General Assembly, *Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel* (11 September 2024) UN Doc. A/79/232 <<https://documents.un.org/doc/undoc/gen/n24/262/79/pdf/n2426279.pdf>>; UN Human Rights Council, 'More than a human can bear': Israel's systematic use of sexual, reproductive and other forms of gender-based violence since 7 October 2023 (13 March 2025) UN Doc. A/HRC/58/C3P.6 <<https://www.un.org/unispal/document/report-of-the-commission-of-inquiry-israel-gender-based-violence-13march2025/>>; UN HRC, *Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, A/HRC/60/CRP.3 (16 September 2025) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session60/advance-version/a-hrc-60-crp-3.pdf>>; UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese: Genocide as colonial erasure* (1 October 2024) UN Doc. A/79/384 <<https://docs.un.org/en/A/79/384>>; UN Human Rights Council, *From economy of occupation to economy of genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese* (30 June 2025) UN Doc. A/HRC/59/23 <<https://www.un.org/unispal/document/a-hrc-59-23-from-economy-of-occupation-to-economy-of-genocide-report-special-rapporteur-francesca-albanese-palestine-2025/>>.

rapidly as possible. Another Advisory Opinion, on the *Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory*, responding to Israel's continued targeting of UN personnel, premises, and aid workers, was requested in December 2024. Notwithstanding the mounting attacks against the International Criminal Court ('ICC'), and the foreseeable, detrimental consequences to the institution when pursuing accountability for Israel, the ICC found it necessary to issue arrest warrants charging Israel's Prime Minister and former Minister of Defence with war crimes and crimes against humanity.

Despite these landmark legal developments, Israel's genocide continues unabated. The international community, and individual States, have not only failed to hold Israel accountable and enforce international law – including the binding provisional measures indicated by the Court – they have protected Israel's impunity, and continued to provide it with diplomatic cover as well as the financial and material means necessary to carry out its genocide against Palestinians in Gaza, where the situation has deteriorated beyond belief. By September 2025, the United States had sanctioned the Prosecutor of the International Criminal Court (ICC), six Judges of the ICC,<sup>3</sup> two Deputy Prosecutors of the ICC, the United Nations Special Rapporteur on the Occupied Palestinian Territory,<sup>4</sup> and three of the leading Palestinian human rights organisations, Al-Haq, Al Mezan Center for Human Rights and the Palestinian Centre for Human Rights.<sup>5</sup>

Widespread famine, malnutrition, and disease are continue to claim Palestinian lives, with the World Food Programme ('WFP') Director of Emergencies warning that conditions in Gaza are "unlike anything we have seen in this century".<sup>6</sup> Escalating ground incursions and clear preparatory steps to permanently occupy the Gaza Strip, along with a vast body of evidence of non-compliance with the rulings of the Court, necessitates revisiting, and finally enforcing, the provisional measures ordered by the Court in *South Africa v. Israel*.

3 ICC, 'The International Criminal Court deplors new sanctions from the US administration against ICC Officials' (5 June 2025) <<https://www.icc-cpi.int/news/international-criminal-court-deplors-new-sanctions-us-administration-against-icc-officials>>; ICC, 'The ICC strongly rejects new US sanctions against Judges and Deputy Prosecutors' (20 August 2025) <<https://www.icc-cpi.int/news/icc-strongly-rejects-new-us-sanctions-against-judges-and-deputy-prosecutors>>.

4 UN OHCHR, 'US sanctions on Special Rapporteur Francesca Albanese threaten human rights system: UN experts' (8 August 2025) <<https://www.ohchr.org/en/statements/2025/08/us-sanctions-special-rapporteur-francesca-albanese-threaten-human-rights-system>>.

5 UN The Question of Palestine, 'UN Human Rights Chief calls on the US to withdraw sanctions against Palestinian rights groups' (5 September 2025) <<https://www.un.org/unispal/document/ohchr-press-release-05sep25/>>.

6 UN News, 'In Gaza, mounting evidence of famine and widespread starvation' (29 July 2025) <<https://news.un.org/en/story/2025/07/1165517>>; World Health Organisation, 'Famine confirmed for first time in Gaza: FAO, UNICEF, WFP and WHO reiterate call for immediate ceasefire and unhindered humanitarian access to curb deaths from hunger and malnutrition' (22 August 2025) <<https://www.who.int/news/item/22-08-2025-famine-confirmed-for-first-time-in-gaza>>.



This report, completed in mid-September 2025, provides an in-depth analysis of the Court's three separate Orders on provisional measures – along with each individual or minority opinion issued by the Judges in the context of the *South Africa v. Israel* proceedings. Article 57 of the Statute of the Court accords to judges the right to attach individual opinions to judgments and other decisions of the Court, such as Orders on provisional measures or Advisory Opinions, if the decision does not fully represent their own view. Individual opinions may include concurring, dissenting, and separate opinions, as well as declarations. The concept of allowing members of a collegiate judicial body to give their individual, and often diverging, opinions on the legal questions presented stems from the Anglo-Saxon or common law judicial system, and is a feature of most international judicial bodies, including the International Tribunal of the Law of the Sea, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights.<sup>7</sup> While individual opinions, sometimes termed 'minority opinions', rarely obtain explicit endorsements in subsequent cases, these opinions can still contribute to the development of international law by influencing future interpretations and the Court's own understanding of complex legal issues. Furthermore, they provide insight into the reasoning behind the judges' votes and consequently enhance the transparency of the proceedings and facilitate intellectual dialogue within the Court itself. Additionally, where the judicial bench is divided on a key legal issue – such as whether there is a plausible risk of genocide or whether there is a change in circumstances that would warrant the indication of further provisional measures – individual opinions containing clear, well-substantiated reasoning may proactively reconcile or bridge gaps between existing divided opinions, which can be availed of in subsequent practice.<sup>8</sup>

Beyond examining each judicial decision, as well as the differences and similarities between them, to ascertain the content and scope of Israel's ongoing obligations pursuant to the Orders, the report explores the impact of the Orders on obligations of Third States and corporations. This includes State obligations under the Genocide Convention, individual criminal responsibility for the crime of genocide under the Rome Statute, and corporate complicity in genocide. Finally, and prior to concluding, focus will shift to the relevance of the Orders to the situation in Gaza, thereby highlighting the urgency of their immediate enforcement.

7 Rainer Hofmann, 'Separate Opinion: International Court of Justice (ICJ)' (OUP, February 2018) *Max Planck Encyclopaedia of International Law*.

8 See Ke Song and Xuechan Ma, 'Individual Opinions as an Agent of International Legal Development?' (2020) *Journal of International Dispute Settlement* 54.

## Contextual Background

Rooted in the context of Israel's 76-year settler colonial apartheid regime, unlawful occupation, annexation, mass forcible transfer, enforced disappearances, widespread arbitrary arrests and mass detention, systematic torture, unlawful killings, persecution, and the ongoing denial of the right of the Palestinian people to self-determination and return, the State of Israel launched its genocidal campaign against the occupied population of the Gaza Strip on 7 October 2023.



Gaza City, 11 October 2025, Photograph by Yousef Zaanoun

Grounded upon the fundamental understanding that Israel's subsequent acts in Gaza "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 ("Palestinians in Gaza")".<sup>9</sup> the Republic of South Africa instituted

<sup>9</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para. 1.

proceedings at the ICJ and requested the indication of provisional measures on 29 December 2023. By this point, UN experts had repeatedly warned that, “[c]onsidering statements made by Israeli political leaders and their allies, accompanied “risk of genocide against the Palestinian people”.<sup>10</sup> UN experts had also already called on the international community to “do everything it can to immediately end the risk of genocide” in light of their “profound concern” about “the failure of the international system to mobilise to prevent genocide” against Palestinians.<sup>11</sup> The Committee on the Elimination of Racial Discrimination (‘CERD’), acting under its early warning and urgent action procedure, had also called on all State Parties to the Genocide Convention to “fully respect” their obligation to prevent genocide.<sup>12</sup> Based on these developments, and the situation unfolding in Gaza, South Africa based its initiation of proceedings on its *erga omnes* obligation to prevent genocide.<sup>13</sup>

Cognisant of the fact that acts of genocide form part of a continuum, South Africa framed its application within the broader context of Israel’s settler-colonial ambitions and subsequent conduct towards Palestinians throughout its 76-year-long apartheid, its 57-year-long belligerent occupation of Palestinian territory, and its 17-year-long blockade of Gaza. This included the serious and ongoing violations of international law associated therewith, including grave breaches of the Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949 (‘Fourth Geneva Convention’), along with other war crimes and crimes against humanity such as forced displacement and persecution. South Africa argues that, since 7 October 2023, Israel has failed in its obligations to prevent genocide or to prosecute the crime of direct and public incitement to genocide. Furthermore, Israel had engaged in, is engaging in and risks further engaging in genocidal acts against the Palestinian people in Gaza. Those acts include killing, causing serious mental and bodily harm, and deliberately inflicting conditions of life calculated to bring about their physical destruction as a group. These acts and omissions by Israel are genocidal in character because they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip.

10 United Nations Office of the High Commissioner for Human Rights (‘UN OHCHR’), ‘Gaza: UN experts decry bombing of hospitals and schools as crimes against humanity, call for prevention of genocide’ (19 October 2023) <<https://www.ohchr.org/en/press-releases/2023/10/gaza-un-experts-decry-bombing-hospitals-and-schools-crimes-against-humanity>>.

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

12 UN OHCHR, ‘Gaza Strip: States are obliged to prevent crimes against humanity and genocide, UN Committee stresses’ (21 December 2023) <<https://www.ohchr.org/en/press-releases/2023/12/gaza-strip-states-are-obliged-prevent-crimes-against-humanity-and-genocide>>.

13 Genocide Convention, Article I.

## Status and Jurisdiction of the ICJ

The creation of the ICJ stems from a search for appropriate methods for the peaceful settlement of international disputes. A principal organ of the UN, on the same footing as the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat, the Court has the authority to rule on two types of cases: “legal disputes between States submitted to it by them (contentious cases) and requests for Advisory Opinions on legal questions referred to it by UN organs and specialized agencies (advisory proceedings)”.<sup>14</sup> Only Members of the UN and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction may be parties to contentious cases. All judgments of the ICJ are final, binding on the parties to a case, and without the possibility of appeal. By signing the UN Charter or accepting the Court’s jurisdiction, a State undertakes to comply with the decision of the Court in any case to which it is a party. Since a case can only be submitted to, and decided by the Court, if the parties have consented to its jurisdiction, it is rare for a decision not to be implemented.<sup>15</sup> Where a State considers that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court, it may bring the matter before the Security Council which is empowered to recommend or decide upon measures to be taken to give effect to the judgment.<sup>16</sup>

For the purpose of a PMO, different legal tests and thresholds apply.<sup>17</sup> To issue a PMO, the Court must determine whether it has *prima facie* jurisdiction, whether there is a link between the measures requested and the rights covered by the case, the plausibility of the underlying claims, the risk of irreparable prejudice to the case if measures are not ordered, and the urgency of the matter.<sup>18</sup> Notably, for the purposes of indicating provisional measures the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.<sup>19</sup> Notwithstanding

14 ICJ, ‘How the Court Works’ <<https://www.icj-cij.org/how-the-court-works>>.

15 ICJ, ‘How the Court Works’ <<https://www.icj-cij.org/how-the-court-works>>.

16 ICJ, ‘How the Court Works’ <<https://www.icj-cij.org/how-the-court-works>>.

17 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Bhandari (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-03-en.pdf>> para. 7.

18 See Rashmin Sagoo and Nomi Bar-Yaacov, ‘South Africa’s genocide case against Israel: The International Court of Justice explained’ (Chatham House, 21 February 2024) <<https://www.chathamhouse.org/2024/01/south-africas-genocide-case-against-israel-international-court-justice-explained>>.

19 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 15; 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)) para. 24.

the multitude of international crimes being committed by Israel, the case of *South Africa v. Israel* is confined only to alleged violations of the Genocide Convention, since South Africa's application is based solely on this legal instrument.

## Order of 26 January 2024

By the time South Africa lodged its application on 29 December 2023, less than three months into Israel's genocidal assault on Gaza, at least 21,110 Palestinians had been killed and over 55,243 wounded.<sup>20</sup> These figures do not include the thousands of Palestinians, mainly women and children, still missing and presumed dead under the rubble. Beyond the staggering death toll and number of injuries, Israel had forcibly displaced approximately 85 percent of Gaza's population.<sup>21</sup> This forced the wounded, sick, elderly, persons with disabilities, children and newborns, as well as breastfeeding and pregnant mothers, into shrinking patches of land devoid of the necessary resources and facilities to sustain life and uphold the dignity of Gaza's residents. The effects of Israel's unlawful "evacuation orders", and subsequent forced transfer of almost all Palestinians in Gaza's, were compounded by the near-total destruction of Gaza's critical infrastructure and Israel's obstruction of aid, including fuel, medicine and food.<sup>22</sup> The entire population was at imminent risk of famine, while the proportion of households affected by acute food insecurity was the largest ever recorded according to the Integrated Food Security Phase Classification ('IPC').<sup>23</sup> The targeting of water desalination plants, waste treatment facilities, pipelines, and wells, along with a complete lack of hygiene products, resulted in contagious and epidemic diseases becoming rife amongst the displaced population.<sup>24</sup>

As it was the first request for the indication of provisional measures in these proceedings, the Court was tasked with establishing its *prima facie* jurisdiction and determining whether measures were justified, and if so, what they may entail. In its application, South Africa based the jurisdiction of the ICJ on Article 36(1) of

20 United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), 'Hostilities in the Gaza Strip and Israel | Flash Update #78' (27 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-78>>; UN OCHA, 'Hostilities in the Gaza Strip and Israel - reported impact | Day 82' (27 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israelreported-impact-day-82>>.

21 UN OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #77' (26 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-77>>.

22 Al-Haq, How to Hide a Genocide: The Role of Evacuation Orders and Safe Zones in Israel's Genocidal Campaign in Gaza (1 January 2025) <<https://www.alhaq.org/publications/25781.html>>.

23 UN OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #77' (26 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-77>>; UN OCHA, 'Remarks to the media by the Secretary-General' (22 December 2023) <<https://www.ochaopt.org/content/remarks-media-secretary-general>>.

24 World Health Organization ('WHO'), 'WHO Director-General's opening remarks at the Special Session of the Executive Board on the health situation in the occupied Palestinian territory – 10 December 2023' (10 December 2023) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-special-session-of-the-executive-board-on-the-health-situation-in-the-occupied-palestinian-territory---10-december-2023>>; UN OCHA, 'Hostilities in the Gaza Strip and Israel | Flash Update #67' (12 December 2023) <<https://www.ochaopt.org/content/hostilities-gaza-strip-and-israel-flash-update-67>>.

the Statute of the Court and Article IX of the Genocide Convention,<sup>25</sup> regarding disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the provisions therein. Based on the public statements made by South Africa in various multilateral and bilateral settings and the dismissal by Israel of any accusation of genocide, the Court held that there did indeed exist a dispute between the Parties.<sup>26</sup> Moreover, it found that “at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention”.<sup>27</sup> Consequently, the Court concluded that, *prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case, and that South Africa did have standing to submit its application to the Court.<sup>28</sup>

While not called upon to definitively determine whether the rights which South Africa is seeking to protect, i.e. the right to be protected from genocide, exist, the Court had to decide whether the rights for which it is seeking protection are at least plausible and connected to the provisional measures requested.<sup>29</sup> As Judge Nolte explains in his Declaration attached to the Order, the Court need not address questions relating to the right to self-defence and the right of self-determination of peoples.<sup>30</sup> This is because the rights which South Africa seeks to protect are the rights of Palestinians in Gaza to not be subjected to acts of genocide, attempted genocide, direct and public incitement to commit genocide, complicity in genocide and conspiracy to commit genocide, in addition to its own right to safeguard compliance with the Convention – rights which are in the interests of humanity generally.

25 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> paras. 8-17.

26 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> paras. 26-28.

27 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 30.

28 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> paras. 31, 33, 34.

29 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 36; 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)) para. 51.

30 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 5.





Jabalia, 4 November 2025, Photograph by Yousef Zaanoun

For the Genocide Convention to apply, Palestinians in Gaza must constitute a distinct “national, ethnic, racial or religious group” protected under Article II of the Genocide Convention. As submitted by South Africa, the acts and omissions by Israel are genocidal in character because “they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnic group, that being the part of the Palestinian group in the Gaza Strip”.<sup>31</sup> South Africa submitted that not only do Palestinians in Gaza constitute part of a protected group, they are a quantitatively substantial part of the Palestinian population of the State of Palestine under occupation as they represent one of the two constituent territories.<sup>32</sup> The Court unequivocally agreed with South Africa, noting that approximately two million Palestinians live in the Gaza Strip, and consequently represent a substantial part of this protected group.<sup>33</sup>

31 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para.1.

32 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para. 22.

33 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 45.



With jurisdiction firmly established, the Court proceeded to highlight various statements made by UN officials detailing the level of destruction, death and despair wrought in Gaza, as well as several genocidal statements made by senior Israeli officials. Based on the information available to it, the Court ruled that the facts and circumstances were sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible.<sup>34</sup>

The Court also found a link between the rights seeking to be protected and the provisional measures requested since it considered that, “by their very nature, at least some of the provisional measures sought by South Africa are aimed at preserving... the right of Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under the Convention”.<sup>35</sup> Pursuant to Article 41 of the Statute, the Court has the power to indicate provisional measures in cases where there a real and imminent risk of irreparable prejudice or consequences being caused in relation to the respective rights. As clarified by the Court in the present proceedings, the condition of urgency is met when the acts liable of causing irreparable prejudice can “occur at any moment” before the Court makes a final decision on the case.<sup>36</sup>

Due to the nature of the rights in question, which constitute violations of the Genocide Convention, the Court found that plausible prejudice to them can cause irreparable harm.<sup>37</sup> This was supported by the repeated iterations of UN officials highlighting the risk of further deterioration of conditions in the Gaza Strip. Considering the vulnerability of the civilian population, all of whom are fighting to survive constant bombardment without basic necessities such as food, potable water, essential medicines or electricity, the Court determined that the “catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further”

34 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 54.

35 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para.59.

36 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 61; 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)) para. 66.

37 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> para. 66.

before it renders its final judgment.<sup>38</sup> Based on the presence of an imminent and real risk that irreparable prejudice will be caused to the (plausible) rights seeking to be protected, the requirement of urgency was also satisfied.

Having found that all the conditions for the Court to indicate provisional measures were met, and with the power to indicate measures that are, in whole or in part, other than those requested provided by Article 75, paragraph 2, the Court proceeded to indicate six legally binding provisional measures that must be complied with:

1. *The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:*
  - a. *killings members of the group;*
  - b. *causing serious bodily or mental harm to members of the group;*
  - c. *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and*
  - d. *imposing measures intended to prevent births within the group;*
2. *The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;*
3. *The State of Israel shall 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;*
4. *The State of Israel shall 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;*
5. *The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of*

<sup>38</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> paras. 70, 72.

