SEPARATE OPINION OF JUDGE HIGGINS

Limitations ratione temporis *to declarations made under Article 36, paragraph 2, of the Statute — "Disputes" — "Situations or Facts" — Reciprocity — "Continuing" events or violations of law — Prima facie jurisdiction for purposes of Article 41 of the Statute — Matters to be decided at provisional measures phase and matters to be reserved for more thorough later consideration — Two alternative consequences of an absence of prima facie jurisdiction — Judicial authority and creativity dependent on jurisdiction.*

1. Where one State has accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute with a limitation *ratione temporis* and the other State has accepted the jurisdiction without such a limitation,

> "nevertheless, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of the Court, it is recognized that this limitation holds good as between the Parties" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 22).

2. The declaration accepting the Court's compulsory jurisdiction made by the Federal Republic of Yugoslavia on 25 April 1999 states in part that:

> "I hereby declare that the Government of the Federal Republic of Yugoslavia recognizes, in accordance with Article 36, paragraph 2, of the Statute of the International Court of Justice, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the said Court in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts subsequent to this signature, except in cases where the parties have agreed or shall agree to have recourse to another procedure or to another method of pacific settlement . . ."

This follows, with a small variation, the well-known so-called "Belgian declaration" of 1925 by which any retrospective jurisdiction of the Court *ratione temporis* was precluded both as to disputes and as to situations and facts.

3. The declaration made by Portugal contains no such limitation, but it applies *inter se* to identify the scope *ratione temporis* of the Court's

jurisdiction, for the reason set out in paragraph 1 of this opinion. This is so even though the Portuguese declaration lacks the customary invocation of the condition of reciprocity. This is because that condition appears as an element within Article 36, paragraph 2, itself.

4. It may, of course, be the case that, while the dispute has clearly arisen subsequent to the critical date for jurisdiction, the situations or facts giving rise to the dispute appear to have occurred before that date. That was exactly the situation in the *Phosphates in Morocco* case, where the Permanent Court addressed the possibility that acts "accomplished after the crucial date", when "taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 23). Equally, there exists the possibility that acts carried out prior to the crucial date "nevertheless gave rise to a permanent situation inconsistent with international law which has continued to exist after the said date" *(ibid.)*. This latter eventuality is indeed reflected in the International Law Commission's Draft Article 25 on State Responsibility (*Yearbook of the International Law Commission*, Vol. II, Part II, p. 80).

5. It is not the Court alone which has had to formulate jurisprudence on the concept of "continuing events": so has the European Court of Human Rights (see *Yagci and Sargin* v. *Turkey, European Human Rights Reports*, 1995, p. 505); and so also has the Human Rights Committee (see *Guye et al.* v. *France,* No. 196/1985, 3 April 1989, 35th Session); and *Siminek* v. *The Czech Republic* (No. 516/1992, 31 July 1995, 54th Session).

6. The Court gave its own answers to this issue in *Phosphates in Morocco*. It explained that the problem of whether there were "continuing events" that gave rise to a cause of action after the crucial date must be examined in the particular context of each case. But two factors always have to be borne in mind: the first is that

> "it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 24).

And second, it was necessary to see if the facts were merely a necessary and logical consequence of earlier ones which were barred from scrutiny by the temporal reservation. On the particular facts of the *Phosphates*

case, the Court found that the cited facts and situations could not be viewed as "a final step and crowning point" of the earlier events (*P.C.I.J., Series A/B, No. 74*, p. 26) nor did they "alter the situation which had already been established" (*ibid.*, p. 27). Nor could they be separated from those that had arisen before the crucial date.

7. That this particular jurisdictional problem, as any other, requires close attention to be given to the intention of the State issuing its declaration with limitations or reservations was stated by the Permanent Court in the *Phosphates in Morocco* case and recently affirmed by this Court in the case of *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment* (*I.C.J. Reports 1998*, p. 454, para. 49). It is striking that the Federal Republic of Yugoslavia did not advance arguments before the Court suggesting either continuing events or a continuing dispute (the latter not having been an issue in *Phosphates in Morocco*). It squarely based itself on a dispute it perceived as arising, and situations and facts that it perceived as occurring, after the crucial date of 25 April. It did not wish any dispute there may have been between itself and Portugal prior to 25 April to be subject to the Court's jurisdiction, nor any situations and facts relating to such dispute. That was the intention of the Federal Republic of Yugoslavia and it was clear. But within that intent there was also a hope — the hope that there could be identified a dispute that arose only *after* 25 April. Certainly there were events, occurring after 25 April, that were the subject of the Federal Republic of Yugoslavia's complaint (though these were not specified by date or in any detail). But the Court has not been able to see a dispute arising only after 25 April. The claim that aerial bombing by NATO, and NATO States, was illegal, was made in the Security Council on 24 March and 26 March, and rebutted there. The conditions specified in the *Mavrommatis* case (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*) for the existence of a dispute were thus met at that time.

