

## STATEMENT

**By Professor John Dugard SC, Counsel and Advocate  
for the Republic of South Africa**

## JURISDICTION

1. Madam President, members of the Court. It is a great privilege to appear before you on behalf of the Republic of South Africa. In my speech today I will address the question of jurisdiction.
2. The people of South Africa and Israel both have a history of suffering. Both States have become parties to the Genocide Convention in the determination to end human suffering. In this spirit neither has attached a reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.
3. It is in terms of this Convention, dedicated to saving humanity, that South Africa brings this dispute before this Court.
4. The prohibition of genocide is a peremptory norm. Obligations under the Genocide Convention are *erga omnes*, obligations owed to the international community as a whole. States parties to this Convention are obliged not only to desist from genocidal acts but also to prevent them. That the obligation of States parties to prevent acts of genocide is the foundation of the Convention is clear from its placement in Article I of the Convention.

5. Article IX of the Genocide Convention makes it clear that States parties are guardians of the Genocide Convention. Unlike other treaties designed to protect human rights<sup>1</sup> it does not oblige States to pursue negotiations as a prelude to approaching this Court. It does not treat the ending of genocidal acts as a bilateral affair between states. Instead, it envisages a situation in which a State, acting on behalf of the international community as a whole, seizes the jurisdiction of the Court as a matter of urgency to prevent genocide.
6. South Africa has long history of close relations with Israel. For this reason, it did not bring this dispute immediately to the attention of this Court. It watched with horror as Israel responded to the terrible atrocities committed against its people on 7 October 2023 with an attack on Gaza that resulted in the indiscriminate killing of innocent Palestinian civilians, most of whom were women and children.
7. The South African government repeatedly voiced its concerns, in the Security Council<sup>2</sup> and in public statements,<sup>3</sup> that Israel's actions had become genocidal. On 10 November,

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<sup>1</sup> See, for instance, Convention on the Elimination of All Forms of Racial Discrimination, Article 22; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 30.

<sup>2</sup> South Africa, Department of International Relations and Cooperation (DIRCO), *South Africa calls for the international community to hold Israel accountable for breaches of International Law (30 October 2023)*, Application, para 13, fn 33, <https://www.dirco.gov.za/south-africa-calls-for-the-international-community-to-hold-israel-accountable-for-breaches-of-international-law/#:~:text=Home-.South%20Africa%20calls%20for%20the%20International%20community%20to%20hold.for%20breaches%20of%20International%20Law&text=Save%20the%20Children%20has%20reported.world's%20conflict%20zones%20since%202019.>

<sup>3</sup> South Africa, DIRCO, *Ministerial Statement on the Ongoing Israeli Palestinian Conflict by Dr GNM Pandor, Minister for International Relations and Cooperation, in the National Assembly House of Parliament (7 November 2023)*, Application, para 13, fn 34, <https://www.dirco.gov.za/ministerial-statement-on-the-ongoing-israeli-palestinian-conflict-by-dr-gnm-pandor-minister-for-international-relations-and-cooperation-in-the-national-assembly-house-of-parliament-7-november-2023/>; South Africa, The Presidency, *President Ramaphosa Meets with the Jewish Board of Deputies* (13

in a formal diplomatic demarche, it informed Israel that while it condemned the actions of Hamas, it wanted the International Criminal Court (ICC) to investigate the leadership of Israel for international crimes, including genocide.<sup>4</sup> As the Court will know, the definition of genocide in the Rome Statute repeats that of the Genocide Convention.<sup>5</sup>

8. On 17 November South Africa referred Israel's commission of the crime of genocide to the International Criminal Court (ICC) for "vigorous investigation"<sup>6</sup>. In announcing this decision President Ramaphosa publicly expressed his abhorrence "*for what is happening right now in Gaza, which is now turned into a concentration camp where genocide is taking place.*"<sup>7</sup> To accuse a State of committing acts of genocide and to condemn it in such strong language is a major act on the part of a State. At this stage it became clear that there was a serious dispute between South Africa and Israel which would end only with the end of Israel's genocidal acts.

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November, 2023), Application, fn 36 <https://www.thepresidency.gov.za/president-ramaphosa-meets-south-african-jewish-board-deputies>; Kate Bartlett, "South Africa Refers Israel to The Hague over Gaza War Crimes," *VOA News* ( 17 November 2023), , Application, para 13, fn 37, <https://www.voanews.com/a/south-africa-refers-israel-to-the-hague-over-gaza-war-crimes-7359022.html>

<sup>4</sup> South Africa, DIRCO, *DIRCO démarches the Ambassador of the State of Israel* (10 November 2023), Application, para 13, fn 35. <https://www.dirco.gov.za/dirco-demarches-the-ambassador-of-the-state-of-israel/>.

