

## DISSENTING OPINION OF VICE-PRESIDENT SEBUTINDE

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### I. INTRODUCTION

1. I have voted against the Order because I firmly believe that the provisional measures previously indicated and reaffirmed by the Court adequately address the current situation in the Gaza Strip, including Rafah. Israel’s ongoing military operations in Rafah are part of the broader conflict initiated by Hamas on 7 October 2023, when Hamas attacked Israeli territory, killing citizens and abducting others. To protect Palestinian civilians in the Gaza Strip caught in this conflict, the Court has at South Africa’s request and in accordance with the Applicant’s rights under the Genocide Convention, indicated several binding and effective provisional measures. Therefore, despite 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, paragraph (1) of the Rules of Court. This forms the basis of my dissent from the majority. To maintain its judicial integrity, the Court must avoid reacting to every shift in the conflict and refrain from micromanaging the hostilities in the Gaza Strip, including Rafah. South Africa’s current request inviting the Court to indicate new provisional measures or to modify the existing ones, marks the fourth within the past few months.

2. Once again, South Africa has invited the Court to micromanage the conduct of hostilities between Israel and Hamas. Such hostilities are exclusively governed by the laws of war (international humanitarian law) and international human rights law, areas where the Court lacks jurisdiction in this case. Regrettably, the wording of the Court’s directive in operative clause 57, paragraph (2) (a), ordering Israel to “halt its military offensive . . . in the Rafah Governorate”, is susceptible to ambiguity and could be misunderstood or misconstrued as ordering an indefinite, unilateral ceasefire, thereby exemplifying an untenable overreach on the part of the Court. In my understanding, the objective of the Court is to order Israel to suspend its military offensive in Rafah only in so far as such suspension is necessary to prevent the bringing about of conditions of life that could bring about

the destruction of the Palestinians in Gaza. In my view, 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. This directive, which could be erroneously misunderstood as mandating a unilateral ceasefire in part of Gaza, amounts to micromanaging the hostilities in Gaza by restricting Israel's ability to pursue its legitimate military objectives, while leaving its enemies, including Hamas, free to attack without Israel being able to respond. This measure also implicitly orders Israel to disregard the safety and security of the over 100 hostages still held by Hamas, a terrorist organization that has refused to release them unconditionally.

3. I firmly believe that Israel has the right to defend itself against its enemies, including Hamas, and to continue efforts to rescue its missing hostages. These rights are not incompatible with its obligations under the Genocide Convention. Israel can continue pursuing its legitimate aims of combating Hamas and rescuing its hostages, provided it respects its obligations under the Genocide Convention and the provisional measures indicated by the Court. In this dissenting opinion, I highlight the broader context of the war in Gaza, which context was, in my view, not fully or accurately reflected in the present Order. I also examine in a more balanced way, the ongoing humanitarian situation in the Gaza Strip, including Israel's efforts at mitigating civilian casualties, since the Court's last Order on 28 March 2024. Lastly, I provide my reasons for rejecting the provisional measures indicated by the Court in the current Order.

## II. THE BROADER CONTEXT OF THE WAR IN THE GAZA STRIP

4. As stated above, South Africa has submitted its fourth request for the indication of provisional measures in as many months (on 29 December 2023; 12 February 2024; 6 March 2024 and 10 May 2024). Significant developments have occurred in Israel and the Gaza Strip since the Court's last Order on 28 March 2024. When considering whether new facts have emerged that justify modifying the existing provisional measures under Article 76, paragraph (1) of the Rules of Court, it is essential to view the ongoing conflict between Israel and Hamas in Rafah within its full context. Since 7 October 2023, Israel has been engaged in armed conflict on multiple fronts, facing attacks from various actors and directions. Hamas continues to launch attacks from Gaza, including Rafah, and still holds over 100 Israeli hostages despite calls from this Court, the United Nations Security Council, and the international community for their unconditional release. Several States believe that the release of these hostages would significantly help end the conflict in Gaza<sup>1</sup>.

