ADVANCE SHEET – MARCH 1, 2024

President's Letter

In light of the recent controversies over campus free speech, we attach herewith a recent discussion between American Law Institute President David Levi and Professor Jeffrey Stone. We thank our former President H. Mark Stichel for bringing this document to our attention and the American Law Institute for granting us permission to reproduce it.

George W. Liebmann

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Be True To Your School – And Law Library

One of the most legendry figures in the history of the Baltimore legal community is the late Melvin J. Sykes. A graduate of Harvard Law School, when folks talked about his school, most of the time it was his high school, City College. Mr. Sykes served on the Library's Board on two separate occasions. Continuing the tradition of City College representation on the Bar Library Board, three current members of the Board are alumnus: the Honorable Charles E. Moylan, Jr.; Rob Ross Hendrickson, Esquire and Benjamin Rosenberg, Esquire.

For eighteen years I worked with the Bar Library's former librarian, Kai-Yun Chiu, who having come to Baltimore from New York, could never understand our dedication to and pride for our high schools. As a graduate of Archbishop Curley you can imagine my dismay when H. Mark Stichel, a graduate of Calvert Hall College High School became President of the Library's Board: a position he would hold from 1992 to 2004. Worse yet, was when I realized I sort of liked the guy, a shame I carry with me to this day. I remember in my conversations with the former Chief Judge of the Maryland Court of Appeals Mary Ellen Barbera how proud she was to be a graduate of Mercy High School.

As advised by the Beach Boys, we are in fact "true to our schools." It is nice when we find something that we can be true to, such as, say for example, a law library. The Bar Library consists of all that you could ever want to be true to: from expansive collections and databases to services to activities, such as lectures and movies. Whatever you could want in a library: you are going to find it here. Think of how proud you will be when you tell people about your wonderful experiences and productive times at Bar Library High.

I look forward to seeing you soon.

Joe Bennett

A discussion between American Law Institute President David Levi and Professor Jeffrey Stone, Professor of Law at the University of Chicago

David Levi: Hello I'm David Levi, president of The American Law Institute, and this is *Reasonably Speaking*, a podcast of the ALI. I am so fortunate today to be in conversation with one of our most distinguished members, Professor Geoffrey Stone, the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago. He was previously provost to the university and dean of the law school.

We will be talking about the difficult topic of free speech on campus, and there is no one better to discuss this topic with than Professor Stone. He has written numerous books and articles on free speech. He was chair of the Freedom of Expression Committee of the University of Chicago, appointed in 2014 by the president of the university to draft a statement articulating the university's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the university's community. The report, variously known as

the Chicago Statement or the Chicago Principles, has had significant influence, not just at Chicago but in many other universities and colleges. This topic has been a pressing one for the past few years and now, once again, is front and center. Geof, welcome to *Reasonably Speaking*.

Geoffrey Stone: Thank you.

Levi: It's such a pleasure to have you.

Stone: I'm delighted to be here. As you know, of course I have the Edward H. Levi Distinguished Professorship, which is your dad.

Levi: Yes, indeed.

Stone: That's something I'm very proud of.

Levi: Yes. Well, I was able to pronounce the last name correctly. We think it's correct. Did you overlap? Were you the Edward Levi Professor while he was still alive?

Stone: No.

Levi: Okay. Well, he would've been very proud because he had a lot of respect and affection for you.

Stone: Yes. Well, likewise. He was wonderful. Amazing man.

Levi: Yes, he was. I've hinted at the University of Chicago's unique history in defending First Amendment principles on campus. I really think the university is a standout among other universities for the job it's done on this. And you've been an important part of that history, as have several others. Can you talk about that history for us and how you got up to the Chicago Principles and then where we are today, at least in Chicago?

Stone: Well, from its very founding, the University of Chicago has been committed to free, open discourse and to academic freedom. That was quite clear by statements from early presidents, including William Rainey Harper, who declared that the university is dedicated to the protection of free speech and ideas that are to be combated and discussed and debated. And that's fundamental. Now, what's important to understand is that was not the norm in the first half of the 19th century and even into the middle and late 19th century because at most universities, the idea was that our job is to teach you what is right. And that was very much the norm of university and college culture. And it was really only Darwin and the evolution issue that began to call that into question. But Chicago, from its very founding, made very clear that it's dedicated to that, is a central commitment of the university. And it's been true to that ever since.

One story that I like that illustrates this is in the 1930s when communism was becoming increasingly debated as a negative thing and not allowed, almost all universities

prohibited any speaker who would advocate communism or any student organization that would advocate communism. But Chicago at that time had a student organization that advocated and believed in communism, and they invited to the campus William Foster, who was the leader of the American Communist Party. And this led to a widespread protest around the city, around the state, and even around the country. And the president of the university allowed him to come. And he did come and gave a speech. And thereafter, the state of Illinois legislature summoned him to come down—this is Robert Maynard Hutchins—to come down to testify before a hearing about how he could possibly have done that. And some 3,000 students from Chicago came down to Springfield and marched in support of Hutchins. And that just exemplifies the kind of commitment that the university has had from the very beginning.

The Kalven Report, as you mentioned, was adopted in 1967. Harry Kalven was one of the nation's leading First Amendment scholars. He was actually the person who taught me the First Amendment when I was a student, and he was a colleague of mine for a short time. And he was asked to draft a report in 1967 that addressed the question of whether the university should take positions on public issues. This was, again, during the Vietnam War and there was a lot of pressure being put on universities to condemn the war, particularly by students.

And the report basically says that the University of Chicago does not take positions as an institution. Its

goal is to create an environment in which faculty, students, and others can debate and discuss issues and not tell them what the right answer is. And that has been, again, a central element of the university's culture at Chicago ever since then. Now, the university has not taken positions on public issues and basically said, "This is not for us to say because if we say this, then that's going to silence faculty and students who disagree." The idea is to encourage that disagreement and have free and open debate.

Levi: The Chicago Principles, is that an elaboration of the Kalven Report? Or how does it differ?

Stone: The Chicago Principles were slightly different issues. In 2014, University of Chicago President Robert Zimmer, appointed a committee that I chaired and asked us to draft a proposal report that was adopted that talks about the university's commitment to free speech, not so much university itself speaking, but the university allowing and encouraging free speech on campus by students and faculty and others. And that had always been a tradition, but we didn't have a formal statement that articulated that. And as I said, I chaired that committee, and we wrote a relatively short report that essentially said that free speech on campus by students, by faculty, by guest speakers, by others is essential to the goals and values of the university and that they should be free to do this in almost all circumstances. And that although there can be some regulations obviously, that fundamentally the goal is to allow students in particular

to invite speakers and to speak themselves and to debate issues, however controversial and provocative they may be.

And it did recognize that there are some circumstances where speech can be restricted—time, place and manner rules and so on like that. But basically, it adopted a very strong First Amendment oriented approach to free speech on campus. And it's since been adopted by about 100 other colleges and universities, which is amazing. That was not our goal. We wrote it explicitly just for us. And indeed, the first half of it talked about the history of university free speech, and then other universities figured out they could lop off the first half of the report and then simply adopt the second half. And it basically takes a very strong position on the rights of faculty and students to say what they want, and also says there are circumstances where speech can be limited, but they're very narrow. And this is essential to the university.

Levi: That's so interesting. With the two reports—the Kalven Report and then the Chicago Principles—you cover most of the landscape of what comes up or what has been so controversial. But my sense from what you just said is that maybe the Chicago Principles have been more influential than the Kalven Report because, at least I get the impression that, universities are taking positions, or at least their presidents are, on a multitude of, I would say, topical matters, from political topics to earthquakes to all sorts of things. They're constantly expressing what

they would say are the values of the university in relation to this event.

