## DECLARATION OF JUDGE BHANDARI

*Two kinds of application, to be treated differently — test for the indication of provisional measures under Article 41 of the Court's Statute — binding assurances before the Court — the Court is required to examine only one element of the test, i.e. prima facie jurisdiction — unnecessary to examine other elements of the test.*

1. I agree with the Court's decision not to indicate provisional measures. I make this declaration to set out my view on the appropriate approach to a party's request for the indication of provisional measures in circumstances where, as here, the opposing party has made binding assurances or undertakings before the Court substantively in the terms of the requested measures.

2. The test for granting provisional measures under Article 41 of the Statute is well established in the Court's jurisprudence. The test in general comprises the following elements: (1) 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; (2) the rights asserted by the party requesting such measures are at least plausible; (3) irreparable prejudice could be caused to those rights or the alleged disregard of such rights may entail irreparable consequences; (4) 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) (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*, paras. 15, 35, 60 and 61).

3. In my view, the Court must make a distinction between an ordinary application for the indication of provisional measures and an application for the indication of provisional measures where the opposing party offers legally binding assurances or undertakings substantively in the terms of the requested measures.

4. In my opinion, in dealing with applications involving binding assurances and undertakings, the Court is required to examine only one element of the test, i.e. prima facie jurisdiction, as mentioned in paragraph 2 of this declaration. The Court need not examine other elements of the test. The application can be disposed of in terms of the assurances and undertakings.

5. There have been previous instances in which a party has, in response to a request for the indication of provisional measures, provided assurances in the form of a binding undertaking in the terms (or at least partially so) of requested measures. On 28 September 2023, Armenia filed a Request for the indication of provisional measures in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan)* (Armenia had filed other such requests in those proceedings before). The Court made its Order further to that request on 17 November 2023. In those proceedings, however, Azerbaijan provided undertakings, including at the hearing, that mirrored the terms of several of Armenia's requested measures (CR 2023/22, pp. 22- 23, para. 27).

6. In its 17 November 2023 Order in that case, the Court held that these undertakings were legally binding on Azerbaijan (*Application of the International Convention on the Elimination of All*

*Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 17 November 2023*, para. 62). The Court then stated as follows:

> "63. The Court observes that many of Azerbaijan's undertakings address the concerns expressed by Armenia in the fifth Request, although the undertakings do not correspond in all respects to the measures requested by Armenia. . . .
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> 64. In the view of the Court, the undertakings made by the Agent of Azerbaijan at the public hearing on the afternoon of 12 October 2023 contribute towards mitigating the imminent risk of irreparable prejudice resulting from the operation commenced by Azerbaijan in Nagorno-Karabakh on 19 September 2023 but do not remove the risk entirely" (*ibid.*, paras. 63-64).

7. Similarly, in an Order in the same case dated 22 February 2023, the Court took note of an undertaking the Agent of Azerbaijan had made during the hearing on 30 January 2023 on a request by Armenia for the indication of provisional measures. The Court then added, however, that this undertaking "does not remove entirely the imminent risk of irreparable prejudice" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023*, p. 28, para. 56).

8. As is clear from the passages above, the Court took the undertakings in those proceedings into account under the heading of "risk of irreparable prejudice". The undertakings, therefore, in the Court's view in that case, had an effect on whether that particular element for the test for indicating provisional measures had been satisfied.

9. Here, too, the Court states at paragraph 34 of its Order that "in light of [Ecuador's binding assurances before the Court], the Court considers that there is at present . . . no . . . imminent risk of irreparable prejudice to the rights claimed by the Applicant". The Court then adds at paragraph 35: "[T]he conditions for the indication of provisional measures identified in its jurisprudence are cumulative. Therefore, having found that one such condition has not been met, the Court is not required to examine whether the other conditions are satisfied." Ecuador's assurances are set out at paragraphs 30 and 31 of the Order.

10. In my view, however, the effect of such binding assurances is broader. Where a party offers legally binding assurances in response to a request for the indication of provisional measures and those assurances mirror the terms of the request, then the Court need not, if it is satisfied on a prima facie basis that it has jurisdiction, examine the other elements of the test. Rather, the assurances remove the need for provisional measures to the extent they mirror the terms of the request. It strikes me as unnecessary to analyze such assurances under the heading of "risk of irreparable prejudice". Instead, they go to the more general question of whether it is necessary to indicate provisional measures at all, which can go beyond the question of whether there is a risk of irreparable harm.

*(Signed)* Dalveer BHANDARI.

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