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To:

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Decision of the International Court of Justice in The Hague Regarding Provisional Measures (South Africa v. Israel)

Legal Opinion on the Scope of Israel's Obligations under the ICJ's Order

Introduction

On January 26, 2024, the International Court of Justice (ICJ) in The Hague issued its decision on provisional measures in the proceedings initiated by South Africa against Israel concerning Israel's responsibility for committing, inciting, and failing to prevent or punish the crime of genocide. The decision to grant most of the measures was made by a majority of 15 judges to 2 (Judge Aharon Barak of Israel and Judge Julia Sebutinde of Uganda). Judge Barak also joined measures 3 and 4, bringing the vote on those to 16–1.

The Court's decision did not include a provisional measure ordering Israel to cease hostilities. Nor did it constitute a final ruling on the Court's jurisdiction, let alone a determination regarding violations of the Convention on the Prevention and Punishment of the Crime of Genocide. However, the decision contains three elements that, in our view, may have significant implications for the State of Israel and its interests in the foreseeable future.

First, the Court ruled that it has *prima facie* jurisdiction to hear South Africa's case, and that there is a plausible risk that Israel is violating its obligations under the Convention. Second, the decision included six measures that are binding upon Israel. Third, the proceeding will likely entail ongoing supervision by the Court—and through it, by other actors and states—of Israel's conduct in Gaza.

The purpose of this document is to closely examine the possible implications of the Court's decision not to dismiss the case *in limine* and to grant these measures. We believe this discussion

is essential for proper preparation for the possible scenarios that may arise from the proceedings. Moreover, the interpretation we present here has, in our view, not been sufficiently explored in the public discourse on the matter. Accordingly, we have found it appropriate to present it to you in the hope that it may contribute to, illuminate, refine, and assist in grappling with these complex proceedings.

The following legal analysis has two distinct goals. The first is to address the provisional measures. The proceedings in The Hague have implications for as long as they continue, regardless of the eventual outcome. Throughout the years until a final ruling is issued, the existence of the provisional measures and Israel's decision whether and how to comply with them will affect its foreign relations. It should be emphasized that South Africa may request additional provisional measures throughout the proceedings. There is thus a high likelihood that further measures will be sought, depending on how Israel chooses to act regarding the existing ones and in light of developments in the war in Gaza.

It is important to stress that even aside from the proceedings in The Hague, a significant portion of the requirements contained in these measures reflect Israel's obligations under the rules of international humanitarian law. Even if Israel denies the allegations brought against it in these proceedings, it does not deny its obligations under international humanitarian law—and it must fulfill them.

The second goal of this document is to offer comments that may influence how Israel responds to the main proceedings. We believe that Israel's policy in Gaza since the outbreak of the war, and its actions there, may affect the likelihood of Israel being found responsible for genocide at the end of the proceedings. Decisions and actions already taken by Israel during its military campaign in Gaza may also be reviewed in retrospect, based on how Israel chooses to act under the Court's order.

The most important dimension of the current situation, in our view, is the humanitarian crisis, which receives extensive attention in the Court's reasoning. Accordingly, we address it in depth. In its decision, the Court characterizes the unique circumstances in Gaza as a catastrophic humanitarian situation (para. 72 of the Order) and links this to the risk of genocide. The Court's

interpretation may be criticized, but it is important to recognize this as its position and to prepare accordingly. As such, it is crucial to develop a policy that aligns with the provisional measures ordered by the Court. On a practical level, if Israel is perceived as violating the ICJ's provisional measures, this could harm its international standing and increase the likelihood that the Court will ultimately find it responsible for violating the Genocide Convention.

Before addressing the measures in detail, we wish to emphasize our view that the interpretation according to which Israel need not take any further action because the measures merely reflect existing obligations that it already fulfills is not a reasonable reading of the Court's decision. Had the Court considered Israel's actions adequate in these respects, it would likely not have ordered provisional measures to prevent irreparable harm to rights. Therefore, Israel's general approach should reflect an understanding that it must "do more" in every area addressed by the Court: in protecting civilians, in preventing violations by forces on the ground, in preventing incitement, and in expanding and improving the delivery of humanitarian aid.

First Measure

Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, (para. 78).

