SEPARATE OPINION OF JUDGE TLADI

Disagree with Court's approach — Court's approach enters into the merits of the case — Rationale behind the conditions for the indication of provisional measures is to avoid arbitrariness and ensure coherence — Conditions are not intended to be a straitjacket.

INTRODUCTION

1. I have voted in favour of the *dispositif*, although I am wholly unconvinced of the Court's approach, which unnecessarily enters into the merits of the case and which I believe lays bare the problem with the Court's insistence on its overly formalistic approach in considering requests for indication of provisional measures — an approach which I have previously referred to as one based on ticking boxes[1].

2. As I have said in the past, because of its formalistic approach, the Court sometimes places itself in a straitjacket and engages in an artificial examination of whether the conditions for the indication of provisional measures have been met, when what is required of the Court under its Statute and Rules is to determine whether the circumstances, as they present themselves, require the indication of provisional measures.

THE RATIONALE FOR DEVELOPING CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

3. Under Article 41 of the Statute, the Court may indicate provisional measures "if it considers that circumstances so require" in order "to preserve the respective rights of either party". Over the years the Court has identified, through its jurisprudence, a number of conditions for the exercise of its power under Article 41. These conditions may be described as the existence of prima facie jurisdiction, the plausibility of the rights asserted by the party requesting the measures, a link between the rights asserted and the measures requested, the risk of irreparable prejudice to the rights asserted and urgency. These conditions, in my view, should not be seen as *requirements* for the indication of provisional measures, but rather as factors to be considered to determine whether the circumstances, as they present themselves, require the indication of provisional measures.

4. The purpose of these conditions is to ensure coherence and to avoid arbitrariness in the Court's handling of requests for provisional measures. These conditions are not intended to be a straitjacket, compelling the Court to tick boxes that may be "untickable". The Court in *Nicaragua* v. *Germany* recognized this and adopted a flexible and fluid approach to the indication of provisional measures. Despite interesting arguments in some individual opinions in that case, the Court *never*

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[1] See *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua* v. *Germany), Provisional Measures, Order of 30 April 2024, I.C.J. Reports 2024 (II)* (hereinafter "*Nicaragua* v. *Germany*"), declaration of Judge Tladi, p. 600, para. 7; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024, I.C.J. Reports 2024 (II)*, declaration of Judge Tladi, p. 698, para. 10.

suggested that it was basing its decision to reject the requested measures on one or another condition[2]. Instead, in *Nicaragua* v. *Germany*, the Court makes the broad statement that it shall "ascertain whether Nicaragua has sufficiently shown that the circumstances as they now present themselves to the Court are such as to require the exercise of its power to indicate provisional measures"[3], and then proceeds to refer to the factual arguments presented by the Parties and to assess these facts[4], before concluding that "the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures"[5].

5. While many cases can be addressed by a formulaic application of the aforementioned conditions (see para. 3), other cases cannot. This was the case in *Nicaragua* v. *Germany*, and I believe it is the case in the present request submitted by Equatorial Guinea.

THE CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES IN THE PRESENT CASE

6. I recall that the Court's jurisprudence on provisional measures, and in particular the identification of conditions for the exercise of its power under Article 41, is intended to avoid arbitrariness. Yet, the Court's Order, due in part to its excessive formalism, is riddled with arbitrariness. In fact, the very basis of the Court's approach is arbitrary. The Court states that it considers it appropriate to "begin with the question whether the rights whose protection is sought by Equatorial Guinea are plausible"[6]. Of course what the Court actually means is that it considers it appropriate to address *only* that condition, since it does not address any other condition. In fact, it is clear from the structure of the Order that the Court never intended to address any other condition developed in its jurisprudence. More importantly — and this is the arbitrariness — the Court never tells us (and I certainly do not know) why it is "appropriate" to begin (and end) with the plausibility of the rights whose protection is sought by Equatorial Guinea.

7. But beyond the arbitrariness of the choice to focus on just one condition for the indication of provisional measures — a choice that is of course consistent with an earlier Order made in

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[2] See *Nicaragua* v. *Germany*, *Provisional Measures, Order of 30 April 2024, I.C.J. Reports 2024 (II),* separate opinion of Judge Iwasawa, p. 588, para. 14 (stating that the "Court's decision not to indicate any provisional measures appears to be predicated on the [grounds that there is no real and imminent risk of irreparable prejudice], even though the Court does not state so explicitly". See also *ibid.*, declaration of Judge Cleveland, p. 595, para. 13 ("as detailed by the Court, the information presented regarding Germany's military assistance to Israel . . . does not presently establish a real and imminent risk of irreparable prejudice to the rights Nicaragua invokes as a result of the actions of Germany"). Cf. *ibid.*, separate opinion of Vice-President Sebutinde, pp. 571-572, paras. 2-3, which contains a strong rebuke of the Order for not applying the Court's jurisprudence for the indication of provisional measures and serves to confirm that the Court adopted a more flexible approach than might be suggested by the interesting arguments in the other opinions. Scholarly commentary on the Court's approach also reflects that the Court, in *Nicaragua* v. *Germany*, adopted a more flexible approach to the indication of provisional measures. See e.g. Becker, Michael A: "Nicaragua Comes Up Empty: Provisional Measures in Nicaragua v. Germany at the ICJ", *VerfBlog*, 1 May 2024, available at https://verfassungsblog.de/nicaragua-comes-up-empty/; Alexander Wentker and Robert Strendel, "Taking the Road Less Travelled: The ICJ's Pragmatic Approach to Provisional Measures in Nicaragua v. Germany", *EJIL:Talk!*, 3 May 2024, available at https://www.ejiltalk.org/taking-the-road-less-travelled-the-icjs-pragmatic-approach-to-provisional-measures-in-nicaragua-v-germany/.