<sup>5</sup> See Article 6 of the Rome Statute of the International Criminal Court.

<sup>6</sup> South Africa, Embassy in the Netherlands, *Letter from the South African Embassy in The Netherlands to the Prosecutor of the International Criminal Court* (17 November 2023) Application, para 13, fn 38', <https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17November-2023pdf>.

<sup>7</sup> Kate Bartlett, "South Africa Refers Israel to The Hague over War Crimes", *VOA News* (17 November 2023), Application, para 13, fn 37, see above footnote 3.

9. South Africa repeated this accusation at a meeting of BRICS on 21 November 2023<sup>8</sup> and at an Emergency Special Session of the UN General Assembly on 12 December 2023.<sup>9</sup> No response from Israel was forthcoming. None was necessary. By this time, the dispute had crystallized as a matter of law. This was confirmed by Israel's official and unequivocal denial on 6 December 2023 that it was committing genocide in Gaza.<sup>10</sup>
10. As a matter of courtesy, before filing the present application, on 21 December 2023, South Africa sent a Note Verbale to the Embassy of Israel to reiterate its view that Israel's acts of genocide in Gaza amounted to genocide — that it, as a State Party to the Genocide Convention, was under an obligation to prevent genocide from being committed.<sup>11</sup> Israel responded by way of a Note Verbale<sup>12</sup> that failed to address the issues raised by South Africa in its Note and neither affirmed nor denied the existence of a dispute. Emailed late on 27 December 2023, this Note Verbale was received by the relevant team on 29 December 2023 after the present Application was filed.<sup>13</sup>

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<sup>8</sup> South Africa The Presidency, *Opening Remarks by President Ramaphosa to the Extraordinary Joint Meeting of BRICS Leaders of Invited BRICS members on the Situation in the Middle East* Application, para 13, fn 39, <https://www.thepresidency.gov.za/opening-remarks-president-cyril-ramaphosa-extraordinary-joint-meeting-brics-leaders-and-leaders>.

<sup>9</sup> UN News, *UN General Assembly votes by large majority for immediate humanitarian ceasefire during emergency session* (video of the session at 1:13:37) (12 December 2023), Application, para 13, fn 40., <https://news.un.org/en/story/2023/12/1144717>.

<sup>10</sup> See Israel, Ministry of Foreign Affairs, *Hamas-Israel Conflict 2023: Frequently asked Questions*, updated to 8 December, pp13-5. This statement declares: "The accusation of genocide in these circumstances is not just legally and factually incoherent, it is obscene": [https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English\\_Documents\\_Israel-Hamas-Conflict-2023-FAQs-Israel-MFA-8-12-23.pdf](https://www.gov.il/BlobFolder/generalpage/swords-of-iron-faq-6-dec-2023/en/English_Documents_Israel-Hamas-Conflict-2023-FAQs-Israel-MFA-8-12-23.pdf)

<sup>11</sup> South Africa, DIRCO, *Note Verbale* (21 December 2023), Ref No ISRA/10/2023. Judges' Folder, Tab 2, p 2-3.

<sup>12</sup> Israel, *Note Verbale* (27 December, 2023), Ref No 2023/1645/004. Judges' Folder, Tab 3, p 4.

<sup>13</sup> The Court was informed about this matter in a letter dated 5 January 2024. See Judge's Folder, Tab 6, p 8.

11. On 4 January 2024, South Africa replied to this Note Verbale,<sup>14</sup> highlighting Israel's failure to provide any response to the matters raised by South Africa over the previous months, as reiterated in its Note Verbale. South Africa made it clear that, given Israel's ongoing conduct against Palestinians in Gaza, the dispute referred to in its Note Verbale of 21 December 2023 remained unresolved and was "plainly not capable of resolution by way of a bilateral meeting." Nevertheless, South Africa proposed a meeting on 5 January 2023 out of courtesy. Israel responded to this Note Verbale by proposing that "we reconnect to coordinate a meeting at the earliest opportunity" after the close of hearings in the present case.<sup>15</sup> To this South Africa replied that such a meeting would serve no purpose.<sup>16</sup> The Notes Verbales are to be found in the Judges' Folder.
12. The existence of a dispute is a matter to be determined by an objective determination of the facts<sup>17</sup> as they existed at the time of the filing of the application.<sup>18</sup> At this time South Africa had accused Israel in the Security Council, the General Assembly and other public fora of engaging in genocidal acts. It had conducted a formal diplomatic demarche on Israel warning it that it viewed its conduct as genocidal. It had requested the ICC to vigorously investigate crimes under the Genocide Convention committed in the Gaza Strip by Israel and accused Israel *inter alia* of the deliberate targeting of civilians, intentionally causing starvation and impeding relief supplies. It had accused Israeli

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<sup>14</sup> South Africa, Note Verbale (4 January 2024), Ref No ISRA/01/2024.Judges' Folder, Tab 4, p 5-6.