Article II of the Convention enumerates a series of acts that, when committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, constitute genocide.

The Court identified four of these acts as those Israel must act to prevent:

- a.** Killing members of the group;
- b.** Causing serious bodily or mental harm to members of the group;
- c.** Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d.** Imposing measures intended to prevent births within the group.

This measure presents an interpretive difficulty, as it imposes a duty of prevention without clarifying who, other than the state itself, is to be prevented from acting. Let us explain:

Duties of prevention have clear operative meaning when third parties are involved, as was the case in *Bosnia v. Serbia*, where the ICJ held Serbia responsible for failing to prevent genocide by the VRS, a non-state militia not under Serbia's effective control. In the present case, there is no non-state militia whose actions might be attributed to the state even if conducted contrary to its orders. Thus, failure to prevent violations may be interpreted as direct state violations.

We identify the following interpretations of this measure as important to consider:

- The measure refers to a **duty to prevent**, i.e., an obligation to act proactively now to prevent future acts. For example, senior officials must issue clear and unequivocal statements that only militarily necessary actions are permissible, and that deviations will be punished. It is equally important that such messages be delivered by commanders at the tactical level, who have greater oversight and influence on soldiers' moral perceptions.
- The measure distinguishes between **state responsibility** for acts of its organs and the **specific duty to prevent** the international crime of genocide by individuals, which arises under the Convention.
- This measure may be used to argue that **Israel must cease hostilities altogether**. South Africa might claim that given on-the-ground conduct—including soldiers' statements—and the extent of civilian harm, the only way to prevent future violations of the Convention is to halt the fighting immediately. While far-reaching, this argument must be anticipated.
- The measure also relates to the need to **prevent further deterioration** of the "catastrophic humanitarian situation in Gaza." It reflects the notion that failure to prevent is itself an intentional act with the aim of destruction. While there may be factual dispute as to whether Israel bears sole responsibility for the humanitarian crisis (with Hamas having contributed significantly), there is no dispute that Israel bears at least some responsibility. The Court based much of its decision to issue provisional measures on the humanitarian crisis, including the killing of medical personnel, destruction of

infrastructure, denial of effective medical treatment, and mass displacement to unsafe areas—circumstances which may, individually or collectively, constitute violations of the Convention (see Articles II(b) and II(c)).

In the wake of the Court’s ruling, reports have increased regarding not only the threat of starvation but also the spread of infectious diseases at extremely high rates across Gaza. This aspect, too, may be incorporated into the Court’s analysis of the humanitarian crisis as part of a broader pattern of genocide. Therefore, the state must invest resources to ensure access to medical care and essential medications.

Second Measure

Israel must immediately and effectively ensure that its military forces do not commit any acts described in Article II of the Genocide Convention (para. 78)

In our view, the main implication of this measure is an **enhanced duty** to clarify to forces in the field their orders, international law, and the obligation of all officers to ensure that troops refrain from deliberately targeting civilians or objects vital to their survival. Furthermore, the measure means that **those who violate these orders must be punished**. For example, reports in the media regarding the practice of setting homes on fire or blowing them up in situations where they were not legitimate military targets, and where there was no military necessity for their destruction, must be addressed. Officers and soldiers who committed such acts must be prosecuted. While the launch of investigations by the IDF’s General Staff mechanism is a positive step, greater transparency and speed are needed for these inquiries to be seen as meeting the requirements of the Order.

We believe this measure suggests that the Court fears Israel does not fully control all its military units, and that some units may be committing acts raising concern of genocide, even if this is not official policy. Even if Israel’s top political and military leaders do not intend to destroy the Palestinian people, Israel is responsible for the actions of all its military units and all its soldiers. During the ICJ hearing, a video was shown of soldiers invoking the biblical Amalek and singing that “there are no innocents.” Foreign media reported statements from officers and soldiers

expressing desires to expel all Palestinians from Gaza and taking pleasure in their suffering. Some soldiers were also reported to have opposed the entry of humanitarian aid. Such actions could trigger **state responsibility** even if performed ultra vires, because they are acts of state organs. This concern is reinforced in the separate opinion of Judge Nolte (paras. 13–15), who stated that he was not persuaded that there is plausibility that the IDF’s military campaign “as such” was carried out with genocidal intent. However, he warned that some statements by Israeli officials, including field commanders, raise the possibility that rights protected by the Convention may be violated—including, of course, the right not to be subjected to genocide or incitement to it.