Stone: Right. And again, that clearly would violate the Kalven Report insofar as they're speaking for the university as opposed for themself as an individual. And yes, the Kalven Report has not been adopted nearly as widely as the free speech principles, and part of the reason for that is that it basically says that universities can't take positions; and universities want to take positions. But the problem with that, which the Kalven Report fully addresses, is that it has a very powerful chilling effect on the willingness of students and faculty and others to take a different position. And that's not consistent with the goals and values of the university.

Levi: Yes, that's interesting. Well, okay, that's a little warmup, a little Chicago warmup, but why don't we just leap right into it, what's on everybody's mind. We've seen in the past month or so three prominent, very prominent, university presidents from Penn, Harvard, and MIT were called to testify before Congress. This was on December 8, 2023. And Congresswoman Stefanik asked if calling for the genocide of Jews would violate their university's code of conduct or rules regarding bullying and harassment.

And although their answers were somewhat different, the presidents said, in sum, that calling for the genocide of Jews might violate the university's code of conduct but depended on the context. And by context, it appears that the presidents meant whether the statement was

targeted at an individual, whether the speech was so pervasive and severe as to amount to harassment, and whether the speech in some sense became conduct by crossing into intimidation, bullying or harassment or perhaps threat, a threat of violence. And it seems that the presidents were trying to summarize what they took to be the First Amendment law regarding speech on campus or maybe speech in other public forums. Putting aside whether treating the question is one that called for a First Amendment answer, did they get the First Amendment right? Was that a fair statement of what First Amendment law is in this context?

Stone: Well, I think a right answer to that question would be to say that a university or any other government entity created under the First Amendment, prohibits harassment or threats. But that basically means one-on-one situations; it doesn't mean public discourse. And therefore, if somebody goes to another person and says, "If you don't support my organization, I'm going to punch you," that would obviously be a threat that would be punishable, even consistent with the First Amendment and the Chicago Principles. And harassment would be basically continuing to follow someone around and arguing with them and telling them they're wrong over and over and over again. And that also could be restricted as inappropriate behavior.

They're right to say that there are certain types of threats and harassment and bullying that could be restricted, consistent with the First Amendment, but the

question is what does that mean in this context? And the clear answer to that is it does not include public discourse, and therefore they should have been more definitive about saying that what people are upset about, for the most part, are these public statements and protests. And those are not harassment or bullying or even threats to any particular individual. They're right to say that threats and harassment can be restricted, but they've left a little ambiguity there in terms of what exactly that meant by a threat and harassment.

Levi: The Congresswoman said, "It's a yes or no. I want a yes or no." And you could say, "Yes, but," or you could say, "No, but," or "Yes. May I explain?", or "No. May I explain?". But it sounds like your thought would be "no," not in that context, although that was not the answer the congresswoman was looking for.

Well, with that in mind, let's say one of those presidents had come to you and said, "Look, you're the First Amendment expert, and you've also been a provost and dean of a law school, and I'm anticipating an ambush on the First Amendment. And I'd like to keep my job. What advice can you give me? How should I handle this, what I am expecting to be a very provocative question?"

Stone: Well, the advice I would give in terms of fulfilling the values of a university would be to say that public discourse of this sort may be disturbing, it may be upsetting to many people, but that's part of free speech. And the Civil Rights Movement was like that, the anti-war

movement was like that during Vietnam. There's lots of speech that is controversial and provocative. The anti and pro-abortion movements were like that; they have upset people. You can't prohibit that speech just because it upsets people. And what you need to do as a university is inculcate in your students and faculty the values of free speech and academic freedom. Why it is that we allow ideas to be expressed that you may hate, that you may be offended by, because if we don't do that, then ideas you have can later be suppressed. And therefore, I think the important part here is to make students and faculty understand, first of all, that that kind of openness is essential to the values and aspirations of university, and second, that it'll come back and haunt them later. It's a two-way street.

Levi: I think somehow, we need to do a better job of this. I think people need to understand that just because somebody is speaking at a university that they don't carry the imprimatur. The university is not vouching for the substance of their speech. We need to do a better job of that. I don't know whether that would be a physical response like the university should say, "Okay, well we have a Hyde Park corner here where kind of anything goes and it's not special. Everybody can have access, they just have to sign up." But I'm also concerned about the public. It just seems like reflecting on that hearing that it's a difficult... The person that undertakes to defend the First Amendment from withering attack has a difficult brief to carry. Do you have thoughts on that?

Stone: Well, I think that's true, it is challenging, and particularly with somebody who's questioning you who will cut you off if she doesn't like what you're saying so you can't even give a full explanation. But I do think that it's fundamentally important for universities to make clear that they do not, and should not, prohibit speech because it is offensive to others. That's a core principle of the First Amendment. Now, of course the universities involved here were private universities, so they're not governed by the First Amendment, but they should follow the same principle in this respect and say that the fact that this upsets people and angers people... The Civil Rights Movement infuriated people in the south, and anti-abortion protests or pro-abortion protests infuriate people; you don't suppress speech for that reason. And that's critical in the university.

Levi: Bullying and harassment can be discrimination under Title VI and Title IX. And so we have the First Amendment. Private universities aren't governed by it, although some private universities are governed by state laws that apply the First Amendment to them. That's true in California, the Leonard Act. But you've got this tension, I think, between bullying and harassment and free speech. Can you explain this framework?

Stone: Well, the basic assumption is that bullying and harassment are not protected by the First Amendment or by university speech policies, but they're defined relatively narrowly. And public discourse does not constitute either of those. And therefore, I think the

reality is that, again, if somebody goes to another person and says, “If you don't do what I want you to do, I’m going shoot you,” then that’s a threat, and it’s harassment, and it's bullying, and so on. And that could be restricted. But public discourse is not understood and should not be understood as bullying or harassment within the meaning of either the First Amendment or the federal laws.

Levi: There’s going to be some gray areas there. There are many times where people may sense a threat or they may sense that they’re being discriminated against or bullied even though they’re in a public forum or around a lot of people, and it is what you would call public discourse, but they perceive it as personal to them.

Stone: Well, the problem with that is if you allow suppression of speech because someone says, “I perceive that speech as threatening to me or as harassment,” then that simply invites people to say, “That speech that I don’t like, I perceived as threatening or I perceived as harassment.” And that would give potentially very little protection to free speech of that sort. And so one of the reasons why these concepts are defined fairly narrowly, particularly from a First Amendment perspective, is that if you define them broadly, they will essentially allow people who don’t like what you’re saying to accuse you of these things. And that’s not what we want to do. That’s not an acceptable thing. Basically, harassments and threats and so on have to be pretty explicit in order to be deemed harassment and threats or bullying. And

typically, they are one-on-one, not public speech that is upsetting to people.

Levi: At the hearing when I think one of the presidents said something like, "Well, if it's directed at an individual," Congresswoman Stefanik said, "Well, it's directed at Jewish individuals." And so she said, "Why does it need just to be one person? If it's many people or several people, wouldn't it have the same impact on them if you're calling for their murder?"

Stone: Well, if somebody says, "If you don't change your laws, we're going to overthrow the government," that's protected speech, even though one could perceive it as a threat. And again, the problem here is finding the right line between allowing free speech, aggressive free speech, and protecting individuals. And what the Court has done over the past century is to realize that you need to give broad protection to free speech in order to enable it to exist in a robust manner. And if you allow it to be restricted by somebody saying, "I feel threatened," then all sorts of speech could be prohibited. And that's just not an acceptable way of doing things. Now, if the speaker says, "If any of you Jews don't do what I want you to do, then we will come and get you," that would be a complicated question. That would be an explicit threat and it would be a complicated question but insofar as nothing that I saw that was said constituted a threat of that sort.

Levi: And then we have cases on this. We had the cross burning case. It was on a particular family's lawn. And the Court analyzed it in that way. Well, when you're on campus, there are certain things that people talk about that don't necessarily fit into this framework. One is hate speech. What is hate speech? How does that figure in?

