SEPARATE OPINION OF JUDGE *AD HOC* COUVREUR

[Translation]

"Procedural loyalty" — Principle of good faith — General obligation not to prejudice the rights at issue pendente lite — *Situation of heightened tension between the Parties — Provisional measures reiterating such a general obligation as a precaution — Measures requested by the Applicant aimed at influencing the holding of the referendum planned by the Respondent — Preliminary considerations — "Domaine réservé" — The Court and domestic law — Domestic legislation and international lawfulness — Referendum convened and questions posed — Conditions traditionally imposed for the indication of provisional measures — Prima facie jurisdiction to entertain the merits and jurisdiction to indicate certain measures — Need for the Court to respect Article 2, paragraph 7, of the Charter in exercising the powers conferred on it under Article 41 of the Statute — "Plausibility" of the rights invoked on the merits and sufficient link between those rights and the provisional measures sought — Absence of such a link when the measures requested cannot protect the rights in question since the object of those measures is not capable of affecting those rights — Real and imminent risk of irreparable prejudice to the rights considered plausible — Domestic act of sovereignty unaccompanied by implementing measures capable of affecting the "external sphere" is unlikely, per se, to constitute or create such a risk.*

1. I voted in favour of the Court's Order because, in my opinion, it is a general principle that the procedural relationship established between the parties and a court, and between the parties themselves in relation to the court, gives rise to a duty of "procedural loyalty"[1] incumbent on them from the outset of the proceedings, which finds practical expression in a general obligation not to prejudice the rights at issue *pendente lite*. When territorial rights are involved, "freezing" claims and maintaining the status quo of situations are the necessary corollary of this. Preserving these rights as they stand, throughout the proceedings, is crucial to ensuring that the decision the court is ultimately required to take in respect of them is not deprived of effect[2]. This fundamental principle, which also protects all the rights at issue, guar-

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[1] See e.g. Ph. Couvreur, "Réflexions sur la 'loyauté' dans les rapports judiciaires internationaux", in *La loyauté, Mélanges offerts à Étienne Cerexhe*, Larcier, 1997, pp. 67 *et seq.*

[2] In its Order of 5 December 1939 indicating interim measures of security in the case concerning the *Electricity Company of Sofia and Bulgaria*, the PCIJ stated the following, in particular:

antees the integrity of the proceedings and the sound administration of justice. Arising from the principle of good faith, it implicitly but necessarily determines the conduct of every party to the proceedings by the very fact of its existence. The corresponding obligation to which it gives rise is immediate. One could therefore contend that the institution of proceedings in itself serves as a provisional measure[3]. The measures indicated by the Court in this case merely reiterate this pre-existing general obligation, in a slightly more precise form and tailored to the circumstances as perceived by the Court[4]. Faced with a situation of mounting and rather troubling tension between the Parties, the Court, in performing its duties under Article 41 of its Statute, considered that it was obliged to indicate "precautionary" measures, intended solely to safeguard the Parties' rights *sub judice*, without prejudging or, *a fortiori*, prejudicing those rights in any way.

2. While I therefore endorse this reiteration of an obligation inherent in the status of party, I could not have supported the indication of any of the measures sought by the Applicant aimed at preventing the holding of the referendum called by the Venezuelan authorities or changing the wording of the questions that those authorities propose to ask, even though I recognize that in the current climate, the discretionary exercise by the Respondent of its constitutional prerogatives may well have a negative impact on relations between the Parties and thus affect the equanimity of the ongoing proceedings.

3. The Court chose not to indicate such measures. Nevertheless, I think it is helpful to set out briefly the reasons why I believe it acted appropriately.

4. I will first make some preliminary remarks relating, in turn, to the *domaine réservé* of States, the traditional attitude of the Court towards States' domestic law, the relationship between domestic legislation and international lawfulness, and, finally, the envisaged referendum.