It must be emphasized that the Gaza operation will not be seen by the Court as a single event. The Court is likely to examine a range of incidents. This is evident from the judgment in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007), where the Court identified genocide in the specific context of Srebrenica.

In this context, it is crucial to understand the close connection between compliance with the laws of armed conflict and the absence of genocidal intent. Because these laws prohibit the intentional killing of civilians and require that every action aim solely to weaken the enemy’s military capabilities, Israel’s compliance—and its punishment of violations—will undermine claims of genocidal intent and help counter claims that this second measure was violated. Israel must offer legal justifications to the international community for actions taken on the ground, and admit when actions have violated the law. Violations—such as abuse or humiliation of detainees, attacks on humanitarian infrastructure, destruction of property without military necessity, or harm to civilians absent justification under the laws of war—must be investigated and addressed. The rules of armed conflict must also be disseminated to all units in the field.

We express, cautiously, our concern that the legal advisory system may be disconnected from field-level decision-making. For example, reports suggest that the destruction of public buildings may have occurred without proper legal authorization. Israel must ensure that legal directives from the Military Advocate General’s Office reach all operational units and are obeyed by soldiers at all levels.

Third Measure

Israel must take all measures within its power to prevent and punish the direct and public incitement to commit genocide against the Palestinians in Gaza (para. 79)

The duty to prevent incitement to genocide applies not only when the inciters are political or military leaders: the state must also prosecute private individuals who incite genocide, including members of the Knesset and other public figures such as retired army officers.

To meet the requirements of this measure, Israel must demonstrate to the Court that it has taken significant action against those who have incited—or are inciting—genocide in a public manner. In addition to what was said regarding the second measure, there must be significantly stricter action against incitement by soldiers and commanders, especially the publication of such incitement on social media. As with the other measures, the Court uses the language of “due diligence”, placing on Israel the obligation to show that it is acting with all means at its disposal to prevent and punish. Therefore, in our view, Israel must demonstrate that it has punished individuals whose statements were particularly severe—either through criminal prosecution, disciplinary measures, or through public expressions of regret. In the absence of punitive action, alongside preventive action, it cannot be argued that the requirements of the third measure have been met. If the inciters are Knesset members or ministers who enjoy immunity from criminal prosecution under domestic law, it is incumbent to consider lifting their immunity, after examining whether their statements are protected by immunity at all—especially in light of the provisions of the 1950 Prevention and Punishment of the Crime of Genocide Law—or to take other measures such as dismissing ministers or imposing parliamentary sanctions on members of Knesset.

The Court noted positively the statement by the Attorney General and State Attorney that incitement allegations are being examined—but also stated that this was insufficient. These investigations must proceed, and their progress must be made public to ensure the deterrent message is conveyed.

Fourth Measure

Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in Gaza (para. 80)

The fourth measure requires Israel to permit the unrestricted delivery of humanitarian aid, subject only to legitimate security-related military necessity. **In our opinion, this is the most important of the six measures, because it requires concrete action by the State of Israel.**

Repeated disruptions to the delivery of humanitarian aid—caused, for example, by protesters—will not be accepted as a legitimate excuse for failure to implement the fourth measure properly. It is clear that Israel is responsible for enforcing the law against those obstructing the entry of humanitarian aid into Gaza. Reports of conflict between the Minister of Defense, who seeks to implement the measure, and the Minister of National Security, who refuses to allocate the police forces necessary to maintain order, are irrelevant to the Court. From the Court’s perspective, failure of Israeli authorities to enforce the law against such protests will be interpreted as evidence that Israel is unwilling to comply with the measure. In any case, under international law, the State of Israel is responsible for the actions of all its authorities, including those that obstruct implementation of the Court’s order.

