SEPARATE OPINION OF JUDGE *AD HOC* BARAK

1. South Africa came to the Court seeking the immediate suspension of the military operations in the Gaza Strip. It has wrongly sought to impute the crime of Cain to Abel. The Court rejected South Africa's main contention and, instead, adopted measures that recall Israel's existing obligations under the Genocide Convention. The Court has reaffirmed Israel's right to defend its citizens and emphasized the importance of providing humanitarian aid to the population of Gaza. The provisional measures indicated by the Court are thus of a significantly narrower scope than those requested by South Africa.

2. Notably, the Court has emphasized that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law", which certainly includes Hamas. The Court has also stated that it "is gravely concerned about the fate of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release" (see Order, para. 85).

I. Genocide: An Autobiographical Remark

3. The Genocide Convention holds a very special place in the heart and history of the Jewish people, both within and beyond the State of Israel. The term "genocide" was coined in 1942 by a Jewish lawyer from Poland, Raphael Lemkin, and the impetus for the adoption of the Genocide Convention came from the carefully planned and deliberate murder of 6 million Jews during the Holocaust.

4. I was five years old when, as part of Operation Barbarossa, the German army occupied the city in which I was born — Kaunas — in Lithuania. Within a few days, almost 30,000 Jews in Kaunas were taken from their homes and put into a ghetto. It was as if we were sentenced to death, awaiting our execution. On 26 October 1941, every Jew in the ghetto was instructed to gather in the central square, known as "Democracy Square". Around 9,000 Jews were taken from the square on that day and executed by machine gun fire.

There was constant hunger in the overcrowded ghetto. But despite all the difficulties, there was an organized community life. It was a community of individuals condemned to death, yet in their hearts there was a spark of hope for life and a desire to preserve basic human dignity.

5. At the beginning of 1944, the Nazis rounded up all children under the age of 12, loaded them onto trucks and shot them during the infamous "Kinder Aktion". It was clear that I had to leave in order to survive. I was smuggled out of the ghetto in a sack and taken to a Lithuanian farmer. A couple of weeks later my mother and I were transferred to another farmer. We had to be very discreet, so the farmer built a double wall in one of the rooms. We hid in that narrow space until we were finally liberated by the Red Army on 1 August 1944. Only 5 per cent of the Jews of Lithuania had survived.

6. Genocide is more than just a word for me; it represents calculated destruction and human behaviour at its very worst. It is the gravest possible accusation and is deeply intertwined with my personal life experience.

7. I have thought a lot about how this experience has affected me as a judge. In my opinion, the effect has been twofold. First, I am deeply aware of the importance of the existence of the State of Israel. If Israel had existed in 1939, the fate of the Jewish people might have been different. Second, I am a strong believer in human dignity. The Nazis and their collaborators sought to reduce us to dust and ashes. They aimed to strip us of our human dignity. However, in this, they failed. During the most challenging moments in the ghetto, we preserved our humanity and the spirit of humankind. The Nazis succeeded in murdering many of our people, but they could not take away our humanity.

8. The rebirth following the Holocaust is the rebirth of the human being, of the centrality of humanity and of human rights for every person. Many international instruments focusing on the rights of the individual were adopted after 1945, and the protection of human rights is also deeply rooted in the Israeli legal system.

II. Israel's Commitment to the Rule of Law and International Humanitarian Law

9. Israel is a democracy with a strong legal system and an independent judicial system. Whenever there is tension between national security interests and human rights, the former must be attained without compromising the protection of the latter. As I have written:

> "Security and human rights go hand in hand. There is no democracy without security; there is no democracy without human rights. Democracy is based upon a delicate balance between collective security and individual liberty"[1].

[1] A. Barak, "International Humanitarian Law and the Israeli Supreme Court", *Israel Law Review*, Vol. 47, July 2014, para. 185.

10. The need for such balancing has served as a silver lining in the rulings of the Supreme Court of Israel. Once, in the midst of a military operation in Gaza, the Supreme Court ordered the army to repair the water pipes that had been damaged by army tanks, and to do so while the operation was still ongoing. On the same occasion, it ordered the army to provide humanitarian aid to civilians and to halt hostilities to allow for the burial of the dead[2]. In its judgment on "targeted killings", the Supreme Court ruled that Israel must always act in accordance with international humanitarian law, and that Israel must refrain from targeting terrorists when excessive harm to civilians is anticipated[3].

