ADVANCE SHEET – MARCH 15, 2024

President's Letter

In this issue, we reproduce two documents from 75 years ago inspired by recent events in Palestine and on American college campuses.

The first is an essay by the journalist Dorothy Thompson warning against the divided loyalties and dangers of an over-enthusiastic Zionism. It was published in Commentary, the magazine of the American Jewish Committee, together with a rejoinder by the historian Oscar Handlin which appears a t **https://www.commentary.org/articles/oscar-handlin/do-israeli-ties-conflict-with-u-s-citizenship-america-recognizes-diverse-loyalties/**

Thompson, though now forgotten, was a force of nature. She was the first American journalist to be expelled from Hitler's Germany on 24 hours' notice in 1934. At the peak of her influence, she had a national weekly radio program, a half-dozen assistants on her staff, a three-times-a-week syndicated column appearing in more than a hundred newspapers including the *New York Times* , a monthly column in the *Ladies Home Journal* and a personal schedule including dozens of public lectures each year. It is doubtful that the Roosevelt Administration would have been able to secure the enactment of Lend Lease without her influence. Several public figures urged that she receive the Republican nomination for President in 1944 and 1948. She was successful in keeping her second husband, Sinclair Lewis, 'off the wagon' during the period in which he wrote the novels that won him a Nobel Prize; their marriage ultimately succumbing to his alcoholism. She was described by Isaiah Berlin as "a woman of tremendous physical energy and animal spirits--she addresses one like a public meeting and preaches her doctrines with fury." At the end of her career, she made herself unpopular in some quarters by her advocacy of a magnanimous peace with Germany and Japan and her interest in the Palestinian refugees. She is the subject of several biographies, including an interesting dual biography comparing her career with that of the Englishwoman Rebecca West, who had a more notable prose style but a less integrated personality. (S. Hertog, *Dangerous Ambition: New Women in Search of Love and Power* (Ballantine, 2011)).

The second document, the so-called Blaustein-Ben Gurion Agreement, appeared until recently on the website of the American Jewish Committee and defined the terms on which prominent non-Zionist philanthropists agreed to support the State of Israel on condition that it not proselytize for immigrants or purport to speak for the Jewish diaspora; Jacob Blaustein, a Baltimorean, was also noted as the leading private sponsor of the UN Declaration of Human Rights.

George W. Liebmann

An Evening With David M. Rubenstein

On **Tuesday, March 26, 2024, David M. Rubenstein, Esquire** will be speaking in the Main Reading Room of the Baltimore Bar Library. Among other topics, Mr. Rubenstein will talk about his early years and upbringing in Baltimore where he attended Baltimore City College High School. Additionally, he will discuss the 2024 elections; the United States and global economies, and of course, his recent purchase of the Baltimore Orioles.

David M. Rubenstein is Co-Founder and Co-Chairman of the Carlyle Group. Prior to forming Carlyle in 1987, Mr. Rubenstein practiced law in Washington, D.C. with Shaw, Pittman, Potts & Trowbridge LLP (now Pillsbury Winthrop Shaw Pittman LLP). From 1977 to 1981, Mr. Rubenstein was Deputy Assistant to the President for Domestic Policy. From 1975 to 1976, he served as Chief Counsel to the United States Senate Judiciary Committee's Subcommittee on Constitutional Amendments. From 1973 to 1975, Mr. Rubenstein practiced law in New York with Paul, Weiss, Rifkind, Wharton & Garrison LLP. Among other philanthropic endeavors, Mr. Rubenstein is Chairman of the Boards of the John F. Kennedy Center for the Performing Arts, the Council on Foreign Relations, the National Gallery of Art, the Economic Club of Washington, and the University of Chicago and serves on the Boards of Memorial Sloan-Kettering Cancer Center, Johns Hopkins Medicine, the Institute for Advanced Study, the National Constitution Center, the Brookings Institution, the Lincoln Center for the Performing Arts, the American Academy of Arts and Sciences, and the World Economic Forum. Mr. Rubenstein serves as Chairman of the Harvard Global Advisory Council and the Madison Council of the Library of Congress. He is a member of the American Philosophical Society, Business Council, Board of Dean's Advisors of the Business School at Harvard, Advisory Board of the School of Economics and Management at Tsinghua University, and Board of the World Economic Forum Global Shapers Community. Mr. Rubenstein is a magna cum laude graduate of Duke University, where he was elected Phi Beta Kappa. Following Duke, Mr. Rubenstein graduated from the University of Chicago Law School, where he was an editor of the Law Review. The Orioles are not the first time Mr. Rubenstein has made a significant purchase. In December 2007, he purchased the last privately owned copy of the Magna Carta.

Place: Mitchell Courthouse – 100 North Calvert Street – Main Reading Room of the Bar Library (Room 618, Mitchell Courthouse).

Time: 5:00 p.m., Tuesday, March 26, 2024.

Reception: Catering by DiPasquale's featuring their famous prosciutto, cod fish, fruits and cheeses.

Admission: The event is free of charge for Bar Library members as well as members of the judiciary. There is a $20 admission charge for others with the proceeds going toward the Harry A. Cole Self-Help Center.

R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to **jwbennett1840@gmail.com**.

Reinvigoration At The Bar Library

The question that I pose to all of you this issue of the *Advance Sheet* is what do the numbers sixty-five and eighteen have in common? The answer is: absolutely nothing. Well, at least when we are talking about a sixty-five year old man and his eighteen month old grandson. What, you might ask? Well, excuse me for being somewhat incoherent: last night was a little rocky. You see, my daughter and her husband, both recently assuming the status of veterans, are in the process of settling into their new place, starting the next act of their lives. My wife says to them "Why not leave your son with us, we'd love it and you'll be able to get things done a lot easier."

I am quickly realizing why, separate and apart from biology, having children is something for the young. What seemed so easy thirty years ago is, well . . . does anyone know how many hours to go before Friday morning? In all sincerity though, the last several days have been a joy, and although I am feeling about thirty years older, my wife seems about thirty years younger. So, if any of you see us together in the near future "No, that is not my daughter."

What reinvigorates me each day, that allows me to be a "parental unit" to someone sixty three years my junior, is my time at the Bar Library. Over the years it has served as a reinvigorating agent to lawyers who are facing sometimes Herculean challenges. It is a place for quiet contemplation, a place that allows for analysis of your case and decisions to be made as to the best course of action to pursue. Once you have determined what you need to do, there is access to endless amounts of material, books and databases, to help you get there. It is the ultimate gps for the justice that you and your client deserve. So, if you want to get there, get here.

I look forward to seeing you soon.

Joe Bennett

Dorothy arriving in Paris after her expulsion from Germany in August 1934. The bouquet of American Beauty roses was a farewell token from her Berlin colleagues. The event was front-page news.

Commentary

Dorothy Thompson

Among those who have expressed concern lest the strong emotional attachment that American Zionists have exhibited for Israel cast suspicion on the loyalty of American Jews to the United States, Dorothy Thompson's has been an especially outspoken voice. She states here the case for this viewpoint, which has won its passionate advocates and aroused equally passionate denials. (Immediately following this article, Oscar Handlin presents an alternative, opposing view of the problem raised by Miss Thompson.)

There exists a famous American document to which reference is often made, but which few people read. It says: "Nothing is more essential [to this country] than that permanent inveterate antipathies against particular foreign nations and passionate attachments for others should be excluded. . . . The nation which indulges towards another an habitual hatred or an habitual fondness is in some degree a slave. . . . Sympathy for the favorite [foreign] nation, facilitating the illusion of an imaginary common interest where no real common interest exists . . . leads to concessions to the favorite nation and privileges denied to others, which is apt doubly to injure the nation making the concessions . . . and it gives corrupted or deluded citizens, who devote themselves to the favorite nation, facilities to betray or sacrifice the interests of their own country without odium, sometimes, even, with popularity, gilding with the appearances of a

virtuous sense of obligation . . . the base or foolish compliances of . . . infatuation."

These words are from Washington's "Farewell Address," and they have hitherto, for the most part, guided American policy towards all nations. Ours has been a policy of equal and reciprocal friendship. If friendships have lapsed it has been because of conflict of interest between other nations and our own, and not because of "inveterate antipathies" or "passionate attachments" to any other nation or nations *per se.*

For no nation was Washington's advice more pertinent than ours. As our country developed, the wisdom of this advice has increased rather than diminished. For the United States has drawn its nationals from other nations, with the concomitant danger that these might transfer to this nation the "inveterate antipathies" or "passionate attachments" of their former nation and so destroy the Republic by internal divisions of loyalty.

From the outset the United States repudiated the idea of a multi-national state —and this point is the main theme of this article. We are a union of American states; we are not a union of European nations or nationals. Each immigrant to these shores came as an individual, prepared to cast off his former nationhood and enter with good faith into a new nationhood, as well as a new statehood. Here, unlike the Soviet Union or the former Austro-Hungarian Empire, nationhood and statehood are conjoined.

It is very important that we keep this basic fact clear. The citizen of the Soviet Union (like the citizen of the former Austro-Hungarian Empire) retains a nationality within a multi-national state. He may be a Ukrainian, speaking the Ukrainian language, or an Uzbek, speaking the Uzbek language, within a state embracing more than a hundred and fifty other nationalities with as many languages, and with schools and courts in all of them.

However, the nationalities of the Soviet Union, like those of the former Austro-Hungarian Empire, were indigenous on the soil the state embraced. The state found them there, as long-settled and cohesive nationalities, and incorporated them together under a single central government.

It is from these East European areas, where state and nation have not meant the same thing, that we have derived the concept of the national "minority."

The concept of national "minorities" arose within multi-national states. National "minorities" were cohesive ethnic groups within a state, with a sense of nationhood, who were denied, or who felt they did not enjoy, equal status with the dominant nationalities comprising the state of their citizenship. The Slavs, for instance, of the former Austro-Hungarian Empire felt they were denied equality of national status with the Germans and the Magyars, and out of this revolt against "minority" status rose the conflict that ended the Empire—and, incidentally, started new conflicts within its successors. Ethnic groups differing from the dominant body demanded "national" rights as "national minorities," including the right to set up a state or other autonomy of their own. Such were Croatians, in the early Yugoslav monarchy, who denied they shared nationality with the Serbs; the Austro-Germans in the Czech Sudeten; the Slovaks, in the Czechoslovak Republic; the Ukrainians in pre-war Poland; repeatedly, the Ukrainians in Russia; and the Jews in all these states as well.

Such a concept never has been, and never could be accepted by the United States, nor are the cases parallel. For the American nation was created by the voluntary transfer of persons from another soil to this, not by federation or conquest of nations on their original soil.

The United States is a nation and a state originally created by British colonists

in a primeval country inhabited only by a sparse population of tribally organized aborigines whom the white settlers gradually displaced. The act of creating the United States included a total break of the then almost purely Anglo-Saxon American people from their mother country. In the break, they created a new nation as well as a new state. We were an American "people" from the time the Constitution opened with the words, "We, the people," to and beyond the time when Abraham Lincoln described "a nation dedicated to the proposition that all men are created equal."

