DISSENTING OPINION OF JUDGE *AD HOC* BARAK

1. Once again, South Africa has requested the Court to order the State of Israel to "cease its military operations in the Gaza Strip. . . and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip"[1]. Once again, South Africa's request has been rejected by the Court. Instead, the first additional measure indicated by the Court provides that

> "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:
>
> 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"[2].

This measure requires Israel to halt its military offensive in the Rafah Governorate only in so far as is necessary to comply with Israel's obligations under the Genocide Convention. In this sense, it merely reaffirms Israel's existing obligations under the Convention. Even without an order issued by the Court, a military offensive that may result in a violation of a State's obligations under the Genocide Convention would have to stop. Israel has never disputed this. Thus, the measures indicated by the Court differ decisively from those requested by South Africa. Instead of ordering a blanket suspension and a total withdrawal from the Gaza Strip, the Court's Order is expressly limited to offensive action in the Rafah Governorate. Since the measure contains an explicit link to Israel's existing obligations under the Genocide Convention ("which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part"), Israel is not prevented from carrying out its military operation in the Rafah Governorate as long as it fulfils its obligations under the Genocide Convention. As a result, the measure is a qualified one, which preserves Israel's right to prevent and repel threats and attacks by Hamas, defend itself and its citizens, and free the hostages.

2. South Africa has turned to the International Court of Justice four times in just five months. Each time it has requested a ceasefire or the suspension of Israel's military operation in Gaza, accusing Israel of engaging in genocide against the Palestinian people. The Court declined to order any kind of ceasefire or suspension in its decisions of 26 January 2024, 16 February 2024 and 28 March 2024. Its reasons were as simple as they were important. South Africa failed to substantiate its claim that Israel's military operation is plausibly motivated by genocidal intent. In fact, the Court itself recognized the immediate context in which Israel decided to undertake the military operation: the attacks of 7 October 2023 by Hamas, which continues to pose an existential threat to Israel, and the abduction of hundreds of Israeli citizens and other foreign nationals to Gaza. Against this background, the Court understood that it cannot order one party to stop, while the other is free to continue. These reasons have lost none of their validity since the Court issued its previous Orders. Today's Order does not undermine these considerations.

3. The Court was fully aware that Israel's military operation in the Gaza Strip would not be taking place had the attacks by Hamas on 7 October 2023 and the abduction of 250 hostages not occurred. In my view, the specific, credible and up-to-date evidence provided by Israel, expertly and convincingly presented by its legal team during the hearings, played a decisive role in refuting any allegations of intent by South Africa. Israel was able to produce this evidence despite the extremely limited amount of time that it had to prepare for the hearings. Even though Israel was in a

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[1] Request of South Africa, 10 May 2024, para. 25.

[2] Order, para. 57 (2) *(a)*.

procedurally disadvantageous position, South Africa did not succeed with its principal request before the Court.

4. Indeed, I cannot fail to note the difference between South Africa's written request of 10 May 2024, its final submissions of 16 May 2024 and the measures indicated by the Court. South Africa, which initially brought a much more limited and specific written request, asking the Court to order Israel to "immediately withdraw and cease its military offensive in the Rafah Governorate"[3], subsequently returned to the request it had already made three times in almost identical terms: it asked for a measure ordering Israel to "cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip"[4]. And yet South Africa's tactics failed. Once again, its request for an "immediate[], total[] and unconditional[] withdraw[al]" of the Israeli army from the Gaza Strip, based on allegations of genocide, failed. To me, this makes clear that today's Order was not adopted because there was any piece of evidence substantiating the allegations made by South Africa under the Genocide Convention.

5. I am not oblivious to the increasing suffering in Gaza. On the contrary, I am no less alarmed by the humanitarian situation in Gaza than the rest of my colleagues at the Court. Nevertheless, I find myself unable to vote in favour of the operative clause of today's Order, because the military operation does not plausibly raise questions under the Genocide Convention. In particular, there is no evidence of intent. Needless to say, every armed conflict, including this one, raises relevant questions under human rights and international humanitarian law. However, those questions, and the corresponding responsibilities, must continue to be addressed and decided by Israel's independent and robust judicial system.