11. As a judge in the Israeli Supreme Court, I wrote that every Israeli soldier carries with him (or her), in their backpack, the rules of international law[4]. This means that international law guides the actions of all Israeli soldiers wherever they are. I also wrote that when a democratic State fights terrorism, it does so with one hand tied behind its back[5]. Even when fighting a terrorist group like Hamas that does not abide by international law, Israel must abide by the law and uphold democratic values.

12. The Israeli Supreme Court, has also held that torture may not be used during the interrogation of terrorists[6], that religious sites and clergy must be protected, and that all captives must be afforded fundamental guarantees[7]. Naturally, as in any democratic society, some of these rulings have been criticized in Israel. Still, the public stands behind them and the military upholds them on a regular basis. Rulings of the Israeli Supreme Court — many of them based on international law — are the standards by which Israel conducts itself.

13. International law is also an integral part of the military code and the conduct of the Israeli army. The Code of Ethics of the Israel Defense Forces states that

> "[a]n IDF soldier will only exercise their power or use their weapon in order to fulfill their mission and only when necessary. They will maintain their humanity during combat and routine times. The soldier will not use their weapon or power to harm uninvolved civilians and

[2] *Physicians for Human Rights* v. *IDF Commander in Gaza* (2004), HCJ 4764/04.

[3] *Public Committee against Torture in Israel* v. *Government of Israel* (2005) (*Targeted Killings*), HCJ 769/02.

[4] *Jam'iat Iscan Al-Ma'almoun* v. *IDF Commander in the Judea and Samaria Area* (1983), HCJ 393/82.

[5] *The Public Committee against Torture in Israel* v. *Government of Israel* (2006), HCJ 769/02.

[6] *Public Committee against Torture in Israel* v. *Government of Israel* (1999) (*Interrogations*), HCJ 5100/94.

[7] *Center for the Defense of the Individual Founded by Dr. Lota Salzberger* v. *Commander of the IDF Forces in the West Bank* (2002), HCJ 3278/02.

> prisoners and will do everything in their power to prevent harm to their lives, bodies, dignity and property."[8]

When those norms are violated, the Attorney General, the State Attorney and the Military Advocate General take the necessary measures to bring those responsible to justice, and their decisions are subject to judicial review. In appropriate cases, the Israeli Supreme Court may instruct them how to act. This is Israel's DNA. Governments have been replaced, new justices have come to the Supreme Court, but the DNA of Israel's democracy does not change.

14. Israel's multiple layers of institutional safeguards also include legal advice provided in real time, during hostilities. Strikes that do not meet the definition of a military objective or that do not comply with the rule of proportionality cannot go forward. The holdings of the Israeli Supreme Court and Israel's institutional framework demonstrate a commitment to the rule of law and human life — a commitment that runs through its collective memory, institutions, and traditions.

III. The Court's Prima Facie Jurisdiction

15. The Court has affirmed its prima facie jurisdiction for the purpose of indicating provisional measures (see Order, para. 31). However, it is doubtful whether South Africa brought this dispute in good faith. After South Africa sent a Note Verbale to Israel on 21 December 2023, concerning the situation in Gaza, Israel replied with an offer to engage in consultations at the earliest possible opportunity. South Africa, instead of accepting this offer, which could have led to fruitful diplomatic talks, decided to institute proceedings against Israel before this Court. It is regrettable that Israel's attempt to open a dialogue was met with the filing of an application.

If anything, history has taught us that the best attempts at peace in the Middle East have generally been a result of political negotiations and not judicial recourse. The 1978 peace talks between Egypt and Israel at Camp David are a good example of this. These talks succeeded when a third party — the United States — entered the process and assisted the parties in reaching an agreement. In my opinion, a similar scenario could have unfolded here. While the jurisdictional clause of the Genocide Convention does not require formal negotiations, the principle of good faith dictates that at least some efforts should be made to resolve disputes amicably before resorting to the Court. South Africa made no such effort and denied Israel a

[8] Israel Defense Forces, Code of Ethics, Additional Values, Purity of Arms.

reasonable opportunity to engage meaningfully in a discussion on how to address the difficult humanitarian situation in Gaza.

16. The present case involves an additional difficulty. The other belligerent in the armed conflict in Gaza, Hamas, is not a party to the present proceedings. Thus, it is not possible to indicate measures directed at Hamas in the Order's operative clause. While this does not prevent the Court from exercising its jurisdiction, it is an essential matter to be considered when determining the appropriate measures or remedies in this case.