It may seem the utmost banality to reaffirm a proposition so obvious. But that it needs reaffirming is indicated by the way the concept of American "minorities" has crept into the American language. It must here be stated: *There are no minorities in the United States*. There are no national minorities, racial minorities, or religious minorities. The whole concept and basis of the United States precludes them. That our culture—and race—has long since ceased to be wholly "Anglo-Saxon"; that America is a blended amalgam of many races and cultures does not change this fact. American democracy is based on equality of right for every individual citizen and religious group, with neither inherent rights nor inherent prejudices for or against any national groups—which are simply not recognized.

Every citizen of the United States and member of the American nation who was not born here came voluntarily as an individual, with one exception—the Negroes whose ancestors were imported as chattel slaves. Each member of this nation possesses his nationhood and his citizenship with equality of right and equality of obligation with every other citizen. Where, or if, his status, or the status of a group to which he belongs, is prejudiced, he has the right, personally and as a member of the group, to fight for the equalization of his status, as in the case of the Negro. But he cannot fight for the recognition of a different national status, or a status of "minority," for no such status is constitutionally recognized or recognizable. We are "one nation, indivisible, with liberty and justice for all."

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Unless this identity of American nation and state is upheld as primary, this nation will not survive. From the beginning, the creation of the American nation was a hazardous experiment. For were a Polish, British, Czech, German, or other European nation to transplant itself in a national bloc to this soil, without a clear break of former nationhood by every individual, one of two things would eventually happen: either the country would split into contending national groups, or its policies would become subject to other states using their nationals here for the purposes of the parent nation-state.

The danger of this has always been recognized by the national instinct, expressing itself in abhorrence of "hyphenates"; symbolized in the naturalization processes; expressed in the law that citizenship can be withdrawn if a naturalized citizen returns to his native country for more than two years without satisfactory explanation; in such rituals as the Oath to the Flag; in the hatred of communism, far less for its social and economic theories than for its acceptance of the Soviet Union as the "workers' fatherland"; and in the immediate revolt against the German-American Bund, claiming national allegiance from Americans of German origin.

Frenchmen, Englishmen, and other Europeans find some of these expressions of American nationalism naive and exaggerated. But Englishmen and Frenchmen have never had to ask themselves what it means to be English or French. With the exception of a few naturalized citizens, that is the way they all were born; that is what their ancestors were. Our country, alone in the whole world, is composed of persons a majority of whose ancestors originally had

other nationalities. Hence the perpetual emphasis has been upon assimilation. All public schools are conducted in one tongue; political life divides the population into parties, not ethnic groups; all religions are accorded equal rights and none is given state favoritism.

Nevertheless, repeatedly in our history, dangers have arisen to the American nation by reason of a recrudescence of former loyalties and the transmission of inter-European interests to their American descendants. Americans of Irish origin have been anti-British for no American reasons; Americans of Polish origin have been anti-Russian and anti-German for no American reasons, etc. It was precisely this danger that Woodrow Wilson warned against, on May 10, 1915, when he said:

You cannot become true Americans if you think of yourselves in groups. America does not consist of groups. A man who thinks of himself as belonging to a particular national group in America has not yet become American, and the man who goes among you to trade upon your nationality is not worthy to live under the Stars and Stripes.

And on occasion, fear of these other, former loyalties has led to harsh measures, often unjust, especially in time of war—to persecution of Americans of German origin, for instance, and, in the last war, to the very un-American treatment accorded the Nisei. For it is recognized as hard, in nature, to relinquish one nationality for another, and even harder in one or two generations to cut ties of peculiar sympathy with a former motherland.

But with all the latent conflicts that could arise from the diversity of American national origins, America was aided by the recognition of other states that they had permanently lost their former nationals when they became American. The single exception was Hitler's claim to Americans of German descent, which provoked so drastic a national reaction, and temporarily prejudiced the status of all Americans of German ancestry.

On the whole it was easy for European countries to relinquish their nationals. Europe, since the industrial revolution, has suffered from over-population; the export of part of its population was a boon, as it would be today to certain countries, notably Italy; European nations wanted to keep the good will of America as a rising powerful state, and also to keep open the American gates. Bismarck, much wiser than Hitler, fought the idea of a "Union of Germans Abroad," on the ground that it would prejudice in other countries the case of Germany herself; and at the outbreak of World War II, the Polish Ambassador to the United States, Jan Ciechanowski, addressing Americans of Polish descent while Poland was being overrun by German armies, had the wisdom and tact to remind his hearers that, although they were bound in natural sympathy to the citizens of their former nation, they must remember that they were not Poles but Americans.

In The growth of the American nation, the Jews joined the great stream of immigrants from Europe, not as Jews, but as Poles, Russians, Austrians, Hungarians, or other nationals, arriving here not to transplant their national allegiances, but to shake them off for a new one. When immigration was restricted and the quota system adopted, Jews shared the quotas assigned to the various European nationals—and still do. Jewish immigration was large. Especially in Eastern Europe, where the Jews held a peculiar status of second-class citizenship, and of a religious and quasi-national minority, their eagerness to acquire a first-class citizenship and equal status was strong. Hence it happened that eventually a third of all the Jews in the world found residence and citizenship in the United States, and with Hider's extermination of the Jews in Europe, American Jews formed half the number of all Jews,

which is the present situation.

In general, and in the past, Jewish immigrants, particularly those from East European countries, were most free of prejudices arising from their former national and state allegiances. Where they had such, they were the prejudices of their co-nationals of other religions. But even so, they had fewer such prejudices. Their ghetto life in pre-revolutionary Russia and Poland had not inclined them to Russian or Polish chauvinism, and in all ways except religion they assimilated rapidly and enthusiastically.

The growth and expansion of Zionism, however, raised, for the first time among the Jewish and non-Jewish populations of Western states, the question of whether a Jew was a person adhering to the religion of Judaism or whether he was a member of a separate nation and chiefly set off from others by this latter fact.

There is no question that the sense of nationhood had always been latent in Orthodox Jewry. The Old Testament is both the source of Jewish religious inspiration and the secular history of a specific people, the twelve tribes that many centuries ago constituted the "nation" of Israel. A few of the religious festivals of Judaism recount the national trials of the Jews and might be interpreted to express national aspirations.

Also, in the face of medieval persecutions, European Jews extended their own religious law codes, with which they governed not only the religious life of Jewish communities but, to an extent, their secular life as well. These theocratic arrangements which governed the medieval European ghettos passed over in part to the modern ghettos, and were even cherished by East European Jews as evidence of their separate religious and secular existence.

But at the end of the 18th century Moses Mendelssohn in Germany, under the influence of the ideas of the Enlightenment, began the reformation of Judaism, to emphasize the spiritual revelations of the prophets rather than the rituals and habits of mind of a nation in exile. He translated the Bible, read by the Jews in Hebrew, into German. (Orthodox Jews burned the translation!)

Nevertheless, the movement of the Enlightenment, for the purpose of making Judaism entirely a religious faith compatible with any nationality, and for the reception of Jews into equal status as nationals of the countries where they lived, extended itself to all of Western Europe during the 19th century. In America, a country cut loose at birth from much unhappy history, in which the Jews breathed perhaps the greatest freedom they had known since the fall of the Jewish state, further reforms made headway under the leadership of Rabbi Isaac M. Wise. These Reform Jews looked upon the Zion of the Bible and the Prayer Book symbolically, as the aspiration of those who would found on the principles of Moses, Isaiah, Amos, and Jeremiah, the *Civitas Dei*—the City of God—wherever they might be. Their Jerusalem hardly differed from the "Holy City," "The Golden," "Of milk and honey Blest" of the Protestant Christians, for whom it was, and is, symbol of a redeemed society, wherever on earth that society may be.

But nearly half a century after Moses Mendelssohn had begun his work, Theodor Herzl, a Viennese Jew, started the Zionist movement, to return the Jews to Palestine and establish there a state. This movement was entirely secular and political. Herzl's impulse was not the religious Zionism of Orthodoxy. As a journalist, writing for the *Neue Freie Presse* of Vienna, he had covered the Dreyfus Affair in France, and by it had been impelled to the belief that there was no permanent hope for the assimilation of Jews anywhere in Europe.

I find it of the highest historical importance that the Zionist movement thus

originated in the old Austro-Hungarian monarchy, the one country historically belonging to Europe which was not a nation-state but a multi-national state, doomed even in Herzl's time to break up by reason of the nationalism of its component elements.

For although Jewish nationalism, or Zionism, does, to be sure, differ in one important essential from the nationalist movements of the last and present century in Eastern Europe, it is practically identical with them in others. It is unique in the fact that it is the movement of a people considering themselves displaced for millennia from their national soil. It was not, therefore, a movement of people to attain self-government and national status on the soil where it was living, but to attain it on a far distant soil, where few of them or their ancestors had lived for centuries. This is what makes it different from the other East European national movements. Otherwise, Zionism was a not atypical East European movement, arising in lands where various nationalities had varying status within multi-national states such as Russia, Poland, and the Austro-Hungarian Empire. The Jewish movement for national freedom and independence could be compared, without stretching the analogy excessively, to movements among the Ukrainians in Poland and Russia, and the Poles, Czechs, Slovaks, Croats, etc., in Austro-Hungary. And just as these movements found support from former nationals elsewhere in the world, so Zionism found similar support. Until Hider, it was pre-eminently a movement of and for such Jews as had no satisfactory or equal status in the countries where they lived.

The Zionist movement, however, received its most powerful impetus and opportunity from the rise to power of Adolf Hider in Germany.

Prior to Hider the Jewish colonization of Palestine was a problem rather of finding sufficient settlers than of dealing with the pressure of vast homeless masses. The number of Jews from the West who joined the *halutzim* and other settlement groups was negligible. Although militant Jewish nationalism was always a part of the Zionist movement, its supporters in the West tended rather to regard it as a relief measure for their less fortunate co-religionists in Eastern Europe.

However, when Germany, the cradle of Jewish emancipation, turned against the Jews a shock was delivered to the Jewish mind and soul such as it had hardly received in its millennial history. It was all that was needed to fan into white heat the Jewish nationalism which the Zionist movement had never previously succeeded in doing more than spark. The fear that had overcome Theodor Herzl at the end of the last century in France was nothing compared to the terror that gripped the hearts of Jews throughout the world, as in the midst of a Western and theoretically advanced civilization Jews were first reduced to second-and third-rate status; branded to the fourth and fifth generations, regardless of intermarriage or religious conversion; and eventually systematically subjected to extermination in every European country occupied by the German armies.

It was thus not the Jews, not even the Zionists, who gave the greatest impetus to Jewish nationalism. It was Hitler, the Germans, and the whole Gentile world, who failed to come with anything like adequate energy to their relief.

But it is also one of the bitter ironies of history and human psychology that we tend to accept the theses of those we hate. It was Hitler's violent and exaggerated nationalism, his concept of the Germans as a separate, persecuted, and superior people, his idea of the eternal identity of race, nation, and state, his identification, furthermore, of nation and religion—in his attempt, for instance, to make a specifically German and exclusive Christianity—all of

which ideas were latent and slumbering in the German subconscious and, for that matter, are probably in some measure latent and slumbering in the subconscious of many other peoples—that resulted in the violent persecution of the Jews.

