Claim No. AC-2023-LON-003634

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE KING
(on the application of Al-Haq)

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendant

-and-

(1) OXFAM
(2) AMNESTY INTERNATIONAL UK
(3) HUMAN RIGHTS WATCH

Interveners

WRITTEN SUBMISSIONS OF HUMAN RIGHTS WATCH AND AMNESTY INTERNATIONAL UK

References: ASFG refers to the Statement of Facts and Grounds, dated 6 February 2024; ADGR refers to the Amended Detailed Grounds of Resistance, dated 28 February 2025

A. Introduction

1. By order of 19 March 2025, Mr. Justice Chamberlain granted permission to Human Rights Watch ("**HRW**") and Amnesty International UK ("**Amnesty UK**") to file written submissions in respect of Grounds 8A, 8B and 8C. Having considered the ASFG and materials lodged by the First Intervener, and in order to avoid duplication, this skeleton argument focuses on Ground 8C, where HRW and Amnesty UK consider that they can most assist the Court. In addition, pursuant to paragraph 1(b)(i) of the Order, HRW and Amnesty UK have permission to file and rely on witness statements by Sacha Deshmukh, Chief Executive of Amnesty UK and Yasmine Ahmed, UK Director of HRW (together with the Joint Annex to those statements).

B. Summary of Amnesty International UK and Human Rights Watch's Position

2. By the date of the challenged decision on 2 September 2024 ("**the Decision**"),[1] the United Nations reported that 41,000 people in the Gaza Strip had been killed, including over 15,000 children. More than 60% of residential property was destroyed and 96% of the population faced food insecurity as a direct result of the Israeli military's destruction of civilian infrastructure. Through its conduct and, in particular, the blockade it has imposed, Israel has inhibited the supply of food, medicine, water and electricity to the population of Gaza. In its Provisional Measures decision, the ICJ found in January 2024 that many Palestinians in the Gaza Strip "*have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating*".[2] At least one quarter of the population has faced extreme lack of food and starvation.[3] In addition, there is evidence (relied on by the ICJ in imposing provisional measures) of statements by senior Israeli officials calling for the destruction of the Gaza Strip and calling into question the existence of the Palestinian population in Gaza.[4] Taking account of these and other circumstances, the ICJ has found that there exists a "***real … risk** of irreparable prejudice to the plausible rights*" of Palestinians in Gaza under the Genocide Convention (emphasis added).[5]

3. Against this background, in reaching the Decision, the Secretary of State considered among other things the duty to prevent genocide under Article I of the Genocide Convention. This duty is triggered where there is a "*serious risk*" of acts contrary to the Genocide Convention. The Secretary of State contends that the duty to prevent is not engaged by his decision. He says this is because that duty is only breached where genocide actually occurs (ADGR § 53). The effect of this, according to the Defendant,

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1 This Intervention focuses on the position prior to the Decision. But for completeness, it is noted that at least another 10,000 Palestinians have been killed since 2 September 2024, according to Gaza's Health Ministry. Furthermore, the humanitarian situation has further deteriorated to a grave extent. Since 2 March 2025 Israeli authorities have again imposed a total blockade on humanitarian aid entering the Gaza Strip.

2 South Africa v. Israel (Application on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip ("***South Africa v Israel***"), Preliminary Measures Order, January 2024 [70].

3 UN Office of the High Commission for Humanitarian Affairs: Reported Impact Snapshot, September 2024.

4 *South Africa v. Israel*, Preliminary Measures Order, January 2024 [52] – [54].

5 *South Africa v. Israel*, Preliminary Measures Order, January 2024 [74].

is that the Court would have to investigate (and make findings about)[6] whether genocide was in fact occurring in the Gaza Strip. Absent such an assessment, the issue of compliance with Article I of the Genocide Convention can, according to the Defendant, safely be ignored regardless of whether an error of law has been made.

