SEPARATE OPINION OF VICE-PRESIDENT SEBUTINDE

Although I have voted with the majority in rejecting Nicaragua's Request for provisional measures, I do not agree with the approach that the Court has adopted in handling the Request, nor do I agree with the scanty reasoning that underpins the Order — There is a need to strictly adhere to the criteria that the Court has developed in its jurisprudence for the indication of provisional measures — It is highly doubtful whether the Court has prima facie *jurisdiction as Nicaragua has not demonstrated that a dispute had crystalized between the Parties as of 1 March 2024 when it filed its Application — In any event, the Court is precluded from exercising its jurisdiction at this stage or at all in relation to any of Nicaragua's claims against Germany, since deciding on Germany's impugned conduct, would as a prerequisite, require the Court to first assess the lawfulness of the conduct of Israel, an indispensable third party that has not consented to these proceedings — The requirement of urgency has not been met because Nicaragua has not demonstrated that Germany's impugned conduct poses a real and imminent risk of irreparable prejudice to the rights of Nicaragua — Nicaragua's Request for provisional measures was rightly rejected.*

I. INTRODUCTION

1. Of recent, there is an increasing inclination amongst States to resort to the procedures referred to in Article 41 of the Statute of the Court. This trend may be attributed to the fact that the procedures offer easier and quicker means of obtaining binding orders from the Court, coupled with a relatively modest standard of proof required, even if ultimately, the success of the primary claim of an applicant seems bleak or uncertain. Furthermore, Article 74 of the Rules of Court gives priority to requests for the indication of provisional measures over other cases, ensuring prompt binding decisions from the Court, compared to substantive proceedings that could potentially span months or years before completion. Whilst the above characteristics underscore the importance and efficiency of provisional measures procedures within the Court's framework, the Court must jealously guard its judicial function by ensuring that these procedures are not abused or misused, and that applicant States strictly and transparently comply with the criteria the Court has developed in its jurisprudence relating to the indication of provisional measures. In my respectful opinion, the Court is once again being asked by a State to micro-manage the conduct of hostilities in the ongoing conflict between Israel and Hamas by issuing "provisional measures". Nicaragua's Request for provisional measures, if granted, would restrict military assistance to one of the parties to the conflict (Israel), regardless of whether that assistance is intended for Israel's own self-defence; while allowing the other party (Hamas) to maintain access to all kinds of military assistance from its friends and allies, regardless of whether that assistance is intended for unlawful purposes. Considering the immense global attention and public scrutiny surrounding this conflict, alongside its political nuances, the Court ought to have rigorously adhered to the criteria for the indication of provisional measures, to mitigate any perception of bias. Regrettably, the Court has deviated from this well-established approach, opting not to reference or apply any specific criteria but rather making general allusions to "the circumstances" of the case.

Need for a strict adherence to the criteria developed in the Court's jurisprudence for the indication of provisional measures

2. The Court has progressively developed legal standards to determine whether and when it should exercise its power under Article 41 of its Statute to indicate the provisional measures. These criteria include the determination of the Court's prima facie jurisdiction (and in some cases prima

facie standing of the requesting party)[1]; a plausibility test to establish if the rights asserted by the requesting party are plausible and if they have a link with the requested provisional measures[2]; and an assessment of urgency in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights asserted before the Court gives its final decision[3]. The Court has held that where any one of the above criteria is not met, the request for the indication of provisional measures will not be granted. In the present case, Nicaragua's failure to meet several of the above criteria is, in my view, fatal to the Applicant's Request.

3. Although I have voted with the majority in rejecting Nicaragua's Request for provisional measures against Germany, I do not agree with the strange approach that the Court has adopted in handling the Request, nor do I agree with the scanty reasoning that underpins the Order of the Court. There is also no discernible reason for shying away from an outright *rejection* or *dismissal* of the Request in the operative clause, in accordance with the usual practice of the Court. Instead, the Court has for no discernible reason, chosen to adopt the softer language reflected therein. The fact of the matter is that the Court has *rejected* Nicaragua's Request because *it does not meet the criteria* that the Court has developed in its jurisprudence for the indication of provisional measures. In this separate opinion, I give the reasons for my rejection of Nicaragua's Request.