Stone: Well, hate speech does not exist as a concept under the First Amendment. The Supreme Court has, without a single exception, unanimously held that something called hate speech, whatever it is, is not unprotected by the First Amendment. And the reason they say that is several fold. First, because there's not historically been a concept of hate speech, unlike, say, obscenity or libel or commercial advertising, which has been routinely regulated over a long period of time. And second, it's incredibly ambiguous. And how do you define what hate speech is? And which statements are or not hate speech? Would be unbelievably complicated. And so the Supreme Court, without a single exception whether conservative or liberal, has taken the view that there is no concept of hate speech within the doctrine of the First Amendment. It would simply be too problematic.
And that, to me, seems to be a sensible approach because if you had a doctrine of hate speech, you then have to figure out what is hate speech? In which situation is it hate speech? And if someone says, "I think that Republicans are stupid," is that hate speech? And so there's no end to it. And again, the Court's view on this, I think correctly, is that this is simply not a concept that we want to get into. It's simply too vague, too

ambiguous, and opens itself up to too much abuse by courts and by prosecutors and by universities in defining what it is, but it has no remotely clear definition.

Levi: You hear a lot about it, though, on campus. And a lot of people talk about hateful speech or speech expressing hateful ideas and that sort of thing. What about safe spaces? Students—I don't know that they do this quite so much as they used to—but they used to talk about their need for safe spaces. How does that figure in? Do you get a safe space on a university campus?

Stone: I think that would be permissible if it were for a group. And so I think that if there's a group of people who have a sense that they need to be able to talk to one another in confidence and in private, that a university can create a safe space for them not based on the particular viewpoint that they're expressing, but on some other basis. I don't think that would be deemed unconstitutional because it's not restricting anyone else's speech.

Levi: Right. What about a classroom? The classroom tends not to be a very safe space, or maybe you don't agree with that. I don't know. What do you—

Stone: No, I think that's true. The basic principles of free speech, the broad and open and free concept of being able to express views, is basically about public speech. And in a classroom, for example, the rules can be different. Even at the University of Chicago, if a student

in a classroom insists on talking about Israel in a class on physics, they could be told, “No, this is not what this class is about. Stop talking about that.” And if they refuse to do that, they could be punished for that. Or a professor who does the same thing and insists on talking about something outside the boundaries of the subject of the course could be punished for that. Inside the classroom, there are regulations that are appropriate to deal with the purpose of the classroom.

Now, what’s important is those are not based on viewpoint, those are not regulations that prohibit certain points of view rather than others. It just says that in the classroom you have to talk about what the subject of the course is. And the more complicated question comes in about, say, insults in the classroom or the use of offensive words in the classroom. And that would be a question where I think universities probably can regulate that if it’s done as an insult to a particular student. But if they use the word in a context relevant to the course that they’re teaching and the materials they’re teaching, then I think that would be regarded as completely appropriate.

Levi: I think the way that would come up, or has come up, is it’s not so much that a faculty member would use a derogatory term addressing a student but they would mispronounce their name, the student’s name, or they would call one student by another student’s name, something like that, a brain sort of thing. This is very upsetting to some students when this happens, I recall

this. And I guess the university just deals with that as a matter of good teaching.

Stone: Yeah, I'm assuming the professor didn't do that intentionally. The truth is there are lots of students whose names are difficult to pronounce. At Chicago, we get sent a list of the names of our students and the pronunciation, so that helps avoid the problem, although it's not perfect. And that never used to happen before. That's a recent phenomenon in order to be respectful. And calling a student by the wrong name, I've done that sometimes because I misunderstood where they were sitting in the class. I've known their name actually, but I thought they were sitting in seat three rather than seat four, and so I called on a student. But those things are just accidental. And I think you want faculty to be responsible in those regards, but unless it's being done intentionally or repeatedly, I think you would say that this is something that professors have to try to do right to be effective.

Levi: Justices O'Connor and Ginsburg had these T-shirts, one said, "I'm Ruth, she's Sandra." The other one said, "I'm Sandra, she's Ruth." The two didn't look remotely alike, but they were both women. And they were the only women for a time on the Court, and so people would just misspeak. But that does happen in the classroom. What we're actually talking about is the difference maybe between academic freedom and freedom of speech. And they are somewhat different, aren't they?

Stone: Well, that depends on whose definition of academic freedom you support. Basically, Chicago's views on this are very similar to the First Amendment in terms of the basic principles. Academic freedom, I think, should be that. But again, it's true that in the university setting there are limitations that are appropriate. We grade students' exams. That's penalizing them for bad speech, for bad thoughts. We deny people tenure because we think their ideas are not persuasive. Those are obviously arguably, quote, "violations" of freedom of speech. But in the university setting, they're clearly not.

And so my own view is that academic freedom and the guarantees of the First Amendment in the context of universities should be pretty similar. Now, that's not to say that the Supreme Court is perfect. And universities can do better when they understand more fully what it is that they are attempting to achieve. A private university doesn't have to abide by the First Amendment. It's perfectly free to adopt policies that are completely incompatible with the First Amendment if they think that's the best way to have an educational system. They could say, for example, that no one can argue that abortion is moral. Now, a public university couldn't do that, but a private university can do whatever it pleases, at least in that respect. But the aspiration that private universities, in my view, like Chicago, should be to at least meet the expectations of the First Amendment and, when necessary, to exceed them.

Levi: It seems to be the case that virtually all of at least the major private universities govern themselves by the First Amendment or what they would call First Amendment principles. But probably not all private universities take that view, because you might have a religious college where conformity to certain faith, principles might be important to the community; it's a bit like what you were saying before. I imagine there's quite a bit of variation, actually, around the country.

Stone: There are institutions that have a reason for being that leads them to think certain perspectives should be presented and not presented. And as long as they're private, they can do that.

Levi: Suppose as part of its DEI commitments, the university develops a code of conduct that forbids bigotry or racism and says that things that promote bigotry or racism are at odds with the fundamental values of the university. And therefore, what happens to bigoted or racist speech? Does that violate then the university's code of conduct?

Stone: Well, that depends, of course, on whether it's a public or private university and it depends on what they adopt as their code of conduct. But if they're trying to be viewpoint neutral across the board and to say that, "It is not for us to say certain points of view are right or wrong and not for us to punish certain points of view as right or wrong," or if they're a public university and subject to the

First Amendment, then I think that one has to be careful about how one implements this.

There is a reality on campuses and in society generally, of course, in which minority groups and women have been discriminated against for a long time and can be made to feel especially uncomfortable when certain things are said about them or about their category. And universities should encourage people to be conscious of that and not to be irresponsibly insulting or reckless. Not to punish them for it, but that's part of the education process. That's part of the academic freedom point is you want people to be responsible citizens, even if you won't punish them for having done these things.

In terms of DEI, my sense is to the extent it is used to punish students or faculty for saying things that upset minority students or faculty or women students or faculty or whatever, I think that's not consistent with the First Amendment or with the ultimate values of the university, but educating people about this is. And that, I think, is the appropriate way of addressing this question. Now, that's not to say that there aren't examples of DEI behavior that aren't about speech that can be restricted, but in terms of speech, I think the reality is that universities should not be punishing such speech unless it's a threat literally. But basically, I think this is a matter of free speech. But again, you want to educate people for what's an effective and appropriate way to do things.

Levi: Let's suppose that one student made an antisemitic remark to another student who was Jewish. That's my hypothetical. And the recipient of this comment believes that it violates the university's code of conduct and DEI principles. That's one part of the hypothetical. Let's suppose we were in a courtroom and one lawyer in the heat of battle made an antisemitic comment to opposing counsel. I could imagine a judge sanctioning that lawyer right there on the spot because it violates the standards of civility that we maintain in our courts. You might end up paying a fine or you might be told to sit down, any number of things, but it would be dealt with.