4. This argument is unattractive and incorrect. For the reasons set out below, HRW and Amnesty UK agree with the Claimant that the Secretary of State has erred in his assessment of whether there is a "*serious risk*" of acts falling within the scope of the Genocide Convention in the Gaza Strip (which, it is common ground, is the trigger for the duty to prevent genocide under Article I). Obligations under Article I of the Genocide Convention arise even when genocide is not occurring, but "*at the instant*" when there is a serious risk of it occurring, whether now **or** in the future.[7] That being the case, an error by the Secretary of State in respect of the "*serious risk*" threshold is a material error in his decision, which could have an important bearing on the outcome of this matter. This is so not least given the *jus cogens* status of the prohibition on genocide, and the UK's long-standing commitment to the enforcement of the obligations in the Genocide Convention.[8]

5. The application of the serious risk test by the Secretary of State is one which this Court is well-equipped to examine on conventional judicial review principles. Indeed, it is closely analogous to the clear risk test with which the Court is familiar in other contexts. In applying the serious risk test, the Secretary of State appears to have misapprehended the relevance and significance of the question of whether the UK has the "*capacity to influence*" Israel in applying the serious risk test. Furthermore, despite the ICJ finding in *South Africa v. Israel*, reaffirmed in *Nicaragua v. Germany*,[9] that there exists a "*real*

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6 The Secretary of State also says that Ground 8 is non-justiciable. These submissions proceed on the basis that the claim is justiciable. The question of justiciability goes beyond the permitted scope of this intervention.

7 See further paragraphs 10.4-10.5 below and in particular *Bosnia and Herzegovina v. Serbia (Bosnia Genocide)* ICJ Reports (2007) p. 43 ("***Bosnia Genocide***") [431].

8 See, for example: Joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom in *Gambia v. Myanmar* (Application of the Convention on the Prevention and Punishment of the Crime of Genocide) ICJ Report (15 November 2023) ("***Gambia v Myanmar***"), [9]; Declaration of intervention of the United Kingdom in *Ukraine v Russia* (Allegations of Genocide under the convention on the Prevention and Punishment of the Crime of Genocide) (5 August 2022) ("***Ukraine v Russia***"), [11].

9 *Nicaragua v Germany* (Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory) ("***Nicaragua v Germany***"), Provisional Measures Order, 30 April 2024 [23] –[24].

and imminent risk" of "*irreparable harm*" to the plausible rights of Palestinians under the Genocide Convention,[10] the Secretary of State's position is that there is "*no evidence that genocide has been committed*" (ADGR § 55). The Secretary of State's failure to recognize the existence (and relevance) of such evidence, including (but not limited to) the evidence identified in detail by the ICJ is an error in the reasoning supporting the Decision that the duty to prevent is not engaged. The Second and Third Interveners submit that that assessment demonstrates an error of approach in respect of both the ICJ's findings and the OPEN material before the Secretary of State more generally.

C. Legal framework: The duty to prevent genocide under the Genocide Convention

6. It is common ground (and well-established) that the prohibition on genocide is a peremptory norm of international law from which derogation is not permissible. The prohibition is absolute. This has been repeatedly reaffirmed by the ICJ in many cases,[11] which has described the Genocide Convention as having a "*manifestly… humanitarian and civilizing purpose*" and "*confirm[ing] and endors[ing] the most elementary principles of humanity*".[12] The obligation also to prevent genocide (and, indeed, the other substantive principles enshrined in the Genocide Convention) are enshrined in customary international law. As the ICJ explained in its judgment on Reservations to the Genocide Convention *"the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"*.[13] The observations set out in these Submissions regarding the Genocide Convention therefore apply equally as a matter of customary international law.

7. Genocide is both a violation of international law to which individual criminal responsibility attaches[14] and a violation of international law which engages the

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10 *South Africa v. Israel*, Provisional Measures, ICJ Reports 2024 p. 3. [54], [74]-[75].

11 See e.g. *Congo v. Rwanda (Armed Activities on the Territory of the Congo),* Jurisdiction ICJ Reports (2006) p. 6 paragraph 64; *Bosnia Genocide* [162].

12 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23 ("***Genocide Reservations Advisory Opinion***") p. 23.

13 *Genocide Reservations Advisory Opinion* p. 23. See also *Croatia v Serbia* ICJ Reports (2015) p. 3 ("***Croatia Genocide***") [87] where the ICJ made clear that the Convention "*embodies principles that are part of customary international law*".

14 See e.g. Article 6 of the Rome Statute of the International Criminal Court.

international responsibility of a state.[15] As regards genocide, international law imposes on all states obligations to prevent and punish genocide (irrespective of whether that state or its nationals are directly involved in the perpetration of genocide).

8. This approach is fundamental to the scheme created by the Genocide Convention. Article I of the Convention imposes an obligation on State Parties to prevent (and punish) genocide, stating that they "*confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish*". The ICJ has been clear that the duty to prevent is not merely "*hortatory*" but creates binding obligations "*distinct from those which appear in the subsequent Articles*" of the Convention.[16] The importance of cooperation among all states to prevent genocide is reflected in the preamble to the Genocide Convention. Thus, in the preamble the States Parties "*recognize*" that "*at all periods of history genocide has inflicted great losses on humanity*" and that they are "*convinced that … in order to liberate mankind from such an odious scourge, international co-operation is required"*. The duty to prevent genocide is therefore fundamental to the overarching scheme of the Genocide Convention.