6. The Court's treatment of evidence regarding the conditions for the indication of provisional measures for protecting rights under the Genocide Convention is particularly concerning. The Court relies primarily on statements made by United Nations officials on social media and on press releases issued by relevant organizations (see Order, paragraphs 44-46). It relies on these statements and press releases without even inquiring into what kind of evidence they draw upon. The Court's approach is in stark contrast with its previous jurisprudence, in which it has stated that "United Nations reports [are] reliable evidence only 'to the extent that they are of probative value and are corroborated, if necessary, by other credible sources'"[5]. In the present case, the statements and press releases noted by the Court have simply not been corroborated. The Court has not inquired into the methodology or amount of research underlying their preparation, as it has done in previous cases[6]. I fail to see how the Court's approach here is compatible with its previous decisions to exclude elements of United Nations reports which rely only on second-hand sources[7]. This complete deviation from the Court's usual treatment of evidence is particularly concerning given that the present case concerns "charges of exceptional gravity" requiring "proof at a high level of certainty appropriate to the seriousness of the allegation"[8]. While I am aware that this standard has been developed for a later

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[3] Request of South Africa, 10 May 2024, para. 25.

[4] CR 2024/27, p. 63, para. 3 (Madonsela).

[5] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 85, para. 215.

[6] *Ibid.*, p. 66, para. 152.

[7] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 225, para. 159.

[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007(I)*, pp. 129-130, paras. 209-210.

stage of such proceedings, it should have at least informed the treatment of evidence at the stage of provisional measures.

7. In this opinion, I wish to do three things. *First*, to offer some remarks on the situation in Rafah and Al-Mawasi. *Second*, to show that there is no place for the indication of new measures. Nothing of what South Africa has argued points to a "change in the situation", which is a condition for the indication of new measures. Rather, its request seeks to turn the Court into a micromanager of the armed conflict. In this context, I will also address the glaring absence of proof establishing, even based on a plausibility standard, circumstances that point to intent of genocide. *Third*, I wish to clarify the scope of the measures indicated by the Court, in particular the limited nature of the suspension and how it still preserves Israel's fundamental right to defend itself and its citizens.

I. THE SITUATION IN RAFAH AND AL-MAWASI

8. Israel's military operation in the Gaza Strip cannot be understood — in fact, would not exist — without the existential threat posed by Hamas and the ongoing captivity of more than one hundred hostages. It is telling that neither the threat posed by Hamas nor the situation of the hostages were mentioned by South Africa in its written request or oral argument. Not even once.

9. For years Rafah, which is part of the Gaza Strip, has been, and still is, the stronghold of Hamas. Israel explained that the indiscriminate threats and attacks by Hamas against Israel have not ceased for a single day[9]. Hamas continues to hide in and around hospitals and schools, and to use Palestinian civilians as human shields[10].

Israel maintained that hundreds of rockets have been fired from Rafah over the last two weeks hitting several cities and towns in Israel[11]. Israel also referred to the elaborate tunnel system under Rafah consisting of 700 tunnel shafts, of which some 50 cross into Egypt[12]. According to Israel, these tunnels are used by Hamas to supply itself with weapons and ammunition, and could potentially be used to smuggle hostages or senior Hamas operatives out of Gaza[13].

10. In order to prevent and repel the threat posed by Hamas and free the hostages, Israel has to carry out military operations in Rafah and in the entirety of the Gaza Strip. It has both a right and a duty to prevent and repel these threats and attacks. As stated by its highest authorities, Israel has only one aim: to defeat Hamas and bring the hostages back to Israel.