5. According to Israel, more than 10,000 rockets have been fired from Gaza into Israel since the hostilities began<sup>2</sup>, including over a thousand recently from Rafah, even from the vicinity of the Rafah crossing. A rocket launched from Rafah recently landed in a children's playground<sup>3</sup>. Israel reports that Rafah hosts several Hamas battalions and numerous tunnels used by Hamas fighters<sup>4</sup>. South Africa has not disputed these facts. An Israeli operation in February 2024 resulted in the rescue of two hostages, and more recently, the bodies of three more hostages killed in captivity were recovered from Rafah. It is plausible that additional hostages in captivity remain in the area, which

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<sup>1</sup> Joint Statement from the Leaders of the United States, Argentina, Austria, Brazil, Bulgaria, Canada, Colombia, Denmark, France, Germany, Hungary, Poland, Portugal, Romania, Serbia, Spain, Thailand, and the United Kingdom Calling for the Release of the Hostages Held in Gaza, 25 April 2024.

<sup>2</sup> CR 2024/28, p. 10, para. 11 (Noam).

<sup>3</sup> CR 2024/28, p. 10, para. 15 (Noam).

<sup>4</sup> CR 2024/28, p. 10, paras. 14-15 (Noam).

is why Israel has declared its intention to locate and return them, dead or alive, to their families. This is a right that the Court cannot deny Israel or the hostages.

6. Apart from Hamas, other armed groups in the Gaza Strip and the West Bank continue to pose threats to Israeli soldiers and civilians. These groups include Palestinian Islamic Jihad and the Al-Aqsa Martyrs Brigades, both of which regularly engage in violent attacks against Israeli soldiers and civilians. In addition, Israel is involved in a large-scale conflict in its north against Hezbollah, another armed group based in Lebanon. Hezbollah frequently launches rockets, missiles, and drones directed at Israeli targets, including civilian areas in northern Israel, using advanced weaponry such as guided missiles and missile-firing drones<sup>5</sup>. Hezbollah's leader has praised Hamas's actions, including the 7 October 2023 attack, and has expressed solidarity with Hamas, openly calling for the annihilation of Israel.

7. Since the 28 March 2024 Order of the Court, Israel has also faced attacks from further afield. The Houthis, another armed group based in Yemen and backed by Iran, have targeted civilian shipping in the Red Sea believed to be connected to Israel, and launched long-range ballistic missiles and drones at Israeli cities, despite international condemnation and efforts to de-escalate the situation<sup>6</sup>. The Houthis have also expressed solidarity with Hamas and openly called for the destruction of Israel. On 13 April 2024, Iran launched a large-scale attack on Israel involving more than 200 drones, cruise missiles, and ballistic missiles aimed at Israeli territory<sup>7</sup>. While South Africa does not dispute these facts, the Court's present Order omits these developments, which are crucial to understanding Israel's continued military operations in the Gaza Strip, including Rafah.

8. These threats collectively pose a significant risk to the safety, security, and welfare of Israel and its citizens. While the international community is rightfully concerned about the safety and security of the displaced Palestinian civilians in Gaza, it is equally important to recognize that Israel's ongoing conflict with Hamas and Hezbollah has resulted in the displacement of 60,000 Israelis from their homes in southern Israel<sup>8</sup> and another 60,000 in northern Israel<sup>9</sup>. Israel has the right to respond to these existential threats, which are interconnected and coordinated. In doing so, Israel is expected to comply with international obligations, including under international humanitarian law. However, neither international law in general nor the Genocide Convention in particular deprive Israel of the right to take necessary and proportionate actions to defend its citizens and territory against such armed attacks on multiple fronts. Had the Court taken this broader context into consideration when evaluating South Africa's fourth request for provisional measures, it might have arrived at a more balanced result that leaves unimpeded Israel's right to defend itself and its citizens against its enemies and that avoids the untenable overreach demonstrated in some of the measures indicated.