IV. The Armed Conflict in Gaza

17. The Court briefly recalls the immediate context in which the present case came before it, namely the attack of 7 October 2023 by Hamas and the military operation launched by Israel in response to that attack (see Order, para. 13). The Court, however, fails to give a complete account of the situation which has unfolded in Gaza since that fateful day.

18. On 7 October 2023, on the day of the Sabbath and the Jewish holiday of "Simchat Torah", over 3,000 Hamas terrorists, aided by members of the Palestinian Islamic Jihad, invaded Israeli territory by land, air and sea. The assault began in the early morning hours, with a barrage of rockets over the entire country and the infiltration of Hamas into Israeli territory. Alerts sounded all over Israel, civilians and soldiers took shelter, and many were later massacred inside those shelters. In other places, houses were burned down with civilians still in their safe rooms, burning alive or suffocating to death. At the Reim Nova Music Festival, young Israelis were murdered in their sleep or while running for their lives across open fields. Women's bodies were mutilated, raped, cut up and shot in the worst possible places. Overall, more than 1,200 innocent civilians, including infants and the elderly, were murdered on that day. Two hundred and forty Israelis were kidnapped and taken to the Gaza Strip, and over 12,000 rockets have been fired at Israel since 7 October. These facts have been largely reported and are indisputable.

19. Israel, faced with an ongoing assault on its people and territory, launched a military operation. The Israeli authorities declared that the purpose of the operation is to dismantle Hamas and destroy its military and governmental capabilities, return the hostages, and secure the protection of Israel's borders.

20. Hamas has vowed to "repeat October 7 again and again"[9]. Hamas is thus an existential threat to the State of Israel, and one that Israel must repel.

[9] See "Hamas Official Ghazi Hamad: We Will Repeat the October 7 Attack Time and Again until Israel Is Annihilated; We Are Victims — Everything We Do Is Justified #Hamas #Gaza #Palestinians", *X* (Twitter.com) at: https://t.co/kXu3U0BtAP.

This terrorist organization rules over the Gaza Strip, exercising military and governmental functions. Hamas seeks to immunize its military apparatus by placing it within and below civilian infrastructure, which is itself a war crime, and intentionally places its own population at risk by digging tunnels under their homes and hospitals. Hamas fires missiles indiscriminately at Israel, including from schools and other civilian installations in Gaza, in the full knowledge that many of them will fall inside Gaza causing death and injuries to innocent Palestinians. This is Hamas's well-known *modus operandi*.

21. A few examples illustrate this well. When humanitarian aid enters Gaza, Hamas hoards it for its own purposes. Hamas has made clear that its tunnel network is designed for its fighters, rather than for civilians seeking shelter from the hostilities. Hamas has compromised the inherently civilian nature of schools and hospitals in Gaza, using them for military purposes by storing or launching rockets from and under these sites.

22. The fate of the hostages is especially disturbing. The act of hostage taking committed by Hamas on 7 October constitutes a grave breach of the Geneva Conventions of 12 August 1949 and is criminalized under the Rome Statute[10]. Hamas has not provided the names of the hostages, or any information regarding who is dead and who is still alive. Nor have they allowed the International Committee of the Red Cross (ICRC) to visit the hostages, as the law requires. The ICRC has not been able to provide medical supplies to the hostages, does not know their whereabouts, and has not succeeded in securing their release. As I write, this agony has now been ongoing for over 100 days.

23. This is not to undermine the suffering of innocent Palestinians. I have been personally and deeply affected by the death and destruction in Gaza. There is a danger of food and water shortages and the outbreak of diseases. The population lives in precarious conditions, facing the unfathomable consequences of war. In the role that has been entrusted to me as a judge *ad hoc*, but also as a human being, it is important for me to express my most sincere and heartfelt regret for the loss of innocent lives in this conflict.

24. The State of Israel was brought before this Court as its leadership, soldiers, and children processed the shock and trauma of the attack of 7 October. An entire nation trembled and, in the blink of an eye, lost its most basic sense of security. Fears of additional attacks were palpable as infiltrations continued in the days following the attack. The immediate context in which South Africa's request was brought to the Court should have played a more central role in the Court's reasoning. While it in no way relieves Israel of its obligations, this immediate context forms the inescapable backdrop for the legal analysis of Israel's actions even at this stage of the proceedings.