*Genocide against members of the Palestinian group in the Gaza Strip;*

6. *The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.*

## Declarations by Judges Nolte, Bhandari, and Xue

Referencing Zimmermann's *The Statute of the International Court of Justice: A Commentary*, Judge Nolte began his Declaration by pointing out that the jurisprudence of the Court is not "entirely clear as to what "plausibility" entails",<sup>39</sup> though recent jurisprudence implies that some level of evidence in support of its allegations, and specifically on the *dolus specialis* for genocide, is required.<sup>40</sup> Judge Nolte viewed establishing the plausibility of this mental element as indispensable at the provisional measures stage, on the basis of it being central to any finding of genocide.<sup>41</sup> Contrasting the present proceedings with the Court's Order of 23 January 2020 in *The Gambia v. Myanmar*, and the fact that its finding on the plausibility of genocidal intent was based on detailed reports by the Independent International Fact-Finding Mission on Myanmar ('IIFFM') which concluded that the factors allowing the inference of genocidal intent were present, Judge Nolte considered the evidence presented to be insufficient to support a finding as to Israel's genocidal intent.<sup>42</sup>

Judge Nolte, a German jurist, held that measures by Israel, while not conclusive, make it at least plausible that its military operation is not being conducted with genocidal intent".<sup>43</sup> He noted for example Israel's calls to the civilian population to evacuate and that a "certain amount of humanitarian aid" was allowed to enter Gaza, while omitting to consider that "evacuation orders" were unlawfully issued and impossible to abide by, and alleged "safe zones" and humanitarian routes are consistently targeted. Hence, despite the abundant, highly-probative evidence – both circumstantial and direct – on Israel's *dolus specialis*, the mere possibility that Israel may not have acted with an intent

39 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 10.

40 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 10.

41 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 11.

42 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> paras. 13-14.

43 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 14.

to destroy was given undue weight in the Declaration. Interestingly, Judge Nolte's opinion stands in opposition to his own State's intervention in *The Gambia v. Myanmar*. In the joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, the prominent Western States stated:

[B]ecause direct evidence of genocidal intent will often be rare, it is crucial for the Court to adopt a balanced approach that recognizes the special gravity of the crime of genocide, without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide near-impossible.<sup>44</sup>

The Declarants further noted that “circumstantial evidence will typically be highly significant in drawing inferences of specific intent” and this must be borne in mind by international courts and tribunals, which must adopt the notion of ‘reasonableness’ when assessing allegations of genocide. This requires the Court to “weigh the evidence before it, and filter out inferences that are not reasonable” – “[p]ut differently, the ‘only reasonable inference’ test applies only between alternative explanations that have been found to be reasonably supported by the evidence”.<sup>45</sup>

However, even the alleged need to establish the plausibility of Israel's genocidal intent is contradicted by the Declaration of Judge Bhandari. Reflecting the view of the Declarants in *The Gambia v. Myanmar*, Bhandari rightly stated that the Court must only “consider such evidence as is before it at this stage, preliminary though it might be”.<sup>46</sup> More importantly, it need not, at a provisional measures stage, make a final determination on the existence of genocidal intent. Interestingly, Judge Bhandari also referenced *The Gambia v. Myanmar* to support his reasoning. Rather than focussing on the available evidence in this case, as Judge Nolte had done, Judge Bhandari drew attention to the Court's ultimate finding that:

[T]he Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the

44 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*: 11 States intervening), Joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom (ICJ, 15 November 2023) <<https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>> para. 51.

45 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*: 11 States intervening), Joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom (ICJ, 15 November 2023) <<https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf>> paras. 50, 52.

46 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Bhandari (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-03-en.pdf>> para. 8.

determination, at the present stage of the proceedings, of the existence of a genocidal intent.<sup>47</sup>

Notwithstanding Judge Nolte's view that the *dolus specialis* for genocide had not been established, he voted in favour of the measures indicated by the Court on the basis of 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 as they "contribute to a potential failure by Israel to prevent and punish acts of public and direct incitement to genocide".<sup>48</sup> In addition, he felt that weight must be given to the respective assessments of UN agencies regarding the circumstances of the existentially threatening situation of Palestinians in the Gaza Strip as regards to their access to adequate food, water, and other forms of humanitarian assistance.<sup>49</sup>

On the other hand, and bearing in mind the lower standards that apply in at the provisional measures stage, as opposed to when the merits of the case are being definitively ruled upon, Judge Bhandari was in full agreement with the Court's Order of 26 January based on the widespread nature of Israel's military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it.<sup>50</sup> Similarly, Judge Xue fully supported the Court's reasoning and gave equal attention to the catastrophic situation in Gaza, including the soaring levels of hunger, shortages of potable water and other essential necessities, the collapsing healthcare system, and the looming outbreak of contagious diseases which "threaten the very existence of people in Gaza and challenges the most elementary principles of morality and humanity".<sup>51</sup> Judge Xue's Declaration also put a spotlight on the inability of Palestinians across the Occupied Palestinian Territory ('OTP') to exercise their fundamental right to self-determination, and the UN's responsibility towards the question of Palestine which includes ensuring "that the Palestinian people are protected under international law, particularly protected from the gravest crime".<sup>52</sup>

47 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) para. 56.

48 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 15.

49 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-04-en.pdf>> para. 16.

50 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Bhandari (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-03-en.pdf>> paras. 9-10.

51 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Xue (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-01-en.pdf>> para. 3.

52 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Xue (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-01-en.pdf>> para. 2.

As noted by Judge Xue, the international community has a common interest and *erga omnes* obligation in the protection of a protected group such as the Palestinian people, which makes South Africa's application and request "the very type of case where the Court should recognize the legal standing of a State party to the Genocide Convention to institute proceedings".<sup>53</sup> Hence, and because of the reasons outlined in the Order, Judge Xue viewed the provisional measures indicated as being fully warranted.

## Separate Opinion of Judge *Ad Hoc* Barak and Dissenting Opinion of Judge Sebutinde

Pursuant to Article 31 of the Statute of the Court, a State party to a case before the ICJ which does not have a judge of its nationality on the Bench may choose a person to sit as judge *ad hoc* in that specific case under the conditions laid down in Articles 35 to 37 of the Rules of Court. The appointed person does not have to be a national of the State that designates them.<sup>54</sup> In *South Africa v. Israel*, Israel chose to appoint Aharon Barak, an Israeli lawyer, jurist and former Chief Justice of the Supreme Court of Israel. Judge *ad hoc* Barak took part in each decision on provisional measures, but ultimately resigned in June 2024 due to "personal family reasons".<sup>55</sup> He was subsequently replaced by Judge Ron A. Shapira,<sup>56</sup> who has openly disrespected the Court accusing the Judges of "intellectual dishonesty, manipulative use of ambiguous definitions, overly cumbersome tools for fact-checking and lie-debunking, and concealment of ulterior motives of the judges themselves via wording that falsely poses as neutral".<sup>57</sup>

In his first opinion in the ongoing proceedings, Judge *ad hoc* Barak began with a personal account of his childhood experience of the Holocaust as a Jew in Lithuania and promptly repeated Israel's oft touted claim that it is a democracy with strong, independent legal and judicial systems which consistently uphold international law. Judge *ad hoc* Barak claimed that international law is "an integral part of the military

53 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Xue (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-01-en.pdf>> para. 4.

54 International Court of Justice, *Judges ad hoc* <<https://www.icj-cij.org/judges-ad-hoc>>.

55 The Times of Israel, 'Aharon Barak resigns as Israeli ad hoc judge at ICJ for 'personal reasons' (6 June 2024) <<https://www.timesofisrael.com/aharon-barak-resigns-as-israeli-ad-hoc-judge-at-icj-for-personal-reasons/>>.

56 ICJ, 'Current Judges ad hoc' <<https://www.icj-cij.org/current-judges-ad-hoc>>

57 Times of Israel, 'Prof. who called ICJ 'unworthy of any trust' tapped as Israel's judge in genocide case (2 July 2024) <<https://www.timesofisrael.com/professor-who-called-icj-unworthy-of-any-trust-tapped-as-judge-in-genocide-case/>>.

code and the conduct of the Israeli army”.<sup>58</sup> Despite the long-standing impunity enjoyed by the Israeli government and military, Judge *ad hoc* Barak went so far as to say that accountability is “Israel’s DNA”,<sup>59</sup> a narrative effort which is demonstrably false, as reflected in Israeli case law and the Israeli military’s acts on the ground.<sup>60</sup>

Notwithstanding the various statements made by South Africa regarding Israel’s manifestly unlawful conduct in Gaza prior to its initiation of proceedings,<sup>61</sup> Judge *ad hoc* Barak believed it was “doubtful whether South Africa brought this dispute in good faith” claiming it did not avail of the possibility to engage in diplomatic talks and instead proceeded with filing its application. In addition, though it does not prevent the Court from exercising jurisdiction, Judge *ad hoc* Barak attempted to make the inability of the Court to indicate provisional measures directed at Hamas (since they are not a party to the proceedings) an “essential matter” to be considered when deciding on appropriate measures or remedies, despite South Africa’s request centring on the Genocide Convention and genocidal acts and omissions committed by Israel.<sup>62</sup>

Judge *ad hoc* Barak’s focus on Hamas, the alleged *modus operandi* of its military wing, and Operation Al-Aqsa Flood, the military operation on 7 October 2023, not only aims to draw attention away from the impact of Israel’s unlawful settler colonial apartheid regime, occupation and annexation of Palestinian territory, and the many statements by Israeli officials expressing genocidal intent, it effectively seeks to justify Israel’s unprecedented, genocidal violence in Gaza since then. This interpretation of Judge *ad hoc* Barak’s analysis is supported by his subsequent disagreement with South Africa’s invocation of the Genocide Convention on the basis that International Humanitarian Law (‘IHL’) represents the appropriate legal framework to be considered and that any violations thereof must be investigated and prosecuted by the competent Israeli authorities:

In my view, the appropriate legal framework for analysing the situation in Gaza is International Humanitarian Law (IHL) and not the Genocide

58 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 13.

59 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 13.

60 Al-Haq, ‘15 Years Since the ICJ Wall Opinion: Israel’s Impunity Prevails Due to Third States’ Failure to Act’ (9 July 2019) <<https://www.alhaq.org/advocacy/14616.html>>; BTselem, *The Occupation’s Fig Leaf: Israel’s Military Law Enforcement System as a Whitenash Mechanism* (May 2016), <[https://www.btselem.org/publications/summaries/201605\\_occupations\\_fig\\_leaf](https://www.btselem.org/publications/summaries/201605_occupations_fig_leaf)>.

61 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para. 13.

62 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 16.



Convention. IHL provides that harm to innocent civilians and civilian infrastructure should not be excessive in comparison to the military advantage anticipated from a strike. The tragic loss of innocent lives is not considered unlawful so long as it falls within the rules and principles of IHL.<sup>63</sup>

As with German Judge Nolte, Judge *ad hoc* Barak noted the lack of comparable evidence to the two IFFM reports relied on in *The Gambia v. Myanmar*. Even the reliability of available evidence was questioned as figures for deaths, injuries and damage to infrastructure were categorically labelled as unreliable due to having been provided by the “ Hamas controlled ” Ministry of Health. Statements of UN officials, on the other hand, are merely attributed to the “ tragic humanitarian situation, which is the unfortunate result of an armed conflict ”,<sup>64</sup> while the genocidal statements made by the President of Israel and the Israeli Minister of Defence of were “ not a sufficient factual basis for inferring a plausible intent of genocide ”. Statements made by Israel’s Minister of Energy and Infrastructure were deemed irrelevant on the basis he does not have authority over the military,<sup>65</sup> with Judge *ad hoc* Barak stating:

The relevant factual basis allowing for an inference of intent to commit genocide must stem from the organs which are capable of having an effect on the military operations.<sup>66</sup>

No case law or legal provisions were provided in support of this statement, nor was there any reasoning as to why this is the case. Judge *ad hoc* Barak simply did not address the countless other statements by Israeli government and military officials referenced in South Africa’s application.

Treating the events in Gaza as standard warfare, thereby ignoring the true gravity of Israel’s acts and its ulterior, settler-colonial aims, Judge *ad hoc* Barak deemed any application of the Genocide Convention in these circumstances to be “ concerning ”, claiming that South Africa was undermining the integrity of the legal instrument. This view was already alluded to in the account of his experience of the Holocaust,

63 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 26.

64 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 36.

65 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 36.

66 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-05-en.pdf>> para. 36.



which appears to set the standards for any determination of genocide on his part. While disagreeing with the conclusions of the majority, Judge *ad hoc* Barak voted in favour of the third and fourth provisional measures (concerning acts of public incitement to genocide and the provision of humanitarian aid, respectively).

In the Dissenting Opinion of Vice-President Sebutinde, the only judge on the 17-member panel to vote against all provisional measures indicated, the focus and legal reasoning appears even less cognisant of the severity of Israel's acts in Gaza. Of note, Sebutinde was also the only dissenting voice on a 15-member panel which ruled that Israel's protracted, belligerent occupation of the occupied Palestinian territories was unlawful.<sup>67</sup> Subsequent comments by Sebutinde have provided important insight into the Ugandan Judge's blind support for Israel. In August 2025, as Gaza was gripped by a manmade famine and subject to relentless bombardment and displacement orders, Sebutinde stated at an event in Watoto Church in Kampala that "[t]he Lord is counting on me to stand on the side of Israel" and that she wants to be "on the right side of history".<sup>68</sup> These statements led the International Commission of Jurists to formally request an investigation, stressing that, if Sebutinde did in fact make these remarks, they reveal a clear bias that compromises judicial integrity and demands remedial action consistent with Principles 17-20 of the UN Basic Principles on the Independence of the Judiciary. In addition, the International Commission of Jurists requested the immediate removal of Vice-President Sebutinde from participating further in proceedings in the *South Africa v. Israel* case due to her lack of impartiality, or the appearance of impartiality, at least in regard to her participation in the deliberations concerning Israel and Palestine.<sup>69</sup>

Almost half of Judge Sebutinde's Dissenting Opinion was dedicated to outlining the historical and political context of the "Israeli-Palestinian Conflict". In Judge Sebutinde's view, the dispute calls for a diplomatic or negotiated settlement, and the implementation of all relevant Security Council resolutions.<sup>70</sup> Because of this, she described South Africa's application as a "pretextual invocation of treaties like the

67 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Dissenting Opinion of Vice-President Sebutinde (ICJ, 19 July 2024) <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-02-enc.pdf>>.

68 Monitor, 'My country disowned me after Israel-Gaza ruling – Sebutinde' (13 August 2025) <<https://www.monitor.co.ug/uganda/news/national/my-country-disowned-me-after-israel-gaza-ruling-sebutinde-5153060>>; Middle East Eye, 'After recent comments, should Julia Sebutinde still serve on Israel cases at the ICJ?' (24 August 2025) <<https://www.middleeasteye.net/news/after-recent-comments-should-julia-sebutinde-still-serve-israel-cases-icj>>.

69 International Commission of Jurists, 'ICJ communication to the International Court of Justice urging the investigation of the Court's Vice-President' (25 August 2025) <<https://www.icj.org/icj-communication-to-the-international-court-of-justice-urging-the-investigation-of-the-courts-vice-president/>>.

70 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> para. 4.

Genocide Convention, in a desperate bid to force a case into the context of such a treaty, in order to foster its judicial settlement” due to the “failure, reluctance or inability of States to resolve political controversies such as this one through effective diplomacy or negotiations”.<sup>71</sup> This interpretation of South Africa’s application and request, which completely ignores the horrific situation in Gaza at that point, is very problematic. By categorising the dispute as a purely political (rather than legal and criminal) issue and blatantly disregarding the context and reasons behind South Africa’s initiation of proceedings, Judge Sebutinde turns a blind eye to, *inter alia*, decades of Israeli aggression, settler-colonialism and apartheid, forced displacement, land dispossession, unlawful detention and killings. Instead, she seems to categorise the proceedings as a last-ditch attempt at finding a solution.

When discussing whether the criteria for the indication of provisional measures have been met, Judge Sebutinde saw no indication that any of the alleged acts were genocidal in nature or committed with the specific intent to destroy the group in whole or in part.<sup>72</sup> In fact, she adopted Israel’s claims *verbatim* in stating that 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” and that any alleged genocidal intent is:

[N]egated 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.<sup>73</sup>

71 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> para. 4.

72 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> paras. 17, 18.

73 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> para. 21.

There is no mention of the systematic destruction of protected objects and buildings, in particular health facilities, the targeting of aid workers, and the reality that evacuation orders are almost impossible to abide by and only serve to further displace the civilian population to shrinking unsafe areas which lack all essential resources and services for survival. Judge Sebutinde even goes as far as to say that:

[T]he 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.

This statement flies in the face of IHL and the core principles of distinction and proportionality. It also ignores the reality on the ground – described in detail by various UN officials and credible international organisations – which includes a total blockade of Gaza, incessant aerial bombardment, and Israel only allowing a fraction of the aid needed to enter Gaza (before subsequently impeding its distribution). Statements by top Israeli officials and politicians cited by South Africa as containing genocidal rhetoric, were viewed by Judge Sebutinde as being placed out of context or “simply misunderstood”.<sup>74</sup>

Even more striking is Judge Sebutinde’s finding that there is no link between the asserted rights and the provisional measures requested by South Africa. This is hard to comprehend. For example, the first and second measures requested by South Africa concerned Israel’s ongoing military assault and the need for a ceasefire. One of the genocidal acts South Africa alleges is killing and causing serious bodily or mental harm to members of a protected group (meaning Palestinians in Gaza). How does calling for a cessation of Israel’s military campaign, which routinely targets densely populated, residential areas, not have a direct link to these rights? Beyond the incomprehensible view that there is no link between the rights afforded by the Genocide Convention and the provisional measures sought, Judge Sebutinde also took issue with the fact that any provisional measures would not apply to Hamas – a point also raised by Judge *ad hoc* Barak. As mentioned above, using this as a reason to not order measures which are solely intended to prevent irreparable harm and preserve the rights of either party – and by extension those of the occupied,

<sup>74</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> para. 22.

protected Palestinian population under the Genocide Convention – amounts to a flagrant denial of the nature of said rights and the entity responsible for breaching the Convention.

Judge Sebutinde proceeded to categorically reject all provisional measures as essentially being unfair or related to IHL.<sup>75</sup> Measures one to three were viewed as already incumbent on Israel based on its obligations under the Genocide Convention, thereby disregarding the fact that it is Israel's violations of its obligations that led to South Africa's request. Measures four to six were deemed to be irrelevant or without basis.<sup>76</sup> This represents a clear misunderstanding of the scope of provisional measures, which may involve the fulfilment of obligations encompassed in other fields of law if intended to protect the specific rights in question. In situations such as the present case, where IHL is being routinely violated in order to create conditions of life calculated to bring about the destruction of Palestinians in Gaza or to kill or cause serious bodily or mental harm, ordering access to adequate food and water or to humanitarian assistance is wholly relevant and appropriate since the aim of the measure is to safeguard the rights enshrined in the Genocide Convention. Interestingly, as a concluding remark, Judge Sebutinde highlighted the need to free Israeli hostages in Gaza, with no mention of the rights of Palestinians and the thousands detained from Gaza and across the OPT by Israel since 7 October 2023.