### III. THE HUMANITARIAN SITUATION IN THE GAZA STRIP

9. The reality of the humanitarian situation in Gaza is far more complex than South Africa suggests in its fourth Request. While the war in Gaza has undoubtedly had devastating humanitarian consequences on innocent civilians, the responsibility for the suffering of the Palestinians of Gaza does not lie only with Israel and nor is it correct to say that Israel has failed to act to alleviate that suffering. Israel has consistently maintained that as a fighting tactic, members of Hamas embed

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<sup>5</sup> AP News, Hezbollah introduces new weapons and tactics against Israel as war in Gaza drags on, 17 May 2024.

<sup>6</sup> UN Security Council, resolution 2722 (2024).

<sup>7</sup> UN News, Secretary-General's remarks to the Security Council on the situation in the Middle East, 14 April 2024.

<sup>8</sup> CR 2024/28, p. 10, para. 12 (Noam).

<sup>9</sup> BBC, Lebanon fears intensification of Israel's Hezbollah offensive, 13 May 2024.

themselves amongst the civilian population often making it difficult for Israeli forces to distinguish between innocent civilians and legitimate military combatants. Citing a deterioration in the humanitarian situation in the Gaza Strip and in Rafah in particular, South Africa asserts that there has been a change in the situation since the Court's March 2024 Order necessitating the indication of additional measures<sup>10</sup>. However, the evidence actually shows a gradual improvement in the humanitarian situation in Gaza since the Court's Order, reflecting efforts by Israel to comply with the Order. Within a week of the Court's March Order, the Israeli Security Cabinet met and made a formal decision to continue and increase efforts to facilitate the provision of humanitarian aid for the civilian population of Gaza<sup>11</sup>. The Israeli government allocated approximately US\$52 million to this effort<sup>12</sup>.

10. Furthermore, multiple concrete actions were taken by Israel to facilitate the provision of humanitarian aid for the civilian population of Gaza since the March Order of the Court. This includes the opening of three additional land crossings. A new land route between Israel and northern Gaza at Gate 96 was established in March 2024 and has been operating since<sup>13</sup>. The East Erez crossing, which was attacked and destroyed by Hamas on 7 October 2023, was reopened on 1 May 2024<sup>14</sup>. Most recently, the West Erez crossing was opened on 1 May 2024<sup>15</sup>. These three crossings operate in conjunction with the Kerem Shalom crossing, which remains operational after it was forced to pause operations from 5 to 8 May 2024 following a Hamas rocket attack on the crossing<sup>16</sup>. Although the Rafah crossing is currently closed, Israel has asserted, without contradiction, that efforts are underway to reopen the crossing, including discussions with Egypt and other relevant actors<sup>17</sup>. In addition to the opening of new crossings, there is evidence that Israel has expanded the capacity of the existing Kerem Shalom crossing, extended its opening hours and improved the movement of trucks delivering aid through the crossing<sup>18</sup>. Efforts also appear to have been made to expand the number of trucks bound for Gaza that are able to enter Israel from Jordan<sup>19</sup> and to extend the opening hours at the Nitzana crossing with Egypt<sup>20</sup>.

11. Israel has also facilitated the opening of new sea routes into Gaza. Israel and Cyprus have agreed on the establishment of a maritime corridor to allow for the direct delivery of aid to Gaza. Shipments of humanitarian aid took place using this corridor in March and April 2024<sup>21</sup>. Furthermore, a floating pier off the Gaza coast constructed with the assistance of the United States Government began operation on 17 May 2024 and is expected to allow for the delivery of up to

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<sup>10</sup> Urgent Request for the modification and indication of provisional measures pursuant to Article 41 of the Statute of the International Court of Justice and Articles 75 and 76 of the Rules of Court of the International Court of Justice, 10 May 2024 ("May 2024 Request"), para. 4.

<sup>11</sup> Report by the State of Israel to the International Court of Justice, 28 April 2024 (Israel's April Report), paras. 10, 19.

<sup>12</sup> CR 2024/28, p. 24, para. 15 (Kaplan Tourgeman).