Stone: That's simply inappropriate behavior in the classroom by the employee of the university in a professional context, especially if it's not directly relevant to the material that's being taught, so I think that would be appropriate. But in terms of outside the classroom interactions, basically I think that's where free speech applies. And calling someone by a nasty name may be inappropriate, but once you open the door to that, you then have to ask, "Well, what names fall within this?" And do you have to call face-to-face to a person or just say it out loud or say it to a group of people? And we all agree that using those kinds of words is insulting, but it's also, by the way, a way of being, I hate to say this, but effective. It's a way of expressing one's views if that's what you really feel in a way that is in fact powerful. And you don't want to take that away from people.

Levi: I think what it would be more likely to be would be a statement that "you people do X," or "you people are characterized by this trait, this negative trait, no matter who you're talking to." Or, you might make a comment, actually, that "only on reflection do you realize that it was stereotyping in some way and had a stereotype at its space or an assumption." What about that?

Stone: I think the proper response is to disagree and to explain why you disagree and why you think that person is wrong and is being unfair and being sexist or racist or whatever, but not to punish the person for making the statement, which is a statement that is a potential belief.

Levi: Yep. Okay, let's take some real examples. Some of these probably aren't too hard for you. But stuff's been happening around the country. I'm a Stanford Law graduate, and I'm very aware that a United States Court of Appeals judge was invited by the local student chapter of the Federalist Society to come and speak on a particular topic. The topic was the way in which cases during the COVID period had been going from the Court of Appeals up to the Supreme Court and back again. But he was viewed—as a judge and as a lawyer before he became a judge—as someone who was hostile to the rights of LGBTQ people and to others, and therefore their students showed up in the classroom where he was speaking and heckled him so much that he had to stop speaking. That's a pretty classic kind of interaction that happens unfortunately from time to time. How do you analyze that?

Stone: Well, as the Chicago Principles say, "Students or faculty are not permitted or can be punished for impairing the ability of individuals to have a discussion that is dedicated to a particular issue," and therefore you can protest what you think this person, the speaker, has done, but not in a way that interferes with the speaking event itself. And again, this is a content-neutral rule. It applies regardless of what side of the debate you're on and what position you have relative to the other person. It simply says that students in this instance may not heckle or interrupt an event as it takes place in a way that prevents the event to work as it's intended to do. They can protest it as long as they don't do so in a way that undermines the ability of those who want to have this talk to have it.

Levi: That's the controversial speaker. Now let's take up the student demonstration on campus. Students are carrying signs with slogans that call for the abolition of the state of Israel. And I understand from news reports, they may not be entirely accurate, but this is what I understood, but treat it as quasi hypothetical. At Harvard, a demonstration of this sort occurs in the main reading room of Widener Library, the main library on campus, but it occurs quietly. People have signs on their laptops and they put a banner up on the wall to this effect. And Jewish students say that they feel threatened, they feel unsafe or unwanted going into the reading room and using it in the normal way.

Stone: Well, universities, a reading room is not a public space in the sense that main quadrangles would be, and therefore, just as with government action where the government can say, "You can't engage in various types of speech," as long as it's content neutral in all sorts of places. And here, I think it would be perfectly reasonable for the university to say that students may not engage in expressive activity in the reading room that would interfere with the ability of students to do their work regardless of the message being communicated. It doesn't matter whether it's pro-Israel, anti-Israel, whatever. That, I think, would be perfectly appropriate. If they generally allowed students to do these things, to protest in the reading group, which is unlikely, and they only picked out this one, then I think, again, it would be a viewpoint-based rule and should not be permissible. But there's a better way to solve the problem, which is just to say you can't have these kinds of demonstrations in a library or reading room or whatever, regardless of what the message is.

Levi: It's probably the case that you don't want people engaging in distracting conduct in a library reading room. You're not supposed to talk. At least in the old days, you didn't talk in a reading room, you left if you had to have a conversation.

Stone: Once you go down that road, again, the problem is that you have to decide which speech, which messages are okay and which ones are not okay. And the possibilities are endless. You could have, again,

anti-abortion, pro-abortion, anti-affirmative action, pro-affirmative action, racist speech, sexist speech, speech attacks whites or attacks Blacks. You don't want to be in that business. And therefore, I think neutral rules are fine, but you don't want to draw distinctions based upon the message being communicated.

Levi: Of course. Okay, now let's take the case of interactions within a school or a classroom. And I picked these up, again, from newspaper accounts, so they may not be perfectly accurate. A student tells her dean, who is Jewish, that what would make her feel safe in the school would be to, quote, "Get rid of the Zionists." And a professor at a university tweets in celebration of the Hamas attack, "It's been an extraordinary day," and that Israel is a, quote, "Murderous, genocidal settler state."

Stone: They're free speech rights. I think they can say those things because, again, if you say they can't, you've got to start asking what other points of view could they be punished for? And that's an endless inquiry. Once you say that the professor can be punished for tweeting a certain thing because it's offensive to people, then there's, again, an endless array of tweets that people could say offend me. And that becomes an impossible thing to administer in any kind of appropriate way. Now, you could say, "No professor can tweet," but that probably would be a terrible idea and unconstitutional. But to pick and choose which messages are punishable opens the door to endless discrimination against certain viewpoints rather than other viewpoints. And that's not

what universities should be doing and it's not what our government should be doing. And there are lots of viewpoints that people find offensive.

50 years ago, 60 years ago, the idea of same-sex marriage would've been regarded as horrendous. And if someone advocated for it, it would've been terribly disturbing to people. Or in the civil rights era, someone in the south who advocated for equal rights for Blacks would've been offending people terribly. And the question is: could he be punished, consistent with the First Amendment, if he advocated for civil rights for Black people? And the examples go on and on and on, but the reality is you don't want to go there. And that's partly what the Supreme Court has learned over time. The Supreme Court in the beginning was not very thoughtful about this, and it allowed the suppression of particular points of view if they had potentially negative consequences. But over time, they realized that creates insanity. And any point of view virtually can be regarded as that. And who's going to decide? Do you really want the university deciding this point of view is permissible, this point of view is not permissible? Do you want the government deciding that? Basically, the answer is no.

Levi: Let's move outside the bubble around the universities and look at some of the responses to what's going on on campus. Many of the top law firms in this country signed on to a statement expressing alarm at antisemitic activities on campus and asked law deans to take what they called an "unequivocal stand against

these activities," and second, "to ensure that students understand that this kind of activity and advocacy is not tolerated in the law firm workplace." Some firms have gone so far as to withdraw offers of employment from students who made or endorsed statements that the firm considered were antisemitic and presumably would be upsetting to firm clients or to other members of the firm. What are your thoughts on this? This is a new thing. Well, it's not entirely new because there's a historical context, but maybe we haven't seen it quite so much in the past 20 years or so.

Stone: Well, law firms have their own First Amendment rights. And they are perfectly free to say whatever they want to say, including that we will not hire people who hold certain viewpoints unless that's prohibited by the federal law or state law. But this is not saying we won't hire a Jew or won't hire Palestinian, they're saying, "We won't to hire someone who advocates a particular viewpoint." They have the right to do that, but they should be responsible, and they should understand that doing that is not healthy for our society, for academia or for their law firms. And they should, therefore, be much more open-minded about these issues.

Now, one of the problems is the pressure this puts on universities, of course, because universities are dependent upon outside funding. And the question is, if donors, whether it be law firms or individuals, say, "If you do not do what I want you to do, I'm going to stop giving you money." And the question is to what extent they should

accept that and change their policies to satisfy those donors. And that's a legitimate problem for a university president or a law school dean who doesn't want to lose that money. But on the other hand, you don't want those people dictating to you what it is you can teach or what it is you can say and what it is your students can say, and therefore, it's important to stand up for that.

This began, really, at the end of the 19th, early 20th, century when universities began looking for outside funding to a much greater degree than ever before. And outside funders began saying, "I'll only give you money if you agree not to teach this or not to allow students to say these things." And that became very problematic. And in part it led to the AAUP, American Association of University Professors, report in 1915 that strongly, for the first time, advocated for free expression by professors on campuses.