II. PRIMA FACIE JURISDICTION

4. In the Order, the Court makes no mention whatsoever of the requirement for a showing of prima facie jurisdiction. Regrettably, other than a cursory conclusion in paragraph 21 of the Order that "[i]n the present case, there being no manifest lack of jurisdiction, the Court cannot accede to Germany's request" (to remove the case from the list), there is nothing in the Order showing how the Court arrived at such a conclusion ; nor is there any indication that the Court gave any prior consideration to the Parties' extensive arguments relating to jurisdiction and the exercise of jurisdiction.

5. The Court may indicate provisional measures only if the provisions relied on by the applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case[4]. In the present case, Nicaragua relies for jurisdiction on the Parties' Declarations accepting the compulsory jurisdiction of the Court under Article 36 (2) of the Court's Statute and Article IX of the Genocide Convention to which both Germany[5] and Nicaragua[6] are parties; there being no reservations in either Declaration relevant to the present case[7]. The Court would have jurisdiction over Nicaragua's claims under Article IX of the Genocide Convention only if it is demonstrated that

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[1] 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),* p. 6, 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*, p. 3, paras. 16-42.

[2] See e.g. *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.

[3] See e.g. *ibid.,* pp. 645-646, paras. 77-78.

[4] *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),* p. 6, para. 24.

[5] United Nations Treaty Series, Vol. 201, p. 369.

[6] United Nations Treaty Series, Vol. 120, p. 300.

[7] Nicaragua's reservation contained its Declaration dated 24 December 1929 relates to matters before 1901, while Germany's reservation contained in its Declaration dated 30 April 2008 relates to the deployment of its armed forces abroad and the use of German territory for military purposes.

they involve a dispute relating to the interpretation, application, or fulfilment of that Convention. Article IX of the Genocide Convention provides that:

> "Disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

6. For prima facie jurisdiction to be established, (i) a *dispute must exist* between the Parties as at the date of filing the Application (1 March 2024) and (ii) the acts complained of by the Applicant must be *capable of falling within the scope* of the treaty or treaties invoked.

The existence of a dispute

7. In the present case, the existence of a dispute (i.e. a disagreement on a point of law, a conflict of legal views or interests between the parties relating to "the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III") is a *sine qua non* for the exercise of jurisdiction[8]. To establish the existence of a dispute, the Court must consider any statements, conduct and exchanges between the Parties and determine whether, at the time Nicaragua submitted its Application, a dispute existed between the Parties concerning the claims at issue. Nicaragua's claims against Germany are categorized as follows[9]:

(a) Germany's alleged violation of the Genocide Convention through its failure to prevent the genocide against the Palestinian people in Gaza; its complicity in or facilitation of genocide by providing aid and assistance to Israel, in particular weapons that would or could be used in the commission of genocide; and by suspending the provision of funds to UNRWA.

(b) Germany's alleged violation of the Geneva Conventions of 1949 in particular, the Convention IV relative to the protection of Civilian Persons in times of war, and their Additional Protocol of 1977, by providing aid and assistance to Israel, in particular weapons that would or could be used in the commission of genocide, war crimes and crimes against humanity, including attacks directed against civilians or civilian objects.

(c) Germany's alleged violation of the principles of customary rules of international law, including *erga omnes* principles of international humanitarian law and peremptory norms of general international law, including the prohibition of racial discrimination and apartheid, including rendering assistance to Israel in its serious breaches of those norms.

(d) Germany's alleged violation of international law by failing to prosecute, bring to trial and punish persons responsible for, or accused of grave crimes of international law, including war crimes and apartheid, whether such persons are German nationals or not.

8. To prove the existence of a dispute, Nicaragua refers to two statements that it contends set out its complaint against Germany. *First*, the Applicant refers to a press release dated 1 February 2024 stating that Nicaragua had "notified the governments of the United Kingdom, Germany, the Netherlands and Canada of its decision to hold them responsible under international law for gross and systematic violations to the Convention on the Prevention and Punishment of the Crime of

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[8] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

[9] Application of Nicaragua, para. 67.