<sup>13</sup> Israel's April Report, para. 24; Reuters, Israeli military says opening new aid routes into Gaza, 22 March 2024.

<sup>14</sup> Reuters, Israel allows trucks from newly reopened Erez crossing into Gaza after US pressure, 1 May 2024.

<sup>15</sup> CR 2024/28, p. 24, para. 13 (Kaplan Tourgeman).

<sup>16</sup> CR 2024/28, p. 23, para. 9 (Kaplan Tourgeman); BBC, Battles in east Rafah amid dispute over reopening of Kerem Shalom crossing, 8 May 2024.

<sup>17</sup> CR 2024/28, p. 23, para. 11 (Kaplan Tourgeman).

<sup>18</sup> Israel's April Report, paras. 27, 29.

<sup>19</sup> Israel's April Report, para. 28.

<sup>20</sup> Israel's April Report, para. 29.

<sup>21</sup> Israel's April Report, para. 34; CR 2024/28, p. 24, para. 18 (Kaplan Tourgeman).

150 truckloads of aid a day, once fully operational<sup>22</sup>. Airdrops to Gaza have also continued since the Court's 28 March Order and have been co-ordinated by Israel<sup>23</sup>.

12. The above efforts have resulted in a tangible improvement in the amount of aid entering Gaza. Figures from the Israeli Government show a steady increase in the number of trucks of humanitarian aid entering Gaza since the Court's March 2024 Order<sup>24</sup>. Media reports show that the number of truckloads entering the territory reached a peak for the entire conflict in early May<sup>25</sup>. Figures from OCHA — which only account for aid from the Rafah and Kerem Shalom crossings and do not include aid entering from other crossings or routes — also show an increase in the number of truckloads since the March Order<sup>26</sup>. Although there appears to have been a significant slowdown in aid entering southern Gaza as a result of the closure of the Rafah crossing and temporary closure of the Kerem Shalom crossing, recent reports indicate that large-scale aid transfers have resumed through the Kerem Shalom crossing<sup>27</sup>. As a result of these increased efforts, thousands of food trucks have entered Gaza; multiple large bakeries have reopened; greater amounts of animal fodder have been able to enter the Strip; water pipelines have been repaired and water pumps supplied with fuel; millions of litres of fuel have been able to enter Gaza; and clothing, hygiene and sanitation supplies have been supplied to Gazan civilians<sup>28</sup>.

13. This improvement in the supply of aid has been recognised by third parties. The UN Senior Humanitarian and Reconstruction Coordinator for Gaza, Ms Sigrid Kaag, has noted the steps taken by Israel to improve aid delivery since 5 April 2024 and has stated that she considers there to have been “very constructive co-operation with her mission” by Israeli authorities, including the Israeli War Cabinet<sup>29</sup>. Third States, including the United States, United Kingdom and Germany have also acknowledged improvements in the delivery of humanitarian assistance<sup>30</sup>.

14. In addition to taking action to increase the amount of aid entering Gaza, Israel has taken action intended to improve access to medical care in the Strip. The ongoing fighting has naturally made it substantially more difficult to provide adequate medical care. Israel has acted since the Court's March Order to remedy this situation. This includes efforts to facilitate the entry of medical supplies and the construction of field hospitals and mobile clinics<sup>31</sup>. Israel noted before the Court that eight field hospitals are now operating in Gaza, with another due to open this month and the establishment of further hospitals being considered<sup>32</sup>. There is also evidence that Israel has evacuated

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<sup>22</sup> CR 2024/28, p. 24, para. 17 (Kaplan Tourgeman); BBC, US confirms first aid trucks arrive via Gaza pier, 17 May 2024.

<sup>23</sup> Israel's April Report, para. 33.

<sup>24</sup> Israel's April Report, para. 38.

<sup>25</sup> New York Times, What We Know About Where Aid Can Enter Gaza, 10 May 2024.

<sup>26</sup> OCHA, Hostilities in the Gaza Strip and Israel – reported impact: Day 124, 17 May 2024.

<sup>27</sup> CR 2024/28, p. 26, para. 26 (Kaplan Tourgeman).