8. No doubt the continuation of the bombing and the targets hit after 25 April has aggravated and intensified the dispute. But every aerial bombardment subsequent to 25 April does not constitute a new dispute. In short, there are situations and facts occurring subsequent to the crucial date, but there is not at the present time a dispute *arising* subsequent to that date. In effectively realizing the intention (which the Court must respect) of its declaration, the Federal Republic of Yugoslavia was not

able also to realize its hope. Its declaration accordingly fails to invest the Court with jurisdiction.

9. Of course, in the *Phosphates in Morocco* case the Court was addressing temporal limits at the phase of preliminary objections. But because the Court must be satisfied that it has jurisdiction, at least prima facie, before considering whether the conditions of Article 41 of the Statute are met for the indication of interim measures of protection, the question must be dealt with here at this stage, albeit on a provisional basis.

10. Complex issues arise for the Court in satisfying itself that it has a jurisdiction at least sufficient to consider indicating provisional measures under Article 41 of the Statute.

11. Minimal guidance is provided in the Statute and in the Rules of Court as to legal requirements relating to the indication of provisional measures. Article 41 of the Statute merely provides that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". This shows both the function of interim measures and the fact that the Court has a discretion as to their indication — but nothing else. The Rules of Procedure in their successive versions have provided little guidance on the application of Article 41 of the Statute, with those of 1936 and 1978 reflecting the most significant developments in the practice (for details, see Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice,* 2nd ed.). It has been through the case law of the Court that the many different legal elements relating to provisional measures have evolved (no interim judgment to be given: case concerning the *Factory at Chorzów, P.C.I.J., Series A, No. 12*; nexus between rights to be protected and the measures sought: *Legal Status of the South-Eastern Territory of Greenland, P.C.I.J., Series A/B, No. 48; Polish Agrarian Reform and German Minority, P.C.I.J., Series A/B, No. 58*; meaning of the protection of the rights of the parties; the question of extension and aggravation of the dispute: *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 79.*

12. It is equally through its case law that the Court has had to address the jurisdictional problems that arise when a request for the indication of provisional measures is made before the Court has definitively established its jurisdiction in a case.

13. In the *Anglo-Iranian Oil Co.* case, the Court stated that, because "it cannot be accepted *a priori*" that the claim "falls completely outside the scope of international jurisdiction" the Court could entertain the request for interim measures of protection (*Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951,* p. 93). At the same time, the Court

noted that the indication of such measures "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*I.C.J. Reports 1951*, p. 93).

14. This latter statement of the consequences for subsequent phases of an Order for interim measures has remained essentially unchanged over the years. However, the jurisdictional prerequisites for the issuance of interim measures of protection have undergone important developments in the jurisprudence. Indeed, the debate had already been heavily engaged within the *Anglo-Iranian Oil Co.* case itself. In their dissenting opinions, Judges Winiarski and Badawi Pasha viewed the Court as finding that it was competent to indicate interim measures of protection "if prima facie the total lack of jurisdiction of the Court is not patent, that is . . . there is a possibility, however remote, that the Court may be competent" (*ibid.*, p. 97). But observing that interim measures of protection were in international law even more exceptional than in municipal law, as they were "a scarcely tolerable interference in the affairs of a sovereign State", they ought not to be indicated unless the Court's jurisdiction was "reasonably probable".

15. In *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, the Court refined the formula, stating that when considering a request for the indication of provisional measures, it had no need "finally to satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest" (*Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 15).

16. In the *Nuclear Tests* case (1973), France insisted that the Court was "manifestly not competent in the case". The Court, departing in part from the formula it had used the year before in the *Fisheries Jurisdiction* case, stated that it "need not . . . finally satisfy itself that it has jurisdiction on the merits of the case", but that it ought not to indicate provisional measures "unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 101). In none of the next three provisional measures cases (*Trial of Pakistani Prisoners of War, Order of 13 July 1973, I.C.J. Reports 1993*, p. 328; *Aegean Sea Continental Shelf, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3; *United States Diplomatic and Consular Staff in Tehran, Order of 17 December 1979, I.C.J. Reports 1979*, p. 7) was the question of jurisdiction the main basis for the order.

