DECLARATION OF JUDGE YUSUF

Change in the situation in Gaza justifies new measures — Palestinian deaths by disease and starvation, not only bombardment and ground assaults — Indicia of genocide require preservation of the right of existence of the group — Prevention is the only effective way to preserve this right — Court's measures involve obligations of result to prevent genocide — Such obligations can only be met by suspending military operations in Gaza — Time to respect binding measures and end atrocities.

1. The situation in the Gaza Strip has indeed changed. It has grown much more gruesome. The Palestinian population there is not only dying every day from aerial bombardments and armoured ground assaults by the Israeli army. It is also succumbing to disease, malnutrition and starvation. Famine is on the horizon for the majority of the 2.3 million inhabitants (IPC Global Initiative, "Special Brief: the Gaza Strip", 18 March 2024). The Court had already recognized, in its Order on provisional measures of 26 January 2024, the right of the Palestinian population of Gaza to be protected from genocide. It had to act again in view of the exceptional gravity of the situation. I fully agree with its decision to accede to South Africa's request and to indicate further measures in the present Order.

2. There is no need for the Court at the stage of indication of provisional measures to determine the existence of genocidal intent. As stated in its Order on provisional measures relating to *The Gambia* v. *Myanmar*,

> "[i]n view of the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of a genocidal intent" (*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. 23, para. 56).

3. The Court has to base itself on the existence of objective indicia relating to the possible commission of genocide. If such indicia exist, which is the case in Gaza, the Court cannot take the position of a powerless bystander in the face of the possible commission of acts which are so offensive to the conscience of humanity. It has to preserve the rights of the protected group. To this end, it is the function of prevention which matters most and which offers the only effective way of preserving the right of existence of the protected group.

4. It is indeed the very right of existence of the Palestinian population of Gaza that is currently at risk of irreparable prejudice. Nothing less. It is therefore the Court's duty to see to it that the obligations undertaken under the Genocide Convention are respected. As the Court observed in its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

> "[t]he origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations" (*Advisory Opinion, I.C.J. Reports 1951*, p. 23).

5. These are the reasons that led the Court to indicate six provisional measures in its Order of 26 January 2024. They are the same reasons that have prompted it again to indicate further measures in this Order. When the evidence indicates, as it does in the present case, that the extent of the atrocities committed against civilians, and the death and suffering caused to them, is of an order which exceeds by far the necessities of war and the limits imposed by the laws of war, it is the duty of the Court to call for an end to the killing, the causing of bodily injury or mental harm, and the imposition of conditions of life calculated to bring about the physical destruction of the whole or part of the protected group to prevent the commission of genocide.

6. The Court did so by the first two measures it indicated in its Order of 26 January 2024. In the first measure, it ordered that Israel

> "take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:
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> *(a)* killing members of the group;
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> *(b)* causing serious bodily or mental harm to members of the group;
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> *(c)* deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
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> *(d)* imposing measures intended to prevent births within the group".

In the second measure, it ordered that "[t]he State of Israel shall ensure with immediate effect that its military does not commit any acts described" in the first measure, i.e. acts *(a)*, *(b)*, *(c)* and *(d)* above.

7. Such an order by the Court issued under the Genocide Convention, calling on a State to "ensure with immediate effect that its military does not commit" any of the acts enumerated under Article II of the Convention, is tantamount, in terms of the application and fulfilment of the Convention, to an injunction to bring to an end any military operations which may contribute to the commission of such acts. Indeed, the prevention of genocidal acts under the Convention, in particular as a conservatory measure, involves the suspension or termination of any actions undertaken by a State in its territory or in the territory of others which might have contributed to the existence of indicia of genocidal activity.

8. The Court's indication of further provisional measures in the present Order shows that it is not satisfied that all that should have been done has been done by Israel to prevent the commission of genocidal acts. The argument that a State party to the Convention that is involved in a conflict with a non-State actor is not under an obligation to suspend its military operations to prevent genocide or should not be ordered to do so, unless the non-State actor is disarmed, makes no sense whatsoever. It is contrary to the very idea of prevention of genocide and to the objectives of the Convention, which was "manifestly adopted for a purely humanitarian and civilizing purpose".

9. In the same way that a State party to the Convention has a duty to prevent genocide in its territory whatever may be the nature of the forces or actors opposing it, it has also the obligation to prevent genocide in any territory which such party invades or occupies. This is the case with respect to the situation in Gaza. Israel has, therefore, an obligation, as underlined by the Court, to take all measures within its power to prevent the commission of genocidal acts and to ensure that its military does not commit any such acts in Gaza.

10. In view of the catastrophic humanitarian situation and the increasing levels of disease and starvation among the population, the only effective way in which Israel can meet its obligations under the Convention is to suspend its military operations to allow for the delivery of aid and to bring to an end the relentless destruction and death caused by it at the expense of the right of existence of the Palestinian population (Order, para. 36). It is with such an objective in mind that the Court has indicated the second measure in the present Order, which modifies and further elaborates on the second measure of the Order of 26 January 2024 quoted above.

11. It is a measure aimed at bringing to an end the killing, maiming or infliction of conditions of life on the population of Gaza which might bring about the destruction in whole or in part of the group. It calls upon Israel to

> "[e]nsure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Genocide Convention, including by preventing, through any action, the delivery of urgently needed humanitarian assistance".

It is an obligation of result which must be acted upon immediately. No such result can be obtained without suspending or terminating the aerial bombardments, the ground assaults on urban centres and refugee camps by the Israeli army, and the removal of the obstacles to the delivery of humanitarian aid. It requires an end to the destruction and death in Gaza.

12. The alarm has now been sounded by the Court. All the indicators of genocidal activities are flashing red in Gaza. An injunction has been served for ending the atrocities. The provisional measures indicated by the Court are binding. They are not something that a State party to the Convention is free to respect or to ignore according to its own pleasure. They must be implemented.

13. The rights of the Palestinian population of Gaza, including its right of existence, must be preserved pending the final decision of the Court on the merits. Such rights cannot and should not continue to be subjected to the risk of irreparable prejudice. This can only be achieved through the suspension, with immediate effect, of Israeli military operations. Therefore, Israel must bring its military operations to an end in order to ensure, as directed by the Court, that its army does not commit any acts which are in violation of the rights of the Palestinian population of Gaza to be protected from genocide.

(Signed) Abdulqawi Ahmed YUSUF.

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