DECLARATION OF JUDGE TLADI

Court's approach for the modification of previous orders — The relationship between Article 41 of the Statute and Articles 75 and 76 of the Rules of Court — Security concerns, self-defence and proportionality.

1. I have voted in favour of the *dispositif* in the Order. I am of the view that the Court's Order and the particular measures identified therein are fully justified given the circumstances. I write this declaration to make only two points. The first concerns the Court's approach to requests for the indication of measures in cases where there already exists a decision on provisional measures, i.e. the Court's approach for the modification of previous decisions. The second purpose is to address the question of security concerns at the heart of Israel's defence.

I. The Requirement for the Modification of Measures

2. The Court has taken great care to explain that, in its view, South Africa's request is based on Article 76 (1) of the Rules of Court, i.e. South Africa is requesting the Court to "modify" the previous Orders on provisional measures because there has been "some change in the situation justifying such . . . modification". The Court takes this definitive position notwithstanding that South Africa's application itself is non-committal about the basis of the request. In addition to Article 76 (1), South Africa's application also refers to Article 75 (3), which is dependent on the presentation of "new facts" rather than "some change in the situation".

3. For the Court, there has been "some change in the situation" since its Order of 28 March 2024. This is because, according to the Court, "the catastrophic humanitarian situation in the Gaza Strip" which it previously noted "was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024". Specifically with respect to Rafah, the Court notes that the fears it expressed in its decision of 16 February 2024 have now materialized and that "the humanitarian situation is now to be characterized as disastrous". The Court also refers to the displacement of a significant portion of the population.

4. Although all of these factors were present in March 2024, I share the Court's assessment that this intensification can, and in the present case does, represent "some change in the situation". At the same time, it is not inconceivable that these same factors could be seen by some as merely a continuation of the same operation by Israeli forces that formed the basis of the Court's Order of 26 January 2024, or the Order of 28 March 2024. In other words, it is not beyond the realm of debate whether intensification, or worsening of the situation, can be seen as a "change in the situation".

5. In *Bosnian Genocide* , the Court was able to find that "the grave risk" that underlined its original order for provisional measures "has been deepened by the *persistence of* conflicts on the territory of Bosnia-Herzegovina and the commission of heinous acts in the course of those conflicts" and that this provided sufficient evidence of "some change in the situation"[1]. Indeed, Bosnia and Herzegovina based its request for the indication of provisional measures on the "*continuing* . . . campaign of genocide against the Bosnian People — whether Muslim, Christian, Jew, Croat or Serb"[2]. Elsewhere, the Request by Bosnia and Herzegovina refers to the "rapidly *escalating* human catastrophe"[3]. These factors are similar to the factors identified by the Court, both in its March Order and the current Order, as constituting evidence of "some change in the situation".

6. Yet, in relation to the current case, in its letter of 16 February 2024, while noting the worsening situation in Gaza and that "the most recent developments in the Gaza Strip, and in Rafah in particular, 'would exponentially increase what is already a humanitarian nightmare with untold regional consequences'", the Court did not see it fit to modify its January 2024 Order. Similarly, in its Order of 12 October 2022 in *Armenia* v. *Azerbaijan*, the Court considered that an eruption of hostilities after the conclusion of a ceasefire agreement was insufficient to establish a change in the situation because the situation had "remained unstable" and "tenuous"[4]. In the view of the Court, notwithstanding the eruption of new hostilities, "the situation that existed [when the first Order was issued] is ongoing and is no different from the present situation"[5].

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[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 337, para. 22, read with paragraph 53 (emphasis added).

[2] Request for the indication of provisional measures of protection submitted by the Government of the Republic of Bosnia and Herzegovina, 27 July 1993, p. 1 (emphasis added).

[3] *Ibid.*, p. 3 (emphasis added).

[4] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, pp. 582-583, para. 18.

[5] *Ibid.*, p. 583, para. 18.

7. In my view, there is no inconsistency between the positions the Court took in its decisions of 16 February 2024 and 12 October 2022 on the one hand, and on the other hand, its Order of 13 September 1993 in *Bosnian Genocide* and the current Order. All that these decisions illustrate is that there cannot be a hard line between "change in situation" and "no change in situation". For this reason, in my view, the emphasis ought not to fall on whether there is "some change in situation". The real question, and therefore the proper place of emphasis, ought to be on whether whatever circumstances put forward are such as to justify the indication of new measures or to modify existing Order.

8. Ultimately, we should not lose sight of the fact that the Rules of Court are intended to facilitate the implementation and application of the Statute, and in my view, the golden rule remains Article 41 of the Statute. The polar star contained in Article 41 empowers the Court to make an order for provisional measures "if it considers [the] circumstances so require". This broad rule is aptly captured in Article 76 (1) of the Rules of Court which not only refers to "some change in the situation" but, and for me most importantly, states that modification of an existing order should only be made if the changed situation "justifies such . . . modification".

9. The Court should not conduct a superficial search for "some change in circumstances" or "new facts". I do not mean to suggest that the Court has done so in this case. Both in the current Order, and in past Orders, notably in *Bosnian Genocide*, the Court has focused on whether the *circumstances* presented to it "justify" the adoption of new or modified measures.