> "[Article 41] of the Statute applies the *principle universally accepted* by international tribunals and . . . laid down in many conventions . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given." (*Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 79*, p. 199 (emphasis added).)

[3] See S. Rosenne, *The Law and Practice of the International Court*, Nijhoff, 2005, p. 427 and reference to the *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 152.

[4] Commenting on the above-mentioned decision of the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, J. Sztucki writes:

> "First, the Court clearly . . . recognises the existence of *certain duties* of the litigants under *general international law* and apparently regards treaty provisions to the same effect as *only declaratory* of those duties. Secondly, the Court recognises . . . the function of interim measures *as a corollary* of those duties", J. Sztucki, *Interim Measures in the Hague Court*, Kluwer, 1983, p. 82 (emphasis added).

5. I shall then examine the three conditions that would have to be satisfied, in accordance with the well-established jurisprudence of the Court, for such provisional measures to be indicated.

I. Introductory Remarks

A. The Domaine Réservé

6. The first three provisional measures whose indication was sought by Guyana were frankly unprecedented in that they asked the Court to interfere directly, and radically, with the exercise of basic constitutional prerogatives by the competent authorities of a sovereign State. Such a request could not fail to raise, almost instantaneously, the question of the *domaine réservé*, which was unsurprisingly mentioned at the hearings[5].

7. It is not unusual for contemporary international jurists to appear somewhat uneasy when the *domaine réservé* is invoked. Not only does the notion — or rather its substance — often seem ill-defined to them, but sometimes, beyond that, they also experience a sense of embarrassment when a State has recourse to it, as if such recourse were a socially unacceptable act in an international community that is supposed to be increasingly integrated and united, in which the selfish interests of individual States must give way to those of the group, which take precedence. It is true that reliance on the *domaine réservé* has not always been free of abuse, but this does not mean of course that the notion belongs to the past. By way of example, one need only refer to the declarations recognizing the jurisdiction of the Court as compulsory which are currently in force to see that recourse to the *domaine réservé* is still very much present in the practice of States[6].

8. There is little need to recall here the content of Article 2, paragraph 7, of the Charter, whose terms are familiar:

> "Nothing contained in the present Charter shall authorize the *United Nations* to intervene in matters which are *essentially* within the *domestic jurisdiction* of any state or shall require the Members to submit such matters to *settlement* under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[7]

[5] See CR 2023/24, pp. 22-24. It is regrettable that it was not possible to hear from Guyana on this matter.

[6] Today, some 30 declarations made under Article 36, paragraph 2, of the Statute of the Court — i.e. almost 40 per cent of all such declarations — still expressly exclude from the Court's jurisdiction matters falling within the exclusive jurisdiction of the declarant State. In five instances, it is even specified that it is for the declarant State itself to define these matters.

[7] Emphasis added.

9. One is struck by the relatively broad terms used to define the *domaine réservé* of States in this provision, particularly when compared to those of Article 15, paragraph 8, of the Covenant of the League of Nations: (1) they now concern *all* organs of the United Nations, including the Court (and no longer just the Council); (2) they cover all matters which are "*essentially*" within the jurisdiction of the Members, and no longer only those "*solely*" within their domestic jurisdiction; and (3) they no longer speak of the need to refer *to international law* in order to determine which matters are subject to that jurisdiction. The desire of the Charter's drafters to enlarge the scope of the "domestic jurisdiction" of Member States in the face of the powers of the United Nations is very clearly discernible from the provision's *travaux préparatoires*[8].

10. At the same time, it is well known that the notion of *domaine réservé* has been the subject of increasingly restrictive interpretations since 1945, particularly in legal writings[9]. Scholars today thus frequently cast doubt on the theory of the "*domaine réservé par nature*", according to which certain matters remain under all circumstances and permanently outside the reach of international law, owing to their close connection to the "very existence" of the State[10]. They contend that it is not actually possible to determine *a priori* and in a precise and definitive way all matters that would fall within the *domaine réservé* of the State, and that the extent of this preserve necessarily decreases as international law broadens its scope to encompass matters traditionally regarded as forming a part of that domain[11].