<sup>28</sup> Israel's April Report, paras. 41-55.

<sup>29</sup> OCHA, Remarks to the Security Council by Sigrid Kaag, Senior Humanitarian and Reconstruction Coordinator for Gaza, 24 April 2024; YouTube, UN Senior Official on Gaza – Media Stakeout, 24 April 2024, <https://www.youtube.com/watch?v=1Q-ds2CdjTQ&t=1s>.

<sup>30</sup> US Department of State, Press Briefing, Department Press Briefing — April 15, 2024, 15 April 2024; US Department of State, Press Briefing, Department Press Briefing — April 23, 2024, 23 April 2024; German Foreign Office, Auswärtiges Amt, @Auswartigesamt, Instagram 18 April 2024.

<sup>31</sup> Israel's April Report, paras. 56-57.

<sup>32</sup> CR 2024/28, p. 27, para. 28 (Kaplan Tourgeman).

thousands of Gazans for treatment abroad, facilitated the arrival of additional ambulances into Gaza and has continued to supply hospitals even in the midst of active fighting<sup>33</sup>.

15. Finally, Israel has throughout the conflict warned Palestinians in Gaza of upcoming operations and has repeatedly requested the evacuation of civilians from areas of active fighting<sup>34</sup>. Such actions are inconsistent with the intent to destroy the group in question. Israel has also acted to make infrastructure available at shelter sites and has facilitated the supply of shelter equipment into Gaza<sup>35</sup>.

16. To be sure, the efforts taken by Israel thus far have not entirely alleviated the ongoing humanitarian crisis in the Gaza Strip. War inevitably, and tragically, affects the lives of civilians. But this does not make Israel's war against Hamas inherently illegitimate or unlawful and nor does it transform it into an act of genocide. Furthermore, Israel is not the only party responsible for the humanitarian situation in Gaza. Indeed, Israel does not currently govern or exercise full control over the Gaza Strip and a majority of Israeli troops appear to have left the territory in April 2024<sup>36</sup>. In this regard, South Africa's Request is to some extent paradoxical in that South Africa requests the withdrawal of Israel from Gaza yet also expects Israel to act on the ground to ensure the effective delivery of aid in the territory.

17. Hamas bears at least partial responsibility for the welfare of Palestinians in Gaza. It remains in control of much of civil life there and aid organizations are reportedly required to coordinate their efforts with the Hamas civil authorities<sup>37</sup>. Hamas' conduct has also impeded the effective delivery of aid. Hamas has launched rocket attacks at aid crossings and at the construction site of Gaza's floating pier<sup>38</sup>. There is also evidence that Hamas has seized aid for its own use<sup>39</sup>.

18. Another actor that plays a key role in facilitating aid delivery is Egypt, which shares a border with Gaza and controls part of both the Rafah and Kerem Shalom crossing facilities. As Israel has noted, efforts to reopen the Rafah crossing require Egyptian co-operation<sup>40</sup>. There have also been reports that Egypt has prevented the movement of aid trucks from Egypt towards Kerem Shalom<sup>41</sup>.

19. Finally, logistical constraints may sometimes operate to prevent the effective delivery of aid by third parties, including international and non-governmental organizations<sup>42</sup>. For example, the United States has noted that a lack of available trucks has prevented the United Nations from distributing aid that has been delivered into Gaza<sup>43</sup>.

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<sup>33</sup> Israel's April Report, paras. 59-60, 111; CR 2024/28, p. 27, para. 29 (Kaplan Tourgeman).

<sup>34</sup> Israel's April Report, para. 109; CR 2024/28, p. 28, para. 31 (Kaplan Tourgeman).

<sup>35</sup> Israel's April Report, paras. 52-53.

<sup>36</sup> Israel's April Report, para. 89.

<sup>37</sup> Israel's April Report, paras. 90-96.

<sup>38</sup> CR 2024/28, pp. 23-24, paras. 9, 17 (Kaplan Tourgeman).