10. While I agree with the conclusion of the Court that there has been some change in the situation which warrants the modification of its previous Orders, I do find the path to that conclusion somewhat troubling. In particular, I am not convinced by the Court's apparent insistence on a clinical separation between the "change in the situation" and circumstances justifying the new modification. While it may sound rigorous and intellectually sound to identify categories and boxes, e.g. "change of situation" or "new facts" and insist that no decision on modification can be made unless one of these categories is ticked, this approach denies the Court the ability to undertake an honest assessment of whether the circumstances as they present themselves justify the modification of the previous Order and the indication of different measures.

11. Indeed, the problem with the Court's general reasoning is laid bare at paragraph 21. There the Court says that it first has to ascertain whether there has been a change in the situation, but that the modification (or new measures) can only be indicated "if the general conditions laid down in Article 41

of the Statute were *also* met in this instance"[6], suggesting that the conditions in Article 41 of the Statute are additional to the requirements of Articles 75 and 76 of the Rules of Court. This clinical distinction between the change in the situation (or new facts) and Article 41 is superficial. Articles 75 and 76 of the Rules of Court should not be seen as additional to the requirements of Article 41 of the Statute, but rather as giving flesh to it. Thus, to suggest that first we search for a change in the situation and then only determine whether the requirements of Article 41 of the Statute have been met is to completely undermine Article 41 of the Statute and to de-emphasize the main condition of "if circumstances so require".

12. In my view, the proper application of the law is reflected in the Court's conclusion where, at paragraph 48, it states that in its assessment, "the circumstances of the case require it to modify its decision set out in its Order of 28 March 2024". It does so without the clinical separation of "change in the situation" and the question whether circumstances justify the modification of previous Orders. In fact, in the conclusion (Section III), the Court does not refer at all to the "change in the situation".

II. The Right of Israel to Defend Itself

13. A central issue in Israel's submissions is its right to defend itself and its people. In its submissions, Israel stated several times that it has the right and obligation to defend itself and its citizens from Hamas attacks. At one level, the argument is that the attack on 7 October 2023 constituted an armed attack to which Article 51 of the Charter of the United Nations entitles Israel to respond. At another level, the argument is that there is a general right to act for the protection of Israel and its population (beyond what is provided for in Article 51). Whether the latter is part and parcel of the former is unclear, but if it is being put forward as an independent ground for the use of force, then it is clearly incorrect.

14. For the limited purpose of this declaration, it is unnecessary to resolve the relationship of the two aspects of the right to security and self-defence. What is important to state is that South Africa, in its oral submissions, pre-empted the self-defence and security argument with a three-pronged response. First, it argued that self-defence can never be a justification for genocide. Second, it argued that Israeli operations were disproportionate to the attacks by Hamas. Finally, South Africa argued that, in accordance with the Court's *Wall* Advisory Opinion, Israel is not entitled to use force against a territory under its occupation.

[6] Emphasis added.

15. As to the first issue, there is no question that the position put forward by South Africa is legally correct, and I am sure Israel would not dispute that position. But Israel will dispute (and in fact has disputed) the fact that a genocide is being committed. South Africa's first prong is therefore intricately wound up with the merits of the case. Similarly, questions have been raised about whether, at the time of the 7 October attacks by Hamas, Gaza was *in fact* occupied. The third prong is thus also perhaps best addressed at the merits phase. But it is not clear to me why Israel does not *at all* address the second prong, i.e. the gross disproportion of its response to the 7 October attacks. Indeed, throughout its oral submissions, one could not but be struck by the gross disproportion between the harms caused by Hamas that Israel is complaining of and statistics of loss and devastation on the Palestinian side occasioned by Israel's military operations. It would have been good to hear Israel respond to this question.

16. The security concern relied on by Israel raises another issue. Israel has explained that to grant South Africa's request "would mean that Hamas would be left unhindered and free to continue its attacks against Israeli territory and Israeli civilians". Yet this position suggests a false choice between two extremes. It suggests that Israel is obliged either to allow the violation of its rights and those of its citizens or to engage in limitless operations causing the catastrophic consequences that have been so widely reported.

17. The Court has ordered Israel to "halt its military offensive . . . [in] Rafah". The reference to "offensive" operations illustrates that legitimate defensive actions, *within the strict confines of international law*, to repel *specific attacks*, would be consistent with the Order of the Court. What would not be consistent is the continuation of the offensive military operation in Rafah, and elsewhere, whose consequences for the rights protected under the Convention on the Prevention and Punishment of Genocide has been devastating.

III. Conclusion

18. There are no more words to describe the horrors in Gaza. The words "apocalyptic", "exceptionally grave", "disastrous" and "catastrophic" have all been used to describe the current situation, and all seem to pale in comparison to what is unfolding before our very eyes. Almost daily we are confronted with gut-wrenching accounts of victims and survivors and images of unimaginable suffering. That this is happening in the age in which international law has been said to have matured into "a much more socially conscious legal order"[7] is simply incongruous.

[7] Bruno Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 250, p. 234.

19. Today, the Court has, in explicit terms, ordered the State of Israel to halt its offensive in Rafah. The Court has previously, albeit in implicit and indirect ways, ordered the State of Israel not to conduct military operations elsewhere in Gaza because such operations prevent the delivery of human assistance and cause harm to the Palestinian people. The Court has also reiterated its urgent call for Hamas to release the hostages. But the Court is only a court!

(Signed) Dire TLADI.