11. There is in fact nothing new in this, the Permanent Court of International Justice (PCIJ) having itself already declared in a well-known *obiter* of 1923 that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon 'the development of international relations'"[12]. This is how, fortunately, the practice of the United Nations and its Member States has made it possible to "remove" from the exclusive domestic jurisdiction of those States such essential questions of collective interest as those concerning respect for human rights and decolonization.

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[8] See e.g. G. Guillaume, in J.-P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies, Commentaire article par article*, 3rd ed., Economica, 2005, pp. 485 *et seq.* The text that was ultimately adopted reflects the clearly expressed wish of the four host Powers.

[9] See e.g. G. Arangio-Ruiz, "Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne", *Collected Courses of the Hague Academy of International Law*, Vol. 225, 1990-VI, pp. 29 *et seq.*

[10] See e.g. P. C. Ulimubenshi, *L'exception du domaine réservé dans la procédure de la Cour internationale*, University of Geneva, GIIS, Thesis No. 649, pp. 35 *et seq.*

[11] See e.g. M. Forteau, A. Miron and A. Pellet, *Droit international public*, 9th ed., LGDJ, 2022, pp. 686 *et seq.*

[12] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24. See also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 25, para. 59.

12. There is, however, another *obiter* of the Permanent Court which, *mutatis mutandis*, beyond the reference to the specific terms of the Covenant, remains generally valid today:

> "[w]ithout th[e] reservation [in Article 15, paragraph 8, of the Covenant], the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, *give way to the equally essential interest of the individual State to maintain intact its independence* in matters which international law recognises to be solely within its jurisdiction."[13]

13. The smooth conduct of international relations thus entails a dynamic balance between the demands on the organs of the United Nations to exercise their statutory functions, on the one hand, and the need to respect the national jurisdictions of its Members, on the other.

14. Even if there is no *domaine réservé* "*a priori*" or "*par nature*", and even though it is now established that, notwithstanding the terms of Article 2, paragraph 7, of the Charter, the scope of this domain at a given moment is to be determined in the light of international law, there are matters that this law, although expanding, still in principle leaves to the national jurisdiction of States.

15. Thus in 1923, the PCIJ found that "questions of nationality [were] . . . in principle within this reserved domain"[14]. The present Court confirmed this in its celebrated 1955 *Nottebohm* Judgment[15], to which I shall briefly return later, and more recently in its 2021 Judgment on the preliminary objections in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*[16].

16. Nor is it disputed today that the development and exercise of a State's constitutional powers as such fall, in principle, within its *domaine réservé*[17].

17. It is only when matters of national jurisdiction are in some way subject to a rule of international law, be it conventional or general, that they, or certain aspects of them, can be "removed" from the *domaine réservé* of the State. As the PCIJ again explained in its 1923 Opinion,

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[13] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 25 (emphasis added).

[14] *Ibid.*, p. 24.

[15] *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 20.

[16] *Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 81.

[17] See e.g. *Dictionnaire de droit international public*, J. Salmon (ed.), Bruylant, 2001, p. 356.

> "it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States"[18].

Likewise, as the PCIJ recognized in particular in its 1932 Advisory Opinion on the *Treatment of Polish Nationals in the Danzig Territory*, while the constitution and laws of a State do not in principle fall "within the domain of . . . international relations" and are "matters of domestic concern"[19], the exercise of the exclusive jurisdiction involved can result in the breaching of that State's international obligations: the matter in question thus "leaves" the *domaine réservé* of the said State[20].