9. It is common ground between the parties that the duty to prevent genocide is an *erga omnes partes* obligation which means that "*the obligations in question are owed by any State party to all the other States parties to the relevant convention*".[17] The ICJ has explained that a consequence of the customary status of the prohibition on genocide is that "*both the condemnation of genocide and the co-operation required 'in order to liberate mankind from such an odious scourge'"* has a "*universal character*".[18] In this context, there can be no dispute that the duty to prevent genocide is a fundamental and binding obligation, incumbent on the United Kingdom.

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15 *Bosnia Genocide* [169]-[197]. Genocide is not the only violation of international law which has this characteristic. For example, grave breaches of the Geneva Conventions will entail both state responsibility and individual responsibility. As with genocide, states are also under an obligation to prevent and punish grave breaches of the Geneva Conventions.

16 *Bosnia Genocide* [162].

17 *Gambia v Myanmar* [107]. As a matter of customary international law the prohibition on genocide is an obligation *erga omnes* which means that all states have a legal interest in the enforcement of the prohibition of genocide (and related obligations) and may invoke the international responsibility of a state vis-a-vis such obligations even where the invoking state is not individually injured by the breach.

18 *Genocide Reservations Advisory Opinion* p. 23.

10. The scope of the obligation to prevent genocide has been considered, or addressed, in a series of judgments of the International Court of Justice,[19] including in its provisional measures orders concerning the situation of Palestinians in the Gaza.[20] A number of propositions are clear from these judgments.

10.1. The obligation is one of means, not result. States must "*employ all means reasonably available to them, so as to prevent genocide so far as possible*,"[21] The Court has also described this as an obligation on States Parties "*to do all in their power to prevent the commission of any such acts [i.e. of Genocide] in the future*".[22] It is important to emphasise that there can be no question of a State balancing a serious risk of genocide against other interests (such as national security). It is unclear whether the Defendant adopted this approach in the context of the Decision in relation to Article I of the Genocide Convention. If he did, this would constitute a clear error of law.[23] The supply of weaponry to a party at serious risk of committing acts of genocide unquestionably falls within the scope of the duty to prevent and is prohibited by that duty (see e.g. *Nicaragua v. Germany,* Provisional Measures).[24]

10.2. The obligation to prevent is distinct from the concept of complicity in genocide in that "*complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed*".[25] Of course,

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19 *Bosnia Genocide*; *Croatia Genocide*; *Gambia v Myanmar*.

20 *See* South Africa v. Israel, Reasoned Order of the Court on 26 January 2024, 28 March 2024 and 24 May 2024; *Nicaragua v Germany,* Reasoned Order of 30 April 2024.

21 *Bosnia Genocide* [430].

22 *Bosnia Genocide*, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 3, at p. 22 [45].

23 This is important as the Defendant accepts that there exists a clear risk that Israel may commit serious violations of IHL (including the grave breach provisions of the Geneva Conventions). The Defendant's decision in relation to the F35 Carve-Out was based on a conclusion that the risk of violations of IHL were outweighed by risks to national security and did not depend on a calibration of risk (ADGR § 14 (a) – (d)). There is no possibility of a balancing approach under Article I of the Genocide Convention.

24 *Nicaragua v. Germany*, Order [24]. Significantly, in her Declaration [14] Judge Cleveland emphasised that the assessment of whether there existed a real risk of prejudice to plausible rights under the Genocide Convention would be informed partly by whether a state regarded the "*clear risk*" or "*overriding risk*" tests in its domestic legal system as obligatory in respect of arms exports to Israel, or whether it balanced these against other political or policy interests. Germany did not do so.

25 *Bosnia Genocide* [432].

positive action which in fact contributes to conduct falling within the scope of the Genocide Convention will *a fortiori* constitute a failure to prevent.

10.3. The ICJ has made clear that there is no requirement that a third-party, such as the UK, need have any certainty that genocide is in fact occurring for the obligation to prevent to arise. In *Bosnia-Genocide*, the Court made clear that "*a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way…"*[26]

10.4. Instead, the ICJ has established a "*serious risk*" threshold for the duty to prevent to be triggered. In *Bosnia Genocide*, the ICJ held at [431] that "*a State's obligation to prevent, and* ***the corresponding duty to act, arise at the instant*** *that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed*" (emphasis added).