75 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> paras. 25-31.

76 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge Sebutinde (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-02-enc.pdf>> para. 33.

## Analysis

The strength of the Order of 26 January 2024 arguably lies in its finding of a plausible risk of genocide, rather than the provisional measures indicated. Law has always performed a communicative function, and this case is no exception. For fifteen out of the seventeen judges, a significant majority of a diverse bench, to agree that there is a plausible risk of genocide implies a clear consensus that Israel's conduct is *prima facie* unlawful and must be addressed. Even Judge Donoghue, of the United States, voted in favour of all six provisional measures – signalling further disapproval of the ongoing Israeli military onslaught on Gaza from a judge appointed by Israel's strongest ally. Responding to the Order on provisional measures, UN experts highlighted the Court's clear implication that Israel's acts are in breach of international law, stating:

We see the decision as dismissing Israel's justification of its actions as self-defence in compliance with international humanitarian law... the Court found that Israel cannot continue to bombard, displace, and starve the population of Gaza, while allowing its officials to dehumanise Palestinians through statements that may amount to genocidal incitement.<sup>77</sup>

Despite sending a strong legal and political message, the provisional measures remain somewhat vague and technically do not go as far as ordering a full ceasefire. South Africa had requested the Court to demand that Israel “suspend its military operations in and against Gaza” and “ensure that any military or irregular armed units which may be directed, supported or influenced by it, as well as any organisations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations” in and against Gaza.<sup>78</sup> It substantiated its request with reference to the provisional measures phase of *Ukraine v. Russian Federation*, in which the Court ordered Russia to “immediately suspend the military operations that it commenced on 24 February in the territory of Ukraine”.<sup>79</sup> In the present proceedings, however, the Court was far more cautious. Instead of

77 UN OHCHR, ‘Gaza: ICJ ruling offers hope for protection of civilians enduring apocalyptic conditions, say UN experts’ (31 January 2024) <<https://www.ohchr.org/en/press-releases/2024/01/gaza-icj-ruling-offers-hope-protection-civilians-enduring-apocalyptic#:~:text=The%20ICJ%20found%20it%20plausible,under%20siege%20in%20Gaza%2C%20and>>.

78 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para. 144, provisional measures (1) and (2).

79 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*Ukraine v. Russian Federation*) Order of 16 March 2022 on Request for the Indication of Provisional Measures (ICJ, 16 March 2022) <<https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-00-en.pdf>> para. 86 (1).

ordering Israel to suspend its military operation, it indicated that Israel should take all measures within its power to prevent the commission of all acts of genocide listed in paragraphs (a) through (e) of Article II of the Genocide Convention.<sup>80</sup> It also chose not to adopt South Africa's proposed wording by stating that Israel must "prevent" such acts, rather than "desist" – which would have implied that Israel had committed and continues to commit genocidal acts.

By requiring Israel to "prevent" genocide, the Court is merely reaffirming binding legal obligations which Israel – and all other States Parties to the Genocide Convention – are already subject to. The same can be said for measures (2) and (3), which require Israel to ensure that its military does not commit any genocidal acts and 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, respectively.

However, while the Court did not order all provisional measures requested by South Africa,<sup>81</sup> a close reading of the Order of 26 January suggests that the practical impact is largely the same. In order to be properly implemented and complied with, Israel would have to halt or, at a minimum, drastically curtail its military operations. This is because, in the Court's view, Israel is plausibly committing genocide through its military activities and policies in Gaza. Hence, Israel must halt all activity which kills, causes serious bodily or mental harm, or creates conditions of life calculated to bring about the destruction of Palestinians in Gaza.<sup>82</sup> Since stopping military operations is the only way for Israel to ensure no civilian casualties in Gaza, many view the Order as calling for a ceasefire without explicitly demanding it.<sup>83</sup> The apparent restraint shown through the Court's wording – and ultimate refusal to explicitly order a ceasefire – may be viewed as an attempt to not unfairly prejudice Israel's rights and interests.<sup>84</sup> Given the lower standard of assessment at this stage of the proceedings, which requires that the rights at risk are "plausible", there is an inevitable gap between plausibility and the

<sup>80</sup> See Provisional Measure (1), Order of 26 January 2024.

<sup>81</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Indication of Provisional Measures (ICJ, 26 January 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>> paras. 76-77.

<sup>82</sup> Milena Sterio, 'The ICJ's Provisional Measures Order in the South Africa v. Israel Case: Unsurprising, Politically and Legally Significant' (Opinio Juris, 27 January 2024) <<http://opiniojuris.org/2024/01/27/the-icjs-provisional-measures-order-in-the-south-africa-v-israel-case-unsurprising-politically-and-legally-significant/>>.

<sup>83</sup> Alonso Gurmendi, 'Comparing the ICJ's Provisional Measures Orders in South Africa v. Israel' (Opinio Juris, 29 March 2024) <<https://opiniojuris.org/2024/03/29/comparing-the-icjs-provisional-measures-orders-in-south-africa-v-israel/>>.

<sup>84</sup> Just Security, 'Top Experts' Views of Int'l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case)' (26 January 2024) <<https://www.justsecurity.org/91457/top-experts-views-of-intl-court-of-justice-ruling-on-israel-gaza-operations-south-africa-v-israel-genocide-convention-case/>>.

much higher level of certainty that South Africa will ultimately need to satisfy in order to establish that Israel has violated its obligations under the Genocide Convention.

Measure (4), requiring Israel to take immediate action 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 highlights Israel's creation of such an environment, which is not a natural consequence of "war". Measure (5), ordering Israel to take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Genocide Convention is designed to ensure relevant evidence will not be destroyed, lost, hidden, or otherwise manipulated prior to the merits phase of the case – which will likely be in several years time. Aside from this measure being important for later determinations by the Court, the preservation of evidence will also benefit proceedings at the ICC as, although dealing with individual criminal (rather than State) responsibility, the evidence will be similarly relevant. The same can be said for proceedings before national courts throughout the world, which would have extraterritorial jurisdiction over genocide. Since the present proceedings are rooted in the applicability of the Genocide Convention, the ICJ does not have the authority to order the preservation of evidence on the commission of war crimes or crimes against humanity. That being said, much of the underlying conduct of the genocidal acts identified by South Africa subsumes a plethora of war crimes and crimes against humanity such as forcible transfer, extermination, murder, wilfully causing great suffering or injury.

## Order of 28 March 2024

At the outset, it is worthy of note that after the first Order, the Court's composition changed slightly. Judge Donoghue, of the United States; Judge Gevorgian, of Russia; Judge Bennouna, of Morocco; and Judge Robinson, of Jamaica, were replaced by Judge Brant, of Brazil; Judge Gómez Robledo, of Mexico; Judge Aurescu, of Romania; and Judge Tladi, of South Africa.

Just two weeks after the Court's Order of 26 January, on 12 February 2024, South Africa called upon the Court to exercise its power under Article 75(1) of the Rules of the Court to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties, due to the developing situation in Rafah. Rather than issuing additional provisional measures, the Court emphasised Israel's duty to fully comply with its obligations under the Genocide Convention and the provisional measures already indicated in its Order of 26 January.<sup>85</sup>

Compelled by events in Gaza and the rapidly deteriorating humanitarian situation on the ground, directly caused by Israel's egregious breaches of the Genocide Convention and refusal to comply with the provisional measures already indicated by the Court, on 6 March 2024 South Africa submitted another request for the indication of further provisional measures and/or to modify its Order of 26 January pursuant to Article 41 of the Statute of the Court, and Articles 75(1) and (3) and 76(1) of the Rules of Court respectively. As stated in its filing:

The horrific deaths from starvation of Palestinian children, including babies, brought about by Israel's deliberate acts and omissions in violation of the Genocide Convention and of the Court's Order – including Israel's concerted attempts since 26 January 2024 to ensure the defunding of UNRWA and Israel's attacks on starving Palestinians seeking to access what extremely limited humanitarian assistance Israel permits into Northern Gaza, in particular... constitute a change in the situation in Gaza for the purposes of Article 76... and constitute new facts for the purposes of Article 75(3).<sup>86</sup>

<sup>85</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Press release 2024/16 (ICJ, 16 February 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf>>.

<sup>86</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Request by South Africa for the indication of provisional measures and modification of the Court's prior provisional measures decisions (ICJ, 6 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240306-wri-01-00-en.pdf>> para. 12.



Consequently, South Africa requested the modification of two existing provisional measures and the indication of additional measures geared towards ending Israel's manmade famine and adverse conditions of life.

Israel responded by rejecting South Africa's claim that incidents of starvation in Gaza are a direct result of its deliberate acts and omissions and argued that materials regarding food insecurity in Gaza were already considered by the Court. It also argued that armed hostilities had been taking place when the Court issued its first Order in late January and thus the situation in Gaza "could not be said to materially change the considerations upon which the Court based its original decision concerning provisional measures".<sup>87</sup>

The Court's Order of 28 March was a response to the 6 March request by South Africa, which it classified as a request for the modification of the Order of 26 January. Hence, the Court was tasked with determining whether the conditions set forth in Article 76 (1) had been fulfilled – namely, that there has been "some change in the situation [which] justified such revocation or modification". In its deliberations, the Court reflected on its prior decision on South Africa's request for additional measures submitted on 12 February, which noted that the developments in the Gaza Strip, and in Rafah in particular, "would exponentially increase what is already a humanitarian nightmare with untold regional consequences".<sup>88</sup> The Court highlighted how the living conditions of Palestinians in Gaza have only deteriorated further since then, largely due to the "prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip have been subjected".<sup>89</sup> The Court supported its finding on the worsening situation in Gaza with an updated report on food insecurity in the Gaza Strip issued by the Integrated Food Security Phase Classification Global Initiative on 18 March, a United Nations Children Fund (UNICEF) report indicating that the number of children under two years of age facing acute malnutrition had doubled since January and was rapidly increasing, as well as the fact that famine is no longer a risk and is instead setting in with 31 people, including 27 children, having died of starvation and dehydration.<sup>90</sup>

87 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Observations of the State of Israel on South Africa's Request for the indication of provisional measures and modification of the Court's prior provisional measures decisions (ICJ, 15 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240315-wri-01-00-en.pdf>> para. 51.

88 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Press Release 2024/16 (ICJ, 16 February 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf>>.

89 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> para. 18.

90 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> paras. 19-21.



Khan Yunis, 16 October 2025, Photograph by Doaa Albaz

In light of these developments, which the Court noted as exceptionally grave, the Court found that there was indeed a change in the situation within the meaning of Article 76 of the Rules of the Court that was not fully addressed by the provisional measures indicated in the Order of 26 January.<sup>91</sup>

With this established, the Court proceeded to examine whether the general conditions laid down in Article 41 of the Statute of the Court were also satisfied. Having already found that it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case and that at least some of the rights claimed by South Africa were plausible, with the provisional measures sought aimed at preserving these rights, the Court saw no reason to revisit its conclusions in the first PMO for the purposes of deciding on the present request. Thus, it was only tasked with determining whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed

<sup>91</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> paras. 22-23.

by South Africa and whether there is urgency that would justify the modification of its previous decision.

Just like in its Order on 26 January, the Court reiterated the real and imminent risk that irreparable prejudice would be caused to the fundamental values sought to be protected by the Genocide Convention.<sup>92</sup> While the Court acknowledged Israel's claims that it had undertaken significant measures, including various humanitarian initiatives and the coordination of access to humanitarian supplies, it proceeded to draw attention to statements of UN officials which expressly discuss Israel's extensive restrictions on the delivery of humanitarian aid, the destruction of crucial civilian infrastructure, and the need for a ceasefire.<sup>93</sup> Notwithstanding UN Security Council resolution 2728 (2024), which demanded an immediate ceasefire for the month of Ramadan (which was intended to lead to a lasting sustainable ceasefire), the various calls of UN experts and humanitarian organisations for an end to the conflict, and the binding provisional measures already ordered, between 26 January and the time of the Court's deliberation, Israel's military operation caused 6,600 additional fatalities and almost 11,000 additional injuries among Palestinians in the Gaza Strip. These facts led the Court to conclude that a modification of its decision concerning provisional measures indicated in the Order of 26 January 2024 was necessary and had a sense of urgency.

Following the precedent of *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, which held that "the Court may, for the preservation of those rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights",<sup>94</sup> the Court refused to indicate the first three provisional measures sought by South Africa. These were:

1. *All participants in the conflict must ensure that all fighting and hostilities come to an immediate halt, and that all hostages and detainees are released immediately.*
2. *All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide*

<sup>92</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> para. 27.

<sup>93</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> paras. 34-38.

<sup>94</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Provisional Measures Order of 13 September (I.C.J. Reports 1993) para. 40.

*must, forthwith, take all measures necessary to comply with all of their obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.*

3. *All Parties to the Convention on the Prevention and Punishment of the Crime of Genocide must, forthwith, refrain from any action, and in particular any armed action or support thereof, which might prejudice the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts, or any other rights in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve.*<sup>95</sup>

Instead, the Court reaffirmed the measures indicated in the Order of 26 January and indicated the following additional provisional measures:

*(2) The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:*

- a. *Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, 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;*
- b. *Ensure with immediate effect that its military does not commit acts which constitute a violation of 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;*

*(3) Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order.*

<sup>95</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Request by South Africa for the indication of provisional measures and modification of the Court's prior provisional measures decisions (ICJ, 6 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240306-wri-01-00-en.pdf>> para. 17.

## Declarations of President Salam, Judge Yusuf, and Judge Charlesworth

President Salam used his brief Declaration to again highlight, just as the Order had done, the deteriorating situation across the Gaza Strip. Drawing from authoritative UN sources such as the World Health Organisation ('WHO'), the United Nations Relief and Works Agency for Palestine Refugees in the Near East ('UNRWA'), the Office for the Coordination of Humanitarian Affairs ('OCHA'), the Food and Agriculture Organization of the United Nations ('FAO'), the World Food Programme ('WFP'), as well as the London School of Hygiene and Tropical Medicine and the John Hopkins Center for Humanitarian Health, President Salam made a clear case for the indication of additional provisional measures based on the rapidly worsening consequences of Israel's genocide. Salam described measure (2) (a) and (b) as directly targeting the spread of famine and starvation which jeopardise Palestinian's "right of existence".<sup>96</sup> The requirement that Israel ensure with *immediate effect* that its military does not commit any violations of the Genocide Convention, outlined in measure (2) (b) he considered crucial to the protection of Palestinians in Gaza, alongside the "immediate ceasefire for the month of Ramadan" demanded by the Security Council in its resolution 2728 (2024) of 25 March 2024.<sup>97</sup>

Judge Yusuf, in reaffirming the position of the Court as capable of preserving the rights of a protected group, noted in his Declaration that if objective indicia relating to the possible commission of genocide exist "the Court cannot take the position of a powerless bystander in the face of the possible commission of acts which are so offensive to the conscience of humanity".<sup>98</sup> Having recalled the Court's finding in *The Gambia v. Myanmar*, which establishes that the determination of the existence of genocidal intent is not a decisive factor at the provisional measures stage,<sup>99</sup> Judge Yusuf explains:

When the evidence indicates, as it does in the present case, that the extent of the atrocities committed against civilians, and the death and suffering

<sup>96</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of President Salam (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-01-en.pdf>> paras. 8-9.

<sup>97</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of President Salam (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-01-en.pdf>> paras. 10-11.

<sup>98</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 3.

<sup>99</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 2.

caused to them, is of an order which exceeds by far the necessities of war and the limits imposed by the laws of war, it is the duty of the Court to call for an end to the killing, the causing of bodily injury or mental harm, and the imposition of conditions of life calculated to bring about the physical destruction of the whole or part of the protected group to prevent the commission of genocide.<sup>100</sup>

Hence, the Court's indication of further provisional measures in the present case signals that "it is not satisfied that all that should have been done has been done by Israel to prevent the commission of genocidal acts".<sup>101</sup> According to Judge Yusuf, the argument that a State party to the Convention that is involved in a conflict with a non-State actor is not under an obligation to suspend its military operations to prevent genocide or should not be ordered to do so unless the non-State actor is disarmed, as Judge Sebutinde argued in her Dissenting Opinion to the Order of 26 January, "makes no sense whatsoever" as it stands in contradiction to the idea of genocide prevention and the objectives of the Convention – which was "manifestly adopted for a purely humanitarian and civilizing purpose".<sup>102</sup>

Grounded in the determination that the only effective way in which Israel can fulfil its obligations under the Convention, and prevent the rise in levels of starvation and disease, is to halt its military onslaught "to allow for the delivery of aid and to bring to an end the relentless destruction and death caused by it at the expense of the right of existence of the Palestinian population", Judge Yusuf fully supported the indication of additional provisional measures. Like President Salam, Judge Yusuf placed particular emphasis on measure (2), which modifies and elaborates on measure (2) of the previous PMO, and demands that Israel bring its military operations to an end as a means of ensuring Palestinians are protected from genocidal acts.<sup>103</sup>

Judge Charlesworth, voting in favour of all three provisional measures indicated in the Order of 28 March also focussed on measure (2), but on subparagraph (b) specifically. Unlike President Salam and Judge Yusuf – who both highlighted the urgent need to implement the measure – Judge Charlesworth felt the "opaque terms"

100 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 5.

101 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 8.

102 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 8.

103 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 13.



in which it was worded fails to provide clear guidance to the Parties.<sup>104</sup> In her view, while measure (2)(a) identifies appropriate actions for Israel to take, (b) is “elliptical” and the Court should have been clear that Israel is required to suspend its military operations in the Gaza Strip, “precisely because this is the only way to ensure that basic services and humanitarian assistance reach the Palestinian population”.<sup>105</sup>

## Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi

Judge Charlesworth’s view on the vague language of measure (2)(b) is shared by Judges Xue, Brant, Gómez Robledo and Tladi. In the very first paragraph of their Joint Declaration, the Judges expressed their deep regret that the measure does not directly and explicitly order Israel to suspend its military operations for the purpose of addressing the catastrophic humanitarian situation in Gaza.<sup>106</sup> This was due to the scale of the humanitarian crisis and the “overwhelming consensus” that, without an end to Israel’s onslaught, the catastrophic situation will worsen. Because of the crucial need for a halt in hostilities, the Judges felt the Court should explicitly order a suspension of military operations.<sup>107</sup> The Judges supported their view by referencing Israel’s position as an Occupying Power which controls all access to Gaza, including land crossings, air space, and maritime areas.<sup>108</sup> Having complete control over the territory and the duty to protect those living under occupation means Israel has the primary responsibility to ensure humanitarian organisations and actors’ unhindered and unimpeded access.<sup>109</sup> This cannot be accomplished if military operations continue. Therefore, though in agreement with the factual finding of the Court, Judges Xue, Brant, Gómez Robledo and Tladi sought to highlight that in order to give full effect to the provisional measures indicated, an explicit demand that military operations be suspended was necessary.