<sup>39</sup> Israel's April Report, para. 94.

<sup>40</sup> CR 2024/28, p. 23, para. 11 (Kaplan Tourgeman).

<sup>41</sup> New York Times, *Actions by Israel and Egypt Squeeze Gaza Aid Routes*, 10 May 2024.

<sup>42</sup> Israel's April Report, para. 96.

<sup>43</sup> US Department of State, *Press Briefing, Department Press Briefing — April 23, 2024*, 23 April 2024.

#### **IV. THE PROVISIONAL MEASURES INDICATED BY THE COURT**

##### **1. Order reaffirming measures indicated in the Orders of 26 January 2024 and 28 March 2024**

20. I have voted against the Order in operative paragraph 57 (1) because I believe that it is unnecessary. Furthermore, it erroneously presumes that Israel is somehow not “effective[ly] implement[ing]”<sup>44</sup> the existing provisional measures earlier indicated including those “reaffirm[ing]” existing orders<sup>45</sup>, a finding the Court can only make at the merits stage of the proceedings. The Court must have faith in the measures it indicates which create binding obligations upon the parties to whom they are directed. The Court should also avoid trying to enforce its own orders as that is not the rationale behind the modification of provisional measures under Article 76 (1) of the Rules of Court. Is the Court going to reaffirm its earlier provisional measures every time a party runs to it with allegations of a breach of its provisional measures? I should think not.

##### **2. Order halting Israel’s military offensive in Rafah Governorate**

21. I have voted against the Order in operative paragraph 57 (2) (a) because I believe it is an overreach by the Court that has no link with South Africa’s plausible rights under the Genocide Convention. As explained above, this measure does not entirely prohibit the Israeli military from operating in Rafah. Instead, it only operates to partially restrict Israel’s offensive in Rafah to the extent it implicates rights under the Genocide Convention. However, as stated above, this directive may be misunderstood as mandating a unilateral ceasefire in Rafah and amounts to micromanaging the hostilities in Gaza by restricting Israel’s ability to pursue its legitimate military objectives, while leaving its enemies, including Hamas, free to attack without Israel being able to respond. This measure also implicitly orders Israel to disregard the safety and security of the more than 100 hostages still held by Hamas, a terrorist organization that has refused to release them unconditionally. I reiterate that Israel has the right to defend itself against its enemies, including Hamas, and to continue efforts to rescue its missing hostages. These rights are not incompatible with its obligations under the Genocide Convention.

##### **3. Order halting “any other action” in Rafah that may inflict conditions of life that could bring about the physical destruction of the Palestinians in Gaza**

22. Furthermore, I have voted against the Order in operative paragraph 57 (2) (a) requiring Israel to “immediately halt . . . 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”, because I believe it is unnecessary and is already covered by the existing measures in operative paragraph 86 (1) (d), (2) and (4) of the Order of 26 January 2024 and reiterated in the Order of 28 March 2024. The newly indicated measure merely repeats verbatim what is contained in the previous Orders, which are binding and applicable throughout the Gaza Strip including Rafah.

##### **4. Order requiring Israel to maintain open the Rafah crossing**

23. I have voted against the Order in operative paragraph 57 (2) (b) requiring Israel to “maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services

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<sup>44</sup> See Order of 24 May 2024, paragraph 52.

<sup>45</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 for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024, operative paragraph 51 (1); and “Decision of the Court on South Africa’s Request for additional provisional measures” contained in Press Release No. 2024/16 dated 16 February 2024.

and humanitarian assistance” because I believe the existing provisional measures are robust enough and already adequately cover the current situation, including over the Rafah crossing. In particular, the measure in operative clause 51 (2) in the Order of 28 March 2024 already requires Israel to,

“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.”

Furthermore, as stated above, Egypt, which shares a border with Gaza and controls part of both the Rafah and Kerem Shalom crossing facilities, plays a key role in facilitating aid delivery through the Rafah crossing. There have also been reports that Egypt has prevented the movement of aid trucks from Egypt towards Kerem Shalom<sup>46</sup>. Without Egypt’s co-operation, Israel alone cannot “maintain open the Rafah crossing”<sup>47</sup> which would render the Court’s current order, which is directed at Israel but not Egypt, impracticable.

