

STATEMENT

By Professor Max du Plessis SC, Counsel and Advocate

for the Republic of South Africa

NATURE OF THE RIGHTS REQUIRING PROTECTION AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED

[Introduction]

1. Madam President, Members of the Court. It is a privilege to appear before you, and my honour to represent South Africa in these proceedings. I will be focusing on the nature of the rights that South Africa seeks to preserve through its application and the link between such rights and the measures requested.
2. As well-established in the Court’s jurisprudence, and most recently in this Court’s decision in *The Gambia* case, for the Court to exercise its power to indicate provisional measures, the rights claimed by South Africa on the merits — and for which it is seeking protection — must be “at least plausible”.¹
3. This threshold does not require the Court to “determine definitively whether the rights which [South Africa] wishes to see protected exist”.²

¹ *The Gambia v. Myanmar; Provisional Measures, Order of 23 January 2020*, p. 18, para. 43

² *The Gambia v. Myanmar; Provisional Measures, Order of 23 January 2020*, p. 18, para. 44.

4. Rather, the rights asserted must merely be “grounded in a *possible* interpretation” of the Convention;³ and “the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party”.⁴

[Rights to be protected: core rights]

5. Palestinians in Gaza— as a very substantial and important part of the Palestinian national, racial and ethnical group — simply but profoundly are entitled to exist.⁵
6. To situate the right to exist, and the threats to that right, requires the Court to appreciate that this Application by South Africa is brought within a particular context. What is happening in Gaza now is not correctly framed as a simple conflict between two parties. It entails, instead, destructive acts perpetrated by an occupying power, Israel, that has subjected the Palestinian people to an oppressive and prolonged violation of their rights to self-determination for 56 years. And those violations occur in a world where Israel for years has regarded itself as beyond and above the law. As the UN Special Rapporteur on the Occupied Palestinian Territories, explained in 2022:⁶ “The occupation by Israel has been conducted in profound defiance of international law and hundreds of United Nations resolutions, with scant pushback from the international community”.

³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 152, para. 60 (emphasis added).

⁴ *Ibid.*

⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23. The right of existence represents the very core of the Genocide Convention. As this Court found in its 1951 Advisory Opinion: “it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups”.

⁶ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, A/HRC/49/87 (12 August 2022), para 11.

7. That context is important, as South Africa made clear in its Application. Where the international community has failed Palestinians for so long, despite Israel's wilful defiance of Palestinians' rights, South Africa turns to this Court seeking to protect the core rights of Palestinians in Gaza to be protected from acts of genocide, attempted genocide, direct and public incitement to genocide, and complicity in and conspiracy to commit genocide. As the Court knows, the Convention prohibits the destruction of a group, or part of that group, including through killing, causing serious bodily and mental harm, and inflicting conditions of life calculated to bring about the group's physical destruction.
8. Through these core rights, the Convention further protects the rights of its members to life, and physical and mental integrity. Palestinians in Gaza — women, men, children — because of their membership in a group, are protected by the Convention, as is the group itself.
9. The core rights are violated and threatened by a remarkable set of facts outlined by my colleagues, and set out in detail in South Africa's application with supporting evidence. In the speeches to this Court today, South Africa has chosen to avoid the showing of graphic videos and photos. It has decided against turning this Court into a theatre for spectacle. It knows, as well as your Excellencies, the temptation for both sides in a dispute to parade pictures to shock. South Africa's application, in this Court today, is built on a foundation of clear legal rights, not images. The detailed material before the Court is marshalled to show a case for provisional measures based firmly on this Court's prior decisions. And South Africa advances its case on the basis that Palestinians' rights are equally as worthy of protection — on the unprecedented evidence before you — as those of the victim groups

that this honourable Court has previously protected, by its issuance of provisional measures.