11. Israel explained during the hearings, and in its reply to the question asked by Judge Nolte, that it has taken measures to establish humanitarian zones where the civilian population may safely evacuate. The Al-Mawasi area has been designated as the principal, but not the only safe zone for the persons fleeing from Rafah. Israel provided evidence that the Al-Mawasi area is connected to the

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[9] CR 2024/28, pp. 9-10, paras. 11-15 (Noam); see also Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11-12 January 2024, 10 January 2024, tab 6 ("The Hamas Agenda") and tab 7 ("Hamas Threat to the Israeli Population").

[10] Judges' folder submitted by Israel (17 May 2024), tab 2; CR 2024/28, p. 11, para. 19 (Noam); see also Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11-12 January 2024, 10 January 2024, tab 7 ("The Embedment of Hamas Military Infrastructure in the Urban Terrain and the Risk to Civilians in Gaza").

[11] Judges' folder submitted by Israel (17 May 2024), tab 1; CR 2024/28, pp. 9-10, paras. 11-15 (Noam).

[12] *Ibid.*; see also CR 2024/28, p. 10, para. 14 (Noam).

[13] CR 2024/28, p. 10, para. 14 (Noam).

two main humanitarian routes in Gaza and to the new temporary pier (JLOTS)[14]. The Al-Mawasi area is not just "barren sand dunes"[15]. According to Israel, it is connected to the Bani Suhueila water line, which Israel has helped to repair, and has water tanks, water pumps and desalination plants[16]. It has also been reinforced with additional supplies of shelter, food and medicine, *inter alia*, and the construction of two field hospitals[17]. On 12 May 2024, Israel announced another new field hospital in the Al-Mawasi area. This constitutes the eighth field hospital facilitated by Israel in Gaza since the beginning of the war[18].

II. NO PLACE FOR THE INDICATION OF NEW MEASURES

12. In my previous opinions, I have set out my views regarding the ill-advised approach taken by the Court since the institution of proceedings by South Africa in December 2023. It is an approach that taints this and all prior orders. As was already the case with respect to the Order of 28 March 2024, this Order does not meet the conditions laid down in Article 76, paragraph 1, of the Rules of Court. The Court can modify an order indicating provisional measures only if there is a change in the circumstances that justifies such modification. Despite the fact that these conditions are not met, the Court has imposed additional measures on Israel. In so doing, it is acting outside its judicial function and beyond the jurisdiction conferred on it by States under Article 41 of the ICJ Statute. Its approach also severely undermines the integrity of the Genocide Convention.

1. No change in the situation

13. South Africa seeks to portray Israel's military operation in Rafah as a "change in the situation" that would justify the indication of new measures. Yet the military operation in Rafah is not a *new* military campaign. It forms part of Israel's ongoing military operation throughout the Gaza Strip, which began in October 2023. It is an integral part of its overall effort to prevent and repel ongoing threats and attacks by Hamas and free the hostages in captivity. Indeed, both in its letter of 16 February 2024 and in its Order of 28 March 2024, the Court explicitly referred to the deteriorating situation in Rafah. The Court should not act every time there is a development in the hostilities. Otherwise, it will become the micromanager of an armed conflict.

2. No justification for new measures

14. The Court can only modify an order for provisional measures if the existing measures are not capable of fully addressing the consequences arising from the change in the situation. However, any consequences that may arise from Israel's actions in Rafah are already covered by the Court's two previous Orders. By its Order of 26 January, the Court has already ordered Israel to take all measures within its power to prevent acts that fall within the scope of the Genocide Convention[19]. Israel must also ensure with immediate effect that its military does not commit any acts prohibited by the Genocide Convention[20]. Furthermore, it must take immediate and effective measures to enable

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[14] Response of the State of Israel to the question posed by Judge Nolte at the oral hearings of 17 May 2024 on South Africa's fourth request for provisional measures, 18 May 2024, para. 8.

[15] CR 2024/27, p. 20, para. 13 (Dugard).

[16] Response of the State of Israel to the question posed by Judge Nolte at the oral hearings of 17 May 2024 on South Africa's fourth request for provisional measures, 18 May 2024, paras. 22-25.