Genocide, international humanitarian law and customary law, including the law of occupation in the Occupied Palestinian Territories, in particular the Gaza Strip"[10]. *Secondly*, the Applicant refers to a Note Verbale dated 2 February 2024 sent by Nicaragua to Germany in which Nicaragua sets out its claim that Germany has violated the Genocide Convention as well as international humanitarian law and customary international law "in the context of its failure to prevent and facilitation of breaches of international law by Israel in its operation against Palestinians in the Occupied Palestinian Territories, particularly Gaza"[11]. Nicaragua argues that a spokesperson of the German Foreign Office made clear Germany's rejection of Nicaragua's claims in a press conference on 7 February 2024[12]. The Applicant also asserts that Germany continued to publicly reiterate its support for Israel after receiving Nicaragua's Note Verbale[13] and that Germany expressed its opposition to Nicaragua's claims on 11 March[14].

9. According to Germany, Nicaragua did not send its said Note Verbale using the ordinary diplomatic channels and Germany only located it on 13 February and acknowledged its receipt on 14 February 2024[15]. Subsequently, while Germany was considering its response. Nicaragua launched proceedings, without allowing for any opportunity to engage[16]. Accordingly, Germany contests the existence of a dispute and consequently, of prima facie jurisdiction. It argues that for a dispute to have existed, there must have been some form of meaningful engagement by Germany with Nicaragua's claim that would have crystallized the dispute[17].

10. In my view, Nicaragua's statements and communications referred to above contain only some but not all the claims that Nicaragua has asserted in its Application. Notably the statements refer to Germany's support for Israel and its temporary suspension of financial assistance to UNRWA as violating Germany's obligations under the Genocide Convention and international humanitarian law. However, Nicaragua's statements did not detail the third and fourth category of claims pertaining to Germany's alleged complicity in Israel's violation of the Palestinian people's right of self-determination, the maintenance of "an apartheid régime" and the failure by Germany to prosecute and punish persons responsible for grave crimes under international law[18]. The term "self-determination" is not mentioned at all in the Note Verbale and is mentioned only once in the press release. The word "apartheid" does not appear at all in either document and nor does either document mention any obligation by Germany to prosecute or punish any individuals for war crimes. Nicaragua's press release contains a single reference to "international humanitarian law and customary law" with no mention of any specific obligation violated or of the Geneva Conventions or of common Article 1, a key element in Nicaragua's claims. Thus, assuming, *arguendo*, that Nicaragua effectively communicated its claims to Germany (which is doubtful) this would only concern Nicaragua's allegations in relation to the Genocide Convention, and not its other claims.

11. More importantly however, is Germany's response to Nicaragua's Note Verbale and Press statement. On 7 February 2024 before Germany had located or seen Nicaragua's Note Verbale, a spokesperson for the German Foreign Ministry stated at a press conference in response to questioning

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[10] *Ibid.*, Ann. 3.

[11] *Ibid.*, Ann. 1.

[12] *Ibid.*, para. 30.

[13] CR 2024/15, p. 50, para. 7 (Argüello Gómez).

[14] CR 2024/15, pp. 50-51, para. 8 (Argüello Gómez).

[15] CR 2024/16, pp. 31-32, para. 28 (Wordsworth).

[16] CR 2024/16, p. 31, paras. 30-31 (Wordsworth).

[17] CR 2024/16, p. 31, para. 27 (Wordsworth).