One would have thought—though the thought would have been superficial, leaving out of account the peculiarities of human psychology—that the reaction of the world, and especially of the Jews, to the unprecedented horrors released by such concepts would have been to repudiate all such ideas for all time. Unfortunately, human emotions do not follow the dictates of reason. Among millions of Jews the reaction to the German action was to release a counternationalism of unprecedented vehemence, bearing in some of the more radical Zionist groups such as the Irgunists and Stemists a striking resemblance to Hitler's own concepts and working itself out—again by one of those strange historical ironies—not against the Germans but against the nation which had made the greatest sacrifices to destroy the enemy of the Jews—Great Britain—and which, also, had been the first country to accept the original Zionist idea.

But it is not my purpose to go into such phases of Zionist phenomena. Who would do so enters the dark regions of the soul and the reactions of despair, in which the terrorized become terrorists, the victims of genomania become genomaniacal, a man like Arthur Koestler creates his own "darkness at noon," and anyone who dares to raise however timid a voice of warning in an attempt to break a circle of action and reaction which has many of the aspects of hell itself is charged as an anti-Semite. These things, too, it seems to me, could have been expected as the result of the Hitler horror. They did not start with the Jews and it ill becomes a non-Jew to assume any attitude of righteousness, however deeply and sadly one may deplore them.

But there is an aspect of Zionism which demands clear facing by Jews and Gentiles alike. And that concerns the relation of the American who recognizes himself as a Jew to the nation of his citizenship, and to the nation-state of Israel. Both among Jews and Gentiles there is a sort of open conspiracy not to face this question—or at least not to face it publicly. I believe that this timidity is extremely dangerous—dangerous, in the first line, to the Jews. For it is being discussed very vehemently in private, both among Jews and Gentiles.

Israel is not the first state in the world to be created by colonization. But it is, I think, the first state in human history to be created by the emigration of a non-recognized "nation" to a non-Existent state of that nation. Colonization in every other historic case was from an existing state to a colony of that state or a territory desired as a colony—after which the colony often broke away to independent existence. In creating the State of Israel, however, the process has been reversed. A hitherto legally non-existent *nation*—the Jewish—has created a nationstate, and not by members of the nation resident within the geographical confines of the state but by members of the nation who were actually citizens of other states yet were successfully urged to regard themselves, at the same time, as in some way nationals of a state in process of creation.

The question, now, of what will be the future relation of an international "nation"—if we accept the Zionist thesis—that created the nation-state of Israel to this, its offspring, is unavoidable. Shall "World Jewry" outside Israel, citizens of many nations but above all concentrated in the United States, regard itself in some manner as "Israel-in-Exile"? Is what the Zionists themselves always call "World Jewry" a continuing part of the Jewish nation? And if this is so, what is bound to be the reaction eventually of the states of their citizenship, and

especially the reaction of the United States, where reside half the Jews of the earth?

The American of Jewish religion has always been, and as long as this nation holds to its basic and Constitutional principles will always be, accepted as a full and equal citizen. But sooner or later the Jewish nationalist, which today means the Israeli nationalist, will have to choose allegiances. "One cannot," says an old Jewish proverb, "sit on one chair at two weddings." There is no room in American nationality for two citizenships or two nationalities. To say it extremely brutally: no one can be a member of the American nation and of the Jewish nation—in Palestine or out of it—any more than he can be a member of the American nation and the British or German nation. In this country nationhood goes with statehood. No one should interfere with the choice but sooner or later the choice will have to be made.

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Many years ago a distinguished Zionist presented me with what seemed a very telling argument in favor of a Jewish state. "Thousands of Jews," he argued, "have within themselves a deep sense of separate nationality. Being stateless, each Jew is compelled to carry this sense around with him, guarding it in his own bosom and feeling treasonable if he drops it. Once given an established state, this feeling will fade away. The Jewish nation-state wall be a specific place and thing, and the individual Jew can give up this harassing sense of vague nationality and make a free choice."

Were that to be true, the establishment of the State of Israel might bring a real emancipation to the Jews throughout the world who feel themselves clearly to be Frenchmen, Britons, Americans, and what not, differing from their fellow-nationals if at all only in matters of religion. One could assume that a natural sympathy would exist between Jews everywhere and the State of Israel, as a natural sympathy exists between Americans of various national origins and the countries of their ancestry, not strong enough, however, to influence their behavior where interests might be in conflict. But, unfortunately, certain tendencies in Zionism do not point in this direction. On the contrary, if the words of some Zionists are to be taken at face value, Zionism conceives of every Jew in the world as belonging to the Jewish "nation," and to a sort of Diaspora of the State of Israel. There is traceable in the United States an increasing wish to separate Jewish cultural existence here from the main stream of American life—this apart from the Jewish religious community—and to set up among American Jews a quasi-secular community. There are already Jewish community councils that try to discipline Jews as though they were members of a separate minority group within the United States. In specifically Jewish publications I have read of such ceremonies as American Jewish children taking oaths to the Star of David flag, which is not, as a flag, a religious symbol but the banner of a state like any other secular state. There are in this country pioneer camps where native-born American children and youth are training for Palestine—training, indeed, to become citizens and soldiers of another state. And on August 31 in Tel Aviv, Israel's Prime Minister, Mr. Ben Gurion, was quoted as saying: "Although we realized our dream of establishing a Jewish state, we are still at the beginning. Today there are only 900,000 Jews in Israel while the greater part of the Jewish people is still abroad. Our next task will not be easier than the creation of a Jewish state. It consists of bringing all the Jews to Israel.

"We appeal chiefly to the youth in the United States. . . . Even if [their parents] decline to help we will bring the youth to Israel."

Now such camps and such statements, unrepudiated by the American Zionist organizations, perturb me. Training camps for Palestine existed in Eastern

Europe under the friendly aegis of East European governments. But they were tolerated because these countries wished to reduce what were, in their terms, cohesive Jewish minorities, and therefore favored their emigration to Palestine —or for that matter to any other place that would receive them. To say it bluntly, these countries wanted to get rid of Jews. Are we to assume that the same reasons lie behind American tolerance of such training camps? And if the half-conscious wish to reduce the Jewish population here does not lie behind the tolerance, what does? What other conceivable reason could make such camps and such a concept as Ben Gurion's acceptable? And how does one equate the desire of European Jews to emigrate to the United States under various quotas, with Jewish exhortations within the United States for American Jews to go to Israel? And, finally, if all the Jews of the world are to have an actual or potential home in Israel, what extended encroachments on the Arab world are implied?

The claim that every Jew in the world is, by his very existence, a member of the Jewish "nation," from which he cannot and may not extricate himself, is a claim never before made, to my recollection, by anybody except anti-Semites. Some of us non-Jews have spent a great part of our lives arguing against anti-Semites that the Jews are not a separate and specific "people," or "nation," or "race" held together within other states by a kind of secret nationhood, and many of us who have supported Zionism have done so on the ground that a Jewish nation-state would tend to end the Diaspora idea, and thus clarify this anti-Semitic suspicion once and for all, by making it possible to say: There, in Palestine, is the Jewish state and nation—there and *nowhere else.*

But this is not the attitude being taken by certain Zionists, who refer over and over again to "World Jewry" as an integral part of the Jewish *nation* with unceasing and perpetual obligations to the Jewish national state—obligations which are not, incidentally, reciprocal. For although, in the official Zionist view, no Jew in the world may be neutral toward Israel, Israel itself has declared a policy of neutrality between Russia and the West at a time of utmost crisis for our civilization. And this, despite the fact that Russia is persecuting Zionism and Jewish Americans have largely financed Israel.

The idea that the world Zionist movement is under the political discipline of the state it has created was expressed in *New Palestine*, June 11, 1948: "From the minute the Jewish State was proclaimed we [Jews abroad] are constrained from taking any political action in regard to Israel without the approval of the Jewish State."

I am sure also, that I do not know what is going to happen to the Jewish religion if it becomes increasingly subservient to political Zionism. Only the other day, the Scriptural verse, "If I forget Thee, oh Jerusalem," was invoked throughout this nation in behalf of a purely political solution of the status of that city. We Christians also pray the same exhortation, "If I forget Thee," associating Jerusalem with the Holy Land of prophecy for peace and good will among all men. In Christian terms, to politicize this concept would be to revive the Crusades to wrest the city from the hands of the infidel! Terrible dangers lie in such politicizing and secularizing of a religion to the purposes of state power. The history of Christianity is full of examples: Jews can learn from the errors of other religions; the equating of politics and religion has always been unfortunate, and must by its nature widen the gap between the religions here in our own country.

There is another aspect of present-day Zionist propaganda which disturbs me. That is an effort to recreate in American Jews Herzl's anxiety and to deepen

the anxiety neurosis in them. American Jews are being indoctrinated by some Zionists with the idea that they exist in this country—as everywhere else outside Israel—on dubious sufferance, and that what happened in Germany could happen here any minute.

Now, God knows, a Jewish anxiety neurosis is understandable after the events of this decade in Europe. But I often think that every person who attempts to lead states, nations, and people should have to make a study of analytical psychology. For when a fear takes possession of the mind, the pattern of behavior becomes self-defeating and of such a nature as to make the realization of the fear more likely. *We bring on what we fear.* Any psychologist will tell you that a primary neurosis is the fear of rejection and that when that neurosis takes hold of a person he unconsciously strives to create the conditions for that rejection.

I find no analogy between the outbreak in Hitler's Germany and the danger in this country. Racialism has been a European disease for centuries, and no part of Europe has ever had the kind of equal democracy of this country. The racially polyglot nature of the United States makes outbursts of racialism highly dangerous to far more than Jewish Americans. The Negroes are, as I have said, unique because their original status was unique. They were not originally admitted to this country as citizens but as slaves, and out of that original sin and crime has come all the malaise and strain that has marked the relations between blacks and whites. Yet it is my faith that this problem too will ultimately solve itself in the only American way, namely, by gradual racial assimilation and more rapid recognition of equality of personal rights.

Every Jew in America should have faith in this, for himself and for others. What the Jews here and everywhere else need today, as rarely in their history, is not discouragement but encouragement, not the instilment of perpetual fear but of confident faith in the American brotherhood; not the conviction that the American dream is going to break down in a horrible pogrom, but that it will triumphantly outride every storm.

We who are Gentiles have much to do to help adjustments between the various types and ancestries that make up our country. I myself, for instance, have throughout my public life fought such silly, un-American, and self-defeating measures as hotel restrictions, residential restrictions, and quotas in private schools. But one is not aided in this if from any group comes a perpetual affirmation of their essential separateness, and affirmation of the conviction that they are apparently appointed by destiny to perpetual persecution. I believe myself that even the continual beating of the drums of anti-anti-Semitism can be, and has been, overdone. Again, I believe it is psychologically false. Prejudice is apparently so integral a part of human nature that we can hardly expect ever to see it wholly eliminated socially, and if I may say so, it is not entirely confined to the Gentile world. But the plain fact of the matter is that for millions of Jews this country is their Zion, their home, and the representative of their democratic faith. And anyone who tends to break down that fact and faith is not the friend of either the United States or the Jews.