And so this is not the first time this has happened, as you said, but the problem is universities have to do their best to stand up to it because if they don't, then they lose the fundamentally core goals and values of their institutions. And part of it, again, is educating people. You want people to understand law firms, for example, or wealthy donors, if you can pull this off, then other people can pull it off in other ways.

Levi: On the donor part, I think it would be easier to go to a donor and say, "You don't want to try to exert this kind of pressure on a university because the university

of our time both with prospective students, with incoming students, with incoming faculty, making clear to them who we are and what our values are and why we think this is the right place to come if you are willing to be completely open-minded and to listen to all different points of view.

Levi: We've been very nice about the University of Chicago, and I think justly so, but I should also put in a plug for The American Law Institute here because one of the things that we've been most proud of is that our debates have continued to be civil even though they touch on matters of great controversy. You look at the Model Penal Code and our project on sexual assault, on campus, policing, these are … even liability insurance, these are not uncontroversial areas, and yet we've been able to maintain lively, interesting debate that's been very, I think, respectful and effective and has had significant positive consequences for the society. And if any donors out there want to consider The American Law Institute, that would be welcome.

Stone: It would be a good investment.

Levi: It would be a good investment. Geof, I can't thank you enough. Your thoughtful comments and your allegiance to First Amendment principles, I think is very noteworthy. And you've been just consistent over time, neutral. You haven't imposed your own preferences on it. Just as you say, that takes you down a road that's just impossible. And these are difficult topics, and they're complicated and hard to think about. We're so fortunate to have you as a thinker and administrator and a scholar. Maybe you'll help lead us to the better place that we need to get to. Thank you.

Stone: Thank you so much for having me, David. This was terrific.

Levi: Thank you. This is David Levi. You've been listening to *Reasonably Speaking*. My guest has been Geoffrey Stone, the Edward H. Levi Distinguished Professor of Law. This is a podcast of The American Law Institute. Thank you very much.

In the last issue of the *Advance Sheet* we set forth the provisional opinion of the International Court of Justice in *South Africa v. Israel*. In this issue we provide the dissenting opinion of **Judge Julia Sebutinde.**

DISSENTING OPINION OF JUDGE SEBUTINDE

In my respectful dissenting opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist - It is not a legal dispute susceptible of judicial settlement by the Court - Some of the preconditions for the indication of provisional measures have not been met - South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel and of which the Applicant complains, were committed with the necessary genocidal intent, and that as a result, they are capable of falling within the scope of the Genocide Convention - Similarly, since the acts allegedly committed by Israel were not accompanied by a genocidal intent, the Applicant has not demonstrated that the rights it asserts and for which it seeks protection through the indication of provisional measures are plausible under the Genocide Convention - The provisional measures indicated by the Court in this Order are not warranted.

I. INTRODUCTION: CONTEXT

A. Limited scope of the provisional measures Order

1. Given the unprecedented global interest and public scrutiny in this case, as can be gathered from, inter alia, media reports and global demonstrations, the reader of the present Order must be cautious not to assume or conclude that, by indicating provisional measures, the Court has already made a determination that the State of Israel ("Israel") has actually violated its obligations under the Genocide Convention. This is certainly not the case at this stage of the proceedings, since such a finding could only be made at the stage of the examination of the merits in this case (see Order, paragraph 30). Nor must one assume that the Court has definitively determined whether the rights that the Republic of South Africa ("South Africa") asserts, and for which the Applicant seeks protection pendente lite, actually exist. At this stage, the

Court is only concerned with the preservation through the indication of provisional measures of those rights that the Court may subsequently adjudge to belong to either Party, pending its final decision in the case (see Order, paragraphs 35-36). In this regard, the Court has stated as follows:

"The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. [The Court] cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures." (*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*, pp. 24-25, para. 66.)

2. Similarly, one should not make the mistaken assumption that the Court has already determined that it has jurisdiction to entertain South Africa's claims on the merits or that it has already found those claims to be admissible. Both of those issues are to be determined at a later phase of the case, after South Africa and Israel have each had an opportunity to submit arguments in relation thereto (see Order, paragraph 84).

B. The Court's jurisdiction is limited to the Genocide Convention and does not extend to grave breaches of international humanitarian law

3. In its Application instituting proceedings before the Court, South Africa invoked, as a basis for the Court's jurisdiction, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") and Article 36, paragraph (1), of the Statute of the Court. Both South Africa and Israel are parties to the Genocide Convention, without reservation (see Order, paragraph 18). Accordingly, for the purposes of the provisional measures Order, the Court's prima facie jurisdiction is limited to the Genocide Convention and does not extend to alleged breaches of international humanitarian law ("IHL"). Thus, while it is not inconceivable that grave violations of international humanitarian law amounting to war crimes or crimes against humanity could have been committed against the civilian populations both in Israel and in Gaza (a matter over which the Court has no jurisdiction in the present case), such grave violations do not, in and of themselves, constitute "acts of genocide" as defined in Article II of the Genocide Convention, unless it can be demonstrated that they were committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious

group, as such".

C. The controversy between Israel and Palestine is historically a political one

4. Furthermore, I am also strongly of the view that the controversy or dispute between the State of Israel and the people of Palestine is essentially and historically *a political or territorial* (and, I dare say, ideological) one. It calls not only for a diplomatic or negotiated settlement, but also for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist. It is my considered opinion that the dispute or controversy is not a legal one calling for judicial settlement by the International Court of Justice. Unfortunately, the failure, reluctance or inability of States to resolve political controversies such as this one through effective diplomacy or negotiations may sometimes lead them to resort to a pretextual invocation of treaties like the Genocide Convention, in a desperate bid to force a case into the context of such a treaty, in order to foster its judicial settlement: rather like the proverbial "Cinderella's glass slipper". In my view, the present case falls in this category, and it is precisely for this, and other reasons articulated in this dissenting opinion, that I have voted against the provisional measures indicated by the Court in operative paragraph 86 of this Order. An appreciation of the historical controversy between the State of Israel and the people of Palestine is a necessary prerequisite to appreciating the context in which the Court is seised with the present case.

II. POLITICAL CONTEXT OF THE ISRAELI-PALESTINIAN CONFLICT

5. The United Nations has been heavily involved in the Israeli-Palestinian conflict throughout its history. In 1947, only two years after the founding of the United Nations, the General Assembly recommended a plan of partition regarding the government of the Mandate of Palestine. That plan provided for the creation of two independent States — one Jewish and one Arab — in recognition of the dual rights of self-determination by the Jewish and Arab inhabitants of the land (General Assembly resolution 181 (II) of 29 November 1947). This laid the foundation for the creation of the State of Israel in May 1948. Unfortunately, the rejection of the partition plan by certain Arab leaders and the outbreak of war in 1948 prevented the realization of the laudable goal of two States for two peoples. Since that time, and in particular since the Israeli seizure of the West Bank and Gaza Strip in the 1967 Arab-Israeli war, the United Nations has remained seised of the conflict.

6. In 1967, the Security Council in its resolution 242 affirmed that "the establishment of a just and lasting peace in the Middle East" required the

fulfilment of the two interdependent conditions of Israeli withdrawal from territories it had seized in the conflict and recognition of Israel's sovereignty, territorial integrity and "right to live in peace within secure and recognized boundaries free from threats or acts of force" (Security Council resolution 242 of 22 November 1967). In 1973, in resolution 338, which called for a ceasefire in the 1973 Arab-Israeli war, the Security Council again decided that "immediately and concurrently with the ceasefire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East" (Security Council resolution 338 of 22 October 1973). This emphasis on the importance of the Israeli-Palestinian and broader Arab-Israeli peace process was subsequently affirmed by the General Assembly, which has emphasized the need to achieve a "just and comprehensive settlement of the Arab-Israeli conflict" (General Assembly resolution 47/64 (D) of 11 December 1992).