[17] *Ibid.*, paras. 19-21, 26-31.

[18] *Ibid.*, paras. 32-34.

[19] *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 (1).

[20] *Ibid.*, para. 86 (2).

the provision of urgently needed basic services and humanitarian assistance[21]. The humanitarian aid obligations were strengthened by the Order of 28 March 2024[22]. Even though I voted against several of these measures, they are binding decisions of the Court[23]. In this sense, the Court's previous Orders already restrict Israel's military operation in Rafah in such a way that they protect any plausible rights found by the Court under the Genocide Convention. Indeed, it is telling that the present Order does not explain at all why it considers that the previous measures "do not fully address the consequences arising from the change in the situation" in the relevant paragraph (see Order, paragraph 30).

15. What South Africa's request appears to be about is Israel's compliance with the previous Orders. However, it is neither for South Africa nor the Court to assess Israel's compliance with the previous Orders at this stage of the proceedings. The Court shall do so only at the merits stage. South Africa also seems to be asking the Court to assume the role of the General Assembly and the Security Council. But the Court cannot exceed its judicial function just because South Africa believes that these bodies have not fulfilled their functions effectively.

3. No circumstances for indicating provisional measures: the lack of intent

16. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the rights claimed by a party, pending a decision on the merits. In the present case, the rights in question are those that exist under the Genocide Convention. No more, no less. South Africa's task was, therefore, to demonstrate that Israel's actions create a risk of irreparable prejudice to *those* rights. Not to rights under international humanitarian law or under human rights law, but under the Genocide Convention alone. South Africa has failed to do so.

17. The conduct of a State can only create a risk of irreparable prejudice to rights under the Genocide Convention, if such conduct falls within the scope of the Convention. For this to be the case, the specific intent to commit genocide (*dolus specialis*) must be present. If the *dolus specialis* of genocide is absent, the conduct does not fall within the scope of the Convention and, consequently, the rights under the Genocide Convention are not implicated.

18. The threshold to find an intent of genocide is very high. In *Bosnian Genocide*, the Court held that

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent".[24]

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[21] *Ibid*., para. 86 (4).

[22] *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 (2)*(a)*.

[23] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373.

19. South Africa has not produced any evidence that would allow the Court to draw this conclusion; not even on the basis of a plausibility standard. Indeed, South Africa has not produced a single piece of *new* evidence that would substantiate the plausible existence of genocidal intent.

20. In contrast to South Africa, Israel distinguishes between Hamas and civilians in Gaza. I find it pertinent to recall that, on 12 February 2024, South Africa brought a request for the indication of provisional measures on the ground that a military operation in Rafah was imminent. The Court rightly rejected it. Israel did not act in February. Instead, as Israel explained, it planned a military operation that would minimize the harm to civilians as much as possible. In the period between February and May, Israel took several measures to protect the civilians that would have to evacuate the Rafah area, some of which were detailed in Israel's reply to Judge Nolte's question. The stated purpose of its military operation in Rafah is to prevent and repel the threat posed by Hamas, to defend itself and its citizens, and to free the hostages. Several high-ranking Israeli officials have reiterated that the military operation is being conducted against Hamas, not the Palestinian people[25].

21. Israel has also noted that the IDF has called on eastern Rafah residents to evacuate. The evacuation messages were communicated through flyers, text messages, phone calls and media broadcasts in Arabic. This information has been corroborated by independent media reports[26].

22. Israel has taken measures to mitigate the harm suffered by the Palestinians displaced from Rafah to the humanitarian area established in Al-Mawasi. Israel is not sending Palestinians to the middle of nowhere. It is not sending them, as South Africa put it, "to the barren sand dunes of Al-Mawasi". On the contrary, Israel is sending them to specifically designated evacuation zones, to which it directs humanitarian aid and assistance. In paragraph 11 of this opinion, I described the measures taken by Israel in the Al-Mawasi area.