In Addition to this fear being engendered among Jews there is another tendency equally dangerous as it affects non-Jews, and that is to equate anti-Zionism with anti-Semitism. This really amounts to making anti-Semites, by appointment, of everybody who either does not believe in Zionism or criticizes any phase of Zionist and Israeli policy. Israel is a state whose policies and interests must conflict at certain points with the interests and policies of other states; it is a state run like all others by fallible men whose policies are open to criticism; and it is also, like other states, one within which there are conflicting

tendencies and conflicting policies and parties, some of which may awaken admiration and others distaste, not at all by reason of race or religion, but by reason of the policy itself. Yet—and I speak from very unhappy experience—we are in a frame of mind and a condition of affairs in this country where to make any criticism of any policy or party in Israel is equated, by Zionist leaders and apologists, with anti-Semitism, with, as a result, a highly strained and by no means healthy condition in the press. I thought, for instance, that the assassination of Count Folke Bernadotte and his aide was a dreadful thing; that the failure of the Israeli government to apprehend the culprits was scandalous; that the immense reception accorded to the Irgunist leader Beigin in New York was out of place; and that some acts of Israeli terrorists against Arabs were shameful. I made these criticisms in good faith but also, as I learned, in most naive innocence, for by making them I called down upon my head a campaign of vilification such as it has seldom been my lot to endure; a huge letter-writing campaign to newspapers demanding that my column be dropped and charging me, of all things, with being an anti-Semite, as though being anti-Irgun or anti-Stern Group or—for that matter—anti-Zionist was synonymous with being against Jews *per se.*

Nothing, to my mind, could be worse. The State of Israel will, in my opinion, be infinitely stronger in world public opinion when journalists and commentators are given no cause to fear treating it with the same forthrightness that they treat other states and their policies. I say this in full knowledge that young and weak states and governments are always more sensitive than established and strong ones, and I say it in the ardent and absolutely sincere hope that Israel will flourish and give expression to the deepest moral instincts and intellectual gifts of the Jewish religion and of Jewish cultural possibilities.

But the Zionists should, I think, realize the truth in the words of Emerson that "a friend is a person with whom one can be sincere." The terrorization of criticism is not, in my experience, characteristically Jewish at all, but quite the contrary; and when any people embark upon a political road they embark upon a controversial road, controversial in essence, in the nature of the act itself.

I have found the courage to write some of these things because I know that thousands of American Jews feel them equally or more strongly than myself, including Jews who have been and are in the Zionist movement, and those others who, though accused of being "traitors to their people," have rejected Zionism. And it is my hope—though not my expectation—that those who read my words will accept them exactly in the spirit in which they are meant—uttered by one who, far from rejecting the American Jews or the State of Israel, wants to see American Jews wholly American, free and equal members of the American nation and no other, and Israel's Jews Israelis, creating the nation they have dreamed of in peace with all their neighbors and with all mankind.

STATEMENTS BY PRIME MINISTER DAVID BEN-GURION AND MR. JACOB BLAUSTEIN ON THE RELATIONSHIP BETWEEN ISRAEL AND AMERICAN JEWS AUGUST 23, 1950

MR. BEN-GURION:

We are very happy to welcome you here in our midst as a representative of the great Jewry of the United States to whom Israel owes so much. No other community abroad has so great a stake in what has been achieved in this

country during the present generation as have the Jews of America. Their material and political support, their warm-hearted and practical idealism, has been one of the principal sources of our strength and our success. In supporting our effort, American Jewry has developed, on a new plane, the noble conception, maintained for more than half a century, of extending its help for the protection of Jewish rights throughout the world and of rendering economic aid wherever it was needed. We are deeply conscious of the help which America has given to us here in our great effort of reconstruction and during our struggle for independence. This great tradition has been continued since the establishment of the State of Israel. You, Mr. Blaustein, are one of the finest examples of that tradition, and as an American and as a Jew you have made many and significant contributions to the Jewish cause and to the cause of democracy.

We are therefore happy on this occasion of your visit here as our guest, to discuss with you matters of mutual interest and to clarify some of the problems which have arisen in regard to the relationship between the people of Israel and the Jewish communities abroad, in particular the Jewish community of the United States. It is our great pride that our newly gained independence has enabled us in this small country to undertake the major share of the great and urgent task of providing permanent homes under conditions of full equality to hundreds of thousands of our brethren who cannot remain where they are and whose heart is set on rebuilding their lives in Israel. In this great task you and we are engaged in a close partnership. Without the readiness for sacrifice of the people of Israel and without the help of America this urgent task can hardly be achieved. It is most unfortunate that since our State came into being some confusion and misunderstanding should have arisen as regards the relationship between Israel and the Jewish communities abroad, in particular that of the United States. These misunderstandings are likely to alienate sympathies and create disharmony where friendship and close understanding are of vital necessity. To my mind, the position is perfectly clear.

The Jews of the United States, as a community and as individuals, have only one political attachment and that is to the United States of America. They owe no political allegiance to Israel. In the first statement which the representative of Israel made before the United Nations after her admission to that international organization, he clearly stated, without any reservation, that the State of Israel presents and speaks only on behalf of its own citizens and in no way presumes to represent or speak in the name of the Jews who are citizens of any other country. We, the people of Israel, have no desire and no intention to interfere in any way with the internal affairs of Jewish communities abroad. The Government and the people of Israel fully respect the right and integrity of the Jewish communities in other countries to develop their own mode of life and their indigenous social, economic and cultural institutions in accordance with their own needs and aspirations. Any weakening of American Jewry, any disruption of its communal life, any lowering of its sense of security, any diminution of its status, is a definite loss to Jews everywhere and to Israel in particular. We are happy to know of the deep and growing interest which American Jews of all shades and convictions take in what it has fallen to us to achieve in this country. Were we, God forbid, to fail in what we have undertaken on our own behalf and on behalf of our suffering brethren, that failure would cause grievous pain to Jews everywhere and nowhere more than in your community. Our success or failure depends in a large measure on our cooperation with, and on the strength of, the great Jewish community of the United States, and we, therefore, are anxious that nothing should be said or done which could in the slightest degree undermine the sense of security

and stability of American Jewry.

In this connection let me say a word about immigration. We should like to see American Jews come and take part in our effort. We need their technical knowledge, their unrivalled experience, their spirit of enterprise, their bold vision, their "know-how." We need engineers, chemists, builders, work managers and technicians. The tasks which face us in this country are eminently such as would appeal to the American genius for technical development and social progress.

But the decision as to whether they wish to come — permanently or temporarily — rests with the free discretion of each American Jew himself. It is entirely a matter of his own volition. We need halutzim, pioneers, too. Halutzim have come to us — and we believe more will come, not only from those countries where the Jews are oppressed and in "exile" but also from countries where the Jews live a life of freedom and are equal in status to all other citizens in their country. But the essence of halutziut is free choice. They will come from among those who believe that their aspirations as human beings and as Jews can best be fulfilled by life and work in Israel. I believe I know something of the spirit of American Jewry among whom I lived for some years. I am convinced that it will continue to make a major contribution towards our great effort of reconstruction, and I hope that the talks we have had with you during these last few days will make for even closer cooperation between our two communities.

MR. BLAUSTEIN: I am very happy, Mr. Prime Minister, to have come here at your invitation and to have discussed with you and other leaders of Israel the various important problems f mutual interest. This is the second time I have been here since the State of Israel was created. A year and a half ago my colleagues and I, of the American Jewish Committee, saw evidence of the valor that had been displayed, and felt the hopes and aspirations that had inspired the people to win a war against terrific odds. This time, I have witnessed the great achievements that have taken place in the interval and have discussed the plans which point the road upon which the present-day Israel intends to travel. I find that tremendous progress has been made under your great leadership; but also, as you well know, tremendous problems loom ahead. The nation is confronted with gigantic tasks of reconstruction and rehabilitation, and with large economic and other problems, as is to be expected in so young a state. I am sure that with your rare combination of idealism and realism, you will continue to tackle these matters vigorously; and that with your usual energy, resourcefulness and common sense, you will be able to overcome them. Traveling over the country and visiting both old and newly established settlements, it has been a thrill to observe how you are conquering the desert of the Negev and the rocks of Galilee and are thus displaying the same pioneering spirit that opened up the great West of my own country. It has been satisfying to see right on the scene, how well and to what good advantage you are utilizing the support from the American Jewish community. I am sure, too, that the American tractors and other machinery and equipment acquired through the loan granted by the Export-Import Bank will further contribute to the technological development of your country.

In the February 16 issue of the *Advance Sheet* we set forth the provisional opinion of the International Court of Justice in *South Africa v. Israel*. Last issue we provided the dissenting opinion of Judge Julia Sebutinde. In this issue we set forth the remaining opinions by Judge Xue Hanqin; Judge Dalveer Bhandari; Judge Georg Nolte and Judge Aharon Darak.

DECLARATION OF JUDGE XUE

1. In the present case, I concur with my colleagues in upholding South Africa's standing, on a prima facie basis, in instituting proceedings against Israel for breach of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). I feel obliged to give a short explanation of my position at this stage.

2. The question of Palestine has been on the agenda of the United Nations since the inception of the Organization. The Palestinian territory is presently under Israel's occupation and control; the Gaza Strip constitutes an integral part of the occupied Palestinian territory. The people of Palestine, including the Palestinians in Gaza, are not yet able to exercise their right to self-determination. In the Wall Advisory Opinion, the Court recalled the statement in the General Assembly resolution 57/107 of 3 December 2002 that "the United Nations has a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 159, para. 49). This responsibility requires that the United Nations, including its principal judicial organ, ensures that the Palestinian people are protected under international law, particularly protected from the gravest crime — genocide.

