

JURISDICTION AND THE MODIFICATION OF PROVISIONAL MEASURES

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1. Mr President, members of the Court. It is a privilege to appear before you on behalf of the Republic of South Africa. In my speech today I will briefly address the subject of jurisdiction and then examine the circumstances that give rise to our request for further provisional measures.

2. In its order of 26 January 2024 the Court found that the Applicant had *prima facie* established the existence of a dispute between it and the Respondent relating to the application of the Genocide Convention and that the Court had jurisdiction in terms of Article IX of the Genocide Convention.¹ In its Order of 28 March, the Court found that there was no reason to revisit this decision.² It is submitted that this conclusion remains valid for the present proceedings.

3. The Court also found that Palestinians in the Gaza Strip have a plausible right to be protected from acts of genocide and that South Africa had the right to seek compliance with this obligation.³ Again, the Court declared that this finding need not be revisited in its decision of 28 March.⁴ It is submitted that this conclusion remains valid: the Court has found that South Africa has advanced a plausible genocide claim.

4. On 26 January the Court found that the situation in Gaza was one that required urgent attention and that there was a risk of irreparable prejudice.⁵ This was confirmed in the Order of 28 March,⁶ and it is a situation that continues today. Indeed, it is further heightened now in the context of Israel's brutal attacks on Rafah and subsequent intensified bombings across the North and Middle Areas.⁷

5. On the basis of the above findings, the Court ordered a number of provisional measures on 26 January. On 28 March the Court found that the circumstances of the situation had changed in terms of

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v Israel)*, Order of 26 January 2024, paras 28, 31.

² *South Africa v Israel*, Order of 28 March 2024, para 24.

³ *South Africa v Israel*, Order of 26 January, para 54.

⁴ *South Africa v Israel*, Order of 28 March, para 25.

⁵ *South Africa v Israel*, Order of 26 January, para 73.

⁶ *South Africa v Israel*, Order of 28 March, para 40.

⁷ UN Global Perspective Human Stories, *Gaza: 80,000 displaced from Rafah as Israeli bombardment intensifies, say UN aid teams* (9 May 2024), <https://news.un.org/en/story/2024/05/1149531>; UN, Global Perspective Human Stories, *Rafah exodus reaches 360,000 as UN underscores \$2.8 billion aid appeal for Gaza, West Bank* (13 May 2024), <https://news.un.org/en/story/2024/05/1149651>.

Article 76 of the Rules of Court as a result of the risk of famine, and ordered three more provisional measures against Israel.⁸

6. Today South Africa approaches the Court for new provisional measures to ensure that the rights in issue in the proceedings, including the right of Palestinians to be protected from acts of genocide, will be so protected.

7. The Rules of Court allow the Court to order new provisional measures when “new facts” are established,⁹ or there has been “some change in the situation” which justifies modification of the existing orders.¹⁰

8. It is impossible to provide an absolute definition of “new facts” or “change in the situation” as it is necessary to have regard to the situation in each case. Decisions of the Court involving provisional measures have dealt with a change in the situation arising from new facts in completely different circumstances. Cases have dealt with matters of life or death¹¹ to territorial change¹² and freedom of movement.¹³ Each case depends on its own set of facts and whether these facts have so altered the situation that new provisional measures are justified. In issuing its March Order, the Court considered that the “developments” since January 2024, which it found to be “exceptionally grave”, constituted “a change in the situation within the meaning of Article 76 of the Rules of Court”.¹⁴ They also found that the previous provisional measures indicated did not “fully address the consequences arising from the changes in the situation”, leading them to order further provisional measures.¹⁵ The changes in the situation since March 2024 are in many ways graver still. They too justify the indication of further provisional measures.

9. On 26 January this Court found that there was a “catastrophic humanitarian situation in the Gaza Strip” which was at “serious risk of deteriorating further before the Court renders its final judgment”¹⁶ which warranted provisional measures. On 28 March the Court found that “the catastrophic

⁸ *South Africa v Israel, Order of 28 March*, para 21.

⁹ International Court of Justice, Rules of Court (1978), art 75(3).

¹⁰ International Court of Justice, Rules of Court (1978), art 76(3).

¹¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro), Provisional Measures, I.C.J Reports 1993*, pp. 325, 343, 349-350.

¹² *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) I.C.J Reports 2013*, p. 354.

¹³ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan), Provisional Measures, I.C.J Reports 2023*, p. 14 at paras 28-30.

¹⁴ *South Africa v Israel, Order of 28 March 2024*, paras 22 and 23.

¹⁵ *South Africa v Israel, Order of 28 March 2024*, paras 23.

¹⁶ *South Africa v Israel, Order of 26 January*, para 73.

living conditions of the Palestinians in the Gaza Strip have deteriorated further, in particular in view of the prolonged and widespread deprivation of food and other basic necessities”.¹⁷

10. It is difficult to imagine that the situation could get worse. But it has. In the early days of the Gaza war, Israel forced Palestinians to relocate to the South, to the Rafah Governorate — 1.5 million people were crammed into this inhospitable area which appeared to offer safety from Israel’s bombing, artillery fire and the brutality of its forces inflamed by genocidal incitement.¹⁸ World leaders warned that an assault on Rafah resulting in the forced and arbitrary evacuation of the already displaced Palestinians to even less hospitable parts of Gaza without adequate food, water, shelter and hospitals would have disastrous consequences.¹⁹ The Director-General of the World Health Organization declared that a military incursion into Rafah “will plunge the crisis into unprecedented levels of humanitarian need. A ceasefire is urgently needed for the sake of humanity.”²⁰

11. Israel has not heeded this warning. It has not even fulfilled its own undertaking not to embark on an assault on Rafah without a proper evacuation plan.²¹ Instead, it has gone ahead and embarked on an attack on Rafah. Rafah Governorate has been bombed, subjected to artillery fire and ground incursions.²² The Rafah crossing is closed and Kerem Shalom is mostly disabled.²³

12. Mr President, my colleagues will provide you with a full account of Israel’s genocidal acts in the Gaza Strip. It is my task to briefly indicate the “new facts” required by Article 75(3) and the “change in the situation” required by Article 76(1).