B. The Court and the Domestic Law of States

18. This is why the Court is quite often called upon to consider the domestic law of States. Indeed, assessing the lawfulness of a State's conduct under all the rules of international law frequently requires the Court to examine acts of a State's legislative, executive and judicial powers under its domestic law. The examples in the jurisprudence of both courts are as numerous as they are diverse. For instance, one can cite the various cases of the PCIJ in which it was required to examine whether a State's domestic law — in the broad sense — was in compliance with peace treaties or related instruments (see for example the case concerning *Certain German Interests in Polish Upper Silesia*[21]), and those of the ICJ in which the Court had to consider the conformity of a State's domestic law with international norms governing, among other things, immunities (see for example the *Arrest Warrant*[22], *Jurisdictional Immunities of the*

[18] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24.

[19] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 25. See also the observations of G. Arangio-Ruiz, "Le domaine réservé. L'organisation internationale et le rapport entre droit international et droit interne", *Collected Courses of the Hague Academy of International Law*, Vol. 225, 1990-VI, pp. 210 *et seq.*

[20] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, pp. 23 *et seq.*; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 131, para. 258. See also e.g. P. C. Ulimubenshi, *L'exception du domaine réservé dans la procédure de la Cour internationale*, University of Geneva, GISS, Thesis No. 649, pp. 59-60.

[21] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 12, 24, 34 and 81; also *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, pp. 29, 36-37 and 43.

[22] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 29-30, paras. 70-71 and p. 32, para. 76.

State[23] and *Cumaraswamy*[24] cases), consular rights (see for example the *LaGrand*[25] and *Avena*[26] cases) and even the law of the sea (see for example the *Fisheries*[27] and *Fisheries Jurisdiction*[28] cases or, more recently, the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*[29]).

19. However, as is clear from these cases, when a State's conduct is at issue before the Court, it is typically its specific acts, usually committed *by virtue of* its domestic legislation (general or implementing), as well as the effects of those acts, which are the subject of the examination of compliance with international law, rather than the legislation itself. This is understandable, since it is equally typical — and I shall return to this point — that "the violation of international law will result not from a simple conflict between the law and an obligation of the State, but from the effective implementation of that law"[30].

20. I would add that in contentious proceedings, purely declaratory judgments are in any event exceptional, even though both the Permanent Court and this Court have accepted them in principle[31].

[23] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 153-154, para. 137.

[24] *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 87-88, paras. 62-65.

[25] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 497-498, paras. 90-91.

[26] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, pp. 56-57, paras. 111-114 and p. 63, paras. 133-134.

[27] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, pp. 125, 127, 129 and 132 *et seq.*

[28] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgments, I.C.J. Reports 1974*, pp. 6-7, para. 11, and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 178-179, para. 12. On the Icelandic legislation at issue, see *ibid.*, pp. 10 *et seq.*, paras. 19 *et seq.*, and pp. 182 *et seq.*, paras. 20 *et seq.*

[29] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*, p. 338, para. 187, p. 340, para. 194, p. 359, para. 243 and p. 365, para. 260.

[30] M. Forteau, A. Miron and A. Pellet, *Droit international public*, 9th ed., LGDJ, 2022, p. 1098.

[31] It will be recalled that, referring in particular to Article 14 of the Covenant of the League of Nations and to Article 36, paragraph 2, and Article 63 of the Statute of the Court, the PCIJ expressly recognized in the case concerning *Certain German Interests in Polish Upper Silesia* that it could render purely declaratory judgments, using the following terms: "There seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this is one of the most important functions which it can fulfil." (*Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 18-19.) And in fact the Court considered that in that case it had in the first place to "ascertain[] whether, *generally speaking*, Articles 2 and 5 of the [Polish] law of July 14th, 1920, [we]re or [we]re not compatible with Articles 6 to 22 of the Geneva Convention [relating to Polish Upper Silesia]" (*ibid.*, p. 20; emphasis added). But at the same time, the Court was called upon to rule, more concretely, "on the question whether or not, in *applying* that law, Poland [wa]s acting in conformity with its obligations towards Germany under the Geneva Convention" (*ibid.*, p. 19; emphasis added). Cf. *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20. See also *Northern Cameroons (Cameroon* v. *United Kingdom),*

21. Furthermore, it is worth recalling that in cases where the Court has found that an instrument of domestic law was the immediate cause of a situation in breach of international law, it has sometimes ordered the adoption of measures having a direct or indirect effect on that instrument or, most often, its implementation, but has always taken great care not to interfere with the *domaine réservé* of the State concerned. In such cases, the Court thus typically imposes an obligation of *result* on the interested party, but expressly allows it the *freedom to choose the means* by which it achieves that end[32].