104 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Charlesworth (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-05-en.pdf>> para. 1.

105 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Charlesworth (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-05-en.pdf>> para. 7.

106 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>> para. 1.

107 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>> para. 4.

108 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>> para. 7.

109 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>> para. 7.

## Separate Opinion of Judge Nolte

Centred on whether the situation in the Gaza Strip constitutes a change within the meaning of Article 76 which would justify a modification of existing provisional measures, Judge Nolte's Separate Opinion explores the jurisprudence of the Court and potential precedent set by the Order of 28 March. Though ultimately concluding that the circumstances described in the Order constitute a "qualitative change in the situation which is exceptional",<sup>110</sup> Judge Nolte noted his hesitations regarding the indication of additional provisional measures. The hesitation stemmed from his view that the deteriorating situation in Gaza would probably not exist if the Order of 26 January had been fully implemented by Israel.<sup>111</sup> Consequently, Judge Nolte considered that the Court's subsequent Order may merely repeat and specify the previous measures indicated rather than impose additional measures. In Judge Nolte's opinion, indicating additional measures would set a dangerous precedent, especially in light of the rather restrictive approach of the Court in its jurisprudence on Article 76(1),<sup>112</sup> as it would imply a low threshold for modifying, adding, or specifying a provisional measure on the basis of a change in the situation.<sup>113</sup> Moreover, Judge Nolte felt it could also be viewed as an "implicit determination of a State's non-compliance with the measures set out in an earlier order, thereby prejudging the Court's assessment at the merits phase".<sup>114</sup>

Judge Nolte stressed that he took "very seriously recently voiced concerns that Israel is using hunger as a 'weapon of war' and the provision of humanitarian aid as a 'bargaining chip'".<sup>115</sup> In his view, in its Order of 28 March, the Court was not stating that the humanitarian situation in Gaza had "simply deteriorated further, but that the prolonged and widespread deprivation of food has become 'exceptionally grave'". With famine imminent, the new circumstances go beyond what the Court previously considered as a 'serious risk of deteriorating further' and instead "reflect a plausible

110 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 6.

111 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 4.

112 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 2.

113 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 5.

114 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 3.

115 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 4.



risk of a violation of relevant rights under the Genocide Convention”.<sup>116</sup>

Just two months prior Judge Nolte viewed South Africa's case as hinging on whether Israeli officials' incitements to genocide could plausibly lead to specific and numbered genocidal acts by Israeli troops, since genocidal intent could not be properly determined. By the time of the second PMO, Judge Nolte considers Israel's starvation alone of Gaza as plausibly constituting genocide. This represents a remarkable shift in perspective that reflects the rapidly changing situation in Gaza, where starvation continues to be used as both a weapon of war and tool to commit genocide.

### Separate Opinion of Judge *Ad Hoc* Barak

In his final decision before resigning in June 2024, Judge *ad hoc* Barak voted against measure (1), since it reaffirmed the measures indicated in the Court's first PMO (which he voted against), and measure (2)(b) for several reasons.

While in the first half of his Separate Opinion Judge *ad hoc* Barak opposed the provisional measures which he interpreted as being essentially related to the law of armed conflict and IHL violations,<sup>117</sup> he did vote in favour of measure (2)(a) which provides that Israel shall take measures to ensure the unhindered provision by all concerned of urgently needed basic services and humanitarian assistance, based on it being consistent with Israel's obligations under IHL.<sup>118</sup> He even goes on to say, “[i]t is only in this sense that I have supported it” since he does “not think this measure is grounded in the preservation of plausible rights under the Genocide Convention”.<sup>119</sup> Yet, just two paragraphs later, he rejects measure (2)(b) “because it is not grounded in the preservation of plausible rights under the Genocide Convention”.<sup>120</sup>

This inconsistent reasoning is hard to comprehend. The view that the provisional measures relate to acts that fall outside the scope of the Genocide Convention raises serious concerns on the basis that it blatantly ignores the fact that upholding the

116 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge Nolte (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-04-en.pdf>> para. 6.

117 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> paras. 6, 9.

118 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 30.

119 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 30.

120 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 32.

Genocide Convention and preserving the rights therein falls squarely within the jurisdiction of the Court. It is for this very reason that the Court ordered Israel's military to not commit acts which constitute a violation of any of the rights of Palestinians in Gaza as a protected group under the Convention in its first PMO. If the Court's power to issue binding provisional measures was circumvented by an inability to order a State's military to not commit the most serious violations of international law, it is rendered meaningless. For Judge *ad hoc* Barak, however, the lack of any plausible intent to commit genocide means that the Court is acting on the basis of humanitarian considerations and "has accepted South Africa's invitation to become the micromanager of an armed conflict".<sup>121</sup>

Barak also expressed the view that Hamas not being a Party to the proceedings creates a structural imbalance as only Israel is bound by its decision.<sup>122</sup> Again, this reasoning disregards the abundance of evidence on Israel's systematic obstruction of aid, as well as the fact that Israel controls all exit and entry points into Gaza and is therefore responsible for the lack of humanitarian aid entering the territory under its occupation and siege, and the conditions of life imposed as a result of depriving an occupied, trapped population of the bare essentials of food and water. Thirdly, Judge *ad hoc* Barak believes the Court has "artificially linked the Genocide Convention to the provision and access of basic services and assistance, which are issues regulated by international humanitarian law".<sup>123</sup> Once again, Judge *ad hoc* Barak either somehow fails to see that the lack of basic services and assistance is creating conditions calculated to bring about the destruction of Palestinians in Gaza or actively chooses to deny the plausible genocide being committed by his country. Unfortunately, the latter seems more apt, as Judge *ad hoc* Barak states in his concluding remarks that the "[t]he war in Gaza is Israel's second war of independence".<sup>124</sup>

Thirdly, regarding the necessary conditions for the modification of provisional measures, Judge *ad hoc* Barak does not consider there to be any change in situation that would justify the modification of provisional measures since South Africa and the Court had already noted the risk of starvation in the course of proceedings

121 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 6.

122 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 7.

123 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 9.

124 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 34.

regarding the first PMO. Based on this, he believes the measures indicated in the first PMO are sufficient to address the worsening situation in Gaza.<sup>125</sup> Taking issue with the Court's decision not to revisit its initial finding that there is plausible genocidal intent, and with South Africa not addressing Israel's *dolus specialis* for genocide in its request for the modification of provisional measures – despite it having done so in detail in its initial request – Judge *ad hoc* Barak claims that the Court must be satisfied that plausible intent is present in the changed situation. He did not point to any jurisprudence establishing this requirement.

Finally, Judge *ad hoc* Barak contested the Court's reliance on evidence not submitted by either of the Parties and on which they were not given an opportunity to comment. Specifically, the Court relied on a special brief by the Integrated Food Security Phase Classification Global Initiative, a UNICEF press release and an OCHA daily report, as well as reports that found that the humanitarian situation can only be addressed by suspending the military operation. Notwithstanding Judge *ad hoc* Barak's reference to *Armenia v. Azerbaijan*, in which the Court stated that its task was to ascertain "whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation which warranted the indication of a provisional measure... has changed since that time",<sup>126</sup> the Court does adopt a flexible approach to evidence and may rely on publicly available information. This was also recognised by him when stating "[w]hile the Court may rely on information publicly available, it should be cautious".<sup>127</sup> Thus, while Judge *ad hoc* Barak hopes that clearer rules on evidence are established and a stricter approach is adopted, the Court did not make any procedural error or go against its Statute.

125 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> paras. 14-15.

126 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), Order of 6 July 2023 on the Request for the Modification of the Order Indicating a Provisional Measure of 22 February 2023, para. 16; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 25.

127 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Separate Opinion of Judge *ad hoc* Barak (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-06-en.pdf>> para. 28.

## Analysis

In its second Order, the Judges came closer to demanding a ceasefire measure but ultimately focused on the imminent outbreak of famine in Gaza and the starvation of the population.<sup>128</sup> Consistent with international law, in particular Articles 55 and 56 of the Fourth Geneva Convention, the current Order requires that Israel not only take measures to “enable” the provision of humanitarian aid, but also take all measures to “ensure” the provision of such aid “at scale”.<sup>129</sup> While both sets of provisional measures demand that Israel address the conditions of life calculated to destroy Palestinians in Gaza resulting from the lack of urgently needed basic services and humanitarian assistance,<sup>130</sup> a key difference between the two Orders is the scope and specificity of Israel’s obligations in relation to humanitarian aid.

The first PMO requires Israel to take “immediate and effective” measures to enable the provision of urgently needed services and assistance, without providing any further detail on the nature of said services or assistance and the steps that Israel should take. The second PMO, issued on the basis of the rapidly deteriorating humanitarian situation and a looming man-made famine – developments which showcase Israel’s open defiance of the Order of 26 January, is far more detailed in both aspects. Unanimously upheld, Measure (2)(a) provides a non-exhaustive list of basic services and aid, “including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza”. Furthermore, rather than leave implementation of the measure open to interpretation, it specifically instructed Israel to increase the capacity and number of land crossing points and to maintain them open for as long as necessary. The Court also ordered Israel to fully cooperate with the UN to ensure the “unhindered provision [of aid] at scale”. The reasoning underpinning the more explicit wording of the provisional measures is likely twofold. Firstly, the specific instructions directed at Israel reflect the Court’s dissatisfaction with Israel’s response to the first PMO. Judge Yusuf explicitly recognised this in his Declaration, stating that “the Court’s indication of further provisional measures in the present Order shows that it is not satisfied that all that should have been done has been done by Israel

128 Mischa Gureghian Hall, ‘Assessing the Contents of the ICJ’s Latest Provisional Measures Order in South Africa v. Israel’ (Ejil/Talk!, 6 June 2024) <<https://www.ejiltalk.org/assessing-the-contents-of-the-icjs-latest-provisional-measures-order-in-south-africa-v-israel/>>.

129 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Joint Declaration of Judges Xue, Brant, Gómez Robledo and Tladi (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-03-en.pdf>> para. 2.

130 Order of 26 January, Measure (4) & Order of 28 March, Measure (2).

to prevent the commission of genocidal acts”.<sup>131</sup> Secondly, it indicates recognition of the logistical and operational challenges of delivering aid in Gaza and the need for comprehensive action to address the many obstacles to a humanitarian response in Gaza created by Israel. In so doing, it also highlights the role of international organisations in addressing humanitarian crises and the need for coordinated action to mitigate the suffering of Palestinians in Gaza.

Measure (2)(b)’s focus lies on the Israeli military and reflects the overwhelming body of evidence of the IOF obstructing aid missions, attacking humanitarian workers and convoys, and destroying humanitarian supplies. It orders Israel to ensure that its military not only refrains from committing genocidal acts, but also to prevent it from hindering the delivery of urgently needed humanitarian assistance. This goes beyond the first set of measures by emphasizing the need to ensure that no military actions obstruct the flow of humanitarian aid, further reflecting the Court’s concern over the catastrophic humanitarian situation in Gaza and the role of the IOF in creating conditions of life calculated to destroy Palestinians in Gaza. However, as noted by Judges Xue, Brant, Gómez Robledo and Tladi, in order to give full effect to the provisional measures indicated, an explicit demand that military operations be suspended was necessary. Considering Israel’s disregard for international law and its binding obligations pursuant to the Order of 26 January, explicitly ordering a ceasefire would have served the added value of stripping Israel of the ability to argue it was in any way unclear on the obligations it was under.

A final similarity between the two sets of measures is the requirement that Israel submit a report to the Court within one month, detailing the measures taken to give effect to the Order. This reporting obligation arguably underscores the Court’s intent to hold Israel accountable and ensure transparency regarding the actions taken to prevent genocide and provide humanitarian aid. The requirement for a prompt report in both sets of PMOs reflects the urgency of the situation and the Court’s demand for immediate action and oversight.

131 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Yusuf (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-02-en.pdf>> para. 8.

## Order of 24 May 2024

In the five months since South Africa instituted proceedings and made its first request for the indication of provisional measures, it petitioned the Court another three times. The Court rejected one request,<sup>132</sup> and indicated provisional measures twice. Similar to its 6 March request, South Africa's 10 May request for the indication of provisional measures and modification of the Court's previous PMOs was motivated by the changing circumstances in Gaza – in this instance Rafah in particular, where Israel commenced a violent ground invasion in the late hours of 6 May –<sup>133</sup> and new facts causing irreparable harm to the rights of Palestinians across the territory.

The request was based on three key concerns. Firstly, at the time, Rafah was effectively the last refuge in Gaza for 1.5 million Palestinians (many of whom had already been displaced multiple times) and “the last viable centre in Gaza for habitation, public administration, and the provision of basic public services, including medical care”.<sup>134</sup> At this point, approximately 76 percent of the territory was under unlawful “evacuation orders” and the barren area of Al-Mawasi – where Israel had directed Palestinians – was already overcrowded and devoid of all necessary resources and infrastructure. Secondly, since its seizure of the Rafah and Karem Abu Salem (‘Kerem Shalom’) crossings, Israel has total control of all entry and exit points to Gaza. Immediately after gaining control, Israel blocked the entry of all life-saving humanitarian and medical supplies, fuel, and prevented all medical evacuations. Thirdly, and lastly, the remaining population and medical facilities were, and remain, at extreme risk, due to: the clear pattern of areas under “evacuation” immediately being treated as extermination zones; the targeting of hospitals and health clinics; the discovery of mass graves at Gaza's hospitals; and the use by Israel of Artificial Intelligence (‘AI’) to identify “kill lists”.<sup>135</sup>

132 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Urgent Request for Additional Measures under Article 75(1) of the Rules of Court of the International Court of Justice (ICJ, 12 February 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240212-wri-01-00-en.pdf>>; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Press release 2024/16 (ICJ, 16 February 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240216-pre-01-00-en.pdf>>.

133 See Al-Haq, ‘Urgent Call: Palestinian Human Rights Organizations Demand Concrete Action to Halt Impending Massacre Amid Rafah Ground Invasion’ (8 May 2024) <<https://www.alhaq.org/advocacy/22990.html>>.

134 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Request by South Africa for the indication of provisional measures and modification of the Court's previous provisional measures (ICJ, 10 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240510-wri-01-00-en.pdf>> para. 5.

135 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Request by South Africa for the indication of provisional measures and modification of the Court's previous provisional measures (ICJ, 10 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240510-wri-01-00-en.pdf>> para. 5.





Rafah, Gaza Strip, 23.7.2025 Photographer: Doaa Albaz

Based on these dramatic developments, South Africa asked the Court in both its request and at the conclusion of its oral observations, to order the State of Israel to: immediately cease its military operations in the Gaza Strip and withdraw its forces; take all effective measures to ensure and facilitate the unimpeded access to Gaza of UN and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies and/or officials investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence, including by ensuring its military does not inhibit this process; submit an open report to the Court on all measures taken to give effect to these orders within one week of their issuance; and submit a report on all measures taken to give effect to all previous provisional measures indicated by the Court within one month.<sup>136</sup>

<sup>136</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> paras. 13, 17.

To decide upon South Africa's request, the Court was again tasked with determining whether the conditions set forth in Article 76(1) had been fulfilled. In effect, it had to establish whether there was reason to conclude that the situation that warranted the decision set out in its Order of 28 March 2024 had changed since that time, and whether such a change justified a modification of its earlier decision concerning provisional measures.<sup>137</sup> Any such modification would be appropriate only if the general conditions laid down in Article 41 of the Statute of the Court were also met.

In a prior decision on South Africa's 12 February request for the indication of further provisional measures, communicated to the Parties by letters dated 16 February 2024, the Court quoted the UN Secretary-General in highlighting that the developments in the Gaza Strip, and in Rafah in particular, "would exponentially increase what is already a humanitarian nightmare with untold regional consequences".<sup>138</sup> Further, it observed that the catastrophic living conditions of the Palestinians in the Gaza Strip had continued to deteriorate since January 2024, especially as a result of the prolonged and widespread deprivation of food and other basic necessities.<sup>139</sup> In the present decision, the Court noted the same foreseeable development and characterised the humanitarian situation as "disastrous".<sup>140</sup> In the eyes of the Court, these developments, in particular the military offensive in Rafah and the repeated large-scale displacement of the extremely vulnerable Palestinian population in the Gaza Strip, were "exceptionally grave" and constituted a change within the meaning of Article 76.<sup>141</sup> The Court was also of the view that the previous provisional measures ordered "do not fully address the consequences arising from the change in the situation... thus justifying the modification of these measures".<sup>142</sup>

137 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 21.

138 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 27.

139 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 27; see Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures (ICJ, 28 March 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240328-ord-01-00-en.pdf>> para. 18.

140 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 28.

141 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 29.

142 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 30.



Turning to the requirements laid down in Article 41, the Court drew from its prior conclusions on jurisdiction and the plausibility of the rights claimed by South Africa under the Genocide Convention and focussed on whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed by South Africa and whether there existed an element of urgency.<sup>143</sup> After considering the arguments of both parties, the Court drew attention to the 800,000 Palestinians displaced from Rafah as of 18 May 2024 and the fact that UN officials had consistently underscored the immense risks associated with a military offensive therein – which had already started to materialise.<sup>144</sup> Based on all the information before it, the Court went on to hold:

On the basis of the information before it, the Court is *not convinced* that the evacuation efforts and related measures that Israel affirms to have undertaken to enhance the security of civilians in the Gaza Strip, and in particular those recently displaced from the Rafah Governorate, are sufficient to alleviate the immense risk to which the Palestinian population is exposed as a result of the military offensive in Rafah.<sup>145</sup>

Israel also failed to provide sufficient information concerning the safety of the population during the “evacuation” process, or the availability in the Al-Mawasi area of the necessary amount of water, sanitation, food, medicine and shelter for the almost one million Palestinians that had evacuated thus far. Consequently, the Court did not believe Israel had addressed or dispelled the concerns raised by its military offensive in the governorate.<sup>146</sup>

In light of its findings, and the inapplicability of prior provisional measures to Rafah specifically, the Court found that Israel’s military offensive in the governorate presented a further, urgent risk of irreparable prejudice to the plausible rights claimed

143 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> paras. 31–34.

144 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> paras. 43–45.

145 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 46 (emphasis added).

146 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 46.

by South Africa.<sup>147</sup> With all the conditions outlined in the relevant Articles of the Rules of Court and Statute of Court fulfilled, the Court reaffirmed the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which it said should be immediately and effectively implemented, and ordered the following additional provisional measures:

*(2) The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:*

- a. Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part;*
- b. Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance;*
- c. Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide*

*(3) Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order*

<sup>147</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Order on Request for the Modification of the Order of 28 March 2024 (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>> para. 46.

## Declarations of Judge Nolte, Judge Aurescu, and Judge Tladi

Repeating concerns expressed in his previous Declaration, namely that there was no real change in the situation that would justify a modification of prior PMOs and that the Order effectively repeated previous measures, Judge Nolte – though voting in favour of the measures indicated in the latest Order – again took the opportunity to express his concerns with the majority's decision.