13. This Application for further provisional measures is prompted by Israel’s assault on Rafah. It is this assault that constitutes the new facts, the change in circumstances. Rafah is the “last refuge” in Gaza for 1.5 million Palestinians, the majority of whom have been forcibly displaced from north and

¹⁷ *South Africa v Israel*, Order of 28 March, para 18.

¹⁸ United Nations, Palestine, *450,000 Gazans now uprooted from Rafah as Israeli bombardment continues* (15 May 2024), <https://palestine.un.org/en/268727-450000-gazans-now-uprooted-rafah-israeli-bombardment-continues>.

¹⁹ “World reacts to Israel’s Rafah evacuation order”, *Al Jazeera* (6 May 2024), <https://www.aljazeera.com/news/2024/5/6/world-reacts-to-israels-rafah-evacuation-order>.

²⁰ Director-General of the WHO, Tedros Adhanom Ghebreyesus, @ Dr Tedros, Tweet (6.23 pm, 6 May 2024), <https://twitter.com/DrTedros/status/1787518675836195224>.

²¹ Prime Minister of Israel, @IsraeliPM, Tweet (4:40 pm, 9 February 2024), <https://twitter.com/IsraeliPM/status/1755979954448150530?lang=en>.

²² UN OHCHR, *Israel’s Rafah invasion must stop now, say UN experts* (10 May 2024), <https://www.ohchr.org/en/press-releases/2024/05/israels-rafah-invasion-must-stop-now-say-un-experts>.

²³ UNRWA, *UNRWA Situation Report #107 on the Situation in the Gaza Strip and the West Bank, Including East Jerusalem* (14 May 2024), <https://www.unrwa.org/resources/reports/unrwa-situation-report-107-situation-gaza-strip-and-west-bank-including-east-jerusalem>.

central Gaza.²⁴ It is the last viable part of Gaza for habitation, public administration, the provision of basic services and medical care. Israel has now commenced its long-threatened assault on Rafah. It has ordered the evacuation of Palestinians in Rafah to the barren sand dunes of Al Mawasi.²⁵ It has closed critical border crossings to humanitarian aid, medical supplies, goods and fuel upon which the population of Gaza depends.²⁶ Displacement, famine and suffering are now the lot of the Palestinian group.²⁷ Israel's actions are in violation of the fundamental rules of international humanitarian law. In addition, they provide evidence of the crime of genocide in terms of Article II (a), (b), (c) and (d) of the Genocide Convention. This attack is the final blow that is intended to destroy the Palestinian group in Gaza. That this is the intention of this final operation will be made clear by Mr Ngcukaitobi.

14. Since South Africa filed the present Application for provisional measures, Israel has intensified its offensive in north and central Gaza.²⁸ In these circumstances we have requested the Court to issue a provisional measure that orders Israel to cease its military activities throughout Gaza and to withdraw from the territory. Such an order alone can bring an end to Israel's genocide in Gaza.²⁹ That the Court has the power to make such an order as a provisional measure is clear. The Court has stated that in terms of Article 75(2) of the Rules of Court "it has the power, under its Statute, when a request for provisional measures has been made to indicate measures that are, in whole or in part, other than those requested."³⁰

²⁴ United Nations, Meetings Coverage and Press Releases, *Bureau of Committee on Palestinian People's Rights Warns against Israeli Military Offensive into Rafah* (14 February 2024), <https://press.un.org/en/2024/gapal1461.doc.htm>.

²⁵ United Nations, Meetings Coverage and Press Releases, *Daily Press Briefing by the Office of the Spokesperson for the Secretary-General* (14 May 2024), <https://press.un.org/en/2024/db240514.doc.htm>.

²⁶ World Food Programme, *Gaza updates: WFP responds to hunger crisis as Rafah incursion cuts access to warehouse* (15 May 2024), <https://www.wfp.org/stories/gaza-updates-wfp-responds-hunger-crisis-rafah-incursion-cuts-access-warehouse>.

²⁷ "Israel's Rafah invasion may be south Gaza's famine 'tipping point'", *The New Arab* (8 May 2024), <https://www.newarab.com/news/israel-rafah-attack-may-be-south-gaza-famine-tipping-point>.

²⁸ UN OHCHR, *Urgent call for ceasefire and release of hostages* (12 May 2024), <https://www.ohchr.org/en/statements/2024/05/urgent-call-ceasefire-and-release-hostages>.

²⁹ UN News, *Global Perspective Human Stories, Gaza: As exodus from Rafah continues, UN urges reopening of aid lines* (10 May 2024), <https://news.un.org/en/story/2024/05/1149591>.

³⁰ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Provisional Measures, I.C.J Reports 2022 (1)*, p. 229, para. 79.