22. *A fortiori*, the Court has always taken care not to interfere, even on a provisional basis, with the adoption of national legislation *as such* or with the determination of its content, however problematic it may have the potential to be in international law, intervening only when *specific* measures implementing the legislation were truly likely to have, or had already had, tangible effects on the rights of third parties in the "external sphere".

23. The respective autonomy of the international legal order and of domestic legal orders has, similarly, always prevented the Court itself from *declaring invalid* a contentious instrument of domestic law[33].

Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 37; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49.

[32] In the above-mentioned cases of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* (*Judgment, I.C.J. Reports 2002*, p. 33, para. 78) and *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (*Judgment, I.C.J. Reports 2004 (I)*, p. 73, para. 153), the Court ordered, respectively, Belgium to cancel the contested warrant "by means of its own choosing" and the United States to provide review and reconsideration of the conviction and sentence handed down to the individuals concerned "by means of its own choosing" (cf. *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 516, para. 128; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 460, para. 149). Cf. *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 90, para. 67. See also the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*, p. 338, para. 187 and p. 367, para. 261 (6). Compare the extreme caution shown by the Court in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)* in ascertaining whether the Iranian companies concerned had exhausted all local remedies in the United States. Having concluded that the companies in question "had no reasonable possibility of successfully asserting their rights in United States court proceedings", the Court was quick to add the following:

> "The Court is not, by the above finding, making any judgment upon the judicial system of the United States, or on the distribution of powers between the legislative and judicial branches under United States law as regards the fulfilment of international obligations within the domestic legal system." (*Judgment, I.C.J. Reports 2023 (I)*, p. 85, para. 72.)

[33] Cf. e.g. *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 60, para. 123; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 455, para. 136. However, in the operative part of its Judgment of 5 April 1933 in the case concerning the *Legal Status of Eastern Greenland*, the PCIJ, reproducing the terms of the corresponding submission of Denmark, "decide[d] that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps

C. Domestic Legislation and International Lawfulness

24. It is also important not to lose sight of the fact that, more generally, in terms of international law, the mere adoption by a State of legislation that is not directly applicable, whose substance could *a priori* give rise to a situation in breach of that law, cannot constitute *as such and in and of itself* an internationally wrongful act, except of course in the particular event that the State in question is said to have made a specific international commitment not to adopt such legislation.

25. In other words, the "potential effect" of legislation contestable under international law sits below the "unlawfulness threshold", which can be crossed only when the State organs responsible for ensuring that such legislation is respected give concrete expression to its scope[34].

26. Hence, the adoption of legislation that is likely to foreshadow or give rise to an internationally wrongful act is at most comparable to a "preparatory action", itself not wrongful, as the Court, in the case concerning the *Gabčíkovo-Nagymaros Project*, characterized the measures taken and works carried out by Slovakia on its own territory in implementing "Variant C", prior to cutting off the original flow of the Danube. The Court justified this finding, which it considered to be well established in international law, by observing that the State performing the preparatory actions was entirely free not to give effect to them[35].

27. It is worth citing here some passages from the work of the International Law Commission to which the Court referred in that context and which appear particularly relevant in the present case. Thus, according to the Commission, "a legislative act whose provisions might open the way to the commission by a State of a wrongful act may not actually lead to such a result because it is not followed by the administrative or judicial action 'ordered by the legislator'"[36].