[10] Rome Statute, Art. 8 (2) *(a)* (viii) and *(c)* (iii).

V. The Appropriate Legal Framework for Analysing the Situation in Gaza

25. South Africa seised the Court on the basis of the Genocide Convention, Article IX of which provides the Court with jurisdiction to resolve disputes related to the "interpretation, application or fulfilment" of that treaty, "including those relating to the responsibility of a State for genocide". This does not mean that the Genocide Convention provides the appropriate legal prism through which to analyse the situation.

26. In my view, the appropriate legal framework for analysing the situation in Gaza is International Humanitarian Law (IHL) — and not the Genocide Convention. IHL provides that harm to innocent civilians and civilian infrastructure should not be excessive in comparison to the military advantage anticipated from a strike. The tragic loss of innocent lives is not considered unlawful so long as it falls within the rules and principles of IHL.

27. The drafters of the Genocide Convention clarified in their discussions that

> "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide.
>
> In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses.
>
> It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide."[11]

28. Violations of IHL occurring in the context of the armed conflict, must be investigated and prosecuted by the competent Israeli authorities.

VI. Lack of Intent

29. Central to the crime of genocide is the element of intent, namely the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group *as such*. International courts have been reluctant to establish such intent and characterize atrocities as genocide. The International Criminal

[11] UN Economic and Social Council, Draft Convention on the Crime of Genocide, Section II: Comments Article by Article, UN doc. E/447, 26 June 1947, reproduced in H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff, 2008, p. 231.

Tribunal for Rwanda (ICTR) was established primarily to prosecute the crime of genocide. Nonetheless, it set a high threshold for proving the *specific intent* required for genocide. In its very first case, the *Akayesu* case, the ICTR described the required specific intent as a "psychological relationship between the physical result and the mental state of the perpetrator" which "demands that the perpetrator clearly seeks to produce the act charged"[12]. This high bar explains some of the full or partial acquittals at the ICTR[13]. An analogous bar was also adopted by the International Criminal Tribunal for the former Yugoslavia.

30. The Court, with regard to State responsibility, has similarly adopted a restrictive approach in cases involving genocide on the merits. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court concluded that — save in the case of Srebrenica — the widespread and serious atrocities committed in Bosnia and Herzegovina were not carried out with the specific intent to destroy, in part, the Bosnian Muslim group (*Judgment, I.C.J. Reports 2007 (I)*, p. 194, para. 370). Some years later, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court found that the required intent was lacking altogether and therefore dismissed Croatia's claims in their entirety (*Judgment, I.C.J. Reports 2015 (I)*, p. 154, para. 524 (2)).

31. I accept that the proof of intent required at this preliminary stage is different from the one required at the merits stage. It is not necessary, at this stage, to convincingly show the *mens rea* of genocide by reference to particular circumstances, or for a pattern of conduct to be such that it could only point to the existence of such intent[14]. However, some proof of intent is necessary. At the very least, sufficient proof to make a claim of genocide plausible.

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32. I strongly disagree with the Court's approach regarding plausibility and, in particular, I disagree on the question of intent.

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[12] ICTR-96-04-T, Trial Chamber I, Judgment of 2 September 1998, paras. 518 and 498.

[13] Of the 75 defendants whose trials were concluded before the ICTR, 14 were acquitted of all charges and several others were acquitted of genocide charges, often due to the difficulty of proving the required specific intent. See, e.g., ICTR-99-50-A, Appeal Judgment of 4 February 2013, para. 91; ICTR-99-52-A, Appeal Judgment of 28 November 2007, para. 912.

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148.

33. The Court may indicate provisional measures "only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 18, para. 43). In the present case, the Court concluded, with scant evidence, that "the right of the Palestinians in Gaza to be protected from acts of genocide" is plausible (Order, para. 54).