7. The international community's focus on encouraging negotiation between the parties has borne fruit, including the 1979 peace treaty between Israel and Egypt and 1994 peace agreement between Israel and Jordan. Most notably, the 1993 Oslo Accords resulted in the recognition by the Palestinian Liberation Organization ("PLO") of the State of Israel and the recognition by Israel of the PLO as the representative of the Palestinian people. The Declaration of Principles on Interim Self-Government Arrangements, signed by representatives of both parties, endorsed the framework set out in Security Council resolutions 242 and 338 and expressed the parties' agreement on the need to "put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process" (Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993). Although the Oslo Accords have not yet been fully implemented, they continue to bind the parties concerned and to provide a framework for allocating responsibilities between Israeli and Palestinian authorities and informing future negotiations.

8. Since that time, the United Nations has repeatedly affirmed the need for negotiations aimed at achieving a two-State solution and resolving the dispute between Israel and Palestine. In 2003, the Security Council, in resolution 1515, "[e]ndorse[d] the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" (the Quartet was composed of representatives of the United States, European Union, Russian Federation and United Nations) (Security Council resolution 1515 of 19 November 2003). In that resolution, the Security Council "[c]all[ed] on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve

the vision of two States living side by side in peace and security" (*ibid.*). Similarly, the Security Council in 2008 declared its support for negotiations between the parties and "support[ed] the parties' agreed principles for the bilateral negotiating process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues" (Security Council resolution 1850 of 16 December 2008). In 2016, the Security Council again recalled both parties' obligations and "[c]alled upon all parties to continue, in the interest of the promotion of peace and security, to exert collective efforts to launch credible negotiations on all final status issues in the Middle East peace process" (Security Council resolution 2334 of 23 December 2016). In this regard, the Security Council "urg[ed] . . . the intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving without delay a comprehensive, just and lasting peace in the Middle East" (ibid.).

9. The General Assembly has likewise regularly recalled the Oslo Accords and the Quartet Roadmap in its resolutions regarding the Israeli-Palestinian Conflict. For example, the General Assembly has:

"[r]eiterate[d] its call for the achievement, without delay, of a comprehensive, just and lasting peace in the Middle East on the basis of the relevant United Nations resolutions, including Security Council resolution 2334 (2016), the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map, and an end to the Israeli occupation that began in 1967, including of East Jerusalem, and reaffirms in this regard its unwavering support, in accordance with international law, for the two-State solution of Israel and Palestine, living side by side in peace and security within recognized borders, based on the pre-1967 borders". (See General Assembly resolution 77/25 of 6 December 2022; General Assembly resolution 76/10 of 1 December 2021; General Assembly resolution 75/22 of 2 December 2020.)

10. Finally, the Court has itself previously pronounced on the importance of continued negotiations. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* , the Court explained:

> "Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal

actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 200-201, para. 162.)

11. As can be seen from the above history, it is clear that a permanent solution to the Israeli Palestinian conflict can only result from good faith negotiations between Israeli and Palestinian representatives working towards the achievement of a just and sustainable two-State solution. A solution cannot be imposed from outside, much less through judicial settlement. This context must be kept in mind in assessing South Africa's Application and Request for the indication of provisional measures.

III. THE EVENTS OF 7 OCTOBER 2023

12. On 7 October 2023, thousands of members of the Harakat al-Muqawama al-Islamiya ("Islamic Resistance Movement" or "Hamas"), a Palestinian Sunni Islamic political and military organization governing the Gaza Strip, invaded the territory of the State of Israel under cover of thousands of rockets fired indiscriminately into Israel and committed massacres, mutilations, rapes and abductions of hundreds of Israeli civilians, including men, women and children. (Israel reports that over 1,200 people were murdered that day, more than 5,500 maimed, and over 240 hostages abducted, including infants, entire families, the elderly, the disabled, as well as Holocaust survivors.) According to Israel, most of the hostages remain in captivity or are simply unaccounted for and many have been tortured, sexually abused, starved or killed while in captivity.

13. Soon after the 7 October attack, Israel, in exercise of what it describes as "its right to defend itself", launched a "military operation" into the Gaza Strip whose objective was, *first*, to defeat Hamas and its network and, *secondly*, to rescue the Israeli hostages. South Africa claims that as a result of the armed conflict that ensued between Israel and Hamas over the past 11 weeks, 1.9

million Palestinians living in Gaza (85 per cent of the population) have been internally displaced; over 22,000 Palestinians, including over 7,729 children, have been killed; over 7,780 are missing and/or presumed dead under the rubble; over 55,243 are severely injured or have suffered mental harm; and vast areas of Gaza, including entire neighbourhoods have been destroyed including 355,000 homes, places of worship, cemeteries, cultural and archaeological sites, hospitals and other critical infrastructure.

14. On 28 December 2023, South Africa filed an Application with the Registry instituting proceedings against Israel concerning alleged violations of the Genocide Convention. South Africa alleges that the acts taken by Israel against the Palestinian people in the wake of the attacks in Israel of 7 October 2023 are genocidal in character because “they are intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnical group, that being the part of the Palestinian group in the Gaza Strip” (Application, para. 1). In South Africa’s view, Israel has violated its obligations under the Genocide Convention in several respects, including by failing to prevent genocide; committing genocide; and failing to prevent or punish the direct and public incitement to genocide. The requests of South Africa are accurately rehearsed in paragraph 2 of the Application.

15. In addition to the Application, South Africa has requested that the Court indicate provisional measures. The provisional measures requested by the Applicant at the end of its oral observations are accurately rehearsed in paragraph 11 of the Application. For its part, Israel, whilst acknowledging that the events of 7 October 2023 and the ensuing war between Hamas and Israel have wracked untold suffering on innocent Israeli and Palestinian civilians, including unprecedented loss of life, protests the Applicant’s description of Israel’s conduct during this war as “genocide”. Israel argues that not every conflict is genocidal, nor does the threat or use of force necessarily constitute an act of genocide within the meaning of Article II of the Genocide Convention. Israel maintains that, in view of the ongoing threat, brutality and lawlessness of Hamas that it continues to face, it has an inherent and legitimate duty to protect the Israeli people and territory, in accordance with international humanitarian law, from attack by an armed group or groups that have openly declared their intention to annihilate the Jewish State. In Israel’s view, South Africa’s present request for the indication of provisional measures is tantamount to an attempt to deny Israel its ability to meet its legal obligation to defend its citizens, rescue its hostages still in Hamas custody and to enable the over 110,000 internally displaced Israelis to safely return to their homes. In its oral observations, Israel requests the Court to reject South Africa’s Request for the indication of provisional measures and to remove the case from the General List.

IV. SOME OF THE CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES HAVE NOT BEEN MET

16. The Court has, through its jurisprudence, progressively developed legal standards or criteria to determine whether it should exercise its power under Article 41 of its Statute to indicate provisional measures. In the present case, the Court should determine (1) whether it has prima facie jurisdiction to entertain the alleged dispute between the Parties (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), p. 217, para. 24; 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*, pp. 9-17, paras. 16-42); (2) whether the rights asserted by South Africa are plausible and have a link with the requested measures (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 638, para. 53); and (3) whether the situation is urgent and presents a risk of irreparable prejudice to the rights asserted (ibid., pp. 645-646, paras. 77-78).

A. There are no indicators of a genocidal intent on the part of Israel

17. I am not convinced that all the above criteria for the indication of provisional measures have been met in the present case. In particular, South Africa has not demonstrated, even on a prima facie basis, that the acts allegedly committed by Israel, and of which the Applicant complains, were committed with the necessary genocidal intent and that, as a result, they are capable of falling within the scope of the Genocide Convention. Similarly, when it comes to the rights that the Applicant asserts and for which South Africa seeks protection through the indication of provisional measures, there is no indication that the acts allegedly committed by Israel were accompanied by a genocidal intent and that, as a result, the rights asserted by the Applicant are plausible under the Genocide Convention. What distinguishes the crime of genocide from other grave violations of international human rights law (including those enumerated in Article II, paragraphs *(a)* to *(d)*, of the Genocide Convention) is the existence of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Accordingly, the acts complained of by South Africa, as well as the rights correlated to those acts, can only be capable of “falling within the scope of the said Convention” if a genocidal intent is present, otherwise such acts simply constitute grave violations of international humanitarian law and not genocide as such.