3. In the past one hundred and nine days, the world was shocked to watch what was unfolding in Gaza. According to United Nations reports, hostilities between Israeli military and Hamas have caused tremendous civilian casualties, unprecedented in history. Following the 7 October massacre and hostage-taking by Hamas, the Israeli military land operation in and air bombardment of Gaza, targeting civilian buildings, hospitals, schools and refugee camps, coupled with the cut-off of food, water, fuel, electricity and telecommunication, and the constant denial of humanitarian assistance from outside, have made Gaza a most dangerous and uninhabitable place. In such a short span of time, it is reported that at least 25,700 Palestinians have been killed, over 63,740 injured, with over 360,000 housing units destroyed or partially damaged and approximately 75 per cent of Gaza's population — 1.7 million people — internally displaced (United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Hostilities in the Gaza Strip and Israel — reported impact, Day 109 (24 Jan. 2024)). Among the victims, most are children and women. The situation in Gaza remains horrendous, catastrophic and devastating. No ceasefire is in sight. According to United Nations reports, the conditions of life in Gaza continue to deteriorate rapidly with catastrophic levels of hunger, a serious shortage of potable water and other essential necessities, a collapsing medical and health system, a looming outbreak of contagious diseases, etc. The gravity of the humanitarian disaster in Gaza threatens the very existence of the people in Gaza and challenges the

most elementary principles of morality and humanity.
4. Over sixty years ago, when Ethiopia and Liberia instituted legal proceedings against South Africa for breach of its obligations as the Mandatory Power in South West Africa, the Court rejected the standing of those two applicants for lack of legal interest in the cases. This denial of justice gave rise to strong indignation of the Member States of the United Nations against the Court, severely tarnishing its reputation. The legal issue was further developed in the Barcelona Traction case, where the Court recognized that in international law there are certain international obligations owed to the international community as a whole; by the very nature of their importance all States have a legal interest in their protection. They are obligations erga omnes. The Court, however, did not touch on the question of standing in that Judgment (Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33). While the law and practice are still evolving, for a protected group such as the Palestinian people, it is least controversial that the international community has a common interest in its protection. In my view, this is the very type of case where the Court should recognize the legal standing of a State party to the Genocide Convention to institute proceedings on the basis of erga omnes partes to invoke the responsibility of another State party for the breach of its obligations under the Genocide Convention.
5. In light of the foregoing considerations and for the reasons contained in the Order of the Court, I agree that the provisional measures indicated in this Order are warranted under the circumstances.

(Signed) XUE Hanqin.

DECLARATION OF JUDGE BHANDARI

Humanitarian situation in Gaza — Present request for the indication of provisional measures — Court not deciding merits — Requirement for the existence of plausible rights — Consideration of factual evidence on the record — Relevance of conduct for plausibility finding.

1. I agree with the Court's reasoning supporting its Order. I make this declaration to add an additional element to this reasoning.
2. First, by way of background, the attacks on civilians in Israel on 7 October 2023 were acts of brutality that must be condemned in the strongest possible terms. It is estimated that 1,200 Israelis lost their lives and 5,500 were wounded and maimed in those attacks.
3. To date, however, more than 25,000 civilians in Gaza have reportedly lost their lives as a result of Israel's military campaign in response to those attacks, many of them women and children. Several thousands are reportedly still missing. Tens of thousands of others have reportedly been injured. Dwellings, businesses and places of worship have been destroyed. It is also reported by United Nations agencies that 26 hospitals and over 200 schools have been damaged. Approximately 85 per cent of Gaza's population has been displaced as a result of the conflict. The situation in Gaza has turned into a humanitarian catastrophe.

4. I note in this connection that, while the present request only concerns the Genocide Convention, other bodies of international law also apply in an armed conflict such as this one, including in particular international humanitarian law.
5. This is an Order granting provisional measures, in accordance with Article 41 (1) of the Statute and the jurisprudence of the Court. According to this

provision, "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

6. Needless to say, the case has not been fully argued at this point, nor does the Court have before it anything even approaching a full factual record. For these reasons alone, it is clear that the Court is not, and cannot be, deciding South Africa's actual claims under the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), as articulated in paragraph 110 of its Application instituting proceedings (the "Application"). Similarly, the Court is not, at this stage, deciding whether to grant any of the relief South Africa requests in paragraph 111 of its Application.

7. All the Court is doing is rendering a decision on South Africa's Request for the indication of provisional measures (the "Request"), which is a discrete request to the Court. In making a decision on the Request, different legal tests and thresholds apply. These are elementary points, but, in the particular context of this case, they bear repeating. It is against this background that one must read the Court's Order.

8. As part of its decision on whether to grant provisional measures, the Court must, in weighing the plausibility of the rights whose protection is claimed, consider such evidence as is before it at
this stage, preliminary though it might be. In particular, it must, in this case, take into account the widespread destruction in Gaza and loss of life that the population of Gaza has thus far endured. Article II of the Genocide Convention provides that an intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" is a constitutive element of genocide as defined under the Convention. Disputes with respect to the meaning of this requirement have, in the past, been before this Court, and the Court's decisions have shed light on the requirements of this provision. According to the Court's jurisprudence, "in order to infer the existence of dolus specialis from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question"1. However, the Court need not, at a provisional measures stage, make a final determination on the existence of such intent. In its Order of 23 January 2020 indicating provisional measures in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), the Court stated that,

"[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".

It added that "all the facts and circumstances mentioned are sufficient to conclude that the rights claimed by The Gambia and for which it is seeking protection . . . are plausible"2.

9. Again, the Court is not at this point deciding whether, in fact, such intent existed or exists. All it is deciding is whether rights under the Genocide Convention are plausible. Here, the widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it — much of which is a matter of public record and has been ongoing since October 2023 — are by themselves capable of supporting a plausibility finding with respect to rights under Article II.

10. Taken together and, bearing in mind the lower standards that apply in respect of provisional measures as opposed to the merits, the evidence on the record at this stage in the proceedings is such that, in the circumstances of this

case, the Court was justified in granting provisional measures in the terms it did.

11. Going further, though, all participants in the conflict must ensure that all fighting and hostilities come to an immediate halt and that remaining hostages captured on 7 October 2023 are unconditionally released forthwith.

(Signed) Dalveer BHANDARI.

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1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), p. 67, para. 148.

2 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.

DECLARATION OF JUDGE NOLTE

1. The circumstances of this case are heartbreaking. On 7 October 2023, persons associated with Hamas attacked Israel from the Gaza Strip. They committed atrocities during which more than 1,000 Israelis were killed and over 200 were taken hostage. Rockets continue to be fired into Israel. Israel has responded with a military operation in the Gaza Strip, as a result of which thousands of Palestinian civilians have been killed and wounded, a large majority of the Palestinians living in the Gaza Strip have been displaced, and a large percentage of all buildings for a population of some 2 million people have been destroyed (see paragraph 13 of the Order)1 . This apocalyptic situation arises from a very complicated political and historical context. Many people around the world hold widely divergent views about who is responsible for the current situation, about various aspects of the larger conflict, and what needs to be done to resolve them.

I.

2. The Court can play only a limited role in the present proceedings. South Africa has brought its Application against Israel based on the Genocide Convention alone. This means that the case concerns, first, only alleged violations of the Genocide Convention and, second, only alleged violations by Israel of that Convention. Thus, the case does not concern possible violations of other rules of international law, such as war crimes, and it does not concern possible violations of the Genocide Convention by persons associated with Hamas. While these limitations may be unsatisfactory, the Court is bound to respect them. I would like to recall, however, that persons associated with Hamas remain responsible for any acts of genocide that they may have committed. Also, both Israel and persons associated with Hamas remain legally responsible for any possible breaches by them of other rules of international law, including international humanitarian law. Any such responsibility can and should be determined through other legal procedures.

3. The Genocide Convention of 1948 is a very special treaty. It was concluded in 1948 in the wake of the Holocaust committed by Nazi Germany against the Jewish people in Europe. In its preamble, the Convention recognizes that “genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world”, and it expresses the commitment of humanity “to liberate mankind from such an odious scourge”. For this purpose, Article II of the Convention legally defines the crime of genocide as specific acts “committed with intent to destroy, in whole or in part,

a national, ethnical, racial or religious group, as such". I can understand that Israel, which was established in 1948 as a homeland offering protection to the Jewish people, including against another genocide, strongly rejects allegations that it has now violated the Genocide Convention.

4. However, the Court cannot dismiss South Africa's Application on this ground. By acceding to the Genocide Convention, Israel has accepted the jurisdiction of the Court under Article IX thereof in "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III".

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1 See United Nations Office for the Coordination of Humanitarian Affairs, "Hostilities in the Gaza Strip and Israel - reported impact, Day 107" (22 January 2024), available at: https://www.ochaopt.org/content/hostilities-gazastrip-and-israel-reported-impact-day-107. It should be noted that the United Nations adds a disclaimer which reads as follows: "The UN has so far not been able to produce independent, comprehensive, and verified casualty figures; the current numbers have been provided by the Ministry of Health or the Government Media Office in Gaza and the Israeli authorities and await further verification. Other yet-to-be verified figures are also sourced."

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5. The Court is not asked, in the present phase of the proceedings, to determine whether South Africa's allegations of genocide are well founded. At this stage, the Court may only examine whether the circumstances of the present case, as they have been presented to the Court, justify the ordering ("indication") of provisional measures to protect rights under the Genocide Convention which are at risk of being violated before the decision on the merits is rendered. For this examination, the Court need not address many well-known and controversial questions, such as those relating to the right to self-defence and the right of self-determination of peoples, or regarding territorial status. The Court must remain conscious that the Genocide Convention is not designed to regulate armed conflicts as such, even if they are conducted with an excessive use of force and result in mass casualties.

6. The limited scope of the present phase of the proceeding requires a summary assessment by the Court of certain widely divergent claims by the Parties. It is regrettable how much the Parties talked past each other during the oral proceedings. South Africa hardly mentioned the attack of 7 October 2023 and the ensuing massacre; Israel barely mentioned the United Nations reports on the humanitarian situation in the Gaza Strip. South Africa hardly mentioned the efforts by Israel to evacuate the civilian population from areas of hostilities; Israel did not satisfactorily address highly problematic forms of speech by some of its officials, including members of its military.

7. Facing the widely divergent presentations of the Parties, the Court needs to apply the existing legal standards. The present case is not the first in which a State has asked the Court to indicate provisional measures based on the Genocide Convention. The Court has already indicated such measures more than once, including in 2020 in the case between The Gambia and Myanmar. As extraordinary as the present case may be, the Court has the means to deal with it: its own jurisprudence. The present Order applies the standards developed in that jurisprudence, without, however, identifying relevant differences between this case and previous cases before the Court and specifying the relative importance of certain factors. I therefore wish to explain why I voted in favour of the Order.

II.

8. It is important to bear in mind that "the essential characteristic of genocide", distinguishing it from other criminal acts (e.g. crimes against humanity and war crimes), is the existence of an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"2 . The Court has established a high threshold for the definite determination of genocidal intent at the stage of the merits. In the absence of a "general plan to this effect", the "intent to destroy, in whole or in part, a protected group" can only be inferred from "a pattern of conduct" if this is the "only reasonable inference that can be drawn" therefrom3.

9. At this stage of the proceedings, the Court is not called upon to determine definitively whether there have been violations of the rights under the Genocide Convention which South Africa

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2 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), pp. 62 and 64, paras. 132 and 138-139.

3 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), p. 67, para. 148; see also 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 (I), pp. 196-197, para. 373.

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wishes to see protected, but only whether these rights are "plausible" and whether there is a "real and imminent risk of irreparable injury" to them before the Court renders its judgment on the merits4 .

10. The jurisprudence of the Court is not entirely clear as to what "plausibility" entails5 . Recent jurisprudence suggests that any request for the indication of provisional measures must provide some level of evidence supporting its allegations6 , including indications for the presence of any essential mental elements7 . In the present Order, the Court has noted the importance of the specific genocidal intent without, however, specifying its plausibility in the present case (see paragraphs 44 and 78).

