DECLARATION OF JUDGE TLADI

Assessment of "circumstances" requiring exercise of the Court's power under Article 41 of the Statute — Court must remain free to weigh all circumstances together in a fluid way — Conditions developed in Court's jurisprudence for indication of provisional measures are not a "box-ticking" exercise — Present Order is not inconsistent with the approach adopted by the Court in the past.

Explanation of the circumstances relevant to the Court's decision to not indicate provisional measures — Germany under a continuing duty to exercise due diligence in the export of arms and supply of military aid to Israel notwithstanding the Court's decision to not indicate measures.

1. While I voted in favour of the Court's Order, I feel it necessary to append this declaration to explain my view on two issues arising from the Order. First, that the Court's decision not to address in a pro forma manner the specific conditions for the indication of provisional measures developed in its jurisprudence is warranted *in this case*. Second, that notwithstanding the Court's decision not to indicate any measures at the present moment, there remains a duty on Germany, and indeed other States, to be vigilant and exercise due diligence in connection with any provision of military aid to Israel in the face of what might be serious breaches of international humanitarian law and possibly even genocide. The Court makes this point abundantly clear in the Order (paras. 23 and 24). Indeed, in my opinion, any export of military equipment to Israel, in light of the evidence adduced in the current proceedings and the present Order, would render Germany without a defence against responsibility in the event of a determination that, either a genocide or serious breaches of international humanitarian law were being perpetrated or even that there was a risk of such crimes being committed. By this I mean, given these proceedings and the reminder by the Court to States, in particular Germany, of "their international obligations relating to the transfer of arms", under current circumstances, it would hardly be open to Germany in the future to argue that it was not aware of the risks.

2. The Court chose its words in the *dispositif* very carefully. It did not, as it could have done, decide to "reject" the request for indication of provisional

measures but rather decided that "the circumstances, as they now present themselves to the Court, are not such as to require" the Court to indicate provisional measures (Order, para. 26). Yet the circumstances on the ground in Gaza and elsewhere in the Occupied Palestinian Territory are grave and by all accounts are worsening. Moreover, it is clear to me that the provision of military assistance to Israel by Germany (and others) has the real potential of contributing to and worsening an already grave situation. It also is undisputed that there are duties on the part of Germany to take measures to prevent the commission of any acts of genocide (Article 1 of the Genocide Convention), and to respect and ensure the respect of the Geneva Conventions (Common Article 1 of the Geneva Conventions). Nicaragua argues that these duties would be breached by the provision of military aid to a State such as Israel in circumstances where there is a real risk of the breach of said duties.

3. So why, given the gravity of the situation and the potential for a breach as alleged by Nicaragua, would the Court determine the circumstances as they now present themselves do not warrant the indication of provisional measures? The simple answer is that, in its oral submissions, Germany acknowledged the gravity of the situation and indicated that it, being aware of the gravity of the situation, had significantly reduced its provision of military assistance to Israel. According to Germany, since the outbreak of the military offensive complained of in October 2023, "no artillery shells [and] no munitions" have been licensed for export to Israel and "nearly all exports [to Israel] involve what is known as 'other military equipment', typically of a subordinate or defensive nature". Germany also submitted that almost 80 per cent of the total volume of exports was approved before the end of October 2023, i.e. before the intensification of the Israeli military offensive. Counsel for Germany further informed the Court that the last licence for export of military equipment, granted on 8 March 2024, "concerned a slip ring for the installation in a radar system" noting that "this is not an item that could plausibly be used to commit war crimes". Finally, Germany submitted that for the time being only a "limited number of requests for exports remain under review" and that the decisions on those requests would take into account current circumstances. This review process deserves a brief comment.

4. In its very detailed presentation Germany referred the Court to its rigorous domestic legal framework and processes as evidence that it exercises due diligence in the provision of arms to Israel and other States. It made plain that Germany's supply of "military equipment to Israel is subject to a continuous evaluation of the situation". In particular, counsel for Germany did submit that,

> "[i]n this case, the Court can trust in German law and in the continuing practice of the authorities responsible for its application: the stringent conditions they impose are sufficient to prevent any risk of prejudice to the rights at issue in this case".

The takeaway from all of this is that Germany, being aware of *its* obligations under international law, *will* exercise due diligence consistent with that obligation, as well as under its domestic legislative framework, to ensure that no transfer of military equipment contributes to breaches of either the Geneva Conventions or the Genocide Convention.

5. For the Court, these circumstances, i.e. the reduction in the rate of export licence approval, the domestic German legislative framework and the assurance of due diligence, are relevant circumstances to be considered in determining whether it is necessary to indicate provisional measures. Here, the Court did not deem it necessary to base its determination on the conditions it has established in its jurisprudence and rightly so. The Court established those conditions in its jurisprudence to explain why, in given cases, "the circumstances" required (or not) the indication of provisional measures. A consideration of the conditions is not a consideration of the Court's power to indicate provisional measures, "but is rather [a consideration] whether the case is a fit and proper one for exercising that power"[1]. In this case, the Court did not refer to those conditions in arriving at its decision, but its approach is not inconsistent with the framework of Article 41.