<sup>15</sup> Judges' Folder Tab 5, p 7.

<sup>16</sup> Judges' Folder Tab 7, p 9.

<sup>17</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports, 2016, p.833 at p.849, para 39.

<sup>18</sup> Ibid, p.851, para 42.

leaders of expressing the “intent of committing genocide.”<sup>19</sup> Israel had flatly rejected South Africa’s accusations.<sup>20</sup>

13. Despite these harsh accusations, Israel has persisted in its genocidal acts against the population of Gaza. What more evidence could be required to establish a dispute? It is precisely because of a situation of this kind, affecting the international community as a whole, that Article IX of the Genocide Convention does not require negotiations as a precondition to seizing the jurisdiction of the Court. Certainly a respondent State cannot prevent a referral to the Court by claiming that there is no dispute and that it wants discussions on this matter when the existence of a dispute is clear. For a State to insist on a timeframe for negotiations would be a licence to commit genocide and would run counter to the object and purpose of the Genocide Convention.
  
14. The question of the crystallization of a dispute has been addressed by this Court in other cases in preliminary objections at the merits stage when the burden of proof is higher. Although the Court has generally adopted a flexible approach to this subject,<sup>21</sup> it has laid down a number of tests for the existence of a dispute:

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<sup>19</sup> International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties*, (17 November 2023), [https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewje1M\\_6gdCDaxXg1QIHHcp3BNIOFnoECC0QAO&url=https%3A%2F%2Fwww.icc-cpi.int%2Fnews%2Fstatement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine&usg=AOvVaw1SF2ycSLIZ\\_pRLQiAIDeGj&opi=89978449](https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewje1M_6gdCDaxXg1QIHHcp3BNIOFnoECC0QAO&url=https%3A%2F%2Fwww.icc-cpi.int%2Fnews%2Fstatement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine&usg=AOvVaw1SF2ycSLIZ_pRLQiAIDeGj&opi=89978449).

<sup>20</sup> See above, fn 10.

<sup>21</sup> See the Dissenting Opinion of Judge Crawford in *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, *Preliminary Objections, Judgment, ICJ Reports 2016*, p.833 at p.1093, paras 2-3, pp. 1095-1011, paras 7-19.

- (a) “It must be shown that the claim of one party is positively opposed by the other”,<sup>22</sup>
- (b) The date for determining the existence of the dispute is the date of application but subsequent conduct may be considered;<sup>23</sup>
- (c) Whether the dispute exists must be determined by an objective determination of the facts;<sup>24</sup>
- (d) “[A]dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed.’ ”<sup>25</sup>

15. When these propositions are applied to the facts of this case it is incontrovertible that a dispute exists between South Africa and Israel. South Africa strongly believes that what Israel is doing in Gaza amounts to genocide; Israel denies this and claims that such an accusation is legally and factually wrong and moreover is obscene.<sup>26</sup>

16. An objective determination of the facts shows that a dispute existed on the date of submission of South Africa’s application and this has been confirmed by Israel’s subsequent statements and continuing conduct in Gaza. Israel must have been aware from South Africa’s public statements, demarche and referral to the ICC of Israel’s genocidal acts that a dispute existed between the two States.

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<sup>22</sup> *South West Africa Cases, (Ethiopia and Liberia v South Africa), Preliminary Objections, ICJ Reports 1962*, p.319 at p.328.

<sup>23</sup> *Application of the Genocide Convention (Gambia v Myanmar) Preliminary Objections, ICJ Reports, ICJ Reports, 2022*, at 502, para 64.

<sup>24</sup> *Obligations Concerning Negotiations of Cessation of the Nuclear Arms Race and to Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 2016*, at 849, para 39.

<sup>25</sup> *Ibid*, para 40.

<sup>26</sup> See above, fn 10.

17. The Court has indicated that in an application for provisional measures it is sufficient to show that there is a *prima facie* basis for jurisdiction.<sup>27</sup> It is submitted that South Africa has convincingly established the existence of a dispute between it and Israel over the fulfilment of the latter's obligations under the Genocide Convention.
18. It is further submitted that regard should be had to the special considerations that apply to the existence of a dispute under Article IX of the Genocide Convention between a State that brings an application in furtherance of its obligation to prevent genocide and a State accused of committing genocide.

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<sup>27</sup> *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Provisional Measures, Order of 8 March 2011, ICJ Reports 2011*, p6, at p 17, para 49; *Jadhav Case, (India v Pakistan), Order of 18 May 2017, ICJ Reports 2017*, p 231, at 239, para 29.