11. Given the crucial role of genocidal intent for rights under the Genocide Convention and for the distinction between genocidal acts and other criminal acts, the plausibility of this mental element is, in my view, indispensable at the provisional measures stage of proceedings involving allegations of genocide. This is confirmed by the Court's Order of 23 January 2020 in The Gambia v. Myanmar. It is true that the Court stated in paragraph 56 of that Order that

"[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. In the Court's view, all the facts and circumstances mentioned above (see paragraphs 53-55) are sufficient to conclude that the rights . . . are plausible."

12. However, this does not preclude that such intent must be shown to be plausible under the circumstances. Indeed, the same paragraph 56 confirms that the Order must be read as being based on the facts and circumstances referred to in the preceding paragraphs. There, the Court considered detailed reports by the Independent International Fact-Finding Mission on Myanmar8 . Each of these reports examines at length — and eventually declares plausible — the existence of genocidal intent9 . In paragraph 55 of the above-mentioned Order, the Court explicitly takes note of the conclusion drawn in the reports that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present". It was based on these findings regarding genocidal

intent that the Court considered the rights under the Genocide Convention to be plausible. The Order of 23 January 2020 thus confirms that the existence of genocidal intent must be plausible for the indication of provisional measures based on the Genocide Convention.

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4 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. 27-28, paras. 74-75.

5 K. Oellers-Frahm and A. Zimmermann, "Article 41", in A. Zimmermann et al., The Statute of the International Court of Justice: A Commentary (3rd ed.), (OUP 2019), pp. 1157-1158.

6 Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, pp. 242-243, para. 45; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), p. 427, para. 54.

7 See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, pp. 131-132, paras. 75-76.

8 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. 22, para. 55, citing United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018; United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018; and United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/50, 8 August 2019.

9 See, IIFFMM (12 September 2018), paras. 84-87; IIFFMM (17 September 2018), paras. 1411-1441; IIFFMM (8 August 2019), para. 90. See further FFM report (16 September 2019), paras. 220-225, 238, which was cited in other paragraphs of the Order.

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13. Bearing these considerations in mind, I am not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent. The evidence provided by South Africa regarding the Israeli military operation differs fundamentally from that contained in the reports by the United Nations fact-finding mission on Myanmar's so-called "clearance operation" in 2016 and 2017 which led the Court to adopt its Order of 23 January 2020 in The Gambia v. Myanmar. These reports provided detailed indications of the involvement of military and security forces in atrocities committed against the Rohingya group10. Having considered various other possible inferences from the available information, in particular security considerations11, the report found that "[t]he actions of those who orchestrated the attacks on the Rohingya read as a veritable check-list [of genocidal intent]", concluding "on reasonable grounds, that the factors allowing the inference of genocidal intent are present"12. Based on this information, the Court considered that, under the circumstances, the rights of the Rohingya group deriving from Article II (a) to (d) of the Genocide Convention, as alleged by The Gambia, were plausible.

14. The information provided by South Africa regarding Israel's military operation is not comparable to the evidence before the Court in The Gambia v.

Myanmar in 2020. While the Applicant cannot now be expected to provide the Court with detailed reports of an international fact-finding mission, it is not sufficient for South Africa to point to the terrible death and destruction that Israel's military operation has brought about and is continuing to bring about. The Applicant must be expected to engage not only with the stated purpose of the operation, namely to "destroy Hamas" and to liberate the hostages, but also with other manifest circumstances, such as the calls to the civilian population to evacuate, an official policy and orders to soldiers not to target civilians, the way in which the opposing forces are confronting each other on the ground, as well as the enabling of the delivery of a certain amount of humanitarian aid, all of which may give rise to other plausible inferences from an alleged "pattern of conduct" than genocidal intent. Rather, these measures by Israel, while not conclusive, make it at least plausible that its military operation is not being conducted with genocidal intent. South Africa has not called these underlying circumstances into question and has, in my view, not sufficiently engaged with their implications for the plausibility of the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention.

15. Even though I do not find it plausible that the military operation is being conducted with genocidal intent, I voted in favour of the measures indicated by the Court. To indicate those measures, it is not necessary for the Court to find that the military operation as such implicates plausible rights of Palestinians in the Gaza Strip. My decision to vote in favour of the measures indicated rests on the plausible claim by South Africa that certain statements by Israeli State officials, including members of its military, give rise to a real and imminent risk of irreparable prejudice to the rights of Palestinians under the Genocide Convention (see paragraphs 50-52 of the Order). At the present stage of the proceedings, it is not necessary to determine whether such statements should be characterized as acts of "[d]irect and public incitement to commit genocide" within the meaning of Article III (c) of the Genocide Convention. It is true that some of these statements can be read as referring exclusively to Hamas and other armed groups in the Gaza Strip. However, these statements are at least highly ambiguous in their use of dehumanizing and indiscriminate language against Palestinians in the Gaza Strip as a group. Since they were made by high-ranking officials, who thereby also addressed soldiers involved in hostilities in the Gaza Strip, I cannot plausibly exclude that such statements contribute to a potential failure by Israel to prevent and punish acts of public and direct incitement to genocide.

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10 UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 1394-1395 and 1406.

11 Ibid., paras. 1434-1438.

12 Ibid., paras. 1440-1441.

Indeed, South Africa has provided evidence, not contradicted by Israel, that inflammatory parts of relevant statements have been echoed in a threatening way by members of the Israeli armed forces13. This confirms that such statements may contribute to a "serious risk" that acts of genocide other than direct and public incitement may be committed, giving rise to Israel's obligation to prevent genocide14.

16. Statements by Israel and by United Nations agencies regarding the access of Palestinians in the Gaza Strip to adequate food, water and other forms of humanitarian assistance differ significantly15. United Nations agencies claim that there is a desperate lack of food and other goods necessary for the survival of the population16. Their statements raise the question whether the

Israeli authorities are unjustifiably restricting the delivery of food and other necessary goods to the entire civilian population in the Gaza Strip, or at least to substantial parts of the population17. Under the circumstances and at the provisional measures stage, I think that weight must be given to the respective assessments of United Nations agencies regarding the circumstances of the existentially threatening situation of the group of Palestinians in the Gaza Strip. I have therefore also voted in favour of measure (4).

III.

17. South Africa has, in my view, shown that some, but not all, of the rights which it has alleged are plausible at the present preliminary stage of the proceedings (see paragraph 54 of the Order). I view the measures indicated by the Court today as responding to certain plausible risks for the rights of Palestinians in the Gaza Strip deriving from the Genocide Convention, and as reminding Israel of its obligations under that Convention.

(Signed) Georg NOLTE.

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13 CR 2024/1, p. 36, para. 21 (Ngcukaitobi).

14 See 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 (I), pp. 221-222, para. 431.

15 CR 2024/2, p. 32, para. 41 (Shaw); pp. 46-49, paras. 51-77 (Raguan); pp. 50-52, paras. 9-13 (Sender); Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths' briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, 'Humanitarian aid' (11 January 2024), available at: ***https://news.un.org/en/story/2024/01/1145422****.*

16 Letter from the Secretary-General to the President of Security Council invoking Article 99 of the United Nations Charter (6 December 2023), available at:
https://www.un.org/sites/un2.un.org/files/sg_letter_of_6_december_gaza.pdf*.*

17 Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator, Mr Martin Griffiths' briefing to the UN Security Council on the humanitarian situation in Israel and the Occupied Palestinian Territory (12 January 2024); UN news, 'Humanitarian aid' (11 January 2024), available at: https://news.un.org/en/story/ 2024/01/1145422.

SEPARATE OPINION OF JUDGE AD HOC BARAK

1. South Africa came to the Court seeking the immediate suspension of the military operations in the Gaza Strip. It has wrongly sought to impute the crime of Cain to Abel. The Court rejected South Africa's main contention and, instead, adopted measures that recall Israel's existing obligations under the Genocide Convention. The Court has reaffirmed Israel's right to defend its citizens and emphasized the importance of providing humanitarian aid to the population of Gaza. The provisional measures indicated by the Court are thus of a significantly narrower scope than those requested by South Africa.

2. Notably, the Court has emphasized that "all parties to the conflict in the Gaza Strip are bound by international humanitarian law", which certainly includes Hamas. The Court has also stated that it "is gravely concerned about the fate of the hostages abducted during the attack on Israel on 7 October 2023 and held since then by Hamas and other armed groups, and calls for their immediate and unconditional release" (see Order, para. 85).

I. GENOCIDE: AN AUTOBIOGRAPHICAL REMARK

3. The Genocide Convention holds a very special place in the heart and history of the Jewish people, both within and beyond the State of Israel. The term “genocide” was coined in 1942 by a Jewish lawyer from Poland, Raphael Lemkin, and the impetus for the adoption of the Genocide Convention came from the carefully planned and deliberate murder of six million Jews during the Holocaust.

4. I was five years old when, as part of Operation Barbarossa, the German army occupied the city in which I was born - Kaunas - in Lithuania. Within a few days, almost 30,000 Jews in Kaunas were taken from their homes and put into a ghetto. It was as if we were sentenced to death, awaiting our execution. On 26 October 1941, every Jew in the ghetto was instructed to gather in the central square, known as “Democracy Square”. Around 9,000 Jews were taken from the square on that day and executed by machine gun fire. There was constant hunger in the overcrowded ghetto. But despite all the difficulties, there was an organized community life. It was a community of individuals condemned to death, yet in their hearts there was a spark of hope for life and a desire to preserve basic human dignity.

5. At the beginning of 1944, the Nazis rounded up all children under the age of 12, loaded them onto trucks and shot them during the infamous “Kinder Aktion”. It was clear that I had to leave in order to survive. I was smuggled out of the ghetto in a sack and taken to a Lithuanian farmer. A couple of weeks later my mother and I were transferred to another farmer. We had to be very discreet, so the farmer built a double wall in one of the rooms. We hid in that narrow space until we were finally liberated by the Red Army on 1 August 1944. Only five per cent of the Jews of Lithuania had survived.

6. Genocide is more than just a word for me; it represents calculated destruction and human behaviour at its very worst. It is the gravest possible accusation and is deeply intertwined with my personal life experience.

7. I have thought a lot about how this experience has affected me as a judge. In my opinion, the effect has been twofold. First, I am deeply aware of the importance of the existence of the State of Israel. If Israel had existed in 1939, the fate of the Jewish people might have been different. Second, I am a strong believer in human dignity. The Nazis and their collaborators sought to reduce us to dust and ashes. They aimed to strip us of our human dignity. However, in this, they failed. During the most challenging moments in the ghetto, we preserved our humanity and the spirit of humankind. The Nazis succeeded in murdering many of our people, but they could not take away our humanity.

8. The rebirth following the Holocaust is the rebirth of the human being, of the centrality of humanity and of human rights for every person. Many international instruments focusing on the rights of the individual were adopted after 1945, and the protection of human rights is also deeply rooted in the Israeli legal system.

