DECLARATION OF JUDGE CLEVELAND

1. I join the Court's decision not to indicate provisional measures in the present proceeding. The ongoing situation in Gaza is catastrophic, as the Court now has recognized multiple times. The question before the Court in this particular proceeding is "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" as a result of the actions of Germany in providing military assistance to Israel (Order, para. 13). This includes the question whether Nicaragua has demonstrated a real and imminent risk of irreparable prejudice to the rights it invokes.

2. In paragraphs 23 and 24 of today's Order, the Court addresses the obligations of States, including Germany, under international humanitarian law and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention"), in the context of the export of military equipment. I write separately to elaborate on the duties of States parties under Article 1 common to the Geneva Conventions of 1949 and Article I of the Genocide Convention with respect to arms transfers, as well as the information before the Court regarding Germany's framework for implementing those obligations (*ibid.*, paras. 16-18).

I. THE DUTY TO PREVENT

3. Common Article 1 of the Geneva Conventions imposes affirmative obligations on States parties "to respect and to ensure respect" for the Geneva Conventions "in all circumstances", while Article I of the Genocide Convention obligates States parties to "prevent" genocide[1]. It is common ground between the Parties, and consistent with the jurisprudence of the Court (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)* (hereinafter "*Wall Advisory*"), p. 200, para. 159; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986* (hereinafter "*Nicaragua* v. *United States*"), p. 114, para. 220, and p. 129, para. 255), that these provisions encompass positive obligations to prevent violations of these treaties by third States. It is also common ground that these obligations go beyond duties to refrain from "complicity" in violations by third States, such as that required under Article III, paragraph *(e)*, of the Genocide Convention, or from "aiding or assisting" internationally wrongful acts by third States under general international law[2].

A. Article I of the Genocide Convention

4. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court found that a State's obligation to prevent genocide under Article I of the Genocide Convention, and the corresponding duty to act, "arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed" (*Judgment, I.C.J. Reports 2007 (I)*, p. 222, para. 431). The Court explained:

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[1] In full, Article I provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

[2] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, UN GAOR, 56th Sess., Supp. 10, Ch. 4, UN Doc. A/56/10 (2001), art. 16.

> "From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit." (*Ibid*.)

The Court underscored that a State's duty is "to employ all means reasonably available to [it], so as to prevent genocide so far as possible" (*ibid*., para. 430). Thus, a State will incur international responsibility if it "manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide" (*ibid*.). The Court emphasized that in these circumstances "due diligence", involving an assessment "*in concreto*" of the factual circumstances, is of critical importance (*ibid.*)[3]. In the context of the Genocide Convention, these obligations necessarily impose a duty to prevent genocide with respect to the conduct of third States as well as the conduct of non-State armed groups.

5. The Court distinguished the obligation to prevent under Article I from the concept of "complicity" or the substantially equivalent concept of "aiding and assisting" violations of international law. While the prohibition on "complicity in genocide" under Article III, paragraph *(e)*, imposes negative obligations on a State to refrain from acting — e.g. to not furnish aid or assistance to the perpetrators — the Article I duty to prevent imposes positive obligations on States to take action or "to do their best to ensure that such acts do not occur". The duty to prevent thus may be violated by the "mere failure to adopt and implement suitable measures to prevent genocide from being committed". Moreover, complicity in genocide requires acting with "full knowledge" that genocide is about to be committed or is under way, coupled with provision of support that "enable[s] or facilitate[s]" the *actus reus*. The obligation to prevent, on the other hand, is triggered if "the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed". In addition, a breach of the obligation to prevent turns, not on whether a State's actions actually facilitated or supported acts of genocide, but whether the State took all measures reasonably available to it once a serious risk was present. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 217, para. 420, and pp. 222-223, para. 432.)

B. Common Article 1 of the Geneva Conventions

6. Common Article 1 of the 1949 Conventions (as well as Article 1 of Additional Protocol I of 1977) provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". In the *Wall Advisory* Opinion, the Court held that Common Article 1 imposes an obligation on all States parties to ensure compliance with the Conventions by third States, "whether or not [the State] is a party to a specific conflict" (para. 158).

7. In *Nicaragua* v. *United States*, the Court held that this obligation requires States parties to refrain to from "encouraging" international humanitarian law violations, whether by third States or

[3] The Court concluded that a State that failed to fulfil its obligation to prevent genocide ultimately would be responsible for breaching Article I "only if genocide was actually committed" (*ibid.*, para. 431). It emphasized, however, that "this obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act" (*ibid.*).

non-State armed groups (paras. 220, 255). This duty arises at least in circumstances where the commission of such violations was "likely or foreseeable", or the State was aware of "allegations" that the belligerents' conduct was not consistent with humanitarian law (*ibid.*, para. 256).

