DISSENTING OPINION OF JUDGE *AD HOC* AL-KHASAWNEH

Unusual character of Court's Order — Divergent from Court's rich and constant jurisprudence — Lack of reasoning — Urgency evidently satisfied — Monetary Gold principle inapplicable — Procedural flaw in hearing the Parties.

1. The Order issued today by the Court on the Request for the indication of provisional measures by Nicaragua is an unusual document, more notable for what it does not contain than for what it does and, as far as can be ascertained, unlike anything before it in terms of the long, rich and constant jurisprudence of the Court when faced with similar requests. At paragraph 26 (*dispositif*) of the Order, the Court finds that the circumstances, as they now present themselves, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. One would expect that such a finding would rest on a solid reasoned foundation (if only as a matter of professional commitment by the Court and, most probably, also as a matter of legitimacy), all the more so when what is at issue here is an ongoing human tragedy of semi-apocalyptic proportions and a real threat to international peace and security.

2. It goes without saying that it is within the Court's power not to indicate any measures. Even then, such a decision has to be based on solid reasoned grounds. Unlike in other cases where the Court declines to indicate provisional measures[1], in the present case neither Party nor indeed any other State knows on what basis the Court did not indicate any measures directed to Germany, as requested by Nicaragua — in other words, which requirement for the indication of provisional measures was deemed not to have been satisfied. It is truly unfortunate — above all for the Court's own standing and judicial function and ultimately for its relevance in these times of

[1] See e.g. *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 33; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 249, para. 89; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 132, para. 76.

perplexity and tumult — that the Court opted for a novel approach constituting a departure from its established jurisprudence in order to respond to Nicaragua's request for provisional measures in the present case[2].

3. As things stand, the Court is content with a minimalistic approach, comprising a statement that reminds all States, including Germany, of their obligations relating to the transfer of arms to what is euphemistically referred to as "parties to an armed conflict" (Order, para. 24) but in reality, concerns a State found by the Court to be plausibly engaged in an ongoing genocide[3]. The "reasoning" deployed to arrive at this platitude would, of necessity, bear the remotest of resemblance to the reasoning of a court of law and much in common with the compromise-seeking parlance and *oratio obliqua* of political discourse. Apparently, the contagion is spreading.

4. As is well known, the indication of provisional measures, which has as its purpose the protection of rights of both Parties pending a final determination of the case by the Court, depends on the satisfaction of certain criteria. It can be safely asserted that these are all fulfilled in the present case. Even the Court does not state otherwise. Indeed, the requirements of prima facie jurisdiction and standing, plausibility of rights that are related to the measures requested, and the risk of irreparable prejudice are plainly apparent from the facts of the case and the settled jurisprudence of the Court. In other words, this is a classic request for the indication of provisional measures.

5. Two matters nevertheless warrant further consideration. The first is urgency, to the extent that the Order (paras. 18-20) may contain an intimation within a hint of legal reasoning in this regard by relying heavily on statements by Germany to which Nicaragua did not have an opportunity to respond. Indeed, the Court's entire "reasoning" is comprised of five paragraphs, virtually all based on what Germany asserts. The second is the Monetary Gold principle, since it was argued extensively by Germany as grounds to preclude the rendering of any measures by the Court.

I. Urgency

6. Urgency must be satisfied "in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed

[2] CR 2024/15, pp. 58-59, para. 39 (Argüello Gómez).

[3] *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. 23, para. 54.

before the Court gives its final decision"[4], essentially requiring a factual determination. In this regard, Germany's decision to transfer 3,000 anti-tank weapons in the aftermath of 7 October 2023 is noteworthy. Anyone familiar with their use in civil wars would know or ought to know that, especially when employed against an enemy which does not have tanks, as is the case in Gaza, they are used to target homes and other buildings with the devastating effect of penetrating the building and indiscriminately incinerating everyone inside. That they have actually been used in an indiscriminate manner in Gaza is attested to by substantial evidence, including footage indicating the wanton use by Israeli soldiers of anti-tank weapons of the sort supplied by Germany against Palestinian homes in Gaza[5]. Equally noteworthy is Germany's permission to allow Israel to use the drones already in the latter's territory. Their use in attacking civilians had also been widely reported[6]. Of considerable significance in assessing the overall German policy is the fact admitted by Germany that weapons to Israel were prioritized immediately after 7 October 2023[7] and are indeed reported to include the possibility of transfers from Germany's own stockpiles[8].