II. ISRAEL’S COMMITMENT TO THE RULE OF LAW AND INTERNATIONAL HUMANITARIAN LAW

9. Israel is a democracy with a strong legal system and an independent judicial system. Whenever there is tension between national security interests and human rights, the former must be attained without compromising the protection of the latter. As I have written: “Security and human rights go hand in hand. There is no democracy without security; there is no democracy without human rights. Democracy is based upon a delicate balance between collective security and individual liberty”1 .

10. The need for such balancing has served as a silver lining in the rulings of the Supreme Court of Israel. Once, in the midst of a military operation in Gaza, the Supreme Court ordered the army to repair the water pipes that had been

damaged by army tanks, and to do so while the operation was still ongoing. On the same occasion, it ordered the army to provide humanitarian aid to civilians and to halt hostilities to allow for the burial of the dead2 . In its judgment on "targeted killings", the Supreme Court ruled that Israel must always act in accordance with international humanitarian law, and that Israel must refrain from targeting terrorists when excessive harm to civilians is anticipated3 .

11. As a judge in the Israeli Supreme Court, I wrote that every Israeli soldier carries with him (or her), in their backpack, the rules of international law4 . This means that international law guides the actions of all Israeli soldiers wherever they are. I also wrote that when a democratic State fights terrorism, it does so with one hand tied behind its back5 . Even when fighting a terrorist group like Hamas that does not abide by international law, Israel must abide by the law and uphold democratic values.

12. The Israeli Supreme Court has also held that torture may not be used during the interrogation of terrorists6 , that religious sites and clergy must be protected, and that all captives must be afforded fundamental guarantees7 . Naturally, as in any democratic society, some of these rulings have been criticized in Israel. Still, the public stands behind them and the military upholds them on a regular basis. Rulings of the Israeli Supreme Court - many of them based on international law - are the standards by which Israel conducts itself.

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1 Aharon Barak, "International Humanitarian Law and the Israeli Supreme Court" (2014), Israel Law Review, Vol. 47, para. 185.

2 HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza (2004).

3 HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel (2005) (Targeted Killings).

4 HCJ 393/82 Jam'iat Iscan Al-Ma'almoun v. IDF Commander in the Judea and Samaria Area (1983).

5 HCK 769/02 The Public Committee against Torture in Israel v. The Government of Israel (2006).

6 HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel (1999) (Interrogations).

7 HCJ 3278/02 Center for Defence of the Individual Founded by Dr Lotta Salzerberger v. Commander of IDF Forces in the West Bank (2002).

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13. International law is also an integral part of the military code and the conduct of the Israeli army. The Code of Ethics of the Israeli Defense Forces states that

"[a]n IDF soldier will only exercise their power or use their weapon in order to fulfill their mission and only when necessary. They will maintain their humanity during combat and routine times. The soldier will not use their weapon or power to harm uninvolved civilians and prisoners and will do everything in their power to prevent harm to their lives, bodies, dignity and property."8

When those norms are violated, the Attorney General, the State Attorney and the Military Advocate General take the necessary measures to bring those responsible to justice, and their decisions are subject to judicial review. In appropriate cases, the Israeli Supreme Court may instruct them how to act. This is Israel's DNA. Governments have been replaced, new justices have come to the Supreme Court, but the DNA of Israel's democracy does not change.

14. Israel's multiple layers of institutional safeguards also include legal advice provided in real time, during hostilities. Strikes that do not meet the definition of a military objective or that do not comply with the rule of proportionality cannot

go forward. The holdings of the Israeli Supreme Court and Israel's institutional framework demonstrate a commitment to the rule of law and human life - a commitment that runs through its collective memory, institutions, and traditions.

III. THE COURT'S PRIMA FACIE JURISDICTION

15. The Court has affirmed its prima facie jurisdiction for the purpose of indicating provisional measures (see Order, para. 31). However, it is doubtful whether South Africa brought this dispute in good faith. After South Africa sent a Note Verbale to Israel on 21 December 2023, concerning the situation in Gaza, Israel replied with an offer to engage in consultations at the earliest possible opportunity. South Africa, instead of accepting this offer, which could have led to fruitful diplomatic talks, decided to institute proceedings against Israel before this Court. It is regrettable that Israel's attempt to open a dialogue was met with the filing of an application.

If anything, history has taught us that the best attempts at peace in the Middle East have generally been a result of political negotiations and not judicial recourse. The 1978 peace talks between Egypt and Israel at Camp David are a good example of this. These talks succeeded when a third party - the United States - entered the process and assisted the parties in reaching an agreement. In my opinion, a similar scenario could have unfolded here. While the jurisdictional clause of the Genocide Convention does not require formal negotiations, the principle of good faith dictates that at least some efforts should be made to resolve disputes amicably before resorting to the Court. South Africa made no such effort and denied Israel a reasonable opportunity to engage meaningfully in a discussion on how to address the difficult humanitarian situation in Gaza.

16. The present case involves an additional difficulty. The other belligerent in the armed conflict in Gaza, Hamas, is not a party to the present proceedings. Thus, it is not possible to indicate measures directed at Hamas in the Order's operative clause. While this does not prevent the Court from exercising its jurisdiction, it is an essential matter to be considered when determining the appropriate measures or remedies in this case.

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8 Israeli Defense Forces, Code of Ethics, Additional Values, Purity of Arms.

IV. THE ARMED CONFLICT IN GAZA

17. The Court briefly recalls the immediate context in which the present case came before it, namely the attack of 7 October 2023 by Hamas and the military operation launched by Israel in response to that attack (see Order, para 13). The Court, however, fails to give a complete account of the situation which has unfolded in Gaza since that fateful day.

18. On 7 October 2023, on the day of the Sabbath and the Jewish holiday of "Simchat Torah", over 3,000 Hamas terrorists, aided by members of the Palestinian Islamic Jihad, invaded Israeli territory by land, air and sea. The assault began in the early morning hours, with a barrage of rockets over the entire country and the infiltration of Hamas into Israeli territory. Alerts sounded all over Israel, civilians and soldiers took shelter, and many were later massacred inside those shelters. In other places, houses were burned down with civilians still in their safe rooms, burning alive or suffocating to death. At the Reim Nova Music Festival, young Israelis were murdered in their sleep or while running for their lives across open fields. Women's bodies were mutilated, raped, cut up and shot in the worst possible places. Overall, more than 1,200 innocent civilians, including infants and the elderly, were murdered on that day. Two hundred and forty Israelis were kidnapped and taken to the Gaza Strip, and over 12,000 rockets have been fired at Israel since 7 October.

These facts have been largely reported and are indisputable.

19. Israel, faced with an ongoing assault on its people and territory, launched a military operation. The Israeli authorities declared that the purpose of the operation is to dismantle Hamas and destroy its military and governmental capabilities, return the hostages, and secure the protection of Israel's borders.

20. Hamas has vowed to "repeat October 7 again and again"9 . Hamas is thus an existential threat to the State of Israel, and one that Israel must repel. This terrorist organization rules over the Gaza Strip, exercising military and governmental functions. Hamas seeks to immunize its military apparatus by placing it within and below civilian infrastructure, which is itself a war crime, and intentionally places its own population at risk by digging tunnels under their homes and hospitals. Hamas fires missiles indiscriminately at Israel, including from schools and other civilian installations in Gaza, in the full knowledge that many of them will fall inside Gaza causing death and injuries to innocent Palestinians. This is Hamas's well-known modus operandi.

21. A few examples illustrate this well. When humanitarian aid enters Gaza, Hamas hoards it for its own purposes. Hamas has made clear that its tunnel network is designed for its fighters, rather than for civilians seeking shelter from the hostilities. Hamas has compromised the inherently civilian nature of schools and hospitals in Gaza, using them for military purposes by storing or launching rockets from and under these sites.

22. The fate of the hostages is especially disturbing. The act of hostage taking committed by Hamas on 7 October constitutes a grave breach of the Geneva Conventions of 12 August 1949

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9 See "Hamas Official Ghazi Hamad: We Will Repeat the October 7 Attack Time and Again Until Israel Is Annihilated; We Are Victims - Everything We Do Is Justified #Hamas #Gaza #Palestinians https://t.co/kXu3U0BtAP" / X (twitter.com).

and is criminalized under the Rome Statute10. Hamas has not provided the names of the hostages, or any information regarding who is dead and who is still alive. Nor have they allowed the International Committee of the Red Cross (ICRC) to visit the hostages, as the law requires. The ICRC has not been able to provide medical supplies to the hostages, does not know their whereabouts, and has not succeeded in securing their release. As I write, this agony has now been ongoing for over 100 days.

23. This is not to undermine the suffering of innocent Palestinians. I have been personally and deeply affected by the death and destruction in Gaza. There is a danger of food and water shortages and the outbreak of diseases. The population lives in precarious conditions, facing the unfathomable consequences of war. In the role that has been entrusted to me as a judge ad hoc, but also as a human being, it is important for me to express my most sincere and heartfelt regret for the loss of innocent lives in this conflict.

24. The State of Israel was brought before this Court as its leadership, soldiers, and children processed the shock and trauma of the attack of 7 October. An entire nation trembled and, in the blink of an eye, lost its most basic sense of security. Fears of additional attacks were palpable as infiltrations continued in the days following the attack. The immediate context in which South Africa's request was brought to the Court should have played a more central role in the Court's reasoning. While it in no way relieves Israel of its obligations, this immediate context forms the inescapable backdrop for the legal analysis of Israel's actions even at this stage of the proceedings.

V. THE APPROPRIATE LEGAL FRAMEWORK FOR ANALYSING THE SITUATION IN GAZA

25. South Africa seised the Court on the basis of the Genocide Convention, Article IX of which provides the Court with jurisdiction to resolve disputes related to the "interpretation, application or fulfilment" of that treaty, "including those relating to the responsibility of a State for genocide". This does not mean that the Genocide Convention provides the appropriate legal prism through which to analyse the situation.

26. In my view, the appropriate legal framework for analysing the situation in Gaza is International Humanitarian Law (IHL) - and not the Genocide Convention. IHL provides that harm to innocent civilians and civilian infrastructure should not be excessive in comparison to the military advantage anticipated from a strike. The tragic loss of innocent lives is not considered unlawful so long as it falls within the rules and principles of IHL.

27. The drafters of the Genocide Convention clarified in their discussions that "[t]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide."11

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10 Rome Statute, Articles 2 (a) (viii) and 2 (c) (iii).

11 UN Economic and Social Council, Draft Convention on the Crime of Genocide, Section II: Comments Article by Article, E/447 (17 June 1947), reproduced in Abtahi and Webb, The Genocide Convention: The Travaux Préparatoires (Martinus Nijhoff 2008), p. 231.

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28. Violations of IHL occurring in the context of the armed conflict, must be investigated and prosecuted by the competent Israeli authorities.