18. Thus, even at this preliminary stage of provisional measures, the Court should have examined the evidence put before it to determine whether there are indicators of a genocidal intent (even if it is not the only inference to be drawn from the available evidence at this stage), in order for the Court to conclude that the acts complained of by the Applicant are, prima facie, capable of falling within the scope of the Genocide Convention. Similarly, for purposes of determining plausibility of rights, it is not sufficient for the Court to only look at allegations of the grave breaches enumerated in paragraphs (a) to (d) of Article II of the Convention. The rights must be shown to plausibly derive from the Genocide Convention.

19. In the present case, South Africa claims that at least some of the acts it has complained of are capable of falling within the scope of the Genocide Convention. These include (1) the killing of Palestinians in Gaza (in violation of Article II *(a)*); (2) causing serious bodily or mental harm to the Palestinians in Gaza (in violation of Article II *(b)*); (3) deliberately inflicting upon the Palestinians in Gaza conditions of life calculated to bring about their physical destruction as a group, in whole or in part (in violation of Article II *(c)*); and (4) imposing measures intended to prevent births within the group (in violation of Article II *(d)*). South Africa further claims that Israel has employed methods of war that continue to target infrastructure essential for survival and that have resulted in the destruction of the Palestinian people as a group, including by depriving them of food, water, medical care, shelter, clothing, lack of hygiene, systematic expulsion from homes or displacement (in violation of Article II *(c)*) (see Application, paras. 125-127). South Africa also claims that certain Israeli officials and politicians have, through their statements, publicly incited the Israeli Defense Force ("IDF") to commit genocide (in violation of Article III *(c)*) and that Israel has failed to punish those responsible for the above violations. To demonstrate a genocidal intent, South Africa referred to the "systematic manner" in which Israel's military operation in Gaza is carried out, resulting in the acts enumerated in Article II of the Convention, as well as to statements of various Israeli officials and politicians that, in the Applicant's view, communicate State policy of Israel and contain genocidal rhetoric against Palestinians in Gaza, including statements by the Israeli Prime Minister, the Deputy Speaker of the Israeli Parliament (Knesset), the Defense Minister, the Minister of Energy and Infrastructure, the Heritage Minister, the President and the Minister for National Security.

20. Israel contests that it is committing acts of genocide in Gaza or that it has a specific intent to destroy, in whole or in part, the Palestinian people, as such. Israel emphasized that its war is not against the Palestinian people as such, but rather is against Hamas, the terrorist organization in control of Gaza that is bent on annihilating the State of Israel. Israel states that the sole objectives of

its military operation in Gaza are the rescue of Israeli hostages abducted on 7 October 2023 and the protection of the Israeli people from displacement and from any future attacks by Hamas, including by neutralizing Hamas' command structures and machinery. The Respondent further argues that any genocidal intent alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. Israel also argues that the statements relied upon by South Africa as containing genocidal rhetoric were all taken out of context and in fact were made in reference to Hamas, not the Palestinian people as such. Moreover, Israel argued that any other persons who might have made statements containing genocidal rhetoric were completely outside the policy and decisionmaking processes of the State of Israel.

21. As stated above, the tragic events of 7 October 2023 as well as the ensuing war in Gaza are symptoms of a more deeply engrained political controversy between the State of Israel and the people of Palestine. Having examined the evidence put forward by each of the Parties, I am not convinced that a prima facie showing of a genocidal intent, by way of indicators, has been made out against Israel. The war was not started by Israel but rather by Hamas who attacked Israel on 7 October 2023 thereby sparking off the military operation in Israel's defence and in a bid to rescue its hostages. I also must agree that any "genocidal intent" alleged by the Applicant is negated by (1) Israel's restricted and targeted attacks of legitimate military targets in Gaza; (2) its mitigation of civilian harm by warning them through leaflets, radio messages and telephone calls of impending attacks; and (3) its facilitation of humanitarian assistance. A careful examination of Israel's war policy and of the full statements of the responsible government officials further demonstrates the absence of a genocidal intent. Here I must hasten to add that Israel is expected to conduct its military operation in accordance with international humanitarian law but violations of IHL cannot be the subject of these proceedings which are purely pursuant to the Genocide Convention. Unfortunately, the scale of suffering and death experienced in Gaza is exacerbated not by genocidal intent, but rather by several factors, including the tactics of the Hamas organization itself which often entails its forces embedding amongst the civilian population and installations, rendering them vulnerable to legitimate military attack.

22. Regarding the statements of Israeli top officials and politicians that South Africa cited as containing genocidal rhetoric, a careful examination of those statements, read in their proper and full context, shows that South Africa has either placed the quotations out of context or simply misunderstood the

statements of those officials. The vast majority of the statements referred to the destruction of Hamas and not the Palestinian people as such. Certain renegade statements by officials who are not charged with prosecuting Israel's military operations were subsequently highly criticized by the Israeli Government itself. More importantly, the official war policy of the Israeli Government, as presented to the Court, contains no indicators of a genocidal intent. In my assessment, there are also no indicators of incitement to commit genocide.

23. In sum, I am not convinced that the acts complained of by the Applicant are capable of falling within the scope of the Genocide Convention, in particular because it has not been shown, even on a prima facie basis, that Israel's conduct in Gaza is accompanied by the necessary genocidal intent. Furthermore, the rights asserted by South Africa are not plausible and the Court should not order the provisional measures requested. But in light of the Court's Order, I will proceed to consider the other criteria required for the indication of provisional measures. This brings me to another criterion which I also find has not been met, namely that there is no link between the rights asserted by South Africa and the provisional measures sought.

B. There is no link between the asserted rights and the provisional measures requested by South Africa

24. The next issue is the link between the asserted rights and the measures requested. South Africa has requested the Court to indicate nine types of measures: The requested measures can be divided into several categories.

1. First and second measures

25. The first and second requested measures concern Israel's ongoing military operations in Gaza. They would not merely require Israel to cease all alleged acts of genocide under Article II and III of the Convention - but would require the suspension of all military operations in Gaza, regardless of whether Hamas, an organization not party to these proceedings, continues to attack Israel or continues to hold Israeli hostages. In this respect, Israel would be required to unilaterally cease hostilities, a prospect I consider unrealistic. These two requested measures appear overly broad and are not clearly linked with the rights asserted by South Africa. Israel is currently engaged in an armed conflict with Hamas in response to the Hamas attack on Israeli military and civilian targets on 7 October 2023. Israeli military operations that target members of Hamas and other armed groups operating in Gaza — as opposed to conduct intended to cause harm to the civilian populace of Gaza - would not appear to fall within the scope of Israel's obligations under the Genocide

Convention. This is particularly the case for Israeli military operations that comply with international humanitarian law. Accordingly, the first and second measures do not appear to have a sufficient link with the asserted rights. A rejection of the first and second requested measures would be consistent with the Court's approach in *Bosnia v. Serbia* and *The Gambia v. Myanmar*, where the Court indicated provisional measures but, in doing so, did not bar either Serbia or Myanmar from continuing their military operations more generally (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 24, para. 52; *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. 30, para. 86). The measures indicated were restricted to the commission of acts of genocide.

2. Third measure

26. Although the Applicant requests this measure to apply to both Parties, it is not clear how South Africa, which is not a party to the conflict in Gaza, would contribute to preserving the rights of Palestinians in Gaza, much less "prevent genocide". In reality this measure would apply only to Israel. That said, to require Israel to "take all reasonable measures within their powers to prevent genocide" in Gaza would simply be to repeat the obligation already incumbent upon Israel and any other State party under the Genocide Convention. This measure appears to be redundant.