Regarding South Africa's statement that it expects the Court to act in order to render its own previous Orders "effective", to prevent them from becoming "worthless", and to step in for the UN Security Council and General Assembly which have failed in fulfilling their mandate,<sup>148</sup> Judge Nolte differentiated between the powers of the Security Council and those of the Court, stating that while both are tasked with maintaining international peace and security, the Security Council has functions of a political nature, whereas the Court exercises purely judicial functions.<sup>149</sup> As Judge Nolte notes, unlike the Security Council, the Court is not tasked with the monitoring or enforcement of the Genocide Convention, but only with the settlement of disputes over the "interpretation, application or fulfilment" of that Convention. Hence, its "incidental jurisdiction under Article 41 of the Statute does not transform the Court into a monitoring body or even an enforcement organ".<sup>150</sup> While Judge Nolte finds that this may imply that the Court could not, or should not, have rendered the present Order, he recognises that Article 76(1) of the Rules of Court is not "formulated in strict terms" since the Court may modify an order if "*in its opinion*" some change in the situation justifies such revocation or modification.<sup>151</sup> The Court's discretion in this regard means it is "inherently competent under this provision to interpret, and thus to specify (or clarify), the measures it has previously indicated to ensure the sound administration of justice".<sup>152</sup> This suggests that "some change in situation", as required by Article 76, may also consist of subsequent developments anticipated by

148 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 9.

149 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 11; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment (I.C.J. Reports 1984) para. 95.

150 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 11.

151 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 13.

152 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 13.

the Court but which raise concerns as to the applicability of existing PMOs.<sup>153</sup>

Based on this understanding, and the “extraordinarily dramatic humanitarian situation” in and around Rafah,<sup>154</sup> Judge Nolte agreed that the specification of a previous order is exceptionally warranted. Though Judge Nolte remained unconvinced of the evidence that Israel has plausible genocidal intent, he was of the opinion that it is not necessary to determine whether Israel has violated its obligations under the Genocide Convention in order to find that Israel has an obligation to prevent, and a corresponding duty to act. Furthermore, for the duty to prevent to even arise, Judge Nolte believed that a serious risk of conduct falling within the scope of Article III of the Genocide Convention, and the knowledge of a State of such a risk, is sufficient – both of which he considered plausible in the present situation.<sup>155</sup> This consideration is due to three factors: first, statements by UN officials and other international organisations raised strong doubts as to whether Israel is able and willing to simultaneously conduct its current military offensive in Rafah and ensure the most basic conditions for the survival of Palestinians in the designated humanitarian areas;<sup>156</sup> second, Israel’s public commitment and its efforts to enable the delivery of food and other humanitarian goods do not give the Court enough confidence to assume that “urgently needed basic services and humanitarian assistance” will be provided in time to the people who have left and will leave Rafah, and to those who remain there despite the ongoing military offensive;<sup>157</sup> third, “significant incendiary speech” by Israeli officials has continued, and been accompanied by clear support for denying humanitarian assistance to Palestinians in Gaza.<sup>158</sup> Disappointingly, Judge Nolte did not reflect on how this public incitement and genocidal statements may amount to plausible genocidal intent and instead limited his analysis to how these statements raise doubts as to whether Israel will uphold its public commitments regarding the delivery of humanitarian

153 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 15.

154 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 16.

155 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 19.

156 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 20.

157 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 21.

158 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 22.

aid in such a “volatile political context”.<sup>159</sup> The aforementioned factors led Judge Nolte to conclude that the Court was justified in specifying measures indicated on 26 January and 28 March, in so far as they applied to the military offensive in Rafah which could create conditions of life calculated to bring about their destruction, and not “other actions of Israel which do give rise to such a risk”.<sup>160</sup>

Like Judge Nolte, Judge Aurescu also felt that the two existing PMOs could apply to the situation in Rafah and that the Court could have taken the opportunity to not only reaffirm the provisional measures already indicated, but also to clarify how they apply to the new situation.<sup>161</sup> In addition, he propounded that the Court should have made it expressly clear that the provisional measures included in the Order of 24 May do not impact Israel’s right to undertake actions, “which should be conducted in strict conformity with international law, including in a manner responding to the criteria of proportionality and necessity,” to protect its civilian citizens and to free the hostages still held in the Rafah area.<sup>162</sup> Similar to the stance of Judges Charlesworth, Xue, Brandt, Gómez Robledo and Tladi on measure (2)(b) of the Order of 28 March, Judge Aurescu took issue with the wording of measure (2)(a) which requires Israel to “halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part”. To Judge Aurescu, it is unclear whether the part starting with “which may inflict” only refers to “any other action” (which is not defined) or to both halting the Israeli military offensive and “any other action”.<sup>163</sup> In his view, it should be interpreted as indicating the halt of the military offensive to the extent that it may inflict conditions of life calculated to bring about the destruction of Palestinians in Gaza in whole or in part.<sup>164</sup>

Of particular interest, is Judge Aurescu’s view that the Court could have used the opportunity of the present Order to include a measure requiring Israel to take all necessary and effective steps to implement with immediate effect the Security Council

159 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 23.

160 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Nolte (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-02-en.pdf>> para. 25.

161 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> paras. 4-5.

162 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 5.

163 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 3.

164 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 3.

resolution 2728 (2024), including a “lasting sustainable ceasefire”.<sup>165</sup> Judge Aurescu rightly notes an array of benefits to this: it would constitute an innovation in the Court’s jurisprudence; it would underscore the complementary functions of the Security Council and the Court in maintaining international peace and security, as already discussed above in the context of Judge Nolte’s Declaration; and it would extend the binding, legal force of provisional measures indicated by the Court to the relevant provisions of the Security Council resolution – “thus inaugurating new, promising cooperation avenues between the two principal organs of the United Nations”.<sup>166</sup> Notwithstanding this missed opportunity, Judge Aurescu complemented the Court for its reference to the developments which amounted to a change in situation within the meaning of Article 76(1) as “exceptionally grave” as it contributed to the case law of the Court which thus far had largely failed to elaborate on “whether the change in the situation needs to be in type or it can also be in degree”.<sup>167</sup> Based on the notion of exceptional gravity in recent orders, subsequent cases can draw from the finding that:

[A] change in the degree or the aggravation of an already existing situation, even though predicted, can justify the need for the Court to issue new or modify the already indicated provisional measures.<sup>168</sup>

Judge Tladi also supported the Court’s finding in this respect, viewing the “intensification” – which may be conceived by some as merely a continuation of the same operation by Israeli forces that formed the basis of the two previous PMOs – as sufficient to justify issuing a third Order on provisional measures.<sup>169</sup> As Judge Tladi drew attention to in his Declaration, this finding is wholly consistent with the Court’s ruling in *Bosnia and Herzegovina v. Yugoslavia*. In this case, which also centred on the Genocide Convention, the Court found that “the grave risk” underlined in its first PMO “has been deepened by the *persistence* of conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts”

165 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 8.

166 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 8.

167 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 7.

168 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Aurescu (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 7.

169 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 4.

and that this provided sufficient evidence of “some change in the situation”.<sup>170</sup> Bosnia and Herzegovina’s request was even based on the “continuing... campaign of genocide”, referring to the “rapidly escalating human catastrophe”.<sup>171</sup>

Drawing from the Court’s prior rejection of South Africa’s request on 16 February, and its Order of 12 October 2022 in *Armenia v. Azerbaijan* which also concluded that an eruption of hostilities after the conclusion of a ceasefire agreement was insufficient to establish a change in the situation since it was in effect no different to when the first PMO was issued,<sup>172</sup> Judge Tladi believes that the various cases illustrate “that there cannot be a hard line between “change in situation” and “no change in situation””.<sup>173</sup> Rather, the Court must determine “whether whatever circumstances put forward are such as to *justify* the indication of new measures or to modify [the] existing Order”.<sup>174</sup>

Distinct from other Declarations and Separate or Dissenting Opinions, Judge Tladi’s Declaration objected to the majority’s view that the conditions in Article 41 of the Statute are additional to the requirements of Articles 75 and 76 of the Rules of Court.<sup>175</sup> Labelling the clinical distinction between a change in the situation (Article 76) or new facts (Article 75) and Article 41 as superficial, Judge Tladi believes that the two provisions should be seen as “giving flesh” to Article 41, rather than adding further conditions that would undermine and de-emphasize the main condition of the provision which is “if circumstances so require”.<sup>176</sup>

Regarding measure (2)(a), requiring Israel to “halt its military offensive in Rafah”, Judge Tladi soundly notes that the language used – namely “offensive” – illustrates that “legitimate defensive actions, within the strict confines of international law, to

170 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Provisional Measures Order of 13 September 1993 (I.C.J. Reports 1993) para. 22, read with para. 53 (emphasis added).

171 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Bosnia and Herzegovina (ICJ, 27 July 1993) 1, 3.

172 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), Order of 12 October 2022 on the Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021 (I.C.J. Reports 2022 (II)) para. 18.

173 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 7.

174 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 7 (emphasis added).

175 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 11.

176 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 11.

repel specific attacks, would be consistent with the Order of the Court”.<sup>177</sup> On this ground alone, Israel’s arguments regarding its alleged right to self-defence, despite Gaza being an occupied territory, are inapplicable.

## Dissenting Opinions of Judge *Ad Hoc* Barak and Vice-President Sebutinde

In his Dissenting Opinion on the Order of 24 May, Judge *ad hoc* Barak once again challenged the Court’s approach to evidence. While his prior Opinions focussed on the lack of detailed UN reports detailing Israel’s genocidal acts (like the Court had been able to refer to in *The Gambia v. Myanmar*) or the Court’s reliance on evidence not submitted to it by either of the Parties, this time, Judge *ad hoc* Barak took issue with the reliance on statements and press releases of UN officials and credible international organisations which referenced evidence from other sources or had not been corroborated. Stating that the Court’s approach is inconsistent with its jurisprudence to date, Judge *ad hoc* Barak referred to the Judgments in *Democratic Republic of the Congo v. Uganda* and *Bosnia and Herzegovina v. Serbia and Montenegro*.<sup>178</sup>

As Judge *ad hoc* Barak is surely aware, the standard of evidence to make a final determination in a case is different to that required at the provisional measures stage where only a *prima facie* case and the plausibility of alleged rights need to be established. Nevertheless, Judge *ad hoc* Barak states that “it should have at least informed the treatment of evidence” at this stage.<sup>179</sup> While this ordinarily implies the Court should have simply kept it in mind, Judge *ad hoc* Barak alleges that the Court erred in its handling of evidence generally<sup>180</sup> – meaning that, in effect, he expects the Court to largely adopt the same standard of evidence as required at the Judgment stage of a case.

After criticising the Court’s approach to evidence for a third time, the Dissenting Opinion again pivoted back to the military operation conducted by Palestinian armed groups on 7 October when discussing the devastating situation in Rafah and Al-

177 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Declaration of Judge Tladi (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-04-enc.pdf>> para. 17.

178 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 6, fns 7-8.

179 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 6.

180 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 6.



Mawasi. Judge *ad hoc* Barak ignores Israel's continued unlawful use of force in the Occupied Palestinian Territory since 1967, when reaffirming Israel's alleged right and duty to prevent and repel threats posed by Palestinian armed groups, despite the findings of the *Wall* Advisory Opinion to the contrary.<sup>181</sup> Instead, he merely repeats Israel's claims that it has established "safe zones", helped to repair a water line, and that Al-Mawasi is connected to two main humanitarian routes.<sup>182</sup> There is no mention of the total blockade imposed by Israel on Gaza which has prevented the entry and distribution of the vast amounts of life-saving aid needed for the survival of Palestinians in Rafah, Al-Mawasi, and every other corner of the Gaza Strip. Equally, there is no mention of Israel's repeated targeting of the alleged "safe zones" to which it has forcibly transferred Palestinians, or of the strikes on croplands, greenhouses, water pipelines or desalination plants which have directly led to people dying of thirst, hunger and disease.

Like in previous Opinions, Judge *ad hoc* Barak repeats his argument that there has been no change in the situation within the meaning of Article 76 since conduct in Rafah is simply part of Israel's military operation which has been ongoing since October 2023<sup>183</sup> and any consequences which may arise from Israel's acts there are already covered by the Court's prior PMOs.<sup>184</sup> This assessment supported Judge *ad hoc* Barak finding that South Africa's request appears to relate to Israel's compliance with the PMOs, which is not within the jurisdiction of the Court to assess at this stage.<sup>185</sup>

In addition to repeating the same evidentiary argument on three separate occasions, Judge *ad hoc* Barak claims – now also for a third time – that Israel lacks any plausible genocidal intent that would even allow for the indication of provisional measures.<sup>186</sup> This argument is based entirely on Israel's issuance of so-called "evacuation orders" and provision of "tents, humanitarian aid and field hospitals",<sup>187</sup> and the view (held since the start of proceedings) that South Africa has failed to establish any plausible genocidal

181 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (I.C.J. Reports 2004) para. 139.

182 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 11.

183 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 13.

184 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 14.

185 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 15.

186 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> paras. 19, 24, 25.

187 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Judge *ad hoc* Barak (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-05-en.pdf>> para. 24.

intent. Again, Israel's pattern of targeting zones to which civilians have evacuated,<sup>188</sup> decimating Gaza's healthcare system,<sup>189</sup> and denying the entry of the vast majority of aid trucks queuing at the border to enter Gaza was not mentioned at all.

The core of Vice-President Sebutinde's Dissenting Opinion also rests on the view that given "the frequent changes in the location and intensity of hostilities, the situation in Rafah does not constitute a "new fact" that would necessitate modifying the existing measures under Article 76".<sup>190</sup> In her opinion, a suspension of Israel's military offensive in Rafah, "whether temporary or indefinite, has no link to South Africa's plausible rights or Israel's obligations under the Genocide Convention, as required by Article 41 of the Statute of the Court and its associated jurisprudence". Vice-President Sebutinde views the present order as tantamount to "micromanaging the hostilities" in Gaza by restricting Israel's ability to pursue its legitimate military objectives.<sup>191</sup>

Unsatisfied with the Court's account of the broader context of the conflict in Gaza and the humanitarian situation therein, Vice-President Sebutinde uses her Dissenting Opinion to provide her own summary of the conflict. This largely centred on attacks and threats against Israel, including by Hezbollah and the Houthis,<sup>192</sup> which she considered "collectively pose a significant risk to the safety, security, and welfare of Israel and its citizens".<sup>193</sup> Israel's 17-year blockade of Gaza, 76-year entrenchment of its settler colonial apartheid regime, and 57-year belligerent occupation were not of relevance to Vice-President Sebutinde. Perhaps unsurprisingly then, her subsequent assessment of the humanitarian situation in the Gaza Strip was equally one-sided. Despite stating that she sought to provide a more "balanced" account,<sup>194</sup> Vice-President Sebutinde claims that multiple concrete actions were taken by Israel to facilitate the provision of humanitarian aid for the civilian population of Gaza since the Court's Order in March, including the opening of three additional land crossings

188 See Al-Haq, *How to Hide a Genocide: The Role of Evacuation Orders and Safe Zones in Israel's Genocidal Campaign in Gaza* (1 January 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/01/02/evacuation-orders-two-pages-view-1735842246.pdf](https://www.alhaq.org/cached_uploads/download/2025/01/02/evacuation-orders-two-pages-view-1735842246.pdf)>.

189 See Al-Haq, *The Systematic Destruction of Gaza's Healthcare System: A Pattern of Genocide* (23 January 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/02/22/destruction-of-gaza-healthcare-system-one-page-view-2-1740217809.pdf](https://www.alhaq.org/cached_uploads/download/2025/02/22/destruction-of-gaza-healthcare-system-one-page-view-2-1740217809.pdf)>.

190 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> para. 1.

191 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> para. 2.

192 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> paras. 6-8.

193 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> para. 8.

194 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-en.pdf>> para. 3.

and a maritime corridor,<sup>195</sup> but did not note that the main artery for the entry and distribution of crucial aid, the Rafah crossing, has been closed and the amounts of aid allowed enter into Gaza were less than a third of pre-7 October levels. The floating pier constructed by the United States, to which she referenced,<sup>196</sup> was only constructed as a response to said obstruction, or outright denial, of aid deliveries which plunged the entire population of Gaza into a state of catastrophic food insecurity, and famine in parts, with diseases spreading rapidly due to a lack of hygiene facilities and materials. Like Judge *ad hoc* Barak, Vice-President Sebutinde drew attention to Israel's (unlawful) issuance of "evacuation orders" and their alleged efforts to improve access to medical care without subsequently noting its targeted attacks on the "safe zones" it has displaced the population to or its decimation of Gaza's healthcare system through constant bombardment and raids on Gaza's medical facilities.<sup>197</sup>

Both Vice-President Sebutinde and Judge *ad hoc* Barak categorically voted against each of the measures indicated based on the reasons outlined directly above. Each of the two Judges took issue with measure (2)(a) since, in their view, it amounted to a unilateral ceasefire that would make Israel vulnerable to further attacks by Hamas. Neither acknowledged that, under international law, Israel cannot claim self-defence against an occupied population for acts that are not attributable to a State.

195 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-cn.pdf>> paras. 10-11.

196 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-cn.pdf>> para. 11.

197 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Dissenting Opinion of Vice-President Sebutinde (ICJ, 24 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-01-cn.pdf>> paras. 14-15; see Al-Haq, *How to Hide a Genocide: The Role of Evacuation Orders and Safe Zones in Israel's Genocidal Campaign in Gaza* (1 January 2025) <<https://www.alhaq.org/cache/uploads/download/2025/01/02/evacuation-orders-two-pages-view-1735842246.pdf>>; Al-Haq, *The Systematic Destruction of Gaza's Healthcare System: A Pattern of Genocide* (23 January 2025) <<https://www.alhaq.org/cache/uploads/download/2025/02/22/destruction-of-gaza-healthcare-system-one-page-view-2-1740217809.pdf>>.

## Analysis

Just as in its two prior Orders on provisional measures, the Court instructed Israel to submit a report to the Court within one month of the Order detailing all measures taken to comply with that specific Order. Unlike previous Orders which concerned Israel's conduct and policies throughout the Gaza Strip, the Order of 24 May was largely specific to plans for and events unfolding in Rafah.

As explained above,<sup>198</sup> the “exceptionally grave” situation in Rafah and the immense risks to Palestinians posed by Israel's violent military offensive there was both the motivation for and determinative factor in the Court's latest PMO. Though not explicitly ordering a cessation of hostilities, the Court did – in its most forceful language to date – instruct Israel to “[i]mmediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part”.<sup>199</sup> The seriousness of the situation, and immediate and long-term consequences thereof, justified the Court in ordering Israel to immediately halt any action in the Rafah governorate that *may* inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.