VI. LACK OF INTENT

29. Central to the crime of genocide is the element of intent, namely the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. International courts have been reluctant to establish such intent and characterize atrocities as genocide. The International Criminal Tribunal for Rwanda (ICTR) was established primarily to prosecute the crime of genocide. Nonetheless, it set a high threshold for proving the specific intent required for genocide. In its very first case, the Akayesu case, the ICTR described the required specific intent as a "psychological relationship between the physical result and the mental state of the perpetrator" which "demands that the perpetrator clearly seeks to produce the act charged"12. This high bar explains some of the full or partial acquittals at the ICTR13. An analogous bar was also adopted by the International Criminal Tribunal for Yugoslavia.

30. The Court, with regard to State responsibility, has similarly adopted a restrictive approach in cases involving genocide on the merits. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the Court concluded that - save in the case of Srebrenica - the widespread and serious atrocities committed in Bosnia and Herzegovina were not carried out with the specific intent to destroy, in part, the Bosnian Muslim group (Judgment, I.C.J. Reports 2007 (I), p. 194, para. 370). Some years later, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), the Court found that the required intent was lacking altogether and therefore dismissed Croatia's claims in their entirety (Judgment, I.C.J. Reports 2015 (I), p. 154, para. 524).

31. I accept that the proof of intent required at this preliminary stage is different from the one required at the merits stage. It is not necessary, at this stage, to convincingly show the mens rea of genocide by reference to particular circumstances, or for a pattern of conduct to be such that it could only point to the existence of such intent14. However, some proof of intent is necessary. At the very least, sufficient proof to make a claim of genocide plausible.

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32. I strongly disagree with the Court's approach regarding plausibility and, in particular, I disagree on the question of intent.

33. The Court may indicate provisional measures "only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible" (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. 18, para. 43). In the present case, the Court concluded, with scant evidence, that "the right of the Palestinians in Gaza to be protected from acts of genocide" is plausible (Order, para. 54).

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12 ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 518.

13 Of the 75 defendants whose trials were concluded before the ICTR, 14 were acquitted of all charges and several others were acquitted of genocide charges, often due to the difficulty of proving the required specific intent. See, e.g., ICTR-99-50-A, Appeal Judgement, 4 February 2013, para. 91; ICTR-99-52-A, Appeal Judgment, 28 November 2007, para. 912.

14 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), p. 67, para. 148.

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34. To understand the Court's erroneous approach, it is important to compare the present case to the Gambia case: 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. To conclude that the asserted rights were plausible, in the Gambia case, the Court relied on two reports issued by an Independent International Fact-Finding Mission (IIFFM)15. These reports were based on the meticulous collection of evidence over two years, which included 400 interviews with victims and eyewitnesses, analysis of satellite imagery, photographs and videos, the cross-checking of information against credible secondary information, expert interviews and raw data16. The independent experts travelled to Bangladesh, Indonesia, Malaysia and Thailand to interview victims and witnesses and hold other meetings. Furthermore, the Mission's secretariat undertook six additional field missions17. In its report of 12 September 2018, the IIFFM concluded that there were "reasonable grounds to conclude that serious crimes under international law ha[d] been committed", including genocide18. The IIFFM also stated that "on reasonable grounds . . . the factors allowing the inference of genocidal intent [were] present"19. The IIFFM reiterated its conclusions, based on further investigations, in its second report of 8 August 2019.20

35. In the present case, there is no evidence comparable to that available to the Court in the Gambia case. To determine the plausibility of rights in the present case, the Court relies on four sets of facts. First, it looks at the figures for deaths, injuries and damage to infrastructure reported by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (see Order, para. 46). Second, it relies on a statement made by the Under-Secretary-

General of OCHA (see Order, para. 47), a report of the World Health Organization (see Order, para. 48), and a statement by the Commissioner-General of UNRWA (see Order, para. 49). Third, it notes the statements of three Israeli officials (see Order, para. 52). Fourth, it considers the views expressed by a group of Special Rapporteurs and the CERD Committee (see Order, para. 53).

36. Regarding the figures for death, injuries and damage to infrastructure, the Court omits to mention that such figures come from the Ministry of Health of Gaza, which is controlled by Hamas. They are not the United Nations' figures. Furthermore, these figures do not distinguish between civilians and combatants, or between military objectives and civilian objects. It is difficult to draw any conclusions from them.

The statements by the Under-Secretary-General of OCHA, the WHO and the Commissioner-General of UNRWA are insufficient to prove plausible intent. None of these statements mention the term genocide or point to any trace of intent. They indeed describe a tragic humanitarian situation, which is the unfortunate result of an armed conflict, but there is no reference to the

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15 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. 22, para. 55.

16 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 37.

17 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, para. 37.

18 See United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, paras. 83 and 84-87.

19United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, para. 1441.

20 United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/50, 8 August 2019, para. 18.

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subject-matter of the Genocide Convention. Furthermore, the Court is unaware of the underlying information or methodology used by the individuals who made these statements. This is in stark contrast to the evidence available to the Court in the Gambia case.

The declarations made by the President of Israel and the Minister of Defence of Israel are not a sufficient factual basis for inferring a plausible intent of genocide. Both authorities have issued several statements clarifying that Israel's intent is the destruction of Hamas, not the Palestinians in Gaza. For example, on 29 October 2023, Israel's Minister of Defence, stated that "we are not fighting the Palestinian multitude and the Palestinian people in Gaza". On 29 November 2023, the President of Israel said that "Israel is doing all it can, in cooperation with various partners, to increase the flow of humanitarian aid to the citizens of Gaza". Regretfully, the Court did not take note of these statements. Finally, regarding the statements made by the Minister of Energy and Infrastructure, the latter is not an official with authority over the military. The relevant factual basis allowing for an inference of intent to commit genocide must stem from the organs which are capable of having an effect on the military operations. These organs have repeatedly explained that the purpose of the military operation is to target Hamas, not the Palestinians in Gaza.

37. It is concerning that certain Israeli officials have used inappropriate and degrading language, as noted by the group of Special Rapporteurs and the CERD Committee. Indeed, it is an issue that will have to be investigated by the competent Israeli authorities. However, to infer an intent to commit genocide from these statements, which were made in the wake of horrific attacks against the Israeli population, is plainly implausible.

38. The evidence presented by Israel shows that it is the opposite intent that is plausible and guides the military operation in Gaza. Israel pointed out that it has adopted several measures to minimize the impact of hostilities on civilians. For example, Israel continues to supply its own water to Gaza by two pipelines; it has increased access to medical supplies, facilitated the establishment of field hospitals and distributed fuel and winter equipment (see Order, para. 64, referring to CR 2024/2, pp. 50-52). Furthermore, the Prime Minister of Israel stated on 17 October 2023 "[a]ny civilian death is a tragedy . . . we're doing everything we can to get the civilians out of harm's way," and on 28 October 2023 that "the IDF is doing everything possible to avoid harming those not involved".

39. It is surprising that the Court took note of Israel's statements explaining the steps it has taken to alleviate the conditions faced by the population in Gaza, together with the Attorney General's statement announcing the investigation of any calls for the intentional harm to civilians (see Order, para. 73), but then it completely failed to draw conclusions from these statements when examining the existence of intent. It is even more surprising that the Court did not view any of these measures and statements as sufficient to rule out the existence of a plausible intent to commit genocide.

40. The Court's approach to plausibility in the present case is not akin to the one it took in the Gambia case, where the Court had compelling evidence of "clearance operations" committed against the Rohingya. These "clearance operations" included sexual violence, torture, the methodical planning of mass killing, denial of legal status, and instigation of hatred based on ethnic, racial, or religious grounds21.

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21 See United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/64, 12 September 2018, paras. 27, 52; United Nations, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 458-748, 1140.

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41. It is concerning that applying the Genocide Convention in these circumstances would undermine the integrity of the Convention and dilute the concept of genocide. The Genocide Convention seeks to prevent and punish the physical destruction of a group as such. It is not meant to ban armed conflict altogether. The Court's approach opens the door for States to misuse the Genocide Convention in order to curtail the right of self-defence, in particular in the context of attacks committed by terrorist groups.

VII. THE MEASURES INDICATED BY THE COURT

42. I now turn to the measures indicated by the Court. It is important to recall that the Court has not made any findings with regard to South Africa's claims under the Genocide Convention. The conclusions reached by the Court in this preliminary stage do not prejudge in any way the claims brought by South Africa, which remain wholly unproven (see Order, paras. 30 and 62).

43. Regarding the conditions for the Court to indicate provisional measures, for the reasons stated above, I am not persuaded by South Africa's arguments on the plausibility of rights, since there is no indication of an intent to commit

genocide. This is why I voted against the first and second provisional measures indicated by the Court. Nevertheless, it is of the utmost importance to highlight that the first and second measures indicated by the Court merely restate obligations that Israel already has under Articles I and II of the Genocide Convention. The Court has made explicit what is already implicit in light of Israel's existing obligations under the Convention.

44. Although I am convinced that there is no plausibility of genocide, I voted in favour of the third and fourth provisional measures.

With regard to the third measure, which concerns acts of public incitement, I have voted in favour in the hope that the measure will help to decrease tensions and discourage damaging rhetoric. I have noted the concerning statements by some authorities, which I am confident will be dealt with by the Israeli institutions.

With regard to the fourth measure, I voted in favour, guided by my deep humanitarian convictions and the hope that this will alleviate the consequences of the armed conflict for the most vulnerable. Through this measure, the Court reminds Israel of essential international obligations, which are already present in the DNA of the Israeli military. This measure will ensure that Israel continues to enable the delivery of humanitarian aid to Gaza, which I see as an obligation arising under IHL.

45. However, it is regretful that the Court was unable to order South Africa to take measures to protect the rights of the hostages and to facilitate their release by Hamas. These measures are based on IHL, as are those enabling the provision of humanitarian aid. Moreover, the fate of the hostages is an integral part of the military operation in Gaza. By taking measures to facilitate the release of the hostages, South Africa could play a positive role in bringing the conflict to an end.

46. I voted against the fifth provisional measure, which concerns the preservation of evidence. I did not vote against this measure because evidence is not important, but because South Africa has not shown that Israel has destroyed or concealed evidence. This claim is baseless and therefore should not have been entertained by the Court.

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47. Genocide is a shadow over the history of the Jewish people, and it is intertwined with my own personal experience. The idea that Israel is now accused of committing genocide is very hard for me personally, as a genocide survivor deeply aware of Israel's commitment to the rule of law as a Jewish and democratic State. Throughout my life, I have worked tirelessly to ensure that the object and purpose of the Genocide Convention is realized in practice; and I have fought to make sure that genocide disappears from our lives.

48. Had the Court granted South Africa's request to put an immediate end to the military operation in Gaza, Israel would have been left defenceless in the face of a brutal assault, unable to fulfil its most basic duties vis-à-vis its citizens. It would have amounted to tying both of Israel's hands, denying it the ability to fight even in accordance with international law. Meanwhile, the hands of Hamas would have been free to continue harming Israelis and Palestinians alike.

49. It is with great respect that I have joined this Court as an ad hoc judge. I was appointed by Israel; I am not an agent of Israel. My compass is the search for morality, truth and justice. It is to protect these values that Israel's daughters and sons have selflessly paid with their lives and dreams, in a war that Israel did not choose.

(Signed) Aharon BARAK.