SEPARATE OPINION OF JUDGE IWASAWA

The five requirements which must be satisfied for the Court to indicate provisional measures are cumulative — If one of them is not satisfied, the Court is not obliged to examine the others — The Court does not indicate provisional measures in the present case because the requirement of urgency is not satisfied — Germany's framework governing exports of military equipment appears robust — Nicaragua has not shown that Germany's conduct will give rise to any real and imminent risk of irreparable prejudice — Since one of the requirements is not satisfied, there is no need for the Court to examine the others, including the requirement of prima facie jurisdiction.

Plausibility is a test aimed at examining whether it is plausible that the rights asserted by the applicant exist under international law — In some cases, the Court has examined the facts and evidence in determining whether the rights asserted by the applicant are plausible — In Canada and Netherlands *v.* Syrian Arab Republic*, the Court examined evidence of alleged breaches of the plausible rights, in the context of the risk of irreparable prejudice and urgency.*

1. I voted in favour of the Court's decision not to indicate any provisional measures (Order, para. 26). Article 41, paragraph 1, of the Statute of the Court provides that "[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". In support of its decision, the Court merely states that,

> "[b]ased on the factual information and legal arguments presented by the Parties, the Court concludes that, at present, the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" (*ibid*., para. 20).

In this opinion, I will elaborate on the reasons why the circumstances are not such as to require the Court to exercise its power to indicate provisional measures in the present case.

*

2. In its jurisprudence, based on Article 41, paragraph 1, of the Statute, the Court has developed five requirements which must be satisfied for the indication of provisional measures: (i) prima facie jurisdiction; (ii) plausibility

of the rights asserted by the applicant; (iii) a link between the rights whose protection is sought and the measures requested; (iv) risk of irreparable prejudice; and (v) urgency. These requirements may be considered as constituting part of the "circumstances" set out in Article 41, paragraph 1, of the Statute.

3. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, the Court, after concluding that it had prima facie jurisdiction, examined the question of the applicant's standing in a separate section (*Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, pp. 16-17, paras. 39-42; see also *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands* v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023, I.C.J. Reports 2023 (II)*, pp. 602-603, paras. 48-51; *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)*, pp. 16-17, paras. 33-34). Since the question of standing concerns the admissibility of the application, it can be concluded that the Court considered prima facie admissibility to be a sixth requirement in addition to, and separate from, prima facie jurisdiction. However, since the question of standing may also be regarded as one of exercise of jurisdiction, it could be considered that the Court examined both the *existence* and the *exercise* of jurisdiction as part of its analysis on prima facie jurisdiction, thereby retaining five requirements.

4. Whether five or six in number, the requirements are cumulative. Accordingly, if the Court considers that one of them is not satisfied, it is not obliged to examine the others. In *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, the Court concluded that

> "[it] is unable to find in [the] alleged breach of [the respondent's] rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures".

The Court then added that "[it] is not called upon to decide any question of its jurisdiction to entertain the merits of the case" (*Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 11 and 13, paras. 33 and 44). In his separate opinion attached to the Order, President Jiménez de Aréchaga stated that

> "[b]efore interim measures can be granted all relevant circumstances must be present . . . However, to refuse interim measures it suffices for only one of the relevant circumstances to be absent . . . [N]one has a logical priority with respect to another. In view of the wide measure of discretion granted by Article 41, the Court is entirely free to determine

> in each case which of the relevant circumstances it will examine first." (*Ibid.*, separate opinion of President Jiménez de Aréchaga, p. 16.)

The Court followed a similar approach in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*. In those orders, the Court concluded that "the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" because "the rights claimed by [the applicant] . . . cannot now be regarded as appropriate for protection by the indication of provisional measures". In drawing such a conclusion, it noted that "in order to pronounce on the present request for provisional measures, the Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction" (*(Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 40 and 42-43; *(Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, paras. 43 and 45-46; see also case concerning *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. 141, para. 12).

*

5. I will first address the requirements of risk of irreparable prejudice and urgency, and explain their relevance to the Court's reasoning in this Order.

6. It is the practice of the Court to examine the risk of irreparable prejudice and urgency together, in a single section. The Court defines the requirement of risk of irreparable prejudice in the following terms:

> "The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences." (See e.g. *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. 24, para. 60.)

In the following paragraph, the Court sets out the requirement of urgency as follows:

> "However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a

> real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency 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 . . . The Court must therefore consider whether such a risk exists at this stage of the proceedings." (*Ibid.*, p. 24, para. 61.)

7. The Court has taken into account the nature of the asserted rights in determining whether the disregard of them may cause irreparable prejudice or entail irreparable consequences, in the sense that they could not be remedied by reparation ordered by the Court in a final judgment. For example, when a case concerns the life or health of persons, the Court has found that the requirement of risk of irreparable prejudice is met (see e.g. *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)*, pp. 26 and 28, paras. 66 and 74), where the Court explained in paragraph 66 that "[i]n view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the plausible rights in question . . . are of such a nature that prejudice to them is capable of causing irreparable harm".

8. The key question in the present case is whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused by the conduct of Germany before the Court gives its final decision. The urgency that was recognized by the Court in *South Africa* v. *Israel* cannot be transposed to the present case, because that case concerns the conduct of Israel, while the present case concerns the conduct of Germany.

9. During the oral proceedings, Germany emphasized that its legal framework governing the export of military equipment is robust. Germany underlines that it is bound by the stringent standards of the 2013 Arms Trade Treaty and the 2008 European Council Common Position. According to the Respondent, all applications for export licences are scrutinized by several ministries with reference to strict requirements. While "other military equipment" requires one licence before export, "war weapons" require two licences before export. Furthermore, individual licences can only be granted following a case-by-case assessment of an individual application on the basis of binding criteria. Germany maintains that its Government carefully assesses whether there is a clear risk that the particular item subject to licensing would be used in the commission of genocide, crimes against humanity or grave breaches of the Geneva Conventions of 1949. It stresses that its domestic law requires that account be taken of highly dynamic situations on the ground.