[18] Application of Nicaragua, paras. 67 (5) and (6).

about the 1 February 2024 press release that "We reject the contents of the press release"[19]. Whilst in Nicaragua's view, this statement suffices to demonstrate Germany's opposition to all the claims of Nicaragua, this single statement by one German spokesperson is insufficient to show that a dispute existed regarding *all* of Nicaragua's claims at the time the Application was submitted. It is unclear which aspects of the press release or of Nicaragua's claims in this case Germany is said to have rejected. Nicaragua has not demonstrated how Germany's rejection of the press release can be said to have demonstrated its opposition to all of Nicaragua's claims contained in its Application, particularly given that most of those claims were not set out in the press release. At best, Germany's response or answer of its spokesperson can be said to demonstrate its opposition to Nicaragua's claim concerning the Genocide Convention, the only claim that was discussed in any detail in the press release. But even with respect to that claim, the relatively general and vague "rejection" does not clearly express opposition to the specific claims of complicity in genocide made in the press release. In my view, it is doubtful whether the Court has prima facie jurisdiction in the sense that a dispute had not crystalized between the Parties as of 1 March 2024 when Nicaragua prematurely filed the Application. Considering the foregoing conclusion, it is not necessary for me to determine whether Nicaragua's claim under the Genocide Convention is "capable of falling" within the provisions of that treaty. Besides the problem of prima facie jurisdiction, there is a bigger concern regarding whether the Court can exercise jurisdiction, assuming, *arguendo*, that it did have prima facie jurisdiction.

III. EXERCISE OF THE COURT'S JURISDICTION AND THE *MONETARY GOLD* PRINCIPLE

12. A more difficult hurdle for Nicaragua to overcome relates to Germany's argument that even if the Court were to find that it has jurisdiction (as indeed it appears to do in paragraph 21 of the Order) it is precluded from exercising that jurisdiction[20]. Germany argues that, since Israel's alleged violations of international law constitute the bedrock of Nicaragua's Application and Request for provisional measures (Nicaragua frequently refers to serious breaches by Israel of international humanitarian law ("IHL") and other peremptory norms of international law taking place in Palestine)[21], the Court must examine whether it is able to exercise jurisdiction during these proceedings, in the absence of Israel, an indispensable third State that has not consented to these proceedings[22]. Germany argues further that indicating provisional measures in the present case would entail a prior assessment of wrongful conduct on the part of Israel, yet Israel would have no standing to challenge the order without Nicaragua's consent[23], and that accordingly, the *Monetary Gold* principle requires the Court to reject Nicaragua's Request on that ground. For its part, Nicaragua contends that the subject-matter of its claims is not the conduct of Israel but that of Germany, namely, the alleged violation by Germany of its own obligations under the Genocide Convention and IHL[24].

13. A fundamental principle of international law is that the Court will not decide a dispute between sovereign States without their consent to its jurisdiction[25]. In a series of cases the Court, referring to this principle, has explained that it cannot exercise its jurisdiction in situations whereby deciding on the claim of one State against another State, would require it to rule, as a prerequisite,

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[19] Application of Nicaragua, Ann. 4.

[20] CR 2024/16, pp. 24-25, para. 6 (Wordsworth).

[21] CR 2024/16, p. 26-29, paras. 13-17 (Wordsworth).

[22] CR 2024/16, pp. 24-25, para. 6 (Wordsworth).

[23] CR 2024/16, pp. 25-26, paras. 8-9 (Wordsworth).

[24] CR 2024/15, pp. 39-48, paras. 10-33 (Pellet).

[25] Article 36 of the Statute of the Court.

on the lawfulness of the conduct of a third State (also referred to as an indispensable third party)[26]. This is often referred to as the *Monetary Gold* principle, taking its name from the relevant case. For the *Monetary Gold* principle to apply, there must be two key elements, namely (i) the legal interest of a third State must form "the very subject-matter of the decision"; and (ii) deciding upon the conduct of the third State must be a "prerequisite" for deciding upon the claim before the Court. If the principle is implicated, the Court should decline to exercise jurisdiction, even prima facie. To conclude otherwise would allow an applicant to receive the benefit of a binding order of the Court in circumstances when its claim will clearly be subject to dismissal for lack of jurisdiction or admissibility at a later stage of the proceedings. To determine whether the Court's prima facie jurisdiction is not barred by the *Monetary Gold* principle, it is necessary to examine each category of the Applicant's claims as presented in Nicaragua's own words.

