

DISSENTING OPINION OF JUDGE *AD HOC* ELIAS

Purpose of provisional measures — Applicant’s right to be heard — Unduly high threshold of the plausibility requirement — Need to protect the rights of both Parties pending decision on the merits — The objective of facilitating the resolution of the dispute.

1. I have voted against the *dispositif* in the Order. Under Article 41 of the Statute of the Court and Article 73 of the Rules of Court, the Court has the power, “if it considers that circumstances so require”, to indicate provisional measures “which ought to be taken to preserve the respective rights of either party”. The Court assesses whether circumstances warrant the indication of provisional measures based on three requirements: the existence of *prima facie* jurisdiction; the plausibility of the rights invoked and the link between those rights asserted and the provisional measures requested; and the risk of irreparable prejudice and urgency. In this instance, the majority decided that Equatorial Guinea does not plausibly enjoy rights whose preservation require the indication of provisional measures. I respectfully disagree with this finding and consider that the reasoning set out in the Court’s Order risks unduly prejudging the merits of the case.

2. The purpose of the power to indicate provisional measures under Article 41 of the Statute is to safeguard the meaningfulness of the final judgment. The power of the Court to indicate provisional measures was inherited from Article 41 of the Statute of the Permanent Court of International Justice, which has its source, *inter alia*, in Article XVIII of the 1907 Convention establishing the Central American Court of Justice¹, reading as follows:

“From the moment in which any suit is instituted against any one or more Governments up to that in which a final decision has been pronounced, the Court may, at the solicitation of any one of the parties, fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved *in statu quo* pending a final decision.”

3. The principle of maintaining the *status quo* prior to the delivery of a final judgment lies at the heart of the purpose and function of provisional measures. However, by rejecting Equatorial Guinea’s request on the grounds of plausibility of the rights invoked, the Court’s Order produces consequences that exceed the scope of this incidental procedure and may alter the situation between the Parties in relation to the building located at 42 avenue Foch.

4. Prior to the Order, the Court has declined requests for provisional measures on the basis of lack of plausibility in several instances². However, in each of those cases, the Court had allowed a second round of oral observations on the request for the indication of provisional measures. This means that this is the first case in which a decision of implausibility has been made without according an applicant a right to reply to the respondent’s argument during the oral procedure. I find this

¹ See Advisory Committee of Jurists, *Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice*, 1920, p. 107, para. 31.

² 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, p. 104; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I), p. 361; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 3; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 405.

precedent concerning, particularly since Equatorial Guinea was not given the chance to respond to France's contention regarding Article 57, paragraph 3 (c) of the Merida Convention, a point that plays an important role in the Court's reasoning³. The absence of an opportunity to respond to France's arguments may have affected Equatorial Guinea's right to present its case fully, particularly as it was required to present its case and address all three criteria for the indication of provisional measures within a limited time frame of approximately two hours.

5. The Court may indicate provisional measures if "the rights asserted by the party requesting such measures are at least plausible"⁴. At this stage, "the Court is not called upon to determine definitively whether the right[s invoked] exist[]"⁵. This calls for a preliminary analysis, which necessarily entails applying a low threshold for plausibility.

6. The Court introduced the plausibility requirement in its 2009 Order on provisional measures in the case concerning *Obligations to Prosecute or Extradite (Belgium v. Senegal)*, stating that "at this stage of the proceedings the Court does not need to establish definitively the existence of the rights claimed by Belgium or to consider Belgium's capacity to assert such rights before the Court . . . the rights asserted by Belgium, being grounded in a possible interpretation of the Convention against Torture, therefore appear to be plausible"⁶. It is appropriate to highlight, in passing, that, in that case, the Court refrained from addressing the applicant's *capacity* to invoke the right in question.

7. As mentioned above, the Court has refused provisional measures based on the plausibility criterion in very few instances. While some precedents may have indicated the beginnings of a departure from the standard set out in *Belgium v. Senegal* towards an approach involving a limited review on the substance of the case⁷, the threshold of "a possible interpretation of the [treaty]" was applied relatively recently, in 2018, in the Order on provisional measures in the *1955 Treaty of Amity (Iran v. USA)* case⁸.

8. The Court should confine its assessment at the provisional measures stage to determining whether the right invoked is not manifestly without foundation and should refrain from evaluating the likelihood of success on the merits of the claims made by the parties. Put differently, establishing the criterion of plausibility does not require the Court to assess which party has a good, or a better, case. Departing from this approach risks creating uncertainty for parties seeking provisional measures and blurs the line between the provisional phase and the merits.

³ See paras. 49-50 of the Order.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, I.C.J. Reports 2024 (I), p. 17, para 35.

⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II), p. 1167, para. 78.

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. 152, para. 60.

⁷ See in particular *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. 74-76. The Court held that it must ascertain whether there are sufficient reasons for considering that certain elements, such as intent or knowledge, are present "in order to determine whether the rights for which Ukraine seeks protection are at least plausible" and found that "[a]t this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present".