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8. In the context of military assistance, the obligations to prevent under Article 1 of the Geneva Conventions and the Genocide Convention necessarily impose a duty on States parties to be proactive in ascertaining and avoiding "the risk that such arms might be used to violate the . . . Conventions" (see Order, para. 24).

9. In light of these and other international legal obligations regulating arms and transfers of military equipment, the Council of the European Union has adopted a binding Common Position governing control of exports of military technology and equipment. Under those rules, Member States "shall . . . deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law"[4].

II. THE GERMAN LEGAL FRAMEWORK GOVERNING MILITARY EXPORTS

10. Germany acknowledges that Article 1 of the Geneva and Genocide Conventions impose affirmative obligations of conduct, including the positive obligations to exert its influence on parties to an armed conflict to observe international humanitarian law and the obligation of States parties to "conduct a proper risk assessment for decisions regarding exports of military equipment and arms"[5]. Germany is also bound by the EU Common Position, and represents that in implementing this Common Position, where the German authorities identify a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law, "they must deny the export licences".

11. Germany is also a State party to the Arms Trade Treaty, which regulates the transfer of conventional arms. Under Article 6 (3) of that Treaty, a State party:

> "[S]hall not authorize any transfer of conventional arms . . . if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches . . . attacks directed against civilian objects or civilians . . . or other war crimes".

Germany recognizes these obligations as binding law. It further maintains that "[i]f an export is not prohibited under this provision [of the Arms Trade Treaty], German authorities assess the potential that the item could be used to commit or facilitate a serious violation of international humanitarian

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[4] EU Council Common Position 2008/944/CFSP of 8 December 2008, OJ 2008 L 335/99 (as amended by Council Decision (CFSP) 2019/1560), OJ 2019 L 239/16, Art. 2 (2) *(c)*.

[5] Citing International Committee of the Red Cross (ICRC), Commentary of 2016, common Art. 1, para. 165; ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria — a Practical Guide* (2nd ed. 2016), p. 13.

law" pursuant to Article 7 of the Treaty. According to the Respondent, "[i]f they find an 'overriding risk' of such a negative consequence, they may not authorize the export". Importantly, Germany additionally maintains that its legal framework "provides for constant reassessment in the light of highly dynamic situations on the ground".

12. Germany stated before the Court that it implements its international obligations regarding military exports through a "strict" "four-layered" domestic legal framework. The German Constitution prohibits the export of weapons without a licence by the federal Government. German domestic statutes regulate weapons exports, as do the EU Common Position and the Arms Trade Treaty. At least four ministries are involved in licensing decisions, with authorizations of "war weapons" requiring two licences issued at the ministerial level. The German Parliament and courts also exercise some oversight.

13. Of course, for a State to comply with the obligations to prevent under Article 1 of the Geneva and Genocide Conventions, its legal framework must function properly in practice. However, as detailed by the Court, the information presented regarding Germany's military assistance to Israel, including with respect to the value, content and volume of transfers and actual military licences issued in recent months (Order, paras. 17 and 18), does not presently establish a real and imminent risk of irreparable prejudice to the rights Nicaragua invokes as a result of the actions of Germany.

14. The circumstances before the Court are not analogous to those confronted by The Hague Court of Appeal concerning distribution of F-35 fighter jet parts from the Netherlands to Israel. In that case, the Dutch court concluded that the Netherlands did not treat the military licensing requirements under the EU Common Position and the Arms Trade Treaty as obligatory, since the standards of "clear risk" and "overriding risk" were balanced against political and diplomatic considerations, including relations with allies such as Israel and the United States[6]. The Netherlands did not recognize an obligation of continuing review of the situation on the ground for standing licences[7], and the evidence before the Dutch court established that F-35 fighter planes were being actively deployed by Israel in the Gaza conflict[8].

15. I therefore agree with the Court's conclusion that Nicaragua has not 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.

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16. As the Court recognizes, the obligations under Article 1 of the Geneva and Genocide Conventions apply to all States parties, not only Germany. They apply to all armed conflicts, including the devastating conflict in Gaza. And they apply with respect to potential

[6] *Oxfam et al.* v. *The Netherlands*, Hague Court of Appeal, ECLI:NL:RBDHA:2023:19744, Judgment of 12 February 2024, paras. 5.36-37 and 5.51.

[7] *Ibid.*, para. 5.23.

[8] *Ibid.*, para. 5.15.

violations by States and non-State actors. Thus, all States parties have an international legal obligation to exercise due diligence in relation to their arms exports and military assistance "in order to avoid the risk that such arms might be used to violate the Conventions" (Order, para. 24), whether the risk may arise from the State of Israel, from Hamas, or from other States or non-State armed groups participating in this, or any other, armed conflict.

(Signed) Sarah H. CLEVELAND.