SEPARATE OPINION OF JUDGE KOROMA

Misgivings regarding plausibility as a criterion for indication of provisional measures — Assertion introduced in Questions relating to the Obligation to Prosecute or Extradite (Belgium *v.* Senegal) *— Not part of settled jurisprudence — Meaning different in English and French — Introduction problematic — Vagueness regarding law or facts or both — Basis on which parties' claims evaluated — If new standard introduced must be transparent.*

1. Although I have voted in favour of the Order, I am constrained to make the following observations in the light of the reference in paragraphs 53 and 54 of the Order to "plausibility" as a criterion for indicating provisional measures. In my view, the introduction of the criterion of plausibility creates ambiguity and uncertainty; moreover, it remains unclear whether this standard refers to legal rights or facts or both.

2. The Court did apply such a standard in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, requiring the parties to demonstrate that their rights were "at least plausible"[1]. However, the criterion cannot be said to have become part of the settled jurisprudence of the Court on provisional measures. Indeed it should not, because the word "plausibility" is ambiguous in English and can refer to an assertion that has the outward appearance of truth, but is in fact specious or false. Moreover, it is unclear whether such a "standard" would require the Applicant to show that its legal claims are plausible, that it enjoys certain legal rights, or that its factual claims are plausible. Hitherto to justify the indication of provisional measures, Applicants have needed only to show that their existing rights were threatened.

3. The Court's ability to indicate provisional measures in cases brought before it pursuant to Article 41 of its Statute is vital to ensure that parties' legal rights are preserved pending the Court's decision on the merits[2]. In the absence of such power, the Court's efficacy could be diminished in many cases, since it would run the risk of facing a fait accompli or seeing an issue become moot by the time it issues a judgment. Historically, the Court has established four criteria to be met before it will indicate provisional measures in favour of one or both parties. First, the provisions

[1] *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[2] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 107, para. 22.

invoked by the applicant must appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established. Second, and as stated in the Order, there must be a link between the alleged rights the Applicant seeks to protect and the subject of the proceedings before the Court on the merits of the case[3]. Third, the Court must be convinced that one or both parties will suffer irreparable prejudice or harm to the rights which are the subject of the dispute on the merits[4]. Fourth, there must be urgency in the sense that there is a real risk that action prejudicial or harmful to the right of either party might be taken before the Court has given its final decision[5].

4. The Court has judiciously decided to indicate provisional measures in the present case. I agree with both the outcome and the bulk of the reasoning in the present Order. Specifically, I agree that there is a link between the measures sought and the rights of sovereignty that the Applicant claims over the disputed territory (Order, para. 60). It is also possible that certain activity by the Respondent in the disputed area could lead to conflicts resulting in irremediable physical harm to individuals. Finally, the criterion of urgency could be seen in conjunction with that of irremediable harm given the nature of the disputed area and the level of tension between the Parties.

5. The Order does however include the element of "plausibility", about which I have some misgivings. In its analysis of the Applicant's claims, the Court appears unwittingly to introduce this additional criterion to be met before the Court will indicate provisional measures. According to the Order, "the Court may exercise this power only if it is satisfied that the rights asserted by a party are at least plausible" (*ibid.*, para. 53).

6. Though not a complete novelty, this criterion, the "plausibility standard" was first enunciated in the *Belgium* v. *Senegal* case[6]. The criterion seems to have appeared out of nowhere. The Court in that case cited no precedent supporting the existence of a "plausibility" standard, nor did it explain why it was establishing such a standard. Indeed, it did not even acknowledge that the "plausibility" standard was a new one[7]. The Court

[3] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 389, para. 118.

[4] See, e.g., *ibid.*, p. 392, para. 128.

[5] *Ibid.*, p. 392, para. 129.

[6] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[7] The paragraph establishing the new standard in the *Belgium* v. *Senegal* Order lies within a section entitled "Link between the right protected and the measures requested" and immediately follows a paragraph discussing the well-established "link" requirement, even though the standard is apparently quite distinct from this existing requirement. The present Order appears to tacitly acknowledge this criterion by creating a new subject heading: "Plausible character of the rights whose protection is being sought and link between these rights and the measures requested" (para. 53).

simply introduced the plausibility standard into the Order, presenting it as if it were a criterion so well-established that it needed no introduction, explanation or justification. This is inconsistent with the settled jurisprudence of the Court, according to which the applicant has to *demonstrate* that an existing right is threatened and needs to be protected.

7. In my view, the most problematic aspect of the plausibility standard is its vagueness, giving the impression that the threshold for the indication of provisional measures has been lowered. The word "plausible" in English has multiple meanings. According to the *Oxford English Dictionary*, "plausible" is defined as "[h]aving an *appearance* or show of truth, reasonableness, or worth; apparently acceptable or trustworthy (sometimes with implication of mere appearance) . . . [c]hiefly of arguments or statements" "having a false appearance of reason or veracity; *specious*"[8]. The term "specious" is further defined in the context of arguments as "[p]lausible, apparently sound or convincing, but in reality sophistical or fallacious"[9].

Another definition of "plausibility" is "an argument, statement, etc. . . . seeming reasonable or probable . . . persuasive but deceptive"[10]. "Plausible" often contains a negative connotation: an implication that, although a plausible claim basically sounds truthful, it is in reality deceitful, only partially true, or completely false. Hence, "plausible" is also defined as "superficially fair, reasonable or valuable but often specious"[11].