10. The material confirms the rights in issue and their violation: that Israel has committed and is committing acts capable of being characterised as “genocidal”. You have heard about direct extermination of thousands of people and children of the Palestinian population in Gaza since 7 October 2023; and South Africa and the world stand witness to the forced evacuation of over 85 per cent of the population of Gaza from their homes and herding them into ever smaller areas, without adequate shelter or medical care, to be attacked, killed and harmed. The rights are immediately and urgently in need of protection because of the ongoing denial by Israel of the conditions necessary for life. Arif Husain, the chief economist at the United Nations World Food Program, chillingly warned on 3 January 2024, and I quote *“I’ve been doing this for the past two decades, and I’ve been to all kinds of conflicts and all kinds of crises. And, for me, this [the situation in Gaza] is unprecedented because of, one, the magnitude, the scale, the entire population of a particular place; second, the severity; and, third, the speed at which this is happening, at which this has unfolded, is unprecedented. In my life, I’ve never seen anything like this in terms of severity, in terms of scale, and then in terms of speed.”*⁷

⁷ “Gaza is Starving: The chief economist of the World Food Program explains how the scarcity of food may tip the territory into famine.”, by Isaac Chotiner (3 January 2024), The New Yorker, <https://www.newyorker.com/news/q-and-a/gaza-is-starving>. Mr Husain’s comments were based on a report dated 21 December 2023 (GAZA STRIP : IPC Acute Food Insecurity | November 2023 – February 2024 - https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Acute_Food_Insecurity_Nov2023_Feb2024.pdf. The UN World Food Program is a partner organization in compiling the report. See also Oxfam “Starvation as weapon of war being used against Gaza civilians” (25 October 2023), <https://www.oxfam.org/en/press-releases/starvation-weapon-war-being-used-against-gaza-civilians-oxfam>

11. The core rights, on the evidence provided by South Africa in its application, are demonstrably being violated. Multiple further statements by UN bodies and experts,⁸ as well as various expert human rights organisations and institutions⁹ and States,¹⁰ set out in South Africa's application, confirm as much: they collectively have considered the acts committed by Israel to be genocidal, or at the very least, warned that the Palestinian people are at risk of genocide. Since the application was initiated, further States¹¹ and experts¹² have expressed their support thereby underlining the plausibility of South Africa's claims for provisional measures.

12. For the purposes of the indication of provisional measures, the rights asserted by South Africa under the Genocide Convention, and their protection corresponds with the very object and purpose of the Convention. Based on the materials before the court, the acts by Israel complained of are capable of being characterised as at least plausibly genocidal. As Mr Ngcukaitobi has explicated, the evidence of the specific genocidal intent is clear from

⁸ Application, para 108, pp. 67 to 69.

⁹ Application, para 109, p. 70.

¹⁰ Application, para 12, p 4.

¹¹ In the 12 days since the application, 12 states, the Arab League, and the Organization of Islamic Co-operation, representing 57 states (note overlap of 6 states between OIC and statements: Malaysia, Türkiye, Jordan, Maldives, Pakistan, Bangladesh; overlap with Arab League): [1] Palestine (29 December 2023); Organization of Islamic Co-operation, representing 57 states (30 December 2023); Malaysia (2 January 2024); Türkiye (3 January 2024); Jordan (4 January 2024); Maldives (5 January 2024); Bolivia (8 January 2024); Venezuela (9 January 2024); Pakistan (9 January 2024); Bangladesh (9 January 2024); Namibia (9 January 2024); Nicaragua (9 January 2024); Arab League (10 January 2024); Brazil (10 January 2024).

¹² For example, Professor Gentian Zyberi (member of the UN Human Rights Committee) on January 6th, stressed that "By now there is NO DOUBT that Israeli authorities' conduct in Gaza meets at least the threshold of Article II(c) of the 1948 Genocide Convention: '(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'" and "It also, at a minimum, meets Article III(b), (c) and (d) on (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; and (d) Attempt to commit genocide. Not only there is enough for the provisional measures stage, but also enough on the merits."

(<https://twitter.com/GentianZyberi/status/1743615390301774285>). Balakrishnan Rajagopal, UN Special Rapporteur on the right to housing, similarly stated "Thank you South Africa"

(<https://twitter.com/adequatehousing/status/1740788601539961328>)

the statements by Israeli governmental officials and soldiers towards Palestinians in Gaza which may be characterised as at the very least “plausibly” genocidal. This at least “plausible” genocidal intent can also be deduced from the pattern of conduct against Palestinians in Gaza. It is also —at the very least— plausible that Israel has failed to prevent or to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, and it is further plausible that South Africa has an obligation to prevent genocide, including by taking all reasonable measures within its powers to influence effectively the actions of persons perpetrating and likely to commit genocide, or engaging in direct or public incitement to genocide. Let me be clear: South Africa’s obligation is motivated by the need to protect Palestinians in Gaza, and their absolute rights not to be subjected to genocidal acts.

