

DECLARATION OF JUDGE AURESCU

Proper interpretation of the second provisional measure regarding the halt of the military offensive — provisional measures already indicated address the current situation — the ordered provisional measures do not affect the right to protect civilians or free hostages — developments of the “change in the situation” requirement regarding the degree of an already examined situation — missed opportunity to include a reference to resolution 2728 (2024) of the Security Council

1. By this Declaration, I would like to reiterate my support for the decision of the Court to indicate provisional measures (paragraph 57 of the Order). The situation in Gaza, especially in the Rafah Governorate, has reached the critical level of a humanitarian catastrophe.

2. At the same time, I find it necessary to mention the following issues in relation to this Order.

3. *First*, I consider that the second provisional measure indicated (“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 . . . [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”) is somehow unclear as to whether the last part of it (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”. In my view, this measure needs to be interpreted that it indicates as well the halt of the Israeli military offensive to the extent that it “may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part”. I also consider that it would have been consistent and clearer, from the perspective of the connection of this measure with the Genocide Convention — which represents the *ratione materiae* basis of the Court’s jurisdiction and, at the same time, which establishes the limits of the Court’s action in response to the present Request — for this provisional measure to use the same terminology as in the Court’s Order of 28 March 2024: instead of the “Palestinian group in Gaza”, the “Palestinians in Gaza as a protected group under the Genocide Convention”¹.

4. *Second*, the Court has already issued numerous provisional measures in its Orders of 26 January 2024 and 28 March 2024. When issuing them, the Court took into account the analyses of various competent UN bodies according to which the situation in the Gaza Strip, unless Israel changes its course of action, would deteriorate dramatically. As the Court said in the present Order, “the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024”. As predicted, the humanitarian situation is now to be characterized as disastrous (paragraph 28 of the Order). I am of the view that the previous two Court’s Orders already address in a comprehensive manner the present situation, which was foreseen at the time of the two Orders. On 26 January 2024 the Court ordered Israel to “take all measures within its power to prevent the commission of all acts within the scope of Article II of [the] Convention”². In addition to that, on 28 March 2024, the Court ordered Israel to “[e]nsure with immediate effect that its military does not commit acts which constitute a violation of any of the

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 45.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Provisional Measures, Order of 26 January 2024*, para. 86.

rights of the Palestinians in Gaza as a protected group under the [Genocide] Convention”³. These measures prohibit conducting a military offensive that may inflict on the Palestinians as a protected group under the Genocide Convention conditions of life that could bring about its physical destruction in whole or in part. On 26 January 2024, the Court also ordered Israel to “take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip”⁴, which was supplemented by the measure indicated on 28 March 2024, namely to “increase[e] the capacity and number of land crossing points and maintaining them open for as long as necessary”⁵, while the second measure indicated in March reinforces the first one just mentioned; they evidently apply to the Rafah crossing as well. Finally, on 26 January 2024 the Court ordered Israel to, *inter alia*, “take effective measures to prevent the destruction and ensure the preservation of evidence”.⁶ Naturally, this includes ensuring the unimpeded access to the Gaza Strip of any competent body to collect the evidence.

5. The Court could have used the opportunity offered by the present Request of South Africa not only to reaffirm the provisional measures already in force, but also to clarify how they apply to the current situation. As a matter of fact, South Africa asked the Court, during the public hearings, to clarify the Court’s previously indicated provisional measures: it mentioned “[t]he Court’s reluctance to date to order ‘directly and explicitly’ that Israel cease its military operations in Gaza in order to give effect to the provisional measures indicated by the Court —relying instead on necessary implication”, and that “[t]he severity of the situation involving ‘horrific human suffering’ mandates that the Court make explicit that which was implicit in its previous Orders, and that it now order Israel to cease its military operations in unequivocal, express terms”⁷. It is however positive, although, in my view, insufficient in the light of the above, that the first provisional measure indicated in the Order “[r]eaffirms the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which should be immediately and effectively implemented” (paragraph 57 of the Order).

6. *Third*, I do believe that the Court should have used the opportunity of the present Request and Order to make clear that the provisional measures indicated, especially the second one referring to the “halt [of] [Israel’s] military offensive, and [of] 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”, do not affect in any way the legitimate right of Israel 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 by Hamas and other armed groups. The reference in paragraph 56 of the Order to the grave concern of the Court over the fate of the hostages abducted during the 7 October 2023 attack is, in my view, a welcome, but insufficient statement.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Provisional Measures, Order of 26 January 2024*, para. 86.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 51.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Provisional Measures, Order of 26 January 2024*, para. 86 (emphasis added).

⁷ CR 2024/27, Verbatim Record, Public sitting held on Thursday 16 May 2024, at 3 p.m., at the Peace Palace, p. 57, para. 14 (Ní Ghrálaigh).

7. *Forth*, in paragraph 29 of this Order, just like in the Order of 28 March 2024⁸, in relation to the change in the situation within the meaning of Article 76 of the Rules of Court, the Court observed that the developments are “exceptionally grave”. The requirement for a “change in the situation” in order to revoke or modify a provisional measure in force has been enshrined in the Rules of the Court since 1936, during the times of the Permanent Court of International Justice. However, it has not been much elaborated upon and until now it remained ambiguous whether the change in the situation needs to be in type or it can also be in degree. I believe that the reference to the exceptional gravity in the recent orders demonstrates 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.

8. *Last, but not least*, in paragraph 37 of the Order of 28 March 2024, the Court took “note of resolution 2728 (2024) of the Security Council, which ‘*d]emand[ed]* an immediate ceasefire for the month of Ramadan respected by all parties leading to a lasting sustainable ceasefire””. I believe that the Court could have used the opportunity of the present Order to include in its *dispositif* a measure by which it could have asked Israel to take all necessary and effective measures to implement with immediate effect the Security Council resolution 2728 (2024), including a “lasting sustainable ceasefire”. Such a measure, beyond representing an innovation in the Court’s jurisprudence, would have had, at the same time, not only the advantage of underscoring the distribution and sharing of the role of maintaining the international peace and security between the Security Council and the International Court of Justice, but also of extending to the relevant provisions of the mentioned Security Council resolution the legal force of the provisional measures indicated by the Court —thus inaugurating new, promising cooperation avenues between the two principal organs of the United Nations.

(Signed) Bogdan AURESCU.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 22.