The issue of humanitarian aid places Israel in a legal dilemma. If the starting point of legal analysis is that the southern part of Gaza is not occupied territory, Israel’s obligation under humanitarian law is only to permit the delivery of aid by third parties, while preserving its right to ensure that the aid does not include materials that could be used in hostilities and that it reaches civilians rather than enemy combatants (i.e., Hamas fighters). However, at this stage of the proceedings, the Court has determined that Israel’s responsibility is plausible, while disregarding the fact that Israel is engaged in a difficult military conflict in the area. The Court did not mention Hamas’s presence in the territory, its de facto control over Gaza, or its role in creating and perpetuating the humanitarian crisis. While this legal approach raises serious difficulties and may be subject to criticism, it is the Court’s position—and it must be addressed.

Israel must remove obstacles—as reported in various sources—to the entry of aid by UN agencies and the International Committee of the Red Cross. It must streamline the inspection of aid to ensure that legitimate security screening does not cause significant delays in the arrival of assistance to its destination. Effective aid delivery also requires improved coordination of aid convoys within Gaza, and the cessation of hostilities in specific areas. It calls for a review of the list of dual-use goods and transparency in this regard. Opening additional aid entry points should also be considered.

In summary, (1) Israel has a duty to allow the entry of humanitarian aid in larger volumes; (2) Israel has the right under the laws of armed conflict to ensure aid does not reach Hamas; (3) Israel must create conditions for the secure and effective distribution of aid to civilians in Gaza.

Fifth Measure

Israel must take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts of genocide or incitement to commit genocide (para. 81)

Compliance with this measure requires good-faith preservation of evidence with due diligence. We recommend appointing a responsible party for this matter—preferably outside the military system, in the Attorney General’s Office. Preservation of evidence includes evidence of wrongdoing by both civilian and military actors, as well as exculpatory evidence, including evidence against Hamas actors. This provisional measure must be interpreted broadly, to include not only allegations of genocide but also alleged war crimes. Ultimately, we believe that unaddressed suspicions of war crimes will reinforce the genocide allegation. Conversely, if war crimes allegations are investigated and evidence is preserved and addressed by prosecutorial authorities, Israel’s legal position will be improved.

Sixth Measure

Israel must submit a report to the Court on all measures taken to give effect to this Order within one month, as from the date of this Order. The report so provided shall then be communicated to South Africa (para. 82)

As stated at the outset of this document, the Court's rules allow South Africa to request additional provisional measures at any point during the proceedings. It is likely that based on the contents of Israel's upcoming report, South Africa will request additional measures—especially further reporting deadlines. Accordingly, Israel must prepare in advance for this possibility. Restructuring efforts to address the humanitarian crisis, and the appointment of a prosecutor tasked with preserving evidence of both liability and exculpation for Israel and suspected international crimes, would indicate preparation for such a long-term dynamic and help minimize legal risks for Israel. As of the writing of this document, there appear to be significant difficulties in complying with the measures required of Israel—for example, the protests that blocked humanitarian aid at the Kerem Shalom crossing. These difficulties reduce the chance—if such a chance existed—that the report under the sixth measure will be the final one.

Conclusion

As stated at the beginning of this document, the interpretation Israel gives to the provisional measures will likely influence whether the Court ultimately finds it responsible for violating the Genocide Convention. In practice, the importance (or lack thereof) attributed to these measures over the years will also depend on how third-party states interpret them in their relations with Israel. Israel cannot remain passive. If it adopts a reasonable interpretation of the provisional measures—one that can be presented to third-party states—there is hope that such states will accept Israel's position. However, if third-party states develop independent interpretations of the provisional measures without Israel presenting a persuasive view, this could severely damage Israeli interests in the coming years. This harm is already evident—for example, in the blow to the agreement meant to support Elbit's activity in the Japanese market, and in the Dutch Supreme Court decision regarding aircraft parts sales to Israel.

We believe that an interpretation consistent with this memorandum will help minimize Israel's legal risks, both before the Court and in the eyes of third-party states. These legal risks are, at this point, significant and foreseeable. Our interpretation seeks, therefore, to warn against alternative interpretations, such as the claim that "the orders issued against Israel should not affect its conduct, since Israel is not committing acts of genocide and is allowing humanitarian aid."¹ We disagree with this position and believe it may further entangle Israel and is incompatible with its commitment to international law and the rule of law.

Sincerely,

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¹ <https://www.inss.org.il/he/publication/icj-israel/>