10. Germany also explained its practice concerning the export of military equipment to Israel. According to the Respondent, the total volume of licences granted for the export of military equipment to Israel has decreased significantly since November 2023. While the volume amounted to €203.01 million in October 2023 (of which €198.68 million were granted after 7 October 2023), it decreased to €23.59 million in November 2023, €19 million in December 2023, €8.42 million in January 2024, €0.59 million in February 2024, and €1.06 million in March 2024. Germany adds that over 25 per cent of military equipment is destined for eventual reimportation and use by the German armed forces. Furthermore, it maintains that 98 per cent of the licences granted since 7 October 2023 did not concern "war weapons" but "other military equipment". According to the Respondent, it has granted licences for the export of "war weapons" in only four instances, three of which concerned items that were for test and training purposes, and unsuitable for use in combat operations. The fourth licence, which concerned the export of 3,000 portable anti-tank weapons, was granted in the immediate context of the 7 October 2023 attack. The Respondent adds that Germany's highest authorities have called for Israel to ensure respect for international humanitarian law.

11. On the other hand, Nicaragua has not sufficiently shown that Germany has failed to exercise due diligence in reviewing its exports of military equipment to Israel.

12. Regarding the alleged suspension of funding to UNRWA, Germany explains that it took only a temporary decision not to approve further funds on 27 January 2024, and that no new payment was due in the weeks following that date. The Respondent adds that it agreed to release a €50 million assistance package to UNRWA from European Union funds on 1 March 2024. Germany also maintains that it has continued to provide humanitarian assistance through other organizations.

13. In light of the above, in my view, Germany's framework governing exports of military equipment appears robust, and Nicaragua has not shown that Germany's conduct will give rise to any real and imminent risk of irreparable prejudice before the Court gives its final decision. Accordingly, the requirement of urgency is not satisfied.

14. The Court's decision not to indicate any provisional measures appears to be predicated on the same reasoning, even though the Court does not state so explicitly. The Court first explains its approach as follows:

> "In the present proceedings, the Court considers that it must first 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." (Order, para. 13.)

It then develops its reasoning (*ibid.*, paras. 16-19), in effect addressing only the risk of irreparable prejudice and urgency. Based on such reasoning, the Court concludes that "the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" (*ibid.*, para. 20).

*

15. Since the five requirements are cumulative, and one of the requirements, urgency, is not satisfied, there is no need for the Court to examine the others. Thus, the Court need not examine the requirement of prima facie jurisdiction at this stage (see *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, paragraph 4 above), including the existence of a dispute and the application of the Monetary Gold rule which concerns the exercise of jurisdiction.

*

16. Nor is there any need for the Court to address the plausibility of rights or their link to the measures requested. However, I will briefly discuss the plausibility of rights to clarify what this test entails.

17. The Court formally introduced the requirement of plausibility of rights in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*. The Court declared that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible" (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57). Plausibility is a test aimed at examining whether it is plausible that the rights asserted by the applicant exist under international law.

18. According to Article 41 of the Statute, provisional measures are taken "to preserve the respective rights of either party". Provisional measures are usually requested by the applicant to preserve its rights, namely the rights of the *State* which instituted the proceedings. The concept of plausibility of rights becomes complex in cases involving human rights. In cases brought under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), the Genocide Convention, and the Convention against Torture, the Court has explained that there is a "correlation" between the respect for individual rights enshrined in the treaty, the obligations of States parties under the treaty, and the right of States parties to seek compliance therewith (see e.g. case concerning *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. 392, para. 126; *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. 20, para. 52; *Application of the*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023, I.C.J. Reports 2023 (II)*, p. 605, para. 57). It was by establishing such a "correlation" that the Court could conclude that the rights of the applicant *State* in those cases were plausible.

19. In the cases brought under CERD, the individual rights were those belonging to the nationals of the applicant State. In recent cases concerning obligations *erga omnes partes*, the individual rights were those belonging to nationals of another State — either the respondent, in *The Gambia* v. *Myanmar* and *Canada and Netherlands* v. *Syria*, or a third State, in *South Africa* v. *Israel*. The present case is similar to *South Africa* v. *Israel*. Although the correlation explained above is more remote in cases concerning obligations *erga omnes partes*, precisely because of the *erga omnes partes* character of the obligations at issue, the applicant's right to compliance by the respondent with those obligations has been found plausible.

20. As explained above, plausibility entails an inquiry into whether it is plausible that the rights asserted by the applicant exist under international law. In some cases, the Court has examined the facts and evidence in determining whether the rights asserted by the applicant are plausible (see e.g. *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 and 135, paras. 74-75 and 82). It may appear that in doing so the Court has examined the plausibility of the applicant's claim that the respondent has breached the rights asserted. In contrast, in the recent *Canada and Netherlands* v. *Syrian Arab Republic* case, the Court found that the rights asserted by the applicants were plausible based on the notion of correlation of rights, and then stated that the respondent's assertion that the applicants had not presented specific evidence of alleged acts of torture would be considered "in the context of the Court's examination of the conditions of a risk of irreparable prejudice and urgency" (*Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (Canada and Netherlands* v. *Syrian Arab Republic), Provisional Measures, Order of 16 November 2023, I.C.J. Reports 2023 (II)*, p. 605, para. 57). Thus, the Court examined evidence of alleged breaches of the plausible rights, in the context of the risk of irreparable prejudice and urgency.

(Signed) IWASAWA Yuji.