17. In *Military and Paramilitary Activities in and against Nicaragua, Provisional Measures* (*Order of 10 May 1984, I.C.J. Reports 1984*, p. 179) the Court came back to the issue, repeating the exact formula of

the *Nuclear Tests* case. That formula is now firmly established (*Arbitral Award of 31 July 1989, Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990,* pp. 68-69; *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991,* p. 17; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 11, and *Order of 13 September 1993, ibid.*, pp. 16-17; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),* p. 12; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998,* p. 255, para. 23; and *LaGrand, Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* p. 13, para. 13).

18. Thus a party seeking the indication of provisional measures must show a prima facie basis upon which the Court's jurisdiction in the case might be founded. That being said, several questions (which have a particular relevance in the present case) remain. What is sufficient to show the required "prima facie" basis for jurisdiction? And what jurisdictional matters will the Court look at, as necessary for this purpose, at the provisional measures stage, and what will it reserve for any further hearings on jurisdiction?

19. It is the practice of the Court that weighty and complex arguments relating to its jurisdiction will not usually be addressed at the provisional measures phase but rather will be regarded as appropriate for resolution only at the preliminary objections phase. The Co-Agent of the Swiss Government in the *Interhandel* case suggested that the Court would not wish, at the interim measures phase, to adjudicate "upon so complex and delicate a question as the validity of the American reservation" (*Interhandel, Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957,* p. 111). The Court, there being able to base its refusal to indicate provisional measures on other grounds, gave no answer to this question. In the *Nuclear Tests* case of 1973, Australia advanced detailed arguments alleging the continued validity and applicability of the General Act of 1928 as a separate basis for jurisdiction. Without distinguishing the General Act from Article 36 of the Statute, the Court satisfied itself with saying that "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973,* p. 102).

20. In the *Military and Paramilitary Activities in and against Nicaragua* case (1984), the Court was faced, at the provisional measures stage, with very complicated arguments relating both to the legal effect of the

United States declaration of 6 April 1984 and to the apparent failure of Nicaragua to have deposited an instrument of ratification of the protocol to bring its adherence to the Statute of the Permanent Court of International Justice into effect. The Court briefly recounted the legal problems associated with each of these provisions and stated that it:

> "will not now make any final determination of the question of the present validity or invalidity of the declaration of 24 September 1929, and the question whether or not Nicaragua accordingly was or was not, for the purpose of Article 36, paragraph 2, of the Statute of the Court a 'State accepting the same obligation' as the United States of America at the date of filing of the Application, so as to be able to rely on the United States declaration of 26 August 1946, nor of the question whether, as a result of the declaration of 6 April 1984, the present Application is excluded from the scope of the acceptance by the United States of the compulsory jurisdiction of the Court . . ." (*Order of 10 May 1984, I.C.J. Reports 1984,* p. 180).

The Court satisfied itself with saying that "the two declarations do nevertheless appear to afford a basis on which the jurisdiction of the Court might be founded" *(ibid.)*.

21. In the present case the Court has also not made any final determination upon the question of the Federal Republic of Yugoslavia's status or otherwise as a Member of the United Nations and thus as a party to the Statute having the right to make a declaration under Article 36, paragraph 2, thereof. This is clearly a matter of the greatest complexity and importance and was, understandably, not the subject of comprehensive and systematic submissions in the recent oral hearings on provisional measures.

22. Of course, just as with the question of Nicaragua's ratification of its adherence to the Statute of the Permanent Court in the *Military and Paramilitary Activities in and against Nicaragua* case, it might be thought that the status of the Federal Republic of Yugoslavia was a necessary "préalable" to everything else. But when dealing with provisional measures the Court is faced with unavoidable tensions between the demands of logic and the inability to determine with finality when operating under urgency in response to a request for provisional measures. The operational principle is that matters of deep complexity will if possible be left to one side in determining the prima facie jurisdiction of the Court for purposes of Article 41.

23. In the *Nuclear Tests* cases and in the *Military and Paramilitary Activities* case, the Court equally held over certain arguments relating to declarations under the Statute. By contrast, the Court in this case has addressed, for purposes of provisional measures, both the terms of the declarations of the Federal Republic of Yugoslavia and Portugal and the

interaction of the declarations of the Federal Republic of Yugoslavia and Portugal.