8. Thus, the ambiguity or vagueness inherent in the English-language meaning of "plausible" makes it unreliable as a legal standard that parties must meet to obtain relief from this Court in the form of provisional measures, especially since the binding force of Orders indicating provisional measures has been confirmed by the Court. The standard may even inadvertently offer parties an opportunity to submit specious claims which, at a superficial glance, may appear credible but could mislead the Court to indicate provisional measures.

9. I am advised that the word "plausible" in French has a somewhat different meaning. As mentioned above, the word was first introduced as

[8] *Oxford English Dictionary*, 1989, Vol. XI, p. 1011; and *Oxford English Dictionary Online*; emphasis added.

[9] *Oxford English Dictionary*, 1989, Vol. XVI, p. 161.

[10] *The Concise Oxford Dictionary of Current English*, 1995, p. 1047.

[11] *Merriam Webster's Online Dictionary*.

a standard in the *Belgium* v. *Senegal* case, in which the French text is authoritative. In French, I am also advised, the word appears to only have a positive connotation and may therefore better reflect the Court's intention when the term was used.

10. In my considered view, another concern raised by the Court's plausibility standard is that it is so far unclear whether the standard applies to legal rights or facts or both. In the *Belgium* v. *Senegal* case, it appears that the Court referred to the former. In that case, Belgium alleged, among other things, that the Convention against Torture gave it the right to bring criminal proceedings against Mr. Habré[12]. The Court, after articulating the plausibility standard, stated that "the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible"[13]. This implies that the Court engaged solely in a legal analysis, whether it was plausible that the Convention against Torture, as a matter of law, gave Belgium the right to bring criminal proceedings against an alleged torturer.

11. In the present Order, however, the Court evaluates the plausibility of Costa Rica's *factual claims*. The actual legal rights at issue in this case are, *inter alia*, Costa Rica's rights to sovereignty and territorial integrity (Order, paras. 1-3). The argument that Costa Rica enjoys these legal rights is certainly "plausible" as a matter of law, as these rights are enshrined in Article 2 of the United Nations Charter. The fact that Costa Rica is entitled to such rights is so self-evident that the Order need not evaluate their legitimacy or plausibility. What the Order examines instead is whether "the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible" (*ibid.*, para. 58).

12. The plausibility standard, therefore, suffers from vagueness and ambiguity. It is unclear from the Court's Order whether the Court requires an applicant seeking provisional measures to demonstrate the plausibility of its legal rights, the plausibility of its factual claims, or both.

13. In my view it would have been worth articulating a *clear* standard of some sort to evaluate, prima facie, the legitimacy of an applicant's claims at the provisional measures stage. Such a standard, which exists already in domestic courts in many common law jurisdictions, would help ensure that parties do not abuse the provisional measures process. Specifically, it would dissuade parties from bringing patently meritless claims with the goal of obtaining provisional measures that would prevent the

[12] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 142, para. 14.

[13] *Ibid.*, p. 152, para. 60.

other party from taking further action until the Court decides the merits of the case. In a sense, such a standard would be similar to the Court's existing prima facie jurisdiction requirement. Both the new standard and the prima facie jurisdiction standard would require a party to demonstrate that it has a reasonable chance of eventually obtaining a judgment on the merits in its favour before it could obtain provisional measures.

14. The Court has on occasion informally evaluated the legitimacy of a party's claim when deciding to indicate provisional measures. In the *Armed Activities* case, for example, the Court noted that the rights at issue were, *inter alia*, the Congo's "rights to sovereignty and territorial integrity and to the integrity of its assets and natural resources"[14]. The Court added that it was "not disputed that . . . Ugandan forces are present on the territory of the Congo, [and] that fighting has taken place on that territory between those forces and the forces of a neighbouring State"[15]. In other words, it was clear that the Congo's rights were involved.

15. In many orders on provisional measures, the Court's analysis of jurisdictional questions or irreparable prejudice also confirms the *credibility* of a party's claims. The language quoted above from the *Armed Activities* case, for example, was used by the Court to support its finding of irreparable prejudice.

16. The more difficult question is what the precise standard should be. One option would be for the Court to revert to an approach similar to its standard for evaluating jurisdiction at the provisional measures stage of proceedings, according to which it requires that a party establish a prima facie case. In other words, the party would have to present evidence that, standing alone, would establish its entitlement to certain rights. Yet another possibility would be to require that the rights asserted by a party be grounded in a *reasonable* interpretation of the law or of the facts.

17. On the other hand, if the Court does decide to adopt a new standard, it should do so in a transparent manner that explains the rationale behind it. It could, for example, state that the existence of such a standard is important to ensure that the Court does not grant provisional measures in cases that are frivolous or highly unlikely to succeed on the merits.

18. Adopting an order indicating provisional measures on the grounds of plausibility may prove a mistake. To paraphrase the 18th century

[14] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 127, para. 40.
[15] *Ibid.*, p. 128, para. 42.

philosopher Edmund Burke, very plausible schemes, with very pleasing commencements, have often shameful and mistaken consequences. It is worth bearing this in mind.

(Signed) Abdul G. KOROMA.