Due to the rather convoluted sentence structure employed in Measure (2)(a), it has been interpreted in a number of ways – though the practical effect remains the same.<sup>200</sup> On the one hand, it has been viewed as putting an immediate halt to Israel's military offensive in Rafah and broadening the scope of action prohibited, as even the possibility of creating conditions of life calculated to destroy Palestinians is sufficient to render the act in breach of the Order. On the other hand, it has been read as limiting the scope of prohibited conduct to only certain activities which may inflict conditions of life calculated to destroy Palestinians. However, this interpretation ignores both the Court's reaffirmation of prior PMOs – meaning Israel is already under an obligation not to commit any genocidal acts, which include killing or causing serious mental or physical injury to Palestinians in Gaza. Moreover, on either reading, Israel was not permitted to continue the military offensive in Rafah as planned, and executed, at the time.

<sup>198</sup> See Section ‘Order of 24 May 2024’.

<sup>199</sup> Order of 24 May, Measure (2)(a).

<sup>200</sup> See Adil Ahmad Haque, ‘Halt: The International Court of Justice and the Rafah Offensive’ (Just Security, 24 May 2024) <[https://www.theguardian.com/global/article/2024/may/29/how-a-single-comma-is-allowing-israel-to-question-icj-rafah-ruling](https://www.justsecurity.org/96123/icj-gaza-israeli-operations/#:~:text=The%20first%20measure%20is%20the%20most%20important.%20Its%20formulation%20is%20somewhat%20ambiguous%2C%20but%20the%20ambiguity%20makes%20no%20practical%20difference%3E; Patrick Wintour, ‘How a single comma is allowing Israel to question ICJ Rafah ruling’ (The Guardian, 29 May 2024) <<a href=)>.

Israel's obligations as regards to humanitarian aid, now a core feature of each of the three PMOs, was outlined by the Court in this instance in the same wording as in its Order of 28 March – namely, that Israel must allow the “unhindered provision at scale of urgently needed basic services and humanitarian assistance”.<sup>201</sup> This indicates the enduring severity of the humanitarian situation, and the fact that it had not been alleviated by the Courts's two prior Orders. Similar to the Order of 28 March, in which the Court ordered Israel to increase the “capacity and number of land crossing points and maintaining them open for as long as necessary”,<sup>202</sup> the 24 May Order demanded Israel maintain open the Rafah crossing specifically. At the time of the Court's Order of 24 May, the Rafah crossing, described by *Médecins sans Frontières* as a “vital humanitarian access point” and a “lifeline for the whole of the Gaza Strip”,<sup>203</sup> was closed until further notice – in flagrant violation of the Court's previous order. Since May 2024, the Rafah crossing has largely remained closed as Israel tightened its siege on the Gaza Strip and further plunged Palestinians into darker depths of despair and deprivation.

A final notable – and novel – provisional measure included in the Order of 24 May is the requirement that Israel take “effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide”.<sup>204</sup> This measure likely stems from the discovery of mass graves, referred to in South Africa's application,<sup>205</sup> in and around the Nasser and Al Shifa medical facilities in Gaza where several hundred bodies, including women, children and older persons, were buried.<sup>206</sup> In South Africa's first request for provisional measures on 29 December 2023, it requested a measure requiring Israel to not “deny or otherwise restrict access by fact-finding missions, international mandates and other bodies to Gaza to assist in ensuring the preservation and retention” of evidence.<sup>207</sup> By the time of the Order, the UN Security Council had already underlined the need for

201 Order of 28 March and 24 May, Measure (2)(a) and Measure (2)(b), respectively.

202 Order of 28 March, Measure (2)(a).

203 Médecins Sans Frontières, ‘Gaza: Thousands forced to flee as Israeli military offensive intensifies and aid is blocked in Rafah’ (10 May 2024) <<https://msf.org.uk/article/gaza-thousands-forced-flee-israeli-military-offensive-intensifies-and-aid-blocked-rafah>>.

204 Order of 24 May, Measure (2)(c).

205 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Request by South Africa for the indication of provisional measures and modification of the Court's previous provisional measures (ICJ, 10 May 2024) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240510-wri-01-00-en.pdf>> paras. 5, 17.

206 UN News, ‘Mass graves in Gaza show victims' hands were tied, says UN rights office’ (23 April 2024) <<https://news.un.org/en/story/2024/04/1148876>>; United Nations, ‘Security Council Press Statement on Mass Graves in Gaza’ (10 May 2024) <<https://press.un.org/en/2024/sc15692.doc.htm>>.

207 Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v. Israel*), Application instituting proceedings and request for the indication of provisional measures (ICJ, 29 December 2023) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>> para. 144.

accountability and “called for investigators to be allowed the unimpeded access to all locations of mass graves in Gaza to conduct immediate, independent, thorough, comprehensive, transparent and impartial investigations to establish the circumstances behind the graves”.<sup>208</sup> The importance of facilitating international investigations was also highlighted by Medical Aid for Palestinians (“MAP”) who, more than one month on from the discovery of the mass graves at Nasser and Al-Shifa hospitals, expressed their deep concerns over the lack of access to international investigators to these and other sites of potential atrocities which require time-sensitive forensic investigation and documentation.<sup>209</sup> Therefore, Measure (2)(c) echoes the UN Security’s Council’s demands and underscores the Court’s recognition of the urgent need for timely, unhindered international investigations to preserve evidence and ensure accountability for Israel’s plausible genocide in Gaza. Any evidence preserved and documented, as well as the findings of any investigative body stemming from said evidence, will undoubtedly benefit accountability proceedings for other international crimes committed by Israel, including those at the ICC.

208 United Nations, ‘Security Council Press Statement on Mass Graves in Gaza’ (10 May 2024) <<https://press.un.org/en/2024/sc15692.doc.htm>>.

209 MAP, ‘A month after mass graves discovered at Gaza hospitals, international investigations and accountability are essential’ (10 June 2024) <<https://www.map.org.uk/news/archive/post/1593-a-month-after-mass-graves-discovered-at-gaza-hospitals-international-investigations-and-accountability-are-essential>>.

## Israel's ongoing obligations pursuant to the Orders

In each Order subsequent to 26 January, the Court explicitly reaffirmed all prior measures indicated. Thus, Israel remains legally bound by all provisional measures outlined in the three PMOs – each of which are intended to protect the rights of Palestinians under the Genocide Convention. These include:

### *I. Obligations to Prevent Genocidal Acts and Incitement to Genocide*

Israel is under a binding obligation to take all measures within its power to prevent acts prohibited under Article II of the Genocide Convention in relation to Palestinians in Gaza. This includes ensuring, “with immediate effect”,<sup>210</sup> that its military does not commit any of these acts. These acts include: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group. In particular, Israel remains under the legal obligation to immediately halt military offensives and any other action in the Rafah Governorate that could inflict conditions of life on the Palestinian group calculated to bring about its physical destruction in whole or in part.

Additionally, Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide against Palestinians in Gaza.

### *II. Obligations Related to Humanitarian Assistance*

A core theme common to each of the PMOs is the imperative to ensure the provision of urgently needed basic services and humanitarian assistance to Palestinians in Gaza. Beginning with an obligation 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”, the Orders of 28 March and 24 May 2024 expanded upon, and further specified, Israel's obligations to facilitate humanitarian aid.

<sup>210</sup> Order of 26 January, Measure (2).



Israel is currently under a binding duty to: take all necessary and effective measures, without delay and in full cooperation with the United Nations, to ensure the unhindered provision at scale of food, water, electricity, fuel, shelter, clothing, hygiene and sanitation, and medical supplies and care; increase the capacity and number of land crossings and maintain them open for as long as necessary, and specifically keep the Rafah crossing open for the provision of humanitarian aid; and ensure that its military does not impede the delivery of such aid.

### *III. Obligations to Preserve Evidence and Permit Investigations*

Arising from the 26 January 2024 Order, and like all measures therein reaffirmed by the Court in its Orders on 28 March and 24 May, Israel must prevent the destruction of and ensure the preservation of evidence relating to alleged acts within the scope of Article II of the Genocide Convention as well as acts under Article III, including conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit genocide, and complicity in genocide. Pursuant to the 24 May 2024 Order, Israel is also required to ensure unimpeded access to Gaza for commissions of inquiry, fact-finding missions, and other investigative bodies mandated by competent United Nations organs to investigate allegations of genocide.

### *IV. Obligation to Report on Compliance*

Finally, in all three PMOs, the Court ordered Israel to submit a report within one month of each respective Order, detailing all measures taken to ensure compliance with the obligations set out therein.

Therefore, while the Court has never explicitly called for a ceasefire, the cumulative effect of its three PMOs resulting from the Court reaffirming prior measures in each subsequent Order implicitly require a full cessation of Israel's military onslaught and genocidal campaign, and the rapid entry of all forms of humanitarian aid, including "dual-use" items which are essential for reconstruction efforts but which Israel has categorically prevented from entering the Gaza Strip for 17 years.

## Impact of the Orders on obligations of Third States & Corporations

There are serious consequential legal effects from the Court's three separate Orders indicating provisional measures. Under customary international law, States and international organisations are responsible for actions or omissions which constitute a violation of their legal obligations.<sup>211</sup> According to Article 16 of the International Law Commission's ('ILC') Articles on Responsibility of States for Internationally Wrongful Acts, a State that aids or assists another State in the commission of an internationally wrongful act is internationally responsible for doing so if it is carried out with the knowledge of the circumstances of the internationally wrongful act and that the act would be internationally wrongful if committed by them. This applies to all forms of support that make a significant contribution to the unlawful acts, such as arms transports and technical, logistical and financial support.<sup>212</sup> Furthermore, a State may be responsible under international law for failing to exercise due diligence by not adequately regulating companies and institutions operating in its jurisdiction that are involved in gross human rights violations, or more specifically, Israel's genocide against Palestinians in Gaza.<sup>213</sup>

While knowledge of the circumstances of the internationally wrongful act is not required in relation to a serious breach of international law,<sup>214</sup> the Court's Order of 26 January – as well as the subsequent two Orders on 28 March and 24 May – eliminates any possibility for States to argue that they are unaware of Israel's manifestly unlawful conduct in Gaza, and its historic yet ongoing crimes against the Palestinian people. In addition, due to the prohibition on genocide constituting a peremptory norm from which no derogation is allowed, States are under customary, *erga omnes* obligations not to aid and assist the commission of genocidal acts, including in its preparation or attempt. This obligation is separate to and distinct from the obligations of States Parties to the Genocide Convention.

211 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 2; ILC, Draft Articles on the Responsibility of International Organizations (2011) Article 3; see also UNGA, 'Res 56/83' (12 December 2001) UN Doc A/RES/56/83, para 3; UNGA, 'Res 59/35' (2 December 2004) UN Doc A/RES/59/35, para 1; UNGA, 'Res 66/100' (9 December 2011) UN Doc A/RES/66/100, para 3.

212 Dr Irene Pietropaoli, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza* (Al-Haq Europe, 5 June 2024) 12-13 <[https://alhaqueurope.org/wp-content/uploads/2024/07/June2024\\_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf](https://alhaqueurope.org/wp-content/uploads/2024/07/June2024_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf)>.

213 *Obligations of States in Respect of Climate Change*, Advisory Opinion (ICJ, 23 July 2025), para. 428.

214 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) Article 40(2).

## State Obligations under the Genocide Convention

The ICJ's near-unanimous finding that Israel is plausibly committing genocide not only influences the court of public opinion, it also triggers the *erga omnes* obligations of States Parties to prevent and punish genocidal acts against Palestinians in Gaza, enshrined in Article I, and to not be complicit in genocide, as stipulated by Article III (e) of the Genocide Convention. This is hugely important, as after South Africa initiated proceedings, world leaders such as former United Kingdom Prime Minister Rishi Sunak and former United States Secretary of State Antony Blinken described the proceedings as without merit, "completely unjustified and wrong", and even "baseless".<sup>215</sup> The Court's determination and decision to indicate provisional measures on three separate occasions has technically stripped States of this claim. Instead, governments have been made aware that providing Israel with any form of diplomatic, political, logistical, technical or financial support, intelligence, or other equipment, in particular weapons and other forms of military "aid", renders them complicit in a plausible genocide and in breach of their duty to prevent and punish genocidal acts.<sup>216</sup>

### *Duty to Prevent and Punish*

Article I of the Genocide Convention affirms that genocide is a crime under international law that can be committed in peace or war time and for which States Party have a duty to prevent and to punish.

The obligation to prevent covers the acts referred to in Article II and III of the Genocide Convention. In 2020, the Court confirmed, in *The Gambia v. Myanmar*, the extraterritorial applicability of these obligations and that States Parties to the Genocide Convention have:

[A] common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.<sup>217</sup>

215 Independent, 'Israel braces for interim ruling on Gaza genocide allegation from UN's top court' (25 January 2024) <<https://www.independent.co.uk/news/world/middle-east/israel-gaza-un-genocide-south-africa-b2485017.html>>; Haaretz, 'Blinken: Genocide Charge Against Israel Is 'Meritless'; Palestinians Must Be Allowed Return to North Gaza' (9 January 2024) <<https://www.haaretz.com/us-news/2024-01-09/ty-article/.premium/blinken-genocide-charge-against-israel-meritless-palestinians-must-be-allowed-return/0000018c-ef8f-da6b-abdd-ffc48d600000>>.

216 See Brian L. Cox, 'Evaluating Security Assistance to Israel Following ICJ Provisional Measures Order' (EJIL:Talk!, 7 March 2024) <<https://www.ejiltalk.org/evaluating-security-assistance-to-israel-following-icj-provisional-measures-order/>>.

217 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Order on the request for the indication of provisional measures (ICJ, 23 January 2020) <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-03-en.pdf>> para. 41.

In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ clarified that:

[A] State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.<sup>218</sup>

Certainty that genocide was about to be perpetrated is not required for a State to incur responsibility for failing in its duty to prevent genocide.

The duty to prevent the commission of genocide requires States to “employ all means reasonably available to them, so as to prevent genocide so far as possible”.<sup>219</sup> This especially applies where States have “the capacity to influence effectively the action of persons likely to commit, or already committing, genocide”.<sup>220</sup> Moreover, “the responsibility is to act to prevent genocide, regardless of whether these actions are likely to succeed or not” – meaning States may not rely on the assumption that their actions would not have been sufficient to prevent genocide. In fact, the Court has explicitly confirmed that it is irrelevant whether Third States claim, or even prove:

[T]hat even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.<sup>221</sup>

218 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 431.

219 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 430.

220 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 431.

221 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 430.

Despite the duty to prevent being “one of conduct and not one of result”, a State’s capacity to influence effectively the action of persons likely to commit, or already committing, genocide is relevant to a determination as to whether a State has duly discharged its *erga omnes* duty to prevent. This is because of the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance.<sup>222</sup> States are required to carry out regular and ongoing assessments of the situation in Gaza based on the information available. The evaluation requirement under the Genocide Convention therefore factors into any determination regarding the duty of States “to employ all means reasonably available to them” to prevent genocide. In this regard, capacity to influence the actions of persons or governments largely stems from strong political ties, extensive trade agreements, geographical distance, and of course the level of financial and military aid provided.<sup>223</sup> Therefore, liability for breaching the non-derogable duty to prevent hinges on whether the State manifestly failed to take “all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”.<sup>224</sup> If so, then it incurs responsibility under international law. This binding precedent applies squarely to Israel’s acts in Gaza.

It is important to stress, however, that halting weapons transfers and other forms of support is not sufficient to free a State from its *erga omnes* obligations under the Genocide Convention. States must also punish genocide.<sup>225</sup> In order to not be in violation of this non-derogable duty, States must undertake, on the basis of universal jurisdiction, to arrest and prosecute nationals or persons present in their territory or within their jurisdiction who are suspected to have committed genocidal acts. In the present case, this extends to Israeli officials, members of the IOF operating in Gaza, and those that have incited genocide against the Palestinian people. States Parties to the Rome Statute must commit to fully cooperate with the Office of the Prosecutor of the ICC, in line with their international and domestic legal obligations. States generally ought to provide significant voluntary funding to the ICC in support of its investigations, including into the Situation in the State of Palestine. Additionally, States must impose punitive sanctions geared towards debilitating Israel’s brutal war machine and ending its genocidal campaign.

222 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 430.

223 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 430.

224 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 430.

225 Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Genocide Convention), Article I.

### *Obligation to not be Complicit*

As a result of the Court's PMOs, States have effectively been put on notice that any relations with Israel constitutes assisting a plausible genocide.<sup>226</sup> Complicity, as defined by the Court in *Bosnia and Herzegovina v. Serbia and Montenegro*, "includes the provision of means to enable or facilitate the commission of the crime".<sup>227</sup> In other words, there must be an enabling or facilitating link between the act of assistance and the commission of a wrongful act.<sup>228</sup> Furthermore, the assistance must be provided with "full knowledge of the facts" and awareness of the perpetrator's specific intent to destroy a protected group.<sup>229</sup> The assisting State does not need to share this specific intent to be complicit, rather, a State is responsible for complicity if:

[I]ts organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts, or to those who were on the point of committing them, enabled or facilitated the commission of the acts.<sup>230</sup>

As such, the obligation to refrain from being complicit through aid or assistance begins the moment the State becomes aware of the existence of a serious risk that genocide may be committed.

Israel's genocidal acts and intent were evident to many within the first month of its genocidal campaign in the Gaza Strip. States should have taken note and adjusted their relations with Israel accordingly. The Order issued by the ICJ on 26 January 2024, finding "a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible", and the two subsequent Orders on 28 March and 24 May 2024, has rendered States irrefutably aware of the risk of genocide in Gaza. As a result, States can no longer deny knowledge of the situation. They now risk legal responsibility if they assist, or even tacitly support, Israel's settler-colonial, apartheid, and genocidal regime in any way.

226 See Dr Irene Pietropaoli, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza* (Al-Haq Europe, 5 June 2024) <[https://alhaqueurope.org/wp-content/uploads/2024/07/June2024\\_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf](https://alhaqueurope.org/wp-content/uploads/2024/07/June2024_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf)>; Brian L. Cox, 'Evaluating Security Assistance to Israel Following ICJ Provisional Measures Order' (EJIL:Talk!, 7 March 2024) <<https://www.ejiltalk.org/evaluating-security-assistance-to-israel-following-icj-provisional-measures-order/>>.

227 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 419.

228 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) paras. 420 and 432.

229 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 432.

230 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007 (I.C.J. Reports 2007) para. 432.

## Individual criminal responsibility under the Rome Statute

Beyond responsibility incurred by the State, government officials may be held individually criminally responsible for aiding and abetting Israel's genocide against the Palestinian people. Article IV of the Genocide Convention states:

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

As such, the Genocide Convention provides for individual criminal responsibility for complicity in genocide.