1. Alleged violation of obligations under the Genocide Convention

14. The first category of Nicaragua's claims concerns the allegation that Germany has:

(a) breached and continues to breach its obligations under the Genocide Convention, in particular the obligation provided in Article I by, with full knowledge of the situation, failing to prevent the ongoing genocide against the Palestinian people in particular Gazans;

(b) breached and continues to breach its obligations under the Genocide Convention, in particular the obligation provided in Article I by . . . providing aid, including military equipment, to Israel that would be used in the commission of genocide by Israel, and by withdrawing the financial assistance to victims provided by UNRWA[27].

15. The obligation to prevent genocide arises as soon as there is a risk or indication that genocide may occur. State parties to the Convention have a legal duty to take measures to prevent genocide within their territories or under their jurisdiction. The international community as a whole has a responsibility to prevent genocide and States are encouraged to co-operate in preventing and suppressing acts of genocide. The obligation not to be complicit in genocide arises whenever a State has the knowledge or reasonable belief that genocide is being committed or is about to be committed and that State fails to take active steps to prevent or stop it. The obligation also entails refraining from any actions that could contribute to or facilitate genocide. However, the Court has held that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed"[28]. Thus, for the Court to be able to find that Germany has "failed to prevent the ongoing genocide by Israel against the Palestinian people in Gaza" or has been complicit in genocide by "providing aid, including military equipment, to Israel that would be used in the commission of genocide by Israel" as alleged by Nicaragua, it must necessarily find, as a prerequisite, that genocide has in fact been committed in Gaza by Israel. The latter is a precondition for the former. In other words, the conduct of Israel (an indispensable third party that has not given its consent in these proceedings) would form "the very subject-matter of the decision" and deciding upon that conduct would be a *prerequisite* for deciding upon Germany's impugned conduct. In my view, the above

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[26] See *Monetary Gold removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 28; *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Preliminary Objection, Judgment of 6 April 2023,* paras. 86-107.

[27] Application of Nicaragua, para. 67.

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnian and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 221, para. 431.

circumstances pose an irreconcilable obstacle to the exercise of the Court's jurisdiction. Exercising jurisdiction in those circumstances would run afoul of the *Monetary Gold* principle.

2. Alleged violation of obligations under Article 1 of the Fourth Geneva Conventions of 1949 and customary international law

16. The second category of claims concerns the allegation that Germany has:

(a) breached and continues to breach its obligations under Article 1 of the Fourth Geneva Conventions and the . . . principles of humanitarian law, not only by failing to ensure that the requirements of that Convention are complied with by Israel, but also by

(b) providing aid, including military equipment that would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes, in violation of its duties under the Geneva Conventions of 1949 and customary international law and

(c) by withdrawing Germany's financial assistance to UNRWA[29].

17. Under Article 1 of the Fourth Geneva Convention, which is common to the four Geneva Conventions, a State party undertakes to respect and ensure respect for the Conventions in all circumstances, regardless of whether it is a party to the conflict or not. States are under an obligation to take effective measures to prevent and suppress violations of the Conventions by their own armed forces, as well as by any persons or groups over which they exercise control. In its *Wall* advisory opinion, the Court observed that "It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with"[30]. Nicaragua does not claim that Germany itself has committed acts in Gaza amounting to serious violations of IHL. Rather, Nicaragua asserts that Germany has failed to comply with this provision to the extent its conduct has *aided or assisted Israel in violating international humanitarian law* or *has failed to ensure Israel's respect for these norms*[31]. As is clear from Article 16 of the ILC's Articles on State Responsibility and its commentary, a finding of *aid or assistance* requires as a prerequisite that a wrongful act be committed in the first place[32]. Determining the IHL violations by Israel would require the Court to engage in a detailed examination of Israel's military operations in Gaza and at the very least, to come to a tentative conclusion concerning the legality of those operations. This would run afoul of the *Monetary Gold* principle as it would require the Court to make determinations regarding Israel's conduct without Israel's consent[33].

18. A similar conclusion applies to Nicaragua's claim under common Article 1 of the Geneva Conventions. In examining this claim, is not clear whether the Court would be required to definitively conclude whether Israel's acts violate international humanitarian law. It may be enough for Nicaragua to show that the commission of such violations was "likely or foreseeable" for Germany's

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[29] Application of Nicaragua, para. 67.