23. I find it difficult to understand why the Court failed to acknowledge, even in a sentence, that there has been an increase of humanitarian aid and assistance entering the Gaza Strip. Indeed, these past months have seen the highest numbers of humanitarian trucks entering Gaza since the beginning of the war. Importantly, last week, the IDF reported that it had allowed hundreds of humanitarian aid trucks carrying flour and fuel into Gaza through the Kerem Shalom and Erez crossings. As shown by the statement of United Nations Senior Humanitarian Coordinator Sigrid Kaag and Israel's reports submitted to the Court, there has been a significant increase in the amount of humanitarian aid delivered to Gaza[27]. The newly constructed temporary pier (JLOTS) is now operating, and the Cyprus Maritime Corridor will make it possible to increase the entry of humanitarian aid and assistance. Israel maintains that it has facilitated both of these initiatives. Regrettably, the Court did not consider or even take account of these developments.

24. One may think that Israel should do more to protect civilians in Rafah. However, that question is not at stake in the present case. The Court can *only* indicate measures to protect rights that are plausible under the Genocide Convention. The relevant question is one of plausible intent. I do not see how Israel's conduct could even plausibly amount to a pattern that provides the basis for inferring the specific intent required by the Genocide Convention. Why would a State that has the

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[25] Volume of documents submitted by the State of Israel for the Provisional Measures Hearing on 11-12 January 2024, 10 January 2024, tab 2 ("Selected Public Statements by Israeli Leaders Stating the War's Objectives and Commitment to International Law"); see also CR 2024/28, p. 25, paras. 22-24 (Kaplan Tourgeman).

[26] CR 2024/28, p. 28, para. 31 (Kaplan Tourgeman).

[27] OCHA, Remarks to the Security Council by Sigrid Kaag, Senior Humanitarian and Reconstruction Coordinator for Gaza, 24 April 2024.

intention to destroy a group provide tents, humanitarian aid and field hospitals? Why would they issue warnings and build humanitarian zones?

25. The absence of proof of plausible intent in all of South Africa's requests is the fatal flaw of its case. The Court cannot look at the *actus reus* without also looking at the *mens rea*. How can the measures indicated by the Court preserve rights under the Genocide Convention when there is no show of intent whatsoever? This is why I have voted against the majority of the measures indicated by the Court thus far.

26. The road taken by the Court is a dangerous one. It weakens the régime of the Genocide Convention by using it (or misusing it) to arbitrate an armed conflict. How can States trust the Court with the settlement of disputes concerning the interpretation and application of multilateral conventions, if they are used for purposes that are entirely removed from the original intention of the parties?

III. THE LIMITED NATURE OF THE MEASURES INDICATED BY THE COURT

27. The first measure indicated by the Court reaffirms the previous Orders of 26 January and 28 March 2024. Since I voted against the majority of the measures indicated by the Court in those Orders, I have voted against this measure as well.

28. The first additional measure indicated by the Court reiterates an obligation that already exists for Israel under the Genocide Convention, and specifies the measures previously indicated by the Court in its Orders of 26 January and 28 March 2024. This measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> 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".

I have voted against this measure because the conditions necessary for its indication under Article 76, paragraph 1, of the Rules of Court are not met. However, I note that this measure does not require Israel to refrain from its military operation in Rafah altogether. It is not an unconditional obligation to halt the military operation. It specifies that Israel must, in accordance with its obligations under the 1948 Genocide Convention, conduct its military offensive in a way that does not deprive the Palestinian civilian population of its essential means of existence. Naturally, if the military offensive was being carried out in violation of Israel's obligations under the Genocide Convention, it would need to end. Nevertheless, there is no evidence, even at the low standard required for provisional measures, that any rights under the Genocide Convention are implicated. The Court's first measure is therefore limited to offensive (and not defensive) military action in Rafah, and requires a halt only in so far as is necessary to protect the Palestinian group in Gaza from conditions of life that could bring about its physical destruction. This qualified measure shows that the Court is cognizant of Israel's need to undertake those military operations that are necessary to prevent and repel threats and attacks by Hamas, and to take action to defend itself and its citizens and free the hostages held in Gaza.