34. To understand the Court's erroneous approach, it is important to compare the present case to *The Gambia* v. *Myanmar* case: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*. To conclude that the asserted rights were plausible, in *The Gambia* v. *Myanmar* case, the Court relied on two reports issued by an Independent International Fact-Finding Mission (IIFFM)[15]. These reports were based on the meticulous collection of evidence over two years, which included 400 interviews with victims and eyewitnesses, analysis of satellite imagery, photographs and videos, the cross-checking of information against credible secondary information, expert interviews and raw data[16]. The independent experts travelled to Bangladesh, Indonesia, Malaysia and Thailand to interview victims and witnesses and hold other meetings. Furthermore, the Mission's secretariat undertook six additional field missions[17]. In its report of 12 September 2018, the IIFFM concluded that there were "reasonable grounds to conclude that serious crimes under international law ha[d] been committed", including genocide[18]. The IIFFM also stated that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present"[19]. The IIFFM reiterated its conclusions, based on further investigations, in its second report of 8 August 2019[20].

35. In the present case, there is no evidence comparable to that available to the Court in *The Gambia* v. *Myanmar* case. To determine the plausibility

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 22, para. 55.

[16] United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 7.

[17] *Ibid*., para. 8.

[18] *Ibid*., paras. 83 and 84-87.

[19] United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441.

[20] United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/50, 8 August 2019, para. 18.

of rights in the present case, the Court relies on four sets of facts. First, it looks at the figures for deaths, injuries and damage to infrastructure reported by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (see Order, para. 46). Second, it relies on a statement made by the Under-Secretary-General of OCHA (see *ibid*., para. 47), a report of the World Health Organization (*ibid*., para. 48), and a statement by the Commissioner-General of UNRWA (*ibid*., para. 49). Third, it notes the statements of three Israeli officials (*ibid*., para. 52). Fourth, it considers the views expressed by a group of Special Rapporteurs and the CERD Committee (*ibid*., para. 53).

36. Regarding the figures for death, injuries and damage to infrastructure, the Court omits to mention that such figures come from the Ministry of Health of Gaza, which is controlled by Hamas. They are not the United Nations' figures. Furthermore, these figures do not distinguish between civilians and combatants, or between military objectives and civilian objects. It is difficult to draw any conclusions from them.

The statements by the Under-Secretary-General of OCHA, the WHO and the Commissioner-General of UNRWA are insufficient to prove plausible intent. None of these statements mention the term genocide or point to any trace of intent. They indeed describe a tragic humanitarian situation, which is the unfortunate result of an armed conflict, but there is no reference to the subject-matter of the Genocide Convention. Furthermore, the Court is unaware of the underlying information or methodology used by the individuals who made these statements. This is in stark contrast to the evidence available to the Court in *The Gambia* v. *Myanmar* case.

The declarations made by the President of Israel and the Minister of Defence of Israel are not a sufficient factual basis for inferring a plausible intent of genocide. Both authorities have issued several statements clarifying that Israel's intent is the destruction of Hamas, not the Palestinians in Gaza. For example, on 29 October 2023, Israel's Minister of Defence, stated that "we are not fighting the Palestinian multitude and the Palestinian people in Gaza". On 29 November 2023, the President of Israel said that "Israel is doing all it can, in cooperation with various partners, to increase the flow of humanitarian aid to the citizens of Gaza". Regretfully, the Court did not take note of these statements. Finally, regarding the statements made by the Minister of Energy and Infrastructure, the latter is not an official with authority over the military. The relevant factual basis allowing for an inference of intent to commit genocide must stem from the organs which are capable of having an effect on the military operations. These organs have repeatedly explained that the purpose of the military operation is to target Hamas, not the Palestinians in Gaza.

37. It is concerning that certain Israeli officials have used inappropriate and degrading language, as noted by the group of Special Rapporteurs and the CERD Committee. Indeed, it is an issue that will have to be investigated by the competent Israeli authorities. However, to infer an intent to commit genocide from these statements, which were made in the wake of horrific attacks against the Israeli population, is plainly implausible.

38. The evidence presented by Israel shows that it is the opposite intent that is plausible and guides the military operation in Gaza. Israel pointed out that it has adopted several measures to minimize the impact of hostilities on civilians. For example, Israel continues to supply its own water to Gaza by two pipelines; it has increased access to medical supplies, facilitated the establishment of field hospitals and distributed fuel and winter equipment (see Order, para. 64, referring to CR 2024/2, pp. 50-52). Furthermore, the Prime Minister of Israel stated on 17 October 2023 "[a]ny civilian death is a tragedy . . . we're doing everything we can to get the civilians out of harm's way", and on 28 October 2023 that "the IDF is doing everything possible to avoid harming those not involved".