[30] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, I.C.J. Reports 2004*, pp. 199-200, para. 158.

[31] Application of Nicaragua, para. 88.

[32] Articles on the Responsibility of States for Internationally Wrongful Acts, Article 16 and commentary.

[33] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 28.

obligations under common Article 1 to be triggered[34]. However, even determining the likelihood or foreseeability of IHL violations by Israel would require the Court to engage in a detailed examination of Israel's military operations in Gaza and at the very least, to come to a tentative conclusion concerning the legality of those operations. This would fall afoul of the *Monetary Gold* principle as it would require the Court to make determinations regarding Israel's conduct in the absence of Israel's consent[35]. In other words, deciding upon the conduct of Israel in Gaza would form "the very subject-matter of the decision" and is a "prerequisite" for deciding upon Germany's impugned conduct.

3. Alleged violation of other obligations under customary international law

19. The third category of claims concerns the allegation that Germany has breached and continues to breach its conventional and customary law obligations, including the obligation to facilitate and co-operate in bringing about the Palestinian people's right to self-determination, by providing aid and particularly military equipment to Israel that is used to deny this right of self-determination and moreover helps to maintain and impose an alleged apartheid regime.

20. A State is said to assist or be complicit in the violation of peremptory norms of international law, such as the right to self-determination, when it provides support, assistance, or encouragement that facilitates or enables the commission of violations of such norms by another State or non-state actor. For the Court to determine whether Germany's conduct amounts to a violation of this obligation, it would have to make a prior determination that Israel (an indispensable third State that has not consented to these proceedings) had violated those norms in the first place. This too would be inconsistent with the *Monetary Gold* principle as it would require the Court to make determinations regarding Israel's conduct in the absence of Israel's consent[36]. As the Court noted in the *East Timor* case, the *Monetary Gold* principle applies even if the right in question is a right *erga omnes*[37].

4. Alleged violation of the obligation to prosecute and punish

21. The last category of claims concerns the allegation that Germany has breached and continues to breach international law by refusing to prosecute, bring to trial, and punish persons responsible for, or accused of grave crimes under international law, including war crimes and apartheid, whether such persons are German nationals or not[38]. In this regard, Nicaragua seems to expect Germany to assert universal criminal jurisdiction over persons allegedly committing these grave crimes outside Germany (i.e. in the Occupied Palestinian Territories).

22. States are obliged to investigate and prosecute *individuals within their jurisdiction* who are responsible for committing grave crimes under international law. Treaty law, such as the Geneva Conventions and their Additional Protocols, the Rome Statute of the International Criminal Court and the Genocide Convention, establish specific obligations for States parties thereto to prosecute and punish individuals responsible for grave crimes. Whilst some States may choose to assert universal jurisdiction over individuals accused of serious international crimes, there is no obligation

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[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Judgment, I.C.J. Reports 1986*, p. 130, para. 256.

[35] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 28.

[36] *Ibid.*

[37] *Ibid.*, p. 102, para. 29.

[38] Application of Nicaragua, para. 67.

under international law for Germany to establish universal jurisdiction over grave crimes committed outside Germany or by non-German nationals. A decision to establish universal jurisdiction is ultimately a matter of national law and policy for each State. In the present case, for the Court to determine whether Germany's impugned conduct amounts to a violation under international law, it would have to make a prior determination that Israel (an indispensable third State that has not consented to these proceedings) was in violation of the Genocide Convention or the prohibition against apartheid or that individuals in Israel had committed grave crimes under the Rome Statute. This too would run afoul of the *Monetary Gold* principle as it would require the Court to make prior determinations regarding Israel's conduct without Israel's consent[39].