29. The second additional measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance".

This measure reaffirms the Court's two previous Orders. In particular, it specifies the measure indicated in paragraph 86, subparagraph 4, of the Order of 26 January 2024, and paragraph 51, subparagraph 2 *(a)*, of the Order of 28 March 2024. I voted in favour of both of those measures because I believe that the provision of humanitarian aid and assistance is crucial. However, I cannot support this new specification because it is targeted at the Rafah crossing. The Court did not have a single piece of evidence regarding the situation of the Rafah crossing. The Parties did not present any evidence on whether Israel, Egypt, or both, are responsible for the current closure of the Rafah crossing. More importantly, the Rafah crossing can only operate if both Egypt and Israel agree. I do not understand how Israel can be expected to "maintain open" a crossing with respect to which it does not have exclusive control. The Court has indicated this measure with scant evidence before it and ignoring that another sovereign State controls the other half of the crossing.

30. The third additional measure reads:

> "The State of Israel shall, in conformity with its obligations under the [Genocide Convention], and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:
>
> Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding missions or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide".

This measure again reaffirms Israel's existing obligations under the first two Orders, which provide that Israel must preserve evidence. I voted against this measure because South Africa has not provided evidence that additional measures are required for the preservation of evidence. Neither the geographic scope nor the mandate of these fact-finding missions is clearly defined. It is also unclear what a "competent organ" means in this context. While I understand the merits of independent fact-finding, such measures should not arise out of a Court order, but rather based on consent.

31. The fourth additional measure provides that "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 if this Order". This measure extends Israel's reporting obligations. I voted against this measure because the reporting obligations have not served a meaningful purpose.

IV. CONCLUDING REMARKS

32. I would like to end by reiterating that I sincerely hope that this war comes to an end as quickly as possible, and that the hostages will return to Israel immediately[28]. In this regard, I appreciate that the Court, in this Order, "finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release" (paragraph 56 of this

[28] See separate opinion of Judge Barak, *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. 37.

Order). Like every State, Israel has the fundamental right to protect its citizens and itself. This right receives a special dimension in the case of the hostages, in the sense that it imposes a duty on the State to do everything in its power to bring them back to Israel. The fulfilment of this duty is not in conflict with Israel's obligations under the Genocide Convention because it stems from Israel's intent to protect its citizens and not from an intent to commit acts prohibited under the Genocide Convention. As I have written in my first opinion in this case, "[i]t is to protect these values that Israel's daughters and sons have selflessly paid with their lives and dreams, in a war that Israel did not choose"[29]. The key to ending this war does not lie in asking the Court to intervene in this conflict by making unsubstantiated allegations of genocide against Israel. The key to ending this war lies in the hands of Hamas. Hamas has started the war and can finish it by releasing the hostages and by fully respecting the security of the State of Israel and its citizens.

33. The Court is in a difficult position and facing great pressure. Even so, the Court should not have sacrificed the integrity of the Genocide Convention and overstepped the limits of its jurisdiction in response to public pressure. The urge to "do something" is understandable, particularly as the ceasefire request comes before this Court for the fourth time. But this cannot be sufficient. The absence of Hamas from the proceedings and a jurisdiction confined to the Genocide Convention and Article 41 of the ICJ Statute remain significant obstacles, as they were in January when South Africa made its first request.

34. I underwent similar experiences in my 28 years as a judge on Israel's Supreme Court. The only way that I found to be truthful as a judge was to leave aside the "background noise" and focus purely on the legal reasoning. This is the only common language that we judges have. We cannot be bothered by political, military or public policy troubles. We can only be concerned with legal troubles. We are a court of law, not one of public opinion. When we judges sit at trial, we also stand on trial. We will not be judged by hysteria and the fleeting waves of the hour, but by history.

(Signed) Aharon BARAK.

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[29] *Ibid.*, para. 49.