In international criminal law, accomplice liability for aiding and abetting an international crime, a category in which genocide is at the apex, requires intentional participation in the crime. The International Criminal Tribunal for the Former Yugoslavia ('ICTY') articulated this concept in *Tadić*:

First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.<sup>231</sup>

The Rome Statute, in Article 25(3)(c), enshrines individual criminal responsibility for persons who "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission". Just like States, government, military and corporate officials (including from financial institutions) may now be considered as being abundantly clear on the criminal, genocidal nature of Israel's acts and policies

As a final point, it is important to stress that responsibility extends beyond the provision of arms and other forms of military assistance and includes diplomatic and political support for Israel. The United States is undeniably Israel's biggest

231 *Prosecutor v. Tadić*, Opinion and Judgment (7 May 1997) IT-94-I-T, para.



supporter and political ally. This is clearly evinced through its continued obstruction of international efforts to bring an end to the Israel's onslaught on the Gaza Strip – the United States has, as of 10 September 2025, vetoed five separate UN Security Council resolutions calling for humanitarian access, a ceasefire, and the release of captives.<sup>232</sup> The United States has also played a key role in disseminating and upholding a narrative of Israel as the victim by continuing to endorse its unlawful claim of self-defence. The Trump administration has even gone as far to issue an Executive Order imposing sanctions against the ICC, its staff, and anyone that assists the institution in proceedings against the United States or its allies.<sup>233</sup> Leading Palestinian civil society organisations Al-Haq, Al-Mezan, and Palestinian Centre for Human Rights,<sup>234</sup> along with UN Special Rapporteur Francesca Albanese,<sup>235</sup> have now been unlawfully targeted with draconian Executive Order 14203 in a clear attack on human rights defenders working to end Israel's genocide and unlawful settler-colonial apartheid regime. The United States has also labelled any attempts at accountability before both the ICJ and ICC as “meritless”<sup>236</sup> and “outrageous”.<sup>237</sup> This dangerous rhetoric has been emulated by an array of Western, global north States such as the United Kingdom, Germany, Italy, Canada and Denmark in countless statements. These forms of political support – all motivated by shared geopolitical, capitalist interests – may incur both state responsibility for either failure to prevent or complicity in genocide<sup>238</sup> and individual criminal responsibility.<sup>239</sup>

232 UN News, 'Israel-Gaza crisis: US vetoes Security Council resolution' (18 October 2023) <<https://news.un.org/en/story/2023/10/1142507>>; UN Palestine, 'US vetoes resolution on Gaza which called for 'immediate humanitarian ceasefire' (8 December 2023) <<https://www.un.org/unispal/document/us-vetoes-resolution-on-gaza-which-called-for-immediate-humanitarian-ceasefire-dec8-2023/>>; UN News, 'US vetoes Algerian resolution demanding immediate ceasefire in Gaza' (20 February 2024) <<https://news.un.org/en/story/2024/02/1146697>>; UN News, 'United States vetoes Gaza ceasefire resolution at Security Council' (20 November 2024) <<https://news.un.org/en/story/2024/11/1157216>>; UN News, 'US vetoes Security Council resolution demanding permanent ceasefire in Gaza' (4 June 2025) <<https://news.un.org/en/story/2025/06/1164056>>.

233 Federal Register, 'Imposing Sanctions on the International Criminal Court' (6 February 2025) <<https://www.federalregister.gov/documents/2025/02/12/2025-02612/imposing-sanctions-on-the-international-criminal-court>>.

234 U.S. Department of State, 'Sanctioning Foreign NGOs Directly Engaged in ICC's Illegitimate Targeting of Israel' (4 September 2025) <<https://www.state.gov/releases/office-of-the-spokesperson/2025/09/sanctioning-foreign-ngos-directly-engaged-in-iccs-illegitimate-targeting-of-israel/>>.

235 U.S. Department of State, 'Sanctioning Lawfare that Targets U.S. and Israeli Persons' (9 July 2025) <<https://www.state.gov/releases/office-of-the-spokesperson/2025/07/sanctioning-lawfare-that-targets-u-s-and-israeli-persons/>>.

236 Bloomberg Television, 'Genocide Charges Against Israel are Meritless: Blinken' (Youtube, 9 January 2024) <[https://www.youtube.com/watch?v=uGjebZk3Hwk&ab\\_channel=BloombergTelevision](https://www.youtube.com/watch?v=uGjebZk3Hwk&ab_channel=BloombergTelevision)>.

237 The Guardian, 'ICC issues arrest warrant for Benjamin Netanyahu for alleged Gaza war crimes' (22 November 2024) <<https://www.theguardian.com/world/2024/nov/21/icc-issues-arrest-warrant-for-benjamin-netanyahu-israel>>.

238 Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Genocide Convention), Article I and Article III (e), respectively.

239 Rome Statute, Article 25(3)(c).

## Corporate complicity in genocide

In the period 2019-2023, Israel was the world's 15<sup>th</sup> largest importer of major arms.<sup>240</sup> As revealed by UN Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967, Francesca Albanese:

In the past 21 months, while Israel's genocide has devastated Palestinian lives and landscapes, the Tel Aviv stock exchange soared by 213 percent (USD), amassing \$225.7 billion in market gains – including \$67.8 billion in the [June 2025] alone. For some, genocide is profitable.<sup>241</sup>

Corporations continue to exploit and profit from structural inequalities “rooted in colonial dispossession”,<sup>242</sup> and for decades have been deeply entwined in Israel's unlawful occupation, apartheid regime, and ongoing Nakba. The same now applies in regard to Israel's genocidal campaign in Gaza. Weapons manufacturers, technological corporations, construction and energy firms and financial institutions are directly providing Israel with the means and resources to continue its genocide against the Palestinian people.<sup>243</sup>

Based on the Court's rulings in *South Africa v. Israel* and its Advisory Opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, as well as related developments at the ICC in the context of the Situation in the State of Palestine, corporations and their managers, directors, and other high-ranking members may be held directly liable for the commission of acts of genocide, as well as war crimes and crimes against humanity. This is reiterated in UNSR Albanese's recent report ‘From economy of occupation to economy of genocide’, in which the UN Special Rapporteur states:

These decisions place on corporate entities a *prima facie* responsibility to not engage and/or to withdraw totally and unconditionally from any associated dealings, and to ensure that any engagement with Palestinians enables their self-determination.<sup>244</sup>

240 Stockholm International Peace Research Institute, ‘How top arms exporters have responded to the war in Gaza’ (3 October 2024) <<https://www.sipri.org/commentary/topical-background/2024/how-top-arms-exporters-have-responded-war-gaza>>.

241 UN OHCHR, ‘Forever-Occupation, genocide, and profit: Special Rapporteur's report exposes corporate forces behind destruction of Palestine’ (3 July 2025) <<https://www.ohchr.org/en/press-releases/2025/07/forever-occupation-genocide-and-profit-special-rapporteurs-report-exposes>>.

242 UN Human Rights Council, *From economy of occupation to economy of genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese* (30 June 2025) A/HRC/59/23, para. 13.

243 See UN Human Rights Council, *From economy of occupation to economy of genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese* (30 June 2025) A/HRC/59/23.

244 UN Human Rights Council, *From economy of occupation to economy of genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese* (30 June 2025) A/HRC/59/23, para. 19.

Article VI of the Genocide Convention specifies that ‘persons’ may be held liable for genocidal acts. In this context, ‘persons’ includes individual businessmen or corporate managers as natural persons and may include corporations as legal persons.<sup>245</sup> While the ICC does not have jurisdiction over legal entities, company personnel in States Parties to the Rome Statute may fall under the Court’s jurisdiction – which covers crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”. Pursuant to Article 25(3)(c) of the Rome Statute, the Court can prosecute those who facilitate the commission of crimes, including through the provision of means – on the condition that the case is of sufficient gravity to warrant the Court exercising jurisdiction.<sup>246</sup>

Many States have also now incorporated relevant provisions of international criminal law into their domestic criminal laws, allowing for the prosecution of legal and natural persons in national jurisdictions.<sup>247</sup> This means that, beyond the potential for the ICC to prosecute individual corporate actors corporations or individual business actors that knowingly assist Israel violating customary international law principles, including the *jus cogens* prohibition of genocide, may be complicit in such a violation. Corporate accomplices are not required to intend the commission of the principal offence. Rather, a corporation or corporate leader is complicit in the commission of genocide where they decide to participate through assistance in the commission of the acts by the State of Israel and that assistance contributes to the commission of genocide. The same can be said for banks and other financial institutions that finance companies selling equipment to the Israeli military and fund Israel’s settler-colonial, apartheid regime, thereby allowing it to advance its genocidal campaign and ongoing Nakba against the Palestinian people.<sup>248</sup>

245 Dr Irene Pietropaoli, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza* (Al-Haq Europe, 5 June 2024) 14 <[https://alhaqueurope.org/wp-content/uploads/2024/07/June2024\\_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf](https://alhaqueurope.org/wp-content/uploads/2024/07/June2024_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf)>.

246 Rome Statute, Article 17(1)(d).

247 Dr Irene Pietropaoli, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza* (Al-Haq Europe, 5 June 2024) 14 <[https://alhaqueurope.org/wp-content/uploads/2024/07/June2024\\_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf](https://alhaqueurope.org/wp-content/uploads/2024/07/June2024_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf)>.

248 See Dr Irene Pietropaoli, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza* (Al-Haq Europe, 5 June 2024) <[https://alhaqueurope.org/wp-content/uploads/2024/07/June2024\\_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf](https://alhaqueurope.org/wp-content/uploads/2024/07/June2024_ObligationsofThirdStatesandCorporationstoPreventandPunishGenocideinGaza3.pdf)>.

## The relevance of the Orders to the current situation in Gaza

Just two days after the Court issued its Order on 24 May 2024, which was motivated by and centred on the catastrophic humanitarian situation in Rafah and Israel's planned military offensive, Israel deliberately attacked displaced Palestinians sheltering in tents in an Israeli-designated "safe zone" in Tal Al-Sultan, western Rafah. Dozens of Palestinians were injured and at least 23 were killed.<sup>249</sup> By this point, over 36,000 Palestinians had been killed since Israel began its genocidal campaign in October 2023. Over a year later, in September 2025, this figure had almost doubled.<sup>250</sup>

Massacres such as the one in Tal Al-Sultan take place on a near-daily basis. Rafah, once the last hope for a refuge for Palestinians throughout the Gaza Strip, has been reduced to rubble. Among the ruins of the city, Israel announced plans to enact the next phase of its ongoing genocide: the forcible transfer and unlawful confinement of Gaza's entire population in a so-called "humanitarian city" amidst the debris and flattened buildings.<sup>251</sup>

Humanitarian aid, a core feature of the three PMOs, has been weaponised to such an extent that Gaza is now in the depths of a man-made famine. Impartial UN agencies, namely UNRWA, and UN-led humanitarian assistance architecture that has operated in Gaza for more than seven decades, along with established humanitarian organisations, have been replaced by the Gaza Humanitarian Foundation ("GHF"). The GHF works in collaboration with the Israeli government and United States private military and security companies. As 15 human rights and legal organisations outlined in an Open Letter: "This new model of privatized, militarized aid distribution constitutes a radical and dangerous shift away from established international humanitarian relief

249 Al-Haq, 'Open Letter to the UN Security Council: Ceasefire Urgently Needed Amid Israel's Genocidal Massacre in Rafah, Defying ICJ Provisional Measures Orders' (28 May 2024) <<https://www.alhaq.org/advocacy/23184.html>>.

250 UN OCHA, 'Reported impact snapshot | Gaza Strip' (10 September 2025) <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-10-september-2025>>.

251 Middle East Eye, 'Concentration camp': Israel's planned new city in Rafah, explained' (10 July 2025) <<https://www.middleeasteye.net/explainers/israel-planned-new-city-rafah-concentration-camp-explained>>; Haaretz, 'Defense Minister Says Israel Plans to Concentrate All Gaza's Population in 'Humanitarian' Zone Built on Rafah's Ruins' (7 July 2025) <<https://www.haaretz.com/israel-news/2025-07-07/ty-article/.premium/defense-minister-israel-to-concentrate-all-gaza-population-in-rafah-humanitarian-zone/00000197-e56a-d1ad-ab97-e5ef764e0000?ts=1751981245644&ts=1751981256295>>. See also Al-Haq Europe, 'Beyond Humanitarian Optics, the EU Must Terminate its Association Agreement with Israel' (11 July 2025) <<https://alhaqueurope.org/beyond-humanitarian-optics-the-eu-must-terminate-its-association-agreement-with-israel/>>.

operations”.<sup>252</sup> Under the scheme, starving Palestinians – all exhausted from thirst, hunger, and 22 months of genocidal warfare, and many injured and ill – are forced to either relocate or walk long distances through militarised zones to one of four “distribution hubs”. UNRWA and other agencies previously delivered assistance through approximately 400 points across Gaza.<sup>253</sup> Three of the four GHF sites are in the south of Gaza, close to the border with Egypt.<sup>254</sup>

The strategic location of GHF sites serve a clear function, which is not the distribution of aid. In reality, food aid is being weaponised as both a genocidal tool and a means of altering the demographics of Gaza through the forced transfer of its population to the south – where they will either be killed or slowly die from Israel’s imposition of conditions calculated to destroy life. Israel’s intent to instrumentalise life-saving aid for political gain and to further its settler-colonial, genocidal plan is further confirmed by the fact that often all “distribution hubs” simply remain closed.

GHF’s militarized model, coupled with its close collaboration with Israeli authorities, undermines the core humanitarian principles of humanity, neutrality, impartiality, and independence. Its for-profit model lacks transparency, with GHF’s operational plans, funding streams, and decision-making structures remaining undisclosed, with little or no independent humanitarian oversight.<sup>255</sup> Yet, these highly problematic aspects are overshadowed by the ulterior function of GHF sites: the daily massacres of Palestinians risking their lives for aid. Since the end of May 2025, when GHF sites were opened, up to 10 September 2025, over 2,456 Palestinians have been directly fired upon and killed while trying access food supplies. A further 17,861 Palestinians have been injured.<sup>256</sup> Incidents of children disappearing after attempting to source food at GHF’s militarised distribution points have also been reported.<sup>257</sup> Palestinians are acutely aware of the risks of trying to source food for their families,

252 Open Letter, ‘Human Rights, Legal Organizations Warn Privatized “Humanitarian” Operators in Gaza of the Risk of Legal Liability for Complicity in Serious Violations of International Law’ (Al-Haq et al, 23 June 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf](https://www.alhaq.org/cached_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf)>.

253 Open Letter, ‘Human Rights, Legal Organizations Warn Privatized “Humanitarian” Operators in Gaza of the Risk of Legal Liability for Complicity in Serious Violations of International Law’ (Al-Haq et al, 23 June 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf](https://www.alhaq.org/cached_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf)>.

254 See IPC, ‘Worst-case scenario of Famine unfolding in the Gaza Strip’ (29 July 2025) <[https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_GazaStrip\\_Alert\\_July2025.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_GazaStrip_Alert_July2025.pdf)>.

255 Open Letter, ‘Human Rights, Legal Organizations Warn Privatized “Humanitarian” Operators in Gaza of the Risk of Legal Liability for Complicity in Serious Violations of International Law’ (Al-Haq et al, 23 June 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf](https://www.alhaq.org/cached_uploads/download/2025/06/24/ghf-letter-sign-on-ww-1750786671.pdf)>.

256 UN OCHA, ‘Humanitarian Situation Update #321 | Gaza Strip’ (10 September 2025) <<https://www.ochaopt.org/content/humanitarian-situation-update-321-gaza-strip>>.

257 UN OCHA, ‘Humanitarian Situation Update #307 | Gaza Strip’ (23 July 2025) <<https://www.ochaopt.org/content/humanitarian-situation-update-307-gaza-strip>>.

but for many the possibility of a meal – and the increased chance of survival this brings – is worth dying for.

Israel's fragmentation of Gaza under an apartheid regime, enduring blockade, carefully manufactured state of total deprivation, along with the lasting effects of Israel's total siege on the Gaza Strip between 2 March and 18 May 2025, have pushed the Palestinian territory – and its population – close to a point of no return. In the first two weeks of July 2025, 96 per cent of surveyed households experienced moderate to high levels of water insecurity.<sup>258</sup> On 29 July 2025, an IPC Alert stated that the “worst-case scenario of Famine is currently playing out in the Gaza Strip. Conflict and displacement have intensified, and access to food and other essential items and services has plummeted to unprecedented levels”.<sup>259</sup> One million women and girls in Gaza are facing mass starvation and violence. UN Under-Secretary-General and UN Women Executive Director Sima Bahous has warned that every day, they are faced with the impossible choice of “starving to death at their shelters, or venturing out in search of food and water at the extreme risk of being killed”.<sup>260</sup> By the first week of September 2025, amid a vicious military offensive in Gaza City that has levelled already damaged buildings, with high-rise towers – surrounded by IDP tents - being systematically targeted, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Tom Fletcher, warned that the window to prevent famine from gripping Deir al Balah and Khan Younis is “closing fast”.<sup>261</sup>

Food diversity has collapsed to its lowest level since October 2023, causing both acute and long-term consequences. Food consumption – the first core famine indicator - has plummeted in Gaza to record lows. Data shows that 39 per cent are now going days without eating and nearly a quarter of Gaza's population are enduring famine-like conditions, while the remaining population is facing emergency levels of hunger. Acute malnutrition – the second core famine indicator – is rising exponentially. In Gaza City, malnutrition levels among children under five quadrupled

258 UN OCHA, 'Humanitarian Situation Update #309 | Gaza Strip' (30 July 2025) <<https://www.ochaopt.org/content/humanitarian-situation-update-309-gaza-strip>>.

259 IPC, 'Worst-case scenario of Famine unfolding in the Gaza Strip' (29 July 2025) <[https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_GazaStrip\\_Alert\\_July2025.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_GazaStrip_Alert_July2025.pdf)>.

260 UN Women, 'UN Women statement on the escalating humanitarian catastrophe in Gaza' (28 July 2025) <<https://www.unwomen.org/en/news-stories/statement/2025/07/un-women-statement-on-the-escalating-humanitarian-catastrophe-in-gaza#:~:text=UN%20Women%20joins%20the%20call,ceasefire%20leading%20to%20sustainable%20peace.>>>.