10.5. Accordingly, the obligation to prevent genocide may, and often will, require states to act (or to refrain from taking certain actions) before genocide actually occurs. In *Bosnia Genocide*, the ICJ described as "*absurd*" an argument that "*the obligation to prevent genocide only comes into being when perpetration of genocide commences*", "*since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act*". However, a state only incurs responsibility for a failure to prevent genocide when "*genocide is actually committed*". The ICJ makes clear in the same paragraph that *"a State's obligation to prevent, and the corresponding duty to act, arise at the instant the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."*[27]

11. In summary, the obligation to take (or to refrain from undertaking) action in order to prevent genocide will arise when there is a "*serious risk*" of acts of genocide occurring. Due diligence on the part of third states such as the UK will require a rigorous prospective assessment of whether there is a risk of genocide. By definition, this will

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26 *Bosnia Genocide* [432].
27 *Bosnia Genocide* [431].

ordinarily occur before genocide has in fact occurred in order that the very purpose of the obligation to prevent not be undermined. Whilst the breach crystalises at the moment genocide is perpetrated, it is clear from the case law that a State Party to the Genocide Convention may act inconsistently with the obligation to prevent genocide prior to a breach occurring.

D. Error in the Secretary of State's core approach to the Genocide Convention

12. The Secretary of State's primary position is that the obligation to prevent genocide is not engaged by his decision because the duty to prevent genocide under the Genocide Convention is only breached where genocide is committed (ADGR §§ 47 - 53).

13. This view is misconceived. The materiality of the duty to prevent genocide for the Secretary of State's decision cannot be dismissed on this basis.

    13.1. As explained above, obligations under Article I of the Genocide Convention arise even when genocide is not occurring but "*at the instant*" there is a serious risk of it occurring, whether now or in the future.

    13.2. For reasons set out below, HRW and Amnesty UK contend that, properly directed, the Secretary of State ought to have concluded that there exists at minimum a serious risk of genocide. If this is so, then it follows that there is at present (at least) a serious risk of a breach by the UK of the duty to prevent genocide now or in the future based on the supply of F35 technology. This is so even if one accepts the argument, *quod non*,[28] that breach has not yet crystallised because genocide is not presently occurring.

    13.3. In these circumstances, the fact that a breach of Article I of the Genocide Convention only occurs when genocide is actually committed is no answer to an error in the assessment of the serious risk test. An error of approach in relation to this threshold remains a highly material error in the Government's evaluation of whether the UK is complying with its obligations under the Genocide Convention, since it gives rise (at least) to a serious risk that the UK will breach

[28] For the avoidance of doubt, HRW and Amnesty UK both consider that the evidence indicates that acts of genocide are, in fact, occurring at present in the Gaza Strip. However, this is not a question which the Court need determine in these proceedings for the reasons set out above.

obligations under the Genocide Convention now or in the future. This is all the more so in circumstances where the Secretary of State has approached his decision on the basis that the supply of F35 technology will not breach the UK's obligations under the Genocide Convention.

14. In these circumstances, there is no need for the Court to reach any conclusion on whether or not genocide is, in fact, occurring in order to determine Ground 8C. The salient question for the Court (and one which it is well equipped to consider) is whether the Secretary of State has erred in his approach to the assessment of the serious risk threshold under Article I of the Genocide Convention.

E. Error in respect of the serious risk threshold under Article I of the Genocide Convention

15. As noted above, to incur responsibility in respect of the duty to prevent genocide "*it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed".*[29] Once the duty to prevent is triggered, no balancing exercise against other considerations, such as national security, is permitted. This is further reinforced by the fact that the prohibition on genocide is a peremptory norm of international law from which derogation is not permissible.[30] A balancing exercise in that context would be contrary to the very nature of the norm.

16. In the Decision, the Secretary of State appears to have concluded that the duty to prevent is not engaged, in part, because he does not have sufficient "*capacity to influence*" Israel's conduct (see ADGR § 56(a)). This conclusion is based on flawed analysis.

16.1. The supply of military technology to a party which is engaged in acts of genocide (or at serious risk of doing so) will, on any view, fall within the scope of the duty to prevent genocide. In *Nicaragua v. Germany*, the ICJ emphasised that it was "*particularly important*" "*to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the* [*Genocide*

[29] *Bosnia Genocide* [432]
[30] Article 53 of the Vienna Convention on the law of Treaties (1969).