23. In conclusion, I am of the view that even if one was to conclude that the Court did have jurisdiction in this case, prima facie the Court cannot exercise that jurisdiction in relation to any of Nicaragua's claims against Germany, since deciding on Germany's impugned conduct, would require the prior assessment, of the lawfulness of the conduct of Israel, an indispensable third party that has not given its consent to these proceedings. For me, this conclusion is not only dispositive of Nicaragua's Request for provisional measures but is also fatal to Nicaragua's primary case against Germany. I would have disposed of Nicaragua's case at this stage.

IV. THE PRE-CONDITION OF URGENCY AND RISK OF IRREPARABLE PREJUDICE

24. Germany argues that there is no imminent risk of harm to Palestinians in Gaza associated with Germany's provision of assistance to Israel. In this regard, Germany notes that its existing legal procedures for exporting arms remove any imminent risk that Germany would assist Israel in violating international law[40]. Furthermore, Germany highlights the significant drop in military assistance to Israel since 7 October 2023[41]. Finally, Germany emphasizes that it continues to provide humanitarian assistance and that, in any event, the lack of humanitarian aid in Gaza is not caused by a lack of funding, but rather a lack of coordination in distribution of humanitarian aid, amongst other problems[42].

25. The Court has stated that "the power of the Court to indicate provisional measures will be exercised only if there is an urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision"[43]. In assessing the existence of such a risk, the Court is not requested to establish breaches of the relevant international rules or make definitive findings of fact, but instead, may consider whether the asserted rights are of such a nature that their violation may entail irreparable consequences[44].

26. In its rulings in the *South Africa* v. *Israel* provisional measures Orders, the Court noted the dire humanitarian situation in the Gaza Strip and concluded that the situation is at severe risk of

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[39] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 28.

[40] CR 2024/16, p. 44, paras. 14-16 (Palchetti).

[41] CR 2024/16, p. 46, paras. 25-27 (Palchetti).

[42] CR 2024/16, p. 47, paras. 32-35 (Palchetti).

[43] *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.

[44] *Ibid.*, p. 649, para. 90.

further deterioration before the Court issues its final judgment[45]. However, the present case is not about Israel's ongoing military offensive in Gaza, as such. Rather, it concerns the role played by Germany in relation to Israel's conduct. In paragraphs 16 to 20 of the Order, the Court rightly highlights Germany's role and conduct regarding the kind and value of military assistance it has supplied to Israel during the Israeli/Hamas war. In particular, the Court rightly notes that Germany's existing legal framework for the manufacture, export and marketing of weapons and other military equipment is stringent and rigorous enough to removes any "real and imminent risk of irreparable harm to Nicaragua's asserted rights" that Germany's conduct would otherwise cause[46]. Furthermore, Germany highlights the significant drop in military assistance to Israel since 7 October 2023[47]. Finally, although Germany emphasizes that it continues to provide humanitarian assistance to the victims in the Occupied Palestinian Territory and that, the lack of humanitarian aid in Gaza is not caused by a lack of funding but rather of maldistribution[48], Germany is under no legal obligation under international law, much less under the Genocide Convention, to donate humanitarian assistance to victims of war anywhere. Accordingly, the requirement of urgency has also not been met in this case.

V. CONCLUSION

27. Considering the foregoing, the conditions for the indication of provisional measures in the present case have not been met. The Court does not have prima facie jurisdiction to entertain Nicaragua's claims on the grounds that Nicaragua's Application was prematurely filed before a dispute had crystalized between the Parties. Alternatively, the Court cannot exercise its jurisdiction, even prima facie, in relation to any of Nicaragua's claims against Germany, on the grounds that deciding on Germany's conduct would require it to assess, as a prerequisite, the lawfulness of the conduct of Israel, an indispensable third party that has not given its consent in this case. Finally, the requirement of urgency has not been met. Nicaragua's Request for provisional measures was therefore rightly rejected.

(Signed) Julia SEBUTINDE.

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[45] See *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,* para. 72; *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 26 January 2024 indicating Provisional Measures, Order of 28 March 2024,* para. 40.

[46] CR 2024/16, p. 44, paras. 14-16 (Palchetti).

[47] CR 2024/16, p. 46, paras. 25-27 (Palchetti).

[48] CR 2024/16, p. 47, paras. 32-35 (Palchetti).