[3] See *Nicaragua* v. *Germany*, *Provisional Measures, Order of 30 April 2024, I.C.J. Reports 2024 (II)*, p. 564, para. 13.

[4] *Ibid.*, pp. 564-567, paras. 14-20.

[5] *Ibid.*, p. 567, para. 20.

[6] Order, para. 36.

Mexico v. *Ecuador*[7], the reasoning of the Court raises some difficulties. This reasoning is contained in one short paragraph. That paragraph (paragraph 49) states:

> "The Court notes that Article 57, paragraph 3 *(c)*, of the Convention provides that a requested State party 'shall . . . give priority consideration' to three possibilities: (i) the return of such property to the requesting State party; (ii) the return of such property to its prior legitimate owners; or (iii) the provision of compensation to the victims of the crime. The phrase 'shall . . . give priority consideration', read in conjunction with the listing of three possibilities, suggests that the requested State party has some discretion as to the course of action ultimately adopted. The Court observes that the return of the confiscated property to the requesting State party is, as a general rule, only one of the possibilities to which the requested State party 'shall . . . give priority consideration' in performing the obligation incumbent upon it under Article 57, paragraph 3 *(c)*."

8. That's it. This is the totality of the Court's reasoning, namely that the requested State party has a discretion under Article 57 (3) *(c)* of the United Nations Convention against Corruption and, as such, there can be no right of return. For me, the problem with the Order is not *only* the brevity of the reasoning, although I can see that some may take issue with the scant reasoning provided in the Order. In fact, in my view, the bigger issue in Equatorial Guinea's case (which the Court could also have relied upon) is the question whether the term "confiscated property" in Article 57 refers *at all* to the building in question instead of the allegedly embezzled funds which were used to purchase the building. But these are matters properly addressed at the merits stage.

9. Putting that aside, the main problem with the Court's reasoning — and this problem would subsist regardless of the interpretation that the Court gives to the term "confiscated property" — is that, to arrive at its conclusion, the Court goes into the merits of the case beyond what is permissible at the provisional measures stage. At the provisional measures stage of the proceedings, the Court is only called upon to determine whether the rights claimed by Equatorial Guinea are "at least plausible". In the terms of the jurisprudence of the Court, this means that the rights in question must be "grounded in a possible interpretation" of the relevant treaty[8].

10. This test — in subsequent orders the Court has not really applied the test or elaborated on its content, and has instead merely recalled that the alleged rights must be at least plausible — requires the Court not to enter too much into the strengths and weaknesses of various interpretations of the parties, and simply to assess whether the right claimed by a party requesting the indication of provisional measures can be grounded "in a possible interpretation" of the relevant law or instrument. Thus, even when the interpretation of a party appears, on balance, incorrect, the Court must, for the purposes of the indication of provisional measures, accept it, if it is possible. This means that to reject a request for provisional measures on the grounds of plausibility, it is not sufficient for the Court to present an interpretation, but rather the Court must show why the interpretation offered by the party requesting provisional measures cannot possibly be grounded in the relevant instrument or rule. In other words, the alleged right must not exist under *any* possible interpretation of the relevant rule or instrument.

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[7] *Embassy of Mexico in Quito (Mexico* v. *Ecuador), Provisional Measures, Order of 23 May 2024, I.C.J. Reports 2024 (II)*, pp. 621-623, paras. 28-35.

[8] *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. 152, para. 60.

11. I wish to pause to place the condition of "plausibility of rights" in its proper context. This condition did not exist prior to *Belgium* v. *Senegal*. Before *Belgium* v. *Senegal*, the prevailing position was summed up neatly by Judge Abraham in his separate opinion in *Pulp Mills*[9]. There, Judge Abraham said the prevailing view, which admittedly he believed was wrong, was that the Court, "when called upon to rule on a request for the indication of provisional measures under Article 41 of the Statute, should — and does in fact — refrain from all consideration of the merit of the arguments by the party requesting the measures, usually the applicant in the main action, in respect of the claimed rights for which it seeks protection through the measures"[10]. Rather, according to Judge Abraham's summation of the prevailing view, the Court ought to "confine itself to ascertaining whether the circumstances are such that the rights claimed, the existence or non-existence of which cannot be determined until the conclusion of the main action, are in danger of irreparable injury in the absence of measures for their interim protection pending the final decision". Judge Abraham states that this understanding means that "the Court should proceed on the basis that the claimed rights do in fact exist"[11]. Ultimately, Judge Abraham put forward his own position that the Court "cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated"[12].

