OBSERVATIONS OF THE STATE OF ISRAEL ON THE REPUBLIC OF SOUTH AFRICA'S "URGENT REQUEST FOR ADDITIONAL MEASURES UNDER ARTICLE 75(1) OF THE RULES OF COURT" DATED 12 FEBRUARY 2024

1. Israel regrets that South Africa seeks once again to misuse the Court's provisional measures procedure, this time by a highly peculiar and improper request that makes reference to Article 75(1) of the Rules of Court.

2. At the outset, Israel again places on record its principled position that South Africa's Application to the Court of 29 December 2023 is wholly unfounded in fact and law, morally repugnant, and represents an abuse both of the Genocide Convention and of the Court itself.

3. Israel moreover wishes to reiterate that its commitment to the observance of international law, including the Genocide Convention and international humanitarian law, is unwavering and applies—as Israel has demonstrated in word and deed—in relation to the conduct of the present hostilities in Gaza and independently of any proceeding before the Court.

4. It is further noted that, as the Court reaffirmed in its Order of 26 January 2024, the decision at the provisional measures stage "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves".[1] The observations below are made on this basis, and are without prejudice to Israel's position with respect to jurisdiction, admissibility, and the merits of the case.

5. South Africa's request of 12 February 2024 is made to the Court less than three weeks after the Court delivered its Order indicating provisional measures, and a very short time prior to the due date for the submission by Israel of a report pursuant to that Order.

6. As the title to South Africa's latest request indicates, South Africa purports to be making a request under Article 75(1) of the Rules of Court. Such a request is a contradiction in terms, since Article 75(1) of the Rules concerns the indication of provisional measures by the Court *proprio motu*, rather than at the request of a party.

7. South Africa's invocation of Article 75(1) of the Rules of Court, which is inapplicable, and its decision not to invoke Article 76(1) of the same Rules, suggests that South Africa is well aware that the condition prescribed in the latter provision—"some change in the situation [that] justifies such revocation or modification"—is not satisfied.

8. It is recalled that in its original request for provisional measures of 29 December 2023, as also at the oral hearing held in January this year, South Africa argued for a host of provisional measures that the Court did not see fit to indicate. Principal among them was a requested

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, Order of 26 January 2024, para. 84; see also paras. 15, 30, and 62.

measure that sought to curtail Israel's inherent right and obligation lawfully to defend itself against the unprecedented terrorist onslaught it faces and to secure the release of over 130 hostages still held by Hamas in brutal captivity.

9. The Court, having regard to the very same issues that South Africa now raises in the context of its second request, indicated provisional measures that cover ongoing hostilities in Gaza. These provisional measures relate to the present situation of hostilities in Gaza as a whole, and Israel's legal commitments referred to above apply to any action that it may take in the context of these hostilities. It is recalled in this regard that in its Order, the Court moreover emphasized that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law" and called for "the immediate and unconditional release" of the hostages held in Gaza by Hamas and other armed groups.[2]

10. In this light, it is clear that South Africa now seeks essentially to relitigate – through a truncated process in which it alarmingly sought to deprive Israel of the right to be heard – what the Court has only recently considered and decided following a two-day hearing, and without there being any "reason to conclude that the situation which warranted the indication of a provisional measure" just last month "has changed since that time".[3] Indeed, the circumstances referred to by South Africa are not qualitatively different to the circumstances it claimed existed in its original request for provisional measures. What is more, nothing in South Africa's present request establishes that the provisional measures already indicated by the Court would no longer be sufficient.

11. South Africa refers in its request to "a significant development in the situation in Gaza", but there has been nothing of the sort. It is not necessary to detail all the various misrepresentations made in South Africa's request with respect to the situation in Rafah, but one outrageous distortion is the depiction of a limited operation on the night of 11 February 2024, which was directed at military targets and enabled the release of two Israeli hostages – Fernando Merman, aged 60, and Luis Har, aged 70 – from over four months in captivity, as an "unprecedented military offensive".[4] South Africa similarly neglects to inform the Court that Hamas continues to demonstrate its contempt for the law, including by refusing to release the hostages immediately and unconditionally. Nor is any mention made of ongoing negotiation efforts by relevant stakeholders, currently underway, to pursue a release of the hostages that may create conditions for a humanitarian pause in the hostilities.

12. It is also noteworthy that South Africa itself refers in its request to an announcement of the Office of Israel's Prime Minister that makes clear that any potential military operation is intended to target Hamas battalions in Rafah and requires the preparation and approval of plans

[2] *Ibid*, at para. 85.
[3] See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)*, Order of 6 July 2023, para. 16; *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*, pp. 580-581, paras. 11-12.
[4] South Africa's request for additional measures under Article 75(1) of the Rules of Court, para. 7.

concerning the protection of civilians.[5] This announcement is in line with Israel's enduring commitment under international humanitarian law to minimize harm to civilians, even as Hamas – in its utter contempt for life and for the law – continues its abhorrent strategy of seeking to maximize such civilian harm through its ongoing attacks against Israeli civilians and through its use of Palestinian civilians and civilian objects as shields in Gaza itself.

13. South Africa's unjustifiable claims make clear that its request is not driven by any change in circumstances, nor does it have any other basis in fact or law. Indeed, South Africa's reference to "the unprecedented military offensive against Rafah" which in fact has not happened, is indicative of more than the carelessness of its argument. Its reliance on a statement regarding a potential operation targeting Hamas battalions exposes yet again an intention to abuse the Genocide Convention and have the Court micro-manage the conduct of hostilities governed by international humanitarian law in a manner that is beyond the Court's purview and jurisdiction. It is evidence of a renewed and cynical effort by South Africa to use provisional measures as a sword, rather than a shield, and to manipulate the Court to protect South Africa's longtime ally Hamas, a genocidal terrorist organization, from Israel's inherent right and obligation to defend itself, in accordance with the law, from the terrorist assault it faces and to pursue the release of over 130 hostages.

14. As noted above, the provisional measures already indicated by the Court cover the situation of hostilities in Gaza as a whole. South Africa's reference to the *LaGrand* case does not support its argument, either, given that in that case the Court deemed it appropriate to indicate provisional measures precisely in circumstances where interim measures of protection were not already in place.

15. In the light of all these considerations, it is plain that South Africa has not established any legal or factual basis for the modification of the Order dated 26 January 2024, nor indeed the granting of additional measures. It is respectfully submitted that its request should be rejected accordingly.

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[5] *Ibid*, at para. 2.