Convention]".[31] Although the steps required to discharge the obligation to prevent will vary according to a State's *"capacity to influence effectively*", the duty will plainly preclude the supply of arms to a party where there is a serious risk of that party engaging in acts of genocide.

16.2. The obligation to take preventative steps arises even if, in isolation, a particular measure may not be successful. In *Bosnia Genocide* [430], the ICJ held "*it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce*". Thus, even if, on its own, a decision by the UK not to license the supply of F35 technology may not have a deterrent impact on the present or future commission of genocide, it is sufficient if it would have such an impact in cooperation with other states.

17. In short, while it is true that, in certain situations, the steps required by the duty to prevent will vary according to a State's capacity to influence, the duty to prevent will <u>always</u> prohibit the supply of military equipment to a state where there is a serious risk of that equipment being used in furtherance of acts contrary to the Genocide Convention. Insofar as the Secretary of State concluded that the duty to prevent is not engaged by the licensing of F-35 technology because of the UK's otherwise limited "*capacity to influence*" Israel, that approach was flawed and appears to have misunderstood the limited role of the principle.

18. Furthermore, in his decision, the Secretary of State concludes that there is "***no evidence***" that genocide has been committed in Gaza (ADGR § 55). This conclusion is based on an error of approach both as to the findings of the ICJ and as to the OPEN

[31] *Nicaragua v Germany*, Order [24].

material before the Secretary of State more generally. The ICJ has affirmed that there is a "*...real and imminent risk that irreparable prejudice will be caused*" to the "*rights [of Palestinians under the Genocide Convention] found by the Court to be plausible*".[32] Importantly, these findings as to the risk to the plausible rights of Palestinians under the Genocide Convention were based on detailed identification by the ICJ of a substantial body of objective evidence of Israeli conduct in Gaza, including information supplied by international agencies active on the ground.[33] The evidence identified included a wide range of matters of the upmost gravity.

18.1. The ICJ identified numerous statements by senior Israeli military and civilian officials inciting violence against the population in Gaza and/or calling for the destruction of the population. Many such statements, including those by senior ministers at the highest level of government, were noted by the ICJ in its provisional measure orders. Further statements, to similar effect, are also set out in the Joint Annex, prepared by Amnesty UK and HRW. This material was all before the Secretary of State at the time of his decision. Many of these statements are, on any view, consistent with a serious risk of genocide. By way of illustration, the ICJ notes that the then Israeli defence minister told troops on 10 October 2023 that "*we are fighting human animals*" and "*we will eliminate everything*" in Gaza.[34] Israel's Minister for agriculture stated that Israel was "*rolling out the Gaza Nakba*".[35]

18.2. The ICJ also addressed the adverse "*conditions of life*" [36] inflicted on Palestinians in Gaza by Israel's conduct in assessing whether "*the current situation entails a risk of irreparable prejudice to the plausible rights"* of Palestinians protected by the Genocide Convention.[37] In its January decision the ICJ found that the population of Gaza had "*no access to the most basic*

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32 *South Africa v Israel,* Provisional Measures Order 26 January 2024 [74]. The ICJ explains that by plausible rights it means "*right of the Palestinians in the Gaza Strip to be protected from acts of genocide*. See Provisional Measures Order 26 January 2024 [66].

33 *South Africa v Israel,* Provisional Measures Order 26 January 2024 [41]–[59].

34 See e.g. *South Africa v Israel,* Provisional Measures Order 26 January 2024 [52].

35 Nakba (literally meaning "catastrophe") refers to the forced displacement of the Palestinian population.

36 *Cf* Article 2(c) Genocide Convention.

37 See *South Africa v. Israel,* Provisional Measures Order 26 January 2024 [33]. The ICJ makes clear at [33] that its subsequent examination of evidence [34] – [47] informs its assessment of this test, which it finds to be met.

foodstuffs, potable water, electricity, essential medicines or heating".[38] In its March decision the court observed that Palestinians had been "*subjected*" to *"prolonged and widespread deprivation of food and other basic necessities"*.[39] (This was also extensively documented in the Amnesty UK and HRW Joint Annex.[40]) In consequence, the ICJ ordered that "*Israel must take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip*".[41] An even stronger obligation was imposed in March when the ICJ ordered that Israel must ensure that "*its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza … including by preventing, through any action, the delivery of urgently needed humanitarian assistance*".[42]