⁸ *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, para. 67.

9. In the case at hand, the Court should have limited itself to examining whether there might be an interpretation under the Merida Convention according to which Equatorial Guinea is entitled to the rights it invokes, and whether there are some facts and evidence suggesting that such rights may be affected. Engaging in a technical interpretation of the provisions and comparing the relative strength of the Parties' positions in detail is a question for the merits stage and should not feature in the analysis of the plausibility test.

10. In keeping with this approach, the Court should have come to the conclusion that the rights claimed by Equatorial Guinea are plausible as it is at least *possible* to interpret that it has a right to a return of the property under the provisions it invoked. Indeed, it is possible to interpret Article 57, paragraph 1 of the Merida Convention as imposing an obligation to dispose of confiscated property, including by "return to its prior legitimate owners", as indicated by the use of the word "shall" in the provision. While France argues that Article 57, paragraph 3 (c), which establishes an obligation to "give priority consideration to returning confiscated property", is applicable only in specified scenarios that do not include the circumstances of the present case, the language "[i]n all other cases" implies broad applicability. Further, although the obligation to "give priority consideration" implies discretion on the part of a requested State, it is possible that the exercise of such discretion is limited or subject to review. Furthermore, a "requesting State" is one of the possible recipients enumerated under Article 57, paragraph 3 (c), there is a possible interpretation according to which Equatorial Guinea has a plausible right to return of the property.

11. Article 51 further supports a plausible right to co-operation, as it provides that asset return is a fundamental principle and that States parties shall afford one another the widest measure of co-operation and assistance in this regard. Therefore, even if the Court may find that Equatorial Guinea has no right under the Merida Convention on the merits, at the present stage, it is at least *possible* to interpret Articles 46, 51, 55 and 57 such that Equatorial Guinea enjoys plausible rights thereunder.

12. However, in the present Order, the Court concluded that Equatorial Guinea did not possess a plausible right to the return of the building located at 42 avenue Foch in Paris, on the basis of the provision it invoked in that respect (see paragraph 50 of the Order). This reads more like a judgment on the merits than an order in incidental proceedings. In my view, this goes against the objective of granting provisional measures under Article 41 of the Statute, which is to provide preventive protection against any action "likely to affect the rights which might be adjudged to belong to [the applicant] on the merits"⁹.

13. The Court, in its Order, after concluding the rights were not plausible (see paragraphs 50-51 of the Order), considered that it was not required to examine the other requirements for the indication of provisional measures, such as the risk of irreparable prejudice and the urgency for Court's protection of the alleged rights (see paragraph 52 of the Order), were satisfied. I believe that the Court could have offered a better path towards the resolution of the dispute. Setting aside the question of *prima facie* jurisdiction, I will briefly address the requirement of urgency and irreparable prejudice.

⁹ *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. 61.*

14. The Court may indicate provisional measures when irreparable prejudice could be caused to rights which have been asserted in the proceedings¹⁰. Furthermore, “the power of the Court to indicate provisional measures will be exercised only if there is urgency”, and this condition is met when “the acts susceptible of causing irreparable prejudice can ‘occur at any moment’ before the Court makes a final decision on the case”¹¹.

15. France argued, *inter alia*, that there is no risk of irreparable prejudice as Equatorial Guinea could be compensated with the proceeds of the sale of the property. However, had the Court found a plausible right to a return of the building, the possibility of the sale of the building undoubtedly represents a manifest risk of irreparable prejudice as it would prevent its recovery by Equatorial Guinea.

16. With regards to urgency, there is little doubt that French authorities are taking steps to proceed with the sale of the building, as demonstrated by the communication dated 27 May 2025 of the French Agency for the Management and Recovery of Seized and Confiscated Assets (“AGRASC”). France has stated that the sale is unlikely to occur in the next 18 months. Yet, it has provided no assurances that the sale will not take place before the Court renders its final judgment on the merits. Given the steps that have been taken toward renovating and selling the building, I believe that the urgency requirement is met.

17. France, on the one hand, asserts that it is unable to sell the building in the near future. On the other hand, it invites the Court to declare that Equatorial Guinea holds no plausible rights under the Merida Convention, thereby implying that France is entitled to proceed with the sale without delay. The more appropriate course of action would have been for France to simply state that it would refrain from selling the property until the Court has rendered its decision on the merits. Such a clear assurance would have constituted a more constructive step toward resolving the dispute.

18. I am of the view that ensuring the preservation of the *status quo* would have provided a more stable framework for the Parties to resolve their dispute under appropriate conditions and within a reasonable time frame. The Court should have seen fit to grant the provisional measures requested, given that their implementation would not have imposed a significant burden on the Respondent; according to France, the sale of the property in question could not have occurred within the next 18 months. I do not believe that a finding of non-plausibility will facilitate the resolution of the dispute between Equatorial Guinea and France.

(Signed) Taoheed Olufemi ELIAS.

¹⁰ See *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 664, para. 27.

¹¹ *Ibid.*, p. 664, para. 28.