13. Notwithstanding the incontestably serious nature of the allegations against Israel, the Court should not be required, before granting provisional measures, to ascertain whether the existence of a genocidal intent is the *only* plausible inference to be drawn from the material before it.¹³ That would amount to the Court making a determination on the merits.

14. Moreover, South Africa stresses that any motive or effort by Israel to destroy Hamas does not preclude genocidal intent towards the whole or part of the Palestinian people in Gaza. Evidence of other motives explaining its conduct as a perpetrator will not save Israel from a finding that it also possessed the requisite genocidal intent.¹⁴ And because of a fundamental feature of genocide – the prohibitions on genocide and associated offences are

¹³ *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, pp. 18 to 19, para. 46.

¹⁴ *Prosecutor v. Jelesic*, No. IT-95-10-A. Judgement (5 July 2001) para. 49. Trial Chamber II, *Popović et al*, Judgment of 10 June 2001, Case No. IT-05-88-T, para. 866; Trial Chamber, *Prosecutor v Krstić*, Judgment of 2 August 2001, Case No. IT-98-33, para. 572.

jus cogens in nature – they are subject to no exception or qualification.¹⁵ They are absolute in nature, in times of war and peace, always, and everywhere.

15. Furthermore, the fact that the alleged acts may *also* be characterised as crimes other than genocide should not exclude the plausible inference of the existence of genocidal intent. As the UN Secretary-General has stated, the prevention of genocide is “intrinsically connected” to preventing crimes against humanity and war crimes, as these crimes “tend to occur concurrently in the same situation rather than as isolated events... Consequently, initiatives aiming at preventing one of the crimes will, in most circumstances, also cover the others.”¹⁶ As set out in the ILC Articles, “the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful”.¹⁷

[Rights to be protected: South Africa / erga omnes]

16. South Africa’s claims thus concern, in the first place, its own obligations as a State party to the Genocide Convention to act to prevent and punish genocide. In the Application, South Africa has stressed that it “is acutely aware of its own obligation – as a State party to the Convention – to prevent genocide”.¹⁸ Indeed, this Court has recognised “the universal character both of the condemnation of genocide and of the co-operation required ‘in order

¹⁵ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p 23; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serbia & Montenegro)*, Judgment of 26 February 2007 [2007] I.C.J. Reports 43, para 64.

¹⁶ UN Human Rights Council, Prevention of genocide: Report of the Secretary-General, A/HRC/41/24 (8 October 2019), <https://undocs.org/A/HRC/41/24>, para. 3.

¹⁷ United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, Second Edition, 2023, p. 214, (Article 15. Breach consisting of a composite act), Commentary: para 9.

¹⁸ *Application*, para. 3. As regards its own standing, see also para. 16 of the Application: “Given that South Africa’s claim concerns its own obligations as a State party to the Genocide Convention to act to prevent genocide –to which Israel’s acts and omissions give rise– South Africa plainly has standing in relation thereto”.

to liberate mankind from such an odious scourge”¹⁹. As the prohibition of genocide is “assuredly a peremptory norm of international law (jus cogens)”,²⁰ it is crucial that States pursue their interest under the Convention in ensuring acts of genocide are prevented.

17. Additionally, due to the “special characteristics”²¹ of the Genocide Convention, the respondent State owes this duty not only to the Palestinian people, but to **all** States parties to the Genocide Convention, including South Africa.

18. This has been emphasised repeatedly by this Court, most recently in *The Gambia* case, where the Court held:

“all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. **That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.**”²²

19. Similarly, the Court has reiterated that: “In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely,

¹⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

²⁰ *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*, p. 111, para. 161.

²¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23

²² *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 17, para. 41, emphasis added.

the accomplishment of those high purposes which are the *raison d'être* of the convention.”²³

20. Accordingly, “**any** State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.”²⁴ That means that South Africa is asserting a collective and individual right.²⁵

21. It is thus beyond doubt that South Africa is entitled to invoke the responsibility of the respondent State under the Genocide Convention. Through South Africa’s interest in the “common interest”, and as a State party to the Genocide Convention, it is entitled to safeguard compliance with that instrument.

[Comparisons with other cases]

22. As has been explained, the events unfolding in Gaza at the hands of the Israeli forces are frighteningly unprecedented. Yet what this Court is being asked to do in these proceedings – interdicting genocidal acts on an interim basis – is sadly by no means novel. In relation

²³ *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 17, para. 41, quoting its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

²⁴ *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 18, para. 43, emphasis added.

²⁵ In the words of the International Criminal Tribunal for the former Yugoslavia: “the violation of such an [erga omnes] obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, para. 151 (regarding the crime of torture).

to genocide, the Court has indicated provisional measures in analogous circumstances to these, in *The Gambia* case, where, as here, a State sought provisional measures on the basis of the *erga omnes* right that the Genocide Convention be complied with. Also in respect of genocide, the Court did the same in the *Bosnia*²⁶ and *Ukraine* cases.²⁷ Most recently, this Court further accepted the *erga omnes* character of parties' rights in relation to the Torture Convention.²⁸

23. South Africa respectfully contends that, in this case, the rights of the Palestinians in Gaza are no less worthy of this Court's considerable protective power under Article 41 to issue provisional measures. This Court cannot but find as it did in *The Gambia* case. There, this Court held – and I quote – “that there is a correlation between the rights of members of groups protected under the Genocide Convention, the obligations incumbent on States parties thereto, and the right of any State party to seek compliance therewith by another State party”.²⁹

[Article 41 compliance – rights of Palestinians and South Africa = Convention rights]

24. South Africa's request therefore complies with Article 41 of this Court's Statute, and engages the power of this Court “to preserve by such measures the rights which may

²⁶ *Bosnia v. Serbia, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 20, para. 36; see also *Bosnia v. Serbia, Provisional Measures, Order of 13 September 1993, I. C.J. Reports 1993*, p. 343, para. 38.

²⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022*, pp. 225, para. 60.

²⁸ *Application of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishments (Canada and The Netherlands v. Syrian Arab Republic), Request for the Indication of Provisional Measures, Order (16 November 2023)* <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf>, para. 50

²⁹ *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 20, para. 52.

subsequently be adjudged by it to belong to either party”.³⁰ South Africa requests this Court to discharge that power, and South Africa does so by virtue of its own right, and obligations held towards the international community as a whole.³¹

25. For the Court to indicate one or more provisional measures, there must also be a link between the rights the protection of which is sought and the provisional measure being requested.³² Such a link manifestly exists between the rights claimed by South Africa in its Application and the provisional measures requested, which are directly linked to the rights which form the subject-matter of the dispute. The provisional measures sought therefore ensure the protection of rights “which might ultimately form the basis of a judgment in the exercise of [the Court’s] jurisdiction”.³³

26. The rights at stake in these proceedings are certainly “at least plausible”, “grounded in a possible interpretation” of the Convention,³⁴ as the Convention imposes on parties the obligation to prevent and punish genocide under Article I, and in doing so intends to protect groups and parts of groups from genocide.

27. The Convention was designed to protect both States parties, and human groups. When acts in breach of the Convention are perpetrated, it is the fundamental rights of people, and the

³⁰ *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 18, para. 43.

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p.616, paras. 31 to 32.

³² *The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020*, p. 18, para. 44, citing *Qatar v. United Arab Emirates, Provisional Measures, Order of 23 July 2018*, p. 422, para. 44.

³³ *Bosnia v. Serbia, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p.19, para. 34.

relevant group, that are violated. Those fundamental rights – of Palestinians in Gaza – would be the subject of any judgment by this Court on the merits.

28. To find otherwise, would not only be to treat Palestinians differently, as less worthy of protection than others. It would also be for the Court to unduly limit its own competence, turn its back upon its extensive prior jurisprudence, and close its eyes to the breach of the rights which lie at the heart of the Convention.