7. Germany prides itself on its robust system designed to ensure that its arms shipments to foreign States meet a high threshold, reflecting Germany's deep concern for international law. There are no reasons to doubt the veracity of such assertions, nor the sincerity of Germany's attachment to those ideals. But a legitimate question arises, given that precisely when the decision to supply the aforementioned lethal weapons was made, both the civilian and military leadership of Israel were making the most blood-curdling genocidal statements ordering the annihilation of the people of Gaza in imitation of the annihilation of the Amalekites of biblical renown (a Semitic people obliterated by the ancient Israelites). The more secular among the Israeli leadership openly declared, among other similar statements, that no water or food will be available to the people of Gaza[9]. These were not merely instigations, but widely disseminated orders that came from people at the helm of power, revealing the otherwise elusive intent (*dolus specialis*) to commit genocide and that were acted upon. It was precisely at this point, when Germany must have known that a genocide was in the making, that it never-

[4] *Ibid.*, p. 24, para. 61.

[5] See e.g. Forensis, *Report: Short Study — German Arms Exports to Israel, 2003-2023*, p. 6.

[6] *Ibid.*, pp. 8 and 25-26.

[7] CR 2024/16, p. 20, para. 23 (Tams).

[8] Matthias Gebauer, Christoph Schult and Gerald Traufetter, "Waffenhilfe für den Gaza-Krieg: Bundesregierung prüft Lieferung von Panzermunition an Israel", *Der Spiegel*, 16 January 2024.

[9] See also *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. 22-23, paras. 52-53.

theless did not hesitate to contribute to the weapons and equipment required to accomplish it.

8. Learned counsel for Germany put much stock in the fact that there has been a significant decrease in German shipments to Israel. Notably, however, there has been no indication, let alone a guarantee, from Germany that this will not be reversed. And yet, it seems to have been the only ground that could have possibly persuaded the Court not to indicate measures at this time directed against Germany. There are none so blind as those who will not see[10]. Moreover, given Germany's assertion regarding the inherited collective guilt for what Nazi Germany did to European Jewry in the Second World War, as reiterated by Germany's distinguished Agent, any hope placed in the robustness of German guarantees might be overestimated. It is relevant that the Court, since at least *Equatorial Guinea* v. *France*[11], has considered the test of urgency to be satisfied when there is a possibility of recurrence. More specifically, "[t]he 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"[12]. There is no reason why it should be otherwise in this case.

9. Indeed, since the closure of oral hearings, Nicaragua has brought to the Court's attention information from the German Government concerning the export licences granted for Israel in 2024. These include war weapons and other military equipment, apparently not for training or test purposes, as Germany had suggested in respect of certain earlier licences. Licences granted in 2024 concern, among other things, ammunition for machine guns; propellant charges; items falling within the category of warships (surface or underwater), specialized naval equipment, accessories, components and other surface vessels; and, most ominously, *an item falling into the category of chemical agents, biological agents, irritants, radioactive substances, associated equipment, components and materials*[13]. It is also worth pointing out that the Court dealt with "other military equipment" as exclusively relating to non-lethal equipment. This was an oversimplification dealt with summarily by the Court since, under German law,

[10] Ultimately traceable to Jeremiah 5:21.

[11] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1169, para. 90.

[12] *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. 645, para. 78.

[13] For more comprehensive and detailed information, see Answer of the Federal Government of Germany to the parliamentary question by Sevim Dağdelen, Dr Sahra Wagenknecht, Ali Al-Dailami, other MPs and the BSW group, 10 April 2024; Supplementary question concerning the parliamentary question by the Sahra Wagenknecht Alliance Group on "German war weapons exports to Israel", 17 April 2024.

certain lethal weapons may fall under the "other military equipment" category.

II. Monetary Gold Principle

10. The pleadings in the present case have brought into sharp focus a number of issues relating to the status of the so-called principle or doctrine of an indispensable third State, otherwise known as the "Monetary Gold principle", as well as the weight to be afforded to it within the overall scheme of access to the Court.

11. Learned counsel for Germany expended considerable effort in attempting to prove that the invocation of the Monetary Gold principle is timely at this stage of the proceedings and applicable in that only a prior determination of Israel's responsibility for genocide would permit a continuation of the proceedings in the present one. Nothing is more debatable.

12. In the first place, a prior determination has already taken place in *South Africa* v. *Israel*, albeit in a preliminary manner[14]. But beyond this and as far as can be ascertained, there has not been one case where the Monetary Gold principle was successfully invoked at the provisional measures stage. In fact, there is one instance where the United States of America attempted to invoke an indispensable third State rule in *Nicaragua* v. *United States of America* and failed. The Court could not have been clearer. It stated that:

> "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection taken to jurisdiction is well-founded, yet it ought not to indicate such measures unless the provisions invoked by the Applicant

[14] *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. 23, para. 54. That the Court found there to be a plausible genocide is reflected in the Court's consideration of Israel's conduct and other relevant evidence before concluding that "at least some of the rights claimed by South Africa . . . are plausible". See *ibid*., pp. 20-23, paras. 46-53. Indeed, that the "plausible right" test has come to be a "plausible claim" test is reflected also in the Court's reasoning in other cases. See e.g. *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1167, para. 79; *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. 425, para. 53.

> appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded"[15].