3. Fourth and fifth measures

27. The fourth requested measure requires Israel to refrain from specific actions that South Africa considers to be linked with its obligation to desist from committing any of the acts referred to in Article II, paragraphs (a) to (d) of the Convention. In my view, this measure, like the first and second, in effect requires Israel to unilaterally stop hostilities with Hamas, which is the only way of guaranteeing that none of the acts stipulated take place. However, as previously stated, this measure, when removed from the requirement of a genocidal intent, merely amounts to a requirement for Israel to abide by IHL, rather than by its obligations under the Genocide Convention. Similarly, the Fifth measure, which requires Israel to refrain from deliberately inflicting on Palestinians in Gaza conditions of life calculated to bring about their destruction in whole or in part, outside the context of the requirement of a genocidal intent, is tantamount to requiring Israel to comply with its obligations under IHL, rather than under the Genocide Convention. Thus, while the expulsion and forced displacement of Palestinians in Gaza from their homes

could amount to violations of IHL, the Court has previously determined in the *Bosnia Genocide* case that such conduct does not, as such, constitute genocide. The Court explained that

> "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement"(*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 123, para. 190).

However, such forced displacement, or other forms of "ethnic cleansing" may constitute genocide if intended to bring about the physical destruction of the group.

28. Similarly, the deprivation of necessary humanitarian supplies would only constitute genocide if taken with the requisite special intent. As discussed above, I do not consider that such special intent exists in this case. Therefore, such a measure is not warranted. The third component of the fifth measure refers to "the destruction of Palestinian life in Gaza". This requested measure is extremely vague and would appear to essentially fall within the requirement for Israel to refrain from deliberately inflicting conditions of life calculated to bring about the physical destruction of the Palestinian population of Gaza. It is therefore unclear what would be accomplished by separately indicating this measure. Accordingly, the Fourth and Fifth measures appear not to be linked to the rights asserted by the Applicant under the Genocide Convention.

4. Sixth measure

29. The sixth measure is written in such a way that it simply repeats the prohibitions mentioned in the Fourth and Fifth measures and is therefore not linked to rights asserted by South Africa.

5. Seventh measure

30. The seventh requested measure relates to the preservation of evidence. Although the Court found the existence of such a link with respect to a similar measure requested and indicated in *Gambia v. Myanmar (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. 24, para. 61), in the present case there is no evidentiary basis for concluding that Israel is engaged in the deliberate destruction of evidence relating to genocide. Moreover, to the extent the requested measure concerns the requirement that Israel allow fact-finding missions and other bodies *access to Gaza*, it would appear to go beyond Israel's obligations under the Genocide Convention. As part of its duties to the Court and to South Africa, Israel may only be required to *preserve evidence under its control*. However, a requirement to allow access to Gaza by third parties does not appear linked with South Africa's asserted rights. Notably, the Court rejected a similar request for access by independent monitoring mechanisms made by Canada and the Netherlands in *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic), Provisional Measures, Order of 16 November 2023*, paras. 13 and 83).

6. Eighth and ninth measures

31. With respect to the eighth and ninth requested measures, as previously noted by the Court:

"the question of their link with the rights for which [the Applicant] seeks protection does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance by the Parties with any specific provisional measure indicated by the Court".

As previously observed, this case is complicated by the fact that in the context of an ongoing war with Hamas, which is not a party to these proceedings, it would be unrealistic to put limitations upon one of the belligerent parties but not the other. Israel would justifiably assert its right to defend itself from Hamas, which would most probably "aggravate the situation in Gaza". For all the above reasons, I am of the view that the provisional measures requested by South Africa do not appear to have a link with South Africa's asserted rights, and that this criterion for the indication of provisional measures is also not met.

32. In conclusion, I am not convinced that the rights asserted by South Africa are plausible under the Genocide Convention, in so far as the acts complained of by the Applicant do not appear to fall within the scope of that Convention. While those acts may amount to grave violations of IHL, they are prima facie, not accompanied by the necessary genocidal intent. I also am of the view that the provisional measures requested by South Africa and not linked to the asserted rights. However, I would also like to express my opinion regarding the

provisional measures actually indicated by the Court, which in my view are also unwarranted for the reasons stated in this dissenting opinion.

V. THE PROVISIONAL MEASURES INDICATED BY THE COURT ARE NOT WARRANTED

33. In my view, the *First measure* obligating Israel to "take all measures within its power to prevent the commission of all acts within the scope of Article II of [the Genocide] Convention" effectively mirrors the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention and is therefore redundant. The *Second measure* obligating Israel to ensure "with immediate effect that its military does not commit any acts described in point 1 above" also seems redundant as it is either already covered under the first measure or is a mirror of the obligation already incumbent upon Israel under Articles I and II of the Genocide Convention. The *Third measure* obligating Israel to "take all measures within its power to prevent and punish the direct and public incitement to commit genocide" also mirrors the obligation already incumbent upon Israel under Articles I and III of the Genocide Convention and is therefore redundant. The *Fourth measure* obligating Israel to "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 the Gaza Strip" has no link with any of the rights purportedly claimed under the Genocide Convention. In other words, under that Convention, a State party has no duty to provide or to enable the provision of, humanitarian assistance, as such. There may be an equivalent duty under IHL but not the Genocide Convention. Besides, there is evidence before the Court that the provision of humanitarian assistance is already taking place with the involvement of Israel and other international organizations, notwithstanding the continuing military operation. The evidence also points to an improvement in the provision of basic needs in the affected areas. This measure too seems unnecessary in the circumstances. Regarding the *Fifth measure* obligating Israel to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Articles II and III of the [Genocide] Convention", there does not seem to be any evidentiary basis for assuming that Israel is engaged in the deliberate destruction of evidence as such. Any destruction of infrastructure is not attributable to the deliberate efforts of Israel to destroy evidence but rather to the exigencies of an ongoing conflict with Hamas, which is not a party to these proceedings. It is difficult to envisage how one of the belligerent parties can be expected to unilaterally "prevent the destruction of evidence" while leaving the other one free to carry on unabated. Finally, in respect of the *Sixth measure*, given that the other measures are not warranted, there is no reason for Israel to be required to "submit a report to the Court on all measures taken to give

effect to th[e] Order".

34. Lastly, a word about the Israeli hostages that remain in the custody of their captors and their families. I join the majority in expressing the Court's grave concern about the fate of the hostages (including children, babies, women, the elderly and sometimes entire families) still held in custody by Hamas and other armed groups following the attack on Israel of 7 October 2023, and in calling for their "immediate and unconditional release" (See Order, paragraph 85). I would only add the following observation. In its Request for provisional measures, South Africa emphasised that both Parties to these proceedings have a duty to act in accordance with their obligations under the Genocide Convention in relation to the situation in Gaza, leaving one wondering what positive contribution the Applicant could make towards defusing the ongoing conflict there. During the oral proceedings in the present case, it was brought to the attention of the Court that South Africa, and in particular certain organs of government, have enjoyed and continue to enjoy a cordial relationship with the leadership of Hamas. If that is the case, then one would encourage South Africa as a party to these proceedings and to the Genocide Convention, to use whatever influence they might wield, to try and persuade Hamas to immediately and unconditionally release the remaining hostages, as a good will gesture. I have no doubt that such a gesture of good will would go a very long way in defusing the current conflict in Gaza.

VI. CONCLUSION

35. For all the above reasons, I do not believe that the provisional measures indicated by the Court in this Order are warranted and have accordingly voted against them. I reiterate that in my respectful opinion the dispute between the State of Israel and the people of Palestine is essentially and historically a political one, calling for a diplomatic or negotiated settlement, and for the implementation in good faith of all relevant Security Council resolutions by all parties concerned, with a view to finding a permanent solution whereby the Israeli and Palestinian peoples can peacefully coexist.

(Signed) Julia SEBUTINDE.

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