12. Judge Abraham's view must be seen in the context of the Court's determination in *LaGrand* that provisional measures are binding — a determination that I find troublesome, but that is an issue for another day. Judge Abraham's basic premise is that the prevailing view presupposes that only the rights of the applicant are at issue, but that in fact, the respondent may also have rights implicated by an order for provisional measures. Because of this, it cannot simply be assumed, as the prevailing view prior to *Belgium* v. *Senegal* might suggest, that the rights exist. It is hard to argue against Judge Abraham's position, particularly in light of *LaGrand*.

13. While I think that Judge Abraham is correct — i.e. the rights claimed cannot simply be assumed to exist, especially if provisional measures are to be binding —, I do not think that, at the provisional measures stage, the applicant should be required to prove, definitively, that the rights claimed exist. In other words, an assessment of plausibility cannot be a binary choice between accepting that the rights asserted exist and requiring that the rights asserted be definitively proved. The medium between these two positions is the position articulated in *Belgium* v. *Senegal*, requiring that the rights in question be grounded in a possible interpretation of the instrument in question. The Court's subsequent jurisprudence has confirmed that the plausibility of a right deriving from a treaty may be founded on a possible interpretation of the provisions of that treaty[13]. However, determining whether the rights claimed are grounded in a possible interpretation of the Convention against Corruption is not what the Court has done here. Rather, here the Court engages in an interpretative

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[9] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 137.

[10] *Ibid.*, p. 138, para. 4.

[11] *Ibid.*

[12] *Ibid.*, p. 140, para. 8.

[13] See for example *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 643, paras. 67 and 70.

exercise and chooses what it deems to be the correct interpretation. It does not assess alternative interpretations to determine whether they are grounded in a possible interpretation of the provisions concerned.

14. For the record, I think the Court's interpretation of the provision is ultimately correct. But this is not the interpretative exercise that the Court is called upon to undertake at the provisional measures stage. To illustrate my concern with the Court's approach, I would like to use the example of another issue of interpretation that I believe is key to this case, i.e. the interpretation of the term "property" in Article 57. I think, at this point, and without the benefit of the full hearing on the merits, that Article 57 (3) *(c)* does not establish the right relied upon by Equatorial Guinea mainly because the property referred to in Article 57 is the embezzled funds and not the building purchased with the embezzled funds. But, while I think this is the most reasonable interpretation, I do not think it excludes (i.e. makes impossible) a possible interpretation that would provide for a right of return of the building. Now, to take the Court's chosen interpretation in this Order — what I would call the "discretion interpretation" — one must note that discretion is not absolute. If France has an obligation to "give consideration" to three or more options, then, at least by one interpretation of that provision, taking one or more of those options off the table would in fact prejudice the right of Equatorial Guinea to have all options given consideration in the final analysis. Only if the discretion in Article 57 (3) *(c)* is deemed absolute, can an option be removed from the table without affecting the rights of the Applicant. But the Court does not consider this possible interpretation, i.e. that the right requires the maintenance of all options to be given priority consideration.

15. The problem with this case is that none of the conditions for the indication of provisional measures *on their own* are sufficient to set aside the request of Equatorial Guinea. As such, I believe the Court could have adopted one of two approaches. *First*, the Court could have adopted the low threshold I have put forward and found that the rights claimed, while improbable (it need not be explicit about improbability since it is not called upon to test probability), are at least plausible. To account for Judge Abraham's concern regarding the rights of the respondent, the Court could have recalled that France's rights are not prejudiced since, in the event that the Application is unsuccessful, it retains the right to sell the property. On this basis the Court could have indicated some of the requested provisional measures.

16. *Second*, the Court could have assessed the relevant facts of the case — without linking them to a particular condition for the indication of provisional measures — and concluded that on the basis of all of them, the Court does not believe that the indication of provisional measures is warranted at this stage. Relevant facts in this regard include the fact that it is not at all clear that Equatorial Guinea can be deemed a "requesting State" under the Convention, and the fact that, as stated by France, it is not possible for the property to be sold imminently. This, in my view, is what the Court did in *Nicaragua* v. *Germany*, and it is only buyer's remorse that prevents the Court doing so here.

CONCLUSION

17. I can live with the decision of the Court not to indicate provisional measures, because I believe that, ultimately, the case is about much more than the return of a building. What I find troubling is that the Court decides, for expediency's sake, to pick randomly one condition for the indication of provisional measures and, on the basis of an assessment of that condition, to reject the requested measures in a manner that could also prejudge an important issue that goes to the merits

of the case. In *Nicaragua* v. *Germany*, the Court did not grant the requested provisional measures and, more importantly, it reached its decision without prejudging the merits of the case. The Court could have done so here too, but alas!

(Signed) Dire TLADI.

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