Obviously, this is a reflection of the fact that the essence and purpose of provisional measures is to protect plausible rights from an imminent risk of irreparable prejudice. It is not apparent how an assessment of possible objections to admissibility is relevant to this purpose or is otherwise necessary for the indication of provisional measures.

13. Secondly, assuming that the doctrine could be invoked (*quod non*), the next issue is the condition that the legal interest of the third State should be the "very subject-matter of the decision" of the Court. However, what constitutes the very subject-matter of the decision is difficult to determine and open to divergent viewpoints. In any event, I fail to see how it could apply to a duty to prevent genocide for that duty is triggered as soon as a State, in this case Germany, learned or should have learned that a genocide is plausibly in the making. Given how openly and boastfully the intent (*dolus specialis*) to commit genocide was communicated by Israeli leaders and the fact that simultaneous on-the-ground implementation was taking place, it would be absurd for Germany to have to await the total completion of genocide before its responsibility could be engaged. In adjudicating compliance with Germany's responsibility to *prevent* genocide, a finding of the commission of genocide by Israel cannot, by definition, be the very subject-matter of the Court's decision. This applies with greater force with respect to the duty to ensure respect for international humanitarian law, not least because "[c]ommon Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions"[16]. Germany's responsibility was triggered as soon it knew or should have known of plausible violations of international humanitarian law and regardless of the ascertainment of intent on the part of Israel.

14. Thirdly, there is every reason to think that, in its limited dealings with the Monetary Gold principle, the Court never treated it as a *carte blanche* that would give third States a virtual veto power on the rights of other States to seek justice through resort to the Court. Thus, in *Nicaragua* v. *United States of America*, the first case where the principle arose after the

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 179, para. 24.

[16] International Committee of the Red Cross, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Commentary of 2016, para. 162.

Monetary Gold case itself, the Court delineated that principle in a very narrow manner. The Court stated that "*[t]he circumstances of the* Monetary Gold *case* probably *represent the limit of the power of the Court* to refuse to exercise its jurisdiction"[17]. The Court added that:

> "[t]here is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings."[18]

15. Fourthly, *Monetary Gold* is distinguishable from the situation where there is a treaty conferring jurisdiction on the Court. In the latter situation, the mere fact of being a party to the treaty with no reservation to its compromissory clause means and can only mean by necessary implication that the State party to the treaty in question has given its consent to refer the question to the Court. We must keep in mind that, in *Guyana* v. *Venezuela*, the inoperativeness of the Monetary Gold principle was based on the fact that the United Kingdom, as a party to the Geneva Agreement of 1966, had expressly given its consent for the proceedings to continue. There is no normative difference between this situation and the case of a State giving its consent by necessary implication by being a party to the Genocide Convention without reservation to Article IX.

16. Fifthly, as a matter of legal policy, the increasing interdependence of States, as exemplified by multilateral treaties, illustrates that it would be wrong to give the Monetary Gold principle wider scope than it is due and certainly wider than its founding judges could have ascribed to it. It should also be borne in mind that the existence of Articles 59, 62 and 63 provide statutory protection for third States whose legal interests might be significantly affected. This delicate balance should not be upset by giving more weight to the Monetary Gold principle than it deserves.

17. Lastly, the dearth of precedent can be gleaned from the attempt by distinguished counsel for Germany to find support for the so-called Monetary Gold principle in the fact that maritime delimitations by the Court stop before reaching the entitlements of third States. That fact can be used just as easily to support precisely the opposite conclusion, since the Court and other courts and tribunals never refrain from adjudicating on such cases due to the possible effect on third States. As a matter of fact, the question came to the forefront in *El Salvador/Honduras*, where the Court acknow-

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88 (emphasis added).

[18] *Ibid.*

ledged that its finding as to the existence of a condominium opposable to one of the parties or of a community of interests between the two parties would:

> "evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the case concerning *Monetary Gold*. . . . [I]t follows from this that the question whether the Chamber would have power to take a decision on these questions, without the participation of Nicaragua in the proceedings, does not arise; but that the conditions for an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled."[19]

So, here again, we find that the Court provided the avenue of third-State intervention as the proper remedy for any impact on a third State's legal interest, rather than the automatic application of the Monetary Gold principle. This yet again proves that the Monetary Gold principle is of modest and limited application.

III. Procedural Matters

18. Before concluding, I ought to put on record my serious misgivings at the way in which Nicaragua's request was dealt with by the Court. In the first place, a one-round two-hour pleading is hardly enough for justice to be done and to be seen to be done. In the present case, Germany did not reply in writing to Nicaragua's written request, so the latter did not know what to expect in the oral pleadings and, since Germany was also the last to speak, did not have the possibility to respond to Germany's submissions. I consider this a serious procedural flaw.

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19. For all the above reasons, I cannot concur with my learned colleagues' findings and feel in duty and conscience-bound to dissent.

(Signed) Awn Al-Khasawneh.

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[19] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 122, para. 73.