39. It is surprising that the Court took note of Israel's statements explaining the steps it has taken to alleviate the conditions faced by the population in Gaza, together with the Attorney General's statement announcing the investigation of any calls for the intentional harm to civilians (see Order, para. 73), but then it completely failed to draw conclusions from these statements when examining the existence of intent. It is even more surprising that the Court did not view any of these measures and statements as sufficient to rule out the existence of a plausible intent to commit genocide.

40. The Court's approach to plausibility in the present case is not akin to the one it took in *The Gambia* v. *Myanmar* case, where the Court had compelling evidence of "clearance operations" committed against the Rohingya. These "clearance operations" included sexual violence, torture, the methodical planning of mass killing, denial of legal status, and instigation of hatred based on ethnic, racial, or religious grounds[21].

41. It is concerning that applying the Genocide Convention in these circumstances would undermine the integrity of the Convention and dilute the concept of genocide. The Genocide Convention seeks to prevent and punish the physical destruction of a group *as such*. It is not meant to ban

[21] See United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, paras. 27 and 52; United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 458-748 and 1140.

armed conflict altogether. The Court's approach opens the door for States to misuse the Genocide Convention in order to curtail the right of self-defence, in particular in the context of attacks committed by terrorist groups.

VII. The Measures Indicated by the Court

42. I now turn to the measures indicated by the Court. It is important to recall that the Court has not made any findings with regard to South Africa's claims under the Genocide Convention. The conclusions reached by the Court in this preliminary stage do not prejudge in any way the claims brought by South Africa, which remain wholly unproven (see Order, paras. 30 and 62).

43. Regarding the conditions for the Court to indicate provisional measures, for the reasons stated above, I am not persuaded by South Africa's arguments on the plausibility of rights, since there is no indication of an intent to commit genocide. This is why I voted against the first and second provisional measures indicated by the Court. Nevertheless, it is of the utmost importance to highlight that the first and second measures indicated by the Court merely restate obligations that Israel already has under Articles I and II of the Genocide Convention. The Court has made explicit what is already implicit in light of Israel's existing obligations under the Convention.

44. Although I am convinced that there is no plausibility of genocide, I voted in favour of the third and fourth provisional measures.

With regard to the third measure, which concerns acts of public incitement, I have voted in favour in the hope that the measure will help to decrease tensions and discourage damaging rhetoric. I have noted the concerning statements by some authorities, which I am confident will be dealt with by the Israeli institutions.

With regard to the fourth measure, I voted in favour, guided by my deep humanitarian convictions and the hope that this will alleviate the consequences of the armed conflict for the most vulnerable. Through this measure, the Court reminds Israel of essential international obligations, which are already present in the DNA of the Israeli military. This measure will ensure that Israel continues to enable the delivery of humanitarian aid to Gaza, which I see as an obligation arising under IHL.

45. However, it is regretful that the Court was unable to order South Africa to take measures to protect the rights of the hostages and to facilitate their release by Hamas. These measures are based on IHL, as are those enabling the provision of humanitarian aid. Moreover, the fate of the hostages is an

integral part of the military operation in Gaza. By taking measures to facilitate the release of the hostages, South Africa could play a positive role in bringing the conflict to an end.

46. I voted against the fifth provisional measure, which concerns the preservation of evidence. I did not vote against this measure because evidence is not important, but because South Africa has not shown that Israel has destroyed or concealed evidence. This claim is baseless and therefore should not have been entertained by the Court.

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47. Genocide is a shadow over the history of the Jewish people, and it is intertwined with my own personal experience. The idea that Israel is now accused of committing genocide is very hard for me personally, as a genocide survivor deeply aware of Israel's commitment to the rule of law as a Jewish and democratic State. Throughout my life, I have worked tirelessly to ensure that the object and purpose of the Genocide Convention is realized in practice; and I have fought to make sure that genocide disappears from our lives.

48. Had the Court granted South Africa's request to put an immediate end to the military operation in Gaza, Israel would have been left defenceless in the face of a brutal assault, unable to fulfil its most basic duties vis-à-vis its citizens. It would have amounted to tying both of Israel's hands, denying it the ability to fight even in accordance with international law. Meanwhile, the hands of Hamas would have been free to continue harming Israelis and Palestinians alike.

49. It is with great respect that I have joined this Court as an *ad hoc* judge. I was appointed by Israel; I am not an agent of Israel. My compass is the search for morality, truth and justice. It 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.

(Signed) Aharon BARAK.

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