6. In its jurisprudence, the Court has developed a number of conditions that must be fulfilled before provisional measures can be indicated. These conditions include the determination of the Court's prima facie jurisdiction[2]; a plausibility test to establish if the rights asserted by the requesting party are plausible and if they have a sufficient link with the requested measures[3]; and an assessment of the urgency and the risk of irreparable prejudice to the rights asserted[4]. These conditions are important to ensure that the Court does not indicate measures arbitrarily and to ensure that there is *some* coherence in the Court's approach to the indication of measures.

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[1] See *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, separate opinion of Judge Shahabuddeen, p. 30.

[2] See e.g. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, pp. 217-218, para. 24; *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*, pp. 9-17, paras. 16-42.

[3] *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. 638, para. 53.

[4] *Ibid.*, pp. 645-646, paras. 77-78.

7. The problem is that in some cases, and I believe this to be one of them, these conditions may create a straitjacket that compels the Court to tick untickable boxes. This explains, in part, the Court's inconsistency with respect to, for example, the question of factual plausibility, i.e. whether in addition to the possibility of the existence of the rights being claimed, there is a condition of plausibility of breach on the facts. Already in 2011 Judge Koroma expressed frustration that, owing to the confusion concerning the test adopted in *Belgium* v. *Senegal*, he was unsure as to "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"[5]. The confusion about what element fits into which box is bound to arise when such a detailed framework is developed to evaluate circumstances which may require balancing of elements.

8. Yet ultimately the golden rule is to be found in Article 41 which sets forth "the power" of the Court to indicate "provisional measures which ought to be taken to preserve" the rights of the parties "if it considers that *circumstances so require*". The Court correctly developed the conditions described above to avoid arbitrariness. In fact, to my mind, the conditions set forth in the Court's jurisprudence can be summed in two elements. First, there has to be *some* prospect of success on the merits. In the jurisprudence of the Court, this element would be covered by the conditions of jurisdiction and plausibility of rights (and this includes whether there is a plausibility that the rights are being or have been infringed). It is only if there is some prospect of success on the merits, i.e. the Court has prima facie jurisdiction and there is a case to be answered at the merits stage, that the second element of a real and imminent risk of irreparable harm comes into play.

9. This broad understanding, I believe, is fully consistent with the Court's more elaborate framework (establishing conditions for the indication of provisional measures), and is, in fact, the same. Yet this broad understanding of the Court's framework allows greater flexibility for the Court when determining whether "the circumstances" require the indication of provisional measures and frees the Court from the straitjacket of filling in each box of its elaborate framework. It allows the Court to weigh the different elements in its framework in a more fluid way and obviates the need for the Court to tick each box mechanically. In the current Order, without making an attempt at ticking every box, the Court has decided to base its determination on Germany's submissions concerning its domestic framework for decision-

[5] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, separate opinion of Judge Koroma, p. 32, para. 12.

making, its acknowledgement of the seriousness of the situation and its assurance of the exercise of due diligence in making further decisions on the transfer of weapons to Israel.

10. Of course, these statements by Germany do not qualify as "assurances" within the meaning of the Court's jurisprudence. In *Belgium* v. *Senegal*, Senegal "solemnly declared" to the Court that it would not permit Hissène Habré to leave its territory and escape its jurisdiction for purposes of the obligation to prosecute or extradite[6]. Based on that unilateral declaration, the Court found that the object of the provisional measures proceeding was moot and did not indicate the measures requested by Belgium, on the basis that there was no longer an apparent risk of irreparable prejudice[7], or any urgency to justify the indication of provisional measures by the Court[8]. In this case, Germany has not made such an explicit "solemn declaration".

11. While Germany's statements do not amount to assurances within the meaning of the Court's jurisprudence, in the special circumstances of this case, where the primary obligations at issue — i.e. the obligation to prevent a possible genocide *by another State* and the duty to respect and ensure the respect of the Geneva Conventions *by another State* — themselves require the exercise of due diligence, it is appropriate to consider, in the balancing of the elements, the guarantees of Germany of the rigour of its process as sufficient reason *for the time being* not to indicate provisional measures. Now the Court could, of course, have decided to attach this consideration to one or other conditions necessary for the indication of provisional measures, such as urgence or risk of irreparable harm, or even plausibility. While that could easily be done, and would be good for formalism, it would not be an accurate reflection of the process by which the decision to not indicate provisional measures was arrived at. The Court must remain free to weigh all the elements together in a more fluid way than can be captured by a box-ticking exercise. At the same time, the Court should avoid creating the allure of rigid formalism when there is, in fact, a degree of fluidity.

12. I should be clear. I do not believe that what the Court has done amounts to the adoption of a different approach, or a departure from its jurisprudence. Rather than establishing a new approach, the Court's Order embraces a necessary degree of flexibility in the assessment of whether circumstances require the indication of provisional measures.

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[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*, pp. 146-147, para. 38.

[7] *Ibid.*, p. 155, para. 72.

[8] *Ibid.*, para. 73.

13. While the Court has not issued any provisional measures at this stage, the current Order makes plain that it expects Germany, and other States supplying weapons to Israel, to exercise due diligence and ensure that weapons transferred to Israel are not used in the commission of acts of genocide or breaches of international humanitarian law. For me this is not a hollow statement but a statement with real legal significance. In particular, in the consideration of the responsibility of Germany, or any other State, for breaches of either the Genocide Convention or international humanitarian law, including responsibility for not taking appropriate measures in the *face of a risk* of such breaches, the effect of this Order would be to remove any plausible deniability of knowledge of the risk.

(Signed) Dire TLADI.