24. The prima facie test of jurisdiction does not make it sufficient merely to note the very existence of two declarations at this stage. This is not to be deduced from the statement of the Court in the *Cameroon* v. *Nigeria* provisional measures case that "the declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute constitute a prima facie basis upon which its jurisdiction in the present case might be founded" (*I.C.J. Reports 1996 (I)*, p. 21, para. 31). The Nigerian request for a reconsideration of the rule in the *Rights of Passage* case, as it bore on the interpretation of its own declaration, clearly fell into that category of complex and weighty objections to jurisdiction that had to be deferred for proper consideration until the preliminary objections phase. In that particular light (and because the *Rights of Passage* principle was well established in the Court's case law), the declarations would in the meantime be treated as establishing prima facie jurisdiction.

25. The same guiding principles apply to treaties said to provide a basis for the Court's jurisdiction. Thus the several complicated arguments that had been advanced in connection with Article IX of the Genocide Convention were not addressed in the provisional measures phase of the *Genocide* case of 1993; and it was against that background that the Court said that Article IX of the Convention appeared to "afford a basis on which the jurisdiction of the Court might be founded" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 16; and *Order of 13 September 1993, I.C.J. Reports 1993,* p. 342).

26. But it should not be thought that mere invocation of a jurisdictional clause, with nothing more, suffices to establish a prima facie basis of the Court's jurisdiction. It cannot be otherwise, because the jurisdiction of the Court — even if one might regret this state of affairs as we approach the twenty-first century — is based on consent. And consent to jurisdiction cannot be established, even prima facie, when it is clear from the terms of the declarations themselves that the necessary consent is not prima facie present, or simply is not present, *simpliciter*. As Sir Hersch Lauterpacht put it in his separate opinion in the *Interhandel* case, the test of jurisdiction of the Court prima facie is met if, in the relevant instruments, there are "no reservations obviously excluding its jurisdiction" (*I.C.J. Reports 1957,* pp. 118-119). Reservations relevant for this purpose are both those in a State's own declaration and those that it may rely on reciprocally.

27. Yugoslavia made no submission at all to the Court on either the optional clause declaration of Portugal or on its interplay with its own reservation. It did not tell the Court why, when read with Article 62, paragraph 2, itself, Portugal's reservation and that of the Federal Republic of Yugoslavia did not together exclude prima facie jurisdiction. Nor did Portugal rely reciprocally on Yugoslavia's declaration, no doubt deeming that to be inconsistent with the position it took alleging the declaration to be invalid. But the Court cannot fail to consider these matters, and none of them is so obscure and complicated that it could not be dealt with at this stage; and nor was that suggested by Yugoslavia.

28. As the Court stated in the *Norwegian Loans* case: "since two unilateral declarations are involved [reciprocal] jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it" (*Judgment, I.C.J. Reports 1957,* p. 23). And the Court clearly stated in *Fisheries Jurisdiction (Spain* v. *Canada)* that:

> "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court." (*I.C.J. Reports 1998,* p. 453, para. 44.)

Each of these dicta appears in the judgments on jurisdiction, these not having been provisional measures cases. But a State seeking the introduction of provisional measures must show that jurisdiction prima facie exists, notwithstanding conditions, reservations and the operation of reciprocity between declarations.

29. The restraint upon the liberty of action of a State that necessarily follows from the indication of provisional measures will not be countenanced unless, prima facie, there is jurisdiction. But an absence of prima facie jurisdiction at this stage and for this purpose does not necessarily mean that jurisdiction may not, in the event, later be established. However, if in considering whether there is jurisdiction prima facie for purposes of Article 41 of the Statute, it is clear beyond doubt that no jurisdiction exists in a particular case, good administration of justice requires that the case be immediately struck off the List *in limine.*

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30. Finally, it should not be thought that the Court, because it has had to address the question of its prima facie jurisdiction in the case brought

by the Federal Republic of Yugoslavia, is indifferent to the great suffering in Kosovo and Yugoslavia. Indeed, the preambular paragraphs to its Order show otherwise. Nor does it seek to avoid making its contribution to an elucidation of the heavily contested issues of law. But the Court can take on its responsibilities within the United Nations system and use its judicial authority and creativity only when it has jurisdiction. In this case, the Court's jurisdiction has yet to be established even prima facie.

(Signed) Rosalyn HIGGINS.