261 UN, 'Statement on Gaza by Tom Fletcher, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator' (7 September 2025) <<https://www.un.org/sg/en/content/sg/note-correspondents/2025-09-07/statement-gaza-tom-fletcher-under-secretary-general-for-humanitarian-affairs-and-emergency-relief-coordinator>>.

in two months, reaching 16.5 per cent by the end of July 2025.<sup>262</sup> An estimated 132,000 cases of children aged 6 to 59 months are projected to suffer from acute malnutrition through June 2026, including 41,000 severe cases. An additional 55,500 pregnant and breastfeeding women and 25,000 infants require urgent nutrition support.<sup>263</sup> This is in addition to the over 20,000 children already admitted for treatment for acute malnutrition between April and mid-July, and with fewer than 15 percent of essential nutrition treatment services currently functional,<sup>264</sup> the risk of malnutrition-related deaths among infants and young children is higher than ever before and any hospitals left standing have reported a rapid increase in hunger-related deaths of children under five years of age.<sup>265</sup> Women are enduring pregnancies without food and water, and high-risk deliveries without water or medical care. Without basic supplies, girls and women alike have been stripped of their dignity, health and safety.<sup>266</sup>

All of this is taking place against a background of constant displacement. Implemented in October 2024, the 'General's Plan' involved a siege on northern Gaza and the forcible displacement of all Palestinians there to south of Wadi Gaza, in addition to heavy bombardment in order to pressure the population to relocate and, in effect, bringing on their destruction.<sup>267</sup> On 21 October 2024, when the blockade of North Gaza was entering its third week, hundreds of right-wing Israelis congregated in a military zone near Gaza's perimeter to celebrate the Jewish festival of Sukkot by calling to erect settlements inside the besieged Gaza. Netanyahu's Likud party and Ben-Gvir's Otzma Yehudit party were present.<sup>268</sup> Israel's intention to eliminate the Palestinian population in Gaza and to annex the territory through permanent occupation and resettlement is no secret. It has been communicated to the Israeli people and international community alike since the first month of the genocide in Gaza.<sup>269</sup>

262 WFP, 'UN agencies warn key food and nutrition indicators exceed famine thresholds in Gaza' (29 July 2025) <<https://www.wfp.org/news/un-agencies-warn-key-food-and-nutrition-indicators-exceed-famine-thresholds-gaza>>.

263 IPC, 'Gaza Strip: Famine confirmed in Gaza Governorate, projected to expand – 1 July – 30 September 2025' (22 August 2025) <[https://www.un.org/unisipal/wp-content/uploads/2025/08/IPC\\_Gaza\\_Strip\\_Acute\\_Food\\_Insecurity\\_Malnutrition\\_July\\_Sept2025\\_Special\\_Snapshot.pdf](https://www.un.org/unisipal/wp-content/uploads/2025/08/IPC_Gaza_Strip_Acute_Food_Insecurity_Malnutrition_July_Sept2025_Special_Snapshot.pdf)>.

264 WFP, 'UN agencies warn key food and nutrition indicators exceed famine thresholds in Gaza' (29 July 2025) <<https://www.wfp.org/news/un-agencies-warn-key-food-and-nutrition-indicators-exceed-famine-thresholds-gaza>>.

265 IPC, 'Worst-case scenario of Famine unfolding in the Gaza Strip' (29 July 2025) <[https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_GazaStrip\\_Alert\\_July2025.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_GazaStrip_Alert_July2025.pdf)>.

266 UN Women, 'UN Women statement on the escalating humanitarian catastrophe in Gaza' (28 July 2025) <<https://www.unwomen.org/en/news-stories/statement/2025/07/un-women-statement-on-the-escalating-humanitarian-catastrophe-in-gaza#:~:text=UN%20Women%20joins%20the%20call,ceasefire%20leading%20to%20sustainable%20peace.>>>.

267 Samer Jaber, 'The Israeli 'General's Plan' for northern Gaza is unlikely to succeed' (Al Jazeera, 16 October 2024) <<https://www.aljazeera.com/opinions/2024/10/16/the-israeli-generals-plan-for-northern-gaza-is-unlikely-to-succeed>>.

268 Oren Ziv, 'Copy-paste the West Bank to Gaza': Hundreds join Gaza resettlement event' (+972 Magazine, 22 October 2024) <<https://www.972mag.com/gaza-israeli-resettlement-event-sukkot/>>.

269 See Al-Haq, 'Nakba at 77: Israel's Territorial Control and Demographic Manipulation Amidst Gaza Genocide - Towards Annexation and Resettlement' (15 May 2025) <<https://www.alhaq.org/advocacy/26404.html>>.



In the first half of 2025, Israel continued to exploit the international community's failure to respond to its unprecedented genocidal violence and mass forcible displacement of Palestinians, leveraging its impunity to further advance its Zionist settler-colonial agenda in Gaza. On 21 March, Israeli Defence Minister Israel Katz announced that the army will permanently seize and annex territory in Gaza if captives are not released.<sup>270</sup> Within two days of this announcement, Katz was forming a bureau for "voluntary emigration",<sup>271</sup> intended to facilitate the transfer of Gaza's population to other countries – an act which amounts to deportation, which constitutes a grave breach of the Fourth Geneva Convention of 1949 and a war crime under the Rome Statute of the International Criminal Court, and when carried out with an intent to destroy, in conditions unfit for survival of the group, an act of genocide.

These inflammatory statements served as a precursor to one of the Israeli government's most explicit declarations of its colonial ambitions in Gaza to date. On 5 May, the day after IOF Chief of Staff Lt. Gen. Eyal Zamir announced that the Israeli military will call up tens of thousands of reservists to expand their assault on the besieged Gaza Strip,<sup>272</sup> Israel's Security Cabinet unanimously approved a plan to "conquer Gaza and hold the territory under its control".<sup>273</sup>

The offensive, named 'Operation Gideon's Chariots', sets out Israel's vision for the future of Gaza and harks back to events in 1948 - specifically, the mass killing and large-scale forcible expulsion of Palestinians from their homeland with no right to return, along with the near-complete destruction of Palestinian society at the hands of Zionist forces. 'Operation Gideon's Chariots' envisions Israel having full, permanent military control of Gaza subsequent to the systematic forced displacement of Palestinians and the weaponisation of life-saving humanitarian aid.<sup>274</sup> What this means in reality, and as Minister Smotrich confirmed, "Gaza will be entirely

270 Einav Halabi and Yoaz Zitun, 'Katz orders expansion of Gaza ground operations, warns Hamas will 'lose more territory' (Ynet, 21 March 2025) <<https://www.ynetnews.com/article/sycwshqjic>>; Amos Harel, 'Israel Is Preparing to Occupy Gaza, Reinstate Military Rule and Fully Control the Palestinian Population' (Haaretz, 21 March 2025) <<https://www.haaretz.com/israel-news/2025-03-21/ty-article/.premium/israel-is-preparing-to-occupy-gaza-reinstate-military-rule-and-fully-control-its-people/00000195-b99c-d862-a3b5-f9bfd5d90000>>.

271 Jonathan Lis and Yaniv Kubovich, 'Israeli Government Approves Bureau for 'Voluntary Emigration' of Palestinians From Gaza' (Haaretz, 23 March 2025) <<https://www.haaretz.com/israel-news/2025-03-23/ty-article/.premium/israeli-government-approves-bureau-for-voluntary-emigration-of-palestinians-from-gaza/00000195-c2ed-dcee-a7b7-fffd83c00000>>.

272 Reuters, 'Israel's army chief says reservists will expand Gaza operation' (4 May 2025) <<https://www.reuters.com/world/middle-east/israels-army-chief-says-reservists-will-expand-gaza-operation-2025-05-04/>>.

273 Emanuel Fabian, Lazar Berman, Nurit Yohanan, Jacob Magid, and Toi Staff, 'Israel okays 'conquering Gaza, holding the territories,' as IDF chief said to warn 'we could lose' the hostages' (The Times of Israel, 5 May 2025) <<https://www.timesofisrael.com/israel-okays-expanding-gaza-op-as-idf-chief-said-to-warn-we-could-lose-the-hostages/>>.

274 Middle East Eye, 'What is 'Gideon's Chariots', Israel's latest plan for Gaza?' (9 May 2025) <<https://www.middleeasteye.net/live-blog/live-blog-update/what-gideons-chariots-israels-latest-plan-gaza-0>>.

destroyed” with Palestinians fleeing in “great numbers”.<sup>275</sup> Strengthened by support from the United States and Third States indifference to the future of Palestinians, Smotrich propounded: “We are finally going to occupy the Gaza Strip. We will stop being afraid of the word ‘occupation’”, before adding that once Operation Gideon’s Chariots begins there will be “no retreat from the territories we have conquered, not even in exchange for hostages”.<sup>276</sup>

Palestinians are being increasingly confined to ever-shrinking areas, while Israel simultaneously fragments the Gaza Strip, and with it its society. Israel’s occupation of the Philadelphi corridor; creation of the Netzarim and Morag corridors which now divide the Gaza Strip and isolate key governorates; and gradual expansion of “security zones” or “no-go areas” has entrenched its control over Gaza’s territory as well as its population, further advancing its genocidal, annexationist goals.<sup>277</sup> Over 87 percent of Gaza’s territory is designated as military zones or areas subject to displacement orders.<sup>278</sup> About 90 percent of Palestinians in Gaza have been forcibly displaced.<sup>279</sup> So-called “evacuation orders”, which breach all relevant provisions of international humanitarian law and are consequently unlawful,<sup>280</sup> remain constant and highly disruptive to any attempts to establish some semblance of a humanitarian response. Between the resumption of hostilities on 18 March 2025 up to 22 August 2025, over 800,000 people have been newly displaced,<sup>281</sup> including more than 25,000 people between 15 and 22 July.<sup>282</sup> Expansion of the ground and air assault to areas in Deir al-Balah on 21 July 2025 lead to further destruction of essential civilian infrastructure and large-scale forced displacement.<sup>283</sup> September 2025 has seen a displacement order issued for the entirety of Gaza City, the heart of the Gaza Strip, subjecting one million Palestinians to mass forcible transfer.<sup>284</sup>

275 Jeremy Sharon and Toi Staff, ‘Smotrich says Gaza to be ‘totally destroyed,’ population ‘concentrated’ in small area’ (The Times of Israel, 6 May 2025) <<https://www.timesofisrael.com/smotrich-says-gaza-to-be-totally-destroyed-population-concentrated-in-small-area/>>.

276 Sam Sokol, ‘Smotrich: Israelis should embrace the word ‘occupation,’ IDF won’t withdraw from Gaza’ (The Times of Israel, 5 May 2025) <[https://www.timesofisrael.com/liveblog\\_entry/smotrich-idf-wont-withdraw-from-gaza-even-for-a-hostage-deal-israelis-should-embrace-the-word-occupation/](https://www.timesofisrael.com/liveblog_entry/smotrich-idf-wont-withdraw-from-gaza-even-for-a-hostage-deal-israelis-should-embrace-the-word-occupation/)>.

277 See Al-Haq, ‘Nakba at 77: Israel’s Territorial Control and Demographic Manipulation Amidst Gaza Genocide - Towards Annexation and Resettlement’ (15 May 2025) <<https://www.alhaq.org/advocacy/26404.html>>.

278 UN OCHA, ‘Reported impact snapshot | Gaza Strip’ (30 July 2025) <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-30-july-2025>>.

279 UNRWA, ‘UNRWA Situation Report #187 on the Humanitarian Crisis in the Gaza Strip and the occupied West Bank, including East Jerusalem’ (5 September 2025) <<https://www.unrwa.org/resources/reports/unrwa-situation-report-187-situation-gaza-strip-and-west-bank-including-east-jerusalem>>.

280 See Al-Haq, *How to Hide a Genocide: The Role of Evacuation Orders and Safe Zones in Israel’s Genocidal Campaign in Gaza* (1 January 2025) <[https://www.alhaq.org/cached\\_uploads/download/2025/01/02/evacuation-orders-two-pages-view-1735842246.pdf](https://www.alhaq.org/cached_uploads/download/2025/01/02/evacuation-orders-two-pages-view-1735842246.pdf)>.

281 IPC, ‘Gaza Strip: Famine confirmed in Gaza Governorate, projected to expand – 1 July – 30 September 2025’ (22 August 2025) <[https://www.un.org/unispal/wp-content/uploads/2025/08/IPC\\_Gaza\\_Strip\\_Acute\\_Food\\_Insecurity\\_Malnutrition\\_July\\_Sept2025\\_Special\\_Snapshot.pdf](https://www.un.org/unispal/wp-content/uploads/2025/08/IPC_Gaza_Strip_Acute_Food_Insecurity_Malnutrition_July_Sept2025_Special_Snapshot.pdf)>.

282 IPC, ‘Worst-case scenario of Famine unfolding in the Gaza Strip’ (29 July 2025) <[https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_GazaStrip\\_Alert\\_July2025.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_GazaStrip_Alert_July2025.pdf)>.

283 IPC, ‘Worst-case scenario of Famine unfolding in the Gaza Strip’ (29 July 2025) <[https://www.ipcinfo.org/fileadmin/user\\_upload/ipcinfo/docs/IPC\\_GazaStrip\\_Alert\\_July2025.pdf](https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_GazaStrip_Alert_July2025.pdf)>.

284 UN OCHA, ‘Humanitarian Situation Update #321 | Gaza Strip’ (10 September 2025) <<https://www.ochaopt.org/content/humanitarian-situation-update-321-gaza-strip>>.



Jabalia, 04.11.25 Photographer Yousef Zaanoun

These developments represent yet another chapter in Israel's longstanding project of settler-colonial erasure, racial domination and control, aimed at eliminating Palestinian presence, sovereignty and long-held hopes for self-determination. As an imperialist colonial power motivated by concepts of racial supremacy that attempt to justify the appropriation of Palestinian land, this project continues to drive the expansion of illegal settlements and the consolidation of Jewish-Israeli control. Israel's statements of intent – not only to sustain the genocidal campaign but to secure permanent territorial control over the Gaza Strip following the destruction or displacement of its population—are not merely rhetorical; they are accompanied by concrete measures actively pursued in furtherance of this lethal objective.

## Conclusion

We are at a pivotal juncture in the history of Israel's settler-colonial apartheid regime. The differences, and to a similar extent the commonalities, between the three PMOs reflect the evolving nature and emerging features of Israel's genocide in Gaza. Throughout this report, images captured in the last six months have been included as a reminder of the necessity of ensuring an immediate ceasefire – one that is not repeatedly violated by Israel with total impunity – and provision of humanitarian assistance capable of reaching Palestinians in all parts of the Gaza Strip without delay or obstruction.

Due to the continued, rapid deterioration of the situation on the ground, with journalists reporting on Israeli mass atrocities and the lived experiences of Palestinians in Gaza being systematically targeted,<sup>285</sup> sustained international scrutiny and action has become paramount. Therefore, this report has aimed to clarify and reaffirm Israel's duties under international law and galvanize the international community to take concrete steps toward ensuring the implementation of the Court's binding directives and preventing further, irreparable harm to the Palestinian people.

By issuing three PMOs in the span of just five months, the Court first and foremost has sought to uphold Israel's binding legal obligations under the Genocide Convention, while also addressing the immediate humanitarian crisis faced by the Palestinian people in Gaza. In doing so, the Court has triggered Third States' *erga omnes* obligations to prevent and punish genocide and consequently stripped them of the ability to credibly refute their positive and negative duties with regards to Israel's Zionist, annexationist, and now genocidal, regime.

The ICJ's Orders, which are binding in nature, have also showcased the extent of Israel's non-compliance with its continuing legal obligations – as well as the efficacy of international mechanisms to enforce such compliance. The implementation of all provisional measures must be a condition before the United States, the United Kingdom, the European Union, or any other country or private entity considers further military, financial, commercial or diplomatic support for Israel. It is imperative that the international community and Third States, decisively enforce the Court's Orders and uphold the integrity of international law. This includes:

285 As of 6 November 2025, 252 journalists and media workers have been killed by the IOF. See UN OCHA, 'Reported impact snapshot | Gaza Strip (5 November 2025)' (6 November 2025) <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-5-november-2025>>.

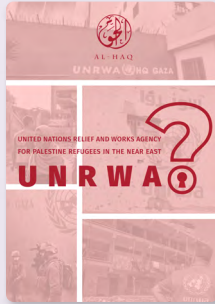
1. Imposing a full and immediate arms embargo against Israel, refusing to gather and share information or provide any logistical support to its military as it carries out its genocide against the Palestinian people, and immediately ceasing all diplomatic and trade relations;
2. Imposing comprehensive sanctions targeting all Israeli Ministers on the Security Cabinet, including *inter alia* Benjamin Netanyahu, Bezael Smotrich, Itamar Ben-Gvir, and Israel Katz along with settlers and settler organisations engaged in genocide incitement, as well as Israeli institutions and entities which aid the maintenance of Israel's settler-colonial apartheid regime and unlawful occupation;
3. Pursuing international justice and accountability for genocidal acts and related crimes committed against the Palestinian people by prosecuting suspected perpetrators in their own jurisdictions; triggering universal jurisdiction against perpetrators of genocidal acts against Palestinians; and intervening in support of South Africa at the ICJ and publicly supporting and cooperating with proceedings at the ICC;
4. Protecting the role of civil society and human rights organisations working tirelessly to uncover, document and report on Israel's genocidal campaign and ongoing Nakba against the Palestinian people.

Private entities must also ensure they do not assist or contribute to Israel's genocidal campaign in any way. All entities and individuals who have furthered or are furthering the goals of the Israeli government or military, or collaborating with the GHF, must immediately cease their operations. Failure to do so exposes these entities and their officers, representatives, and agents to further risk of criminal and civil liability for aiding and abetting or otherwise being complicit in genocidal acts, under both international law and relevant domestic legislation under the principle of universal jurisdiction.

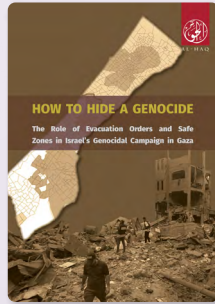
A black and white photograph of a stack of books. The top book is open, showing its pages fanning out. The text "READ ALSO ..." is printed in a bold, dark blue font across the top of the stack.

**READ ALSO ...**

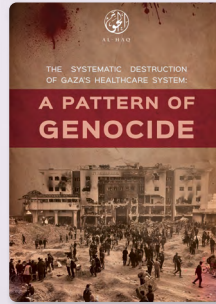




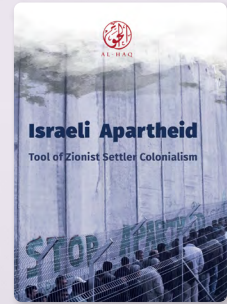
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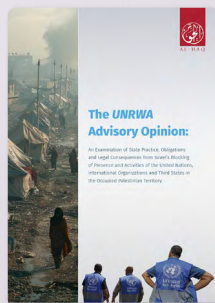
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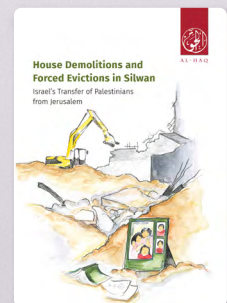
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AL - HAQ

### About Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah in the Occupied Palestinian Territory (OPT). Established in 1979 to protect and promote human rights and the rule of law in the OPT, the organisation has special consultative status with the United Nations Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, irrespective of the identity of the perpetrator, and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. Al-Haq conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. Al-Haq has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), ESCR-Net - The International Network for Economic, Social and Cultural Rights, the Palestinian Human Rights Organizations Council (PHROC), and the Palestinian NGO Network (PNGO). In 2018, Al-Haq was a co-recipient of the French Republic Human Rights Award, whereas in 2019, Al-Haq was the recipient of the Human Rights and Business Award. In 2020, Al-Haq received the Gwynne Skinner Human Rights Award presented by the International Corporate Accountability Roundtable (ICAR) for its outstanding work in the field of corporate accountability. Al-Haq was awarded the prestigious Bruno Kreisky Prize and the MESA Academic Freedom Award in 2022.