## **5. Order requiring Israel to ensure unimpeded access of fact-finding missions**

24. I have voted against the measure requiring Israel to facilitate the unimpeded access to Gaza of fact-finding missions, internationally mandated bodies or officials, investigators, and journalists. In this regard, it can be noted that more than 1,000 personnel of international organizations have entered Gaza since November 2023<sup>48</sup>. Furthermore, there are allegations that Hamas has itself engaged in the destruction of documentary evidence<sup>49</sup>. This measure responds to South Africa’s request made earlier in December 2023 and rejected by the Court in its January Order but repeated in the present request. In its December Request, South Africa asked that the Court indicate a measure stating that

“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 of the Convention on the Prevention and Punishment of the Crime of Genocide; to that end, the State of Israel shall not act to 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 said evidence”<sup>50</sup>.

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<sup>46</sup> “Actions by Israel and Egypt Squeeze Gaza Aid Routes”, *The New York Times*, 10 May 2024.

<sup>47</sup> CR 2024/28, p. 23, para. 11 (Kaplan Tourgeman).

<sup>48</sup> Israel’s April Report, para. 124.

<sup>49</sup> Israel’s April Report, para. 123.

<sup>50</sup> Application of South Africa, para. 144.



25. In the 26 January Order, the Court did indicate a measure requiring Israel to prevent the destruction of evidence and ensure its preservation but did not require that access be granted to fact-finding missions or similar bodies. The primary concern with granting South Africa's request is that it is not sufficiently linked with plausible rights under the Genocide Convention. While a general measure requiring the preservation of evidence acts directly to preserve the rights at issue, requiring access by fact-finding missions imposes a much broader obligation without a clear textual basis in the Genocide Convention. South Africa has also not put forward any specific evidence that Israel is engaging in the destruction of evidence that may require the indication of new measures relating to this issue. There may also be legitimate security reasons behind preventing the access of certain individuals into Gaza during an active conflict, given that their safety could not be guaranteed.

26. Furthermore, the Court has never imposed an obligation upon a sovereign State to admit third-party observers onto its territory. Notably, the Court's January rejection of South Africa's earlier request was in line with the approach taken in *Gambia v. Myanmar* and in *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, where the Court rejected a similar request for access by independent monitoring mechanisms made by the applicants. The Court also rejected a request by Armenia in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* for access by the United Nations and its agencies to the Armenians of Nagorno-Karabakh. In Syria, Myanmar and Nagorno-Karabakh there is a far lower level of media presence and international scrutiny than there is in Gaza. Thus, it is difficult to reconcile a decision to grant this particular measure with the approach taken by the Court in those other cases. For the above reasons I have voted against it.

## **6. Order requiring Israel to file another report**

27. Lastly, I have voted against the last measure requiring the filing of yet again one more report from Israel. In view of the number of reports that the Court has already ordered Israel to file, this measure could be seen as another effort by the Court to enforce the implementation of its existing orders, which is a power it does not possess.

## **V. ISSUES OF PROCEDURE**

28. Finally, I find it necessary to note my serious concerns regarding the manner in which South Africa's Request and incidental oral hearings were managed by the Court, resulting in Israel not having sufficient time to file its written observations on the request. In my view, the Court should have consented to Israel's request to postpone the oral hearings to the following week to allow for Israel to have sufficient time to fully respond to South Africa's Request and engage counsel. Regrettably, as a result of the exceptionally abbreviated time-frame for the hearings, Israel could not be represented by its chosen Counsel, who were unavailable on the dates scheduled by the Court. It is also regrettable that Israel was required to respond to a question posed by a Member of the Court over the Jewish Sabbath. The Court's decisions in this respect bear upon the procedural equality between the Parties and the good administration of justice by the Court.

(Signed) Julia SEBUTINDE.

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