18.3. The ICJ also found mass forced displacement of the Palestinian population in Gaza as part of the evidential matrix demonstrating "*a real and imminent risk that irreparable prejudice will be caused to the rights [of the Palestinian population under the Genocide Convention] found by the Court to be plausible*".[43] Similar findings were made in its subsequent provisional measure decisions.[44] In addition, there was before the Secretary of State substantial corroborating evidence of Israeli ministers (including the Prime Minister) advocating for the forced expulsion of the entire population of Gaza (and a policy paper was prepared by the Israeli government to the same effect).[45] Such a policy, if implemented, alone, or in combination with other factors, creates a serious risk of the destruction of the Palestinian population in Gaza. The deliberate infliction of conditions of life calculated to bring about the physical destruction of the Palestinian population in Gaza constitutes an

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38 *South Africa v. Israel,* Provisional Measures Order 26 January 2024 [70].
39 *South Africa v. Israel*, Provisional Measures Order, 28 March 2024 [18].
40 Joint Annex §§ 14 – 30 and 66-75 (as regards the destruction of the healthcare system in Gaza by Israel).
41 See *South Africa v. Israel,* Provisional Measures Order 26 January 2024 [52].
42 *South Africa v. Israel*, Provisional Measures Order, 28 March 2024 [80].
43 *South Africa v. Israel,* Provisional Measures Order 26 January 2024 [70] and [74]. See also paragraph [46]. In assessing evidence as to the plausible rights of Palestinians engaged by Israel's conduct the Court drew attention to the fact that "*the military operation being conducted by Israel following the attack of 7 October 2023 has resulted in a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population*".
44 See e.g. *South Africa v. Israel,* Provisional Measures Order, 24 May 2024 [46] – [47].
45 See HRW and Amnesty UK Joint Annex § 43.

act of genocide contrary to Article 2(c) of the Genocide Convention.[46] Article 6(c)(4) of the ICC Elements of Crimes[47] explains that "*[t]he term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services**, or systematic expulsion from homes***" (emphasis added). In other words, mass expulsions can constitute an act of genocide if carried out in such circumstances that they were calculated to bring about the physical destruction of the group in question.[48]

18.4. In *Tolimir*, the ICTY Appeals Chamber held that Article 4(2)(c) of the ICTY Statute, which reproduces verbatim Article 2(c) of the Genocide Convention, included "*methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts punishable under Article 4(2)(c) include, inter alia, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion*".[49]

19. The lawfulness of the Secretary of State's finding that there was "*no evidence*" of genocide must be assessed against these (binding) findings by the ICJ in its provisional measure orders (in circumstances where the Defendant contends that his decision was compatible with applicable international law). Any misdirection by the Secretary of State as to the significance of the ICJ's provisional measure orders (and findings therein) is of particular significance as regards the duty to prevent genocide. In finding

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46 The same provision is included in Article 6(c) of the Rome Statute of the ICC.

47 The ICC Elements of Crimes is a treaty between the States Parties to the ICC Statute and it authoritatively defines genocide. The most recent (revised) ICC Elements of Crimes was adopted by the ICC States Parties in the 2010 Review Conference and is binding in the interpretation of the crimes laid down in the Rome Statute (including as regards the UK as a State Party to the ICC Statute). The Elements of Crimes document is available here: https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf

48 See further: *Bosnia Genocide*, [190]; *Croatia Genocide*, [162]-[163]. [434]. In *Croatia Genocide* the ICJ held [434] that "*.. the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part. … the Court recalls that the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be "indicative of the presence of a specific intent (dolus specialis) inspiring those acts*".

49 *Prosecutor v. Tolimir,* ICTY Appeals Chamber, IT-05-88 /2-A [225] – [226].

that the duty to prevent had been triggered in *Bosnia -Genocide* [435], the ICJ attached considerable weight to the fact that it had issued provisional measures imposing "*very specific obligations*" in respect of genocide, demonstrating that Serbia was on notice of the serious risk thereof. Similar obligations have been recalled by the ICJ in respect of the situation in Gaza. Indeed, in *Nicaragua v. Germany* the ICJ warned "*all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the* [*Genocide Convention*]".[50]

F. Conclusion

20. For the reasons set out above, HRW and Amnesty UK respectfully support the Claimant's position that the Court should quash the Decision of 2 September 2024, and remit the matter back to the Secretary of State for reconsideration.

JEMIMA STRATFORD KC
CONOR MCCARTHY
ANTHONY JONES
HUGH WHELAN
17 April 2025

[50] *Nicaragua v. Germany*, Order [24].