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taken in this respect by that Government, constitute[d] a violation of the existing legal situation and [we]re accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 75). The wording of this clause is somewhat ambiguous and it is not possible to discern from the Judgment's reasoning the exact scope that the Court intended to confer on it. Such a declaration, like the well-known Ihlen declaration of 1919, which served as the basis of the Court's decision, was a unilateral act which, by definition, originates in domestic law but is intended to produce effects in international law. These acts lie on the "outermost bounds" of the two legal orders. In these circumstances, it can be assumed that the Court did not intend to deprive of all validity the royal resolution of 10 July 1931 (*ibid.*, p. 43) or the measures implementing it in Norwegian domestic law, but rather wished to state that the publication of that resolution and its transmission by Note Verbale to the Danish Government had been deprived of all effect in the international legal order and that the acts of occupation that had followed were unlawful under that same legal order.

[34] Cf. M. Forteau, A. Miron and A. Pellet, *Droit international public*, 9th ed., LGDJ, 2022, p. 1098.

[35] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 54, para. 79.

[36] *Yearbook of the International Law Commission*, 1993, Vol. II, Part Two, p. 57, para. 14.

And the Commission adds:

> "Indeed, in the presence of conduct of another State which manifestly appears to constitute the initial phase of a course of action (or omission) likely to lead to a wrongful act, the State could, with all the necessary precautions, take the appropriate steps, with due respect for the principle of non-intervention in the other party's domestic affairs, to suggest in an amicable manner an adjustment of the former State's conduct which might avert liability."[37]

28. Consequently, a legislative act of this nature has not, as such, "left" the *domaine réservé* of the State concerned. However, this does not mean, of course, that it is not capable of giving rise to a wrongful act in the near future. It depends on the act in question and the circumstances.

D. The Referendum Announced by Venezuela

29. In this case, the referendum that Venezuela plans to hold on 3 December 2023 has been convened by approval of the National Assembly on the basis of Article 71 of the Venezuelan Constitution[38]; and under the very terms of that provision, such a referendum, unlike others organized via the same Constitution, is of a purely "consultative" nature[39]. The non-binding nature of the responses given to the questions posed in this context appears to be well established in the constitutional doctrine[40] and, more clearly still,

[37] *Ibid*., p. 58.

[38] See Judgment No. 1469 of the Constitutional Chamber of the Supreme Court of Justice of Venezuela, 31 October 2023, case No. 23-1081, Part III.

[39] The first part of Article 71 provides:

> "Las materias de especial trascendencia nacional podrán ser sometidas a referendo consultivo por iniciativa del Presidente o Presidenta de la República en Consejo de Ministros; por acuerdo de la Asamblea Nacional, aprobado por el voto de la mayoría de sus integrantes; o a solicitud de un numero no menor del diez por ciento de los electores y electoras inscritos en el Registro Civil y Electoral." ("Matters of special national transcendence may be referred to a consultative referendum, on the initiative of the President of the Republic, taken at a meeting of the Cabinet; by resolution of the National Assembly, passed by a majority vote; or at the request of a number of voters constituting at least 10 per cent of all voters registered on the national, civil and electoral registry." *[English translation available at: https://www.constituteproject.org/constitution/Venezuela_2009.]*)

[40] See e.g. L. Salamanca, "La Constitución venezolana de 1999: de la representación a la hiper-participación ciudadana", *Revista de derecho público*, 2000, Vol. 82, p. 98; H. Rondón de Sansó, "El referendo en la Constitución venezolana de 1999", in R. Duque Corredor and Jesús María Casal (eds.), *Estudios de Derecho Público*, Vol. II, Caracas, Universidad Católica Andrés Bello, 2004, II-7; *Contra*, C. G. Pellegrino Pacera, "Una introducción al estudio del referendo como mecanismo de participación ciudadana en la Constitución de 1999", in A. Arismendi A. and J. Caballero Ortiz (eds.), *El derecho público a comienzos del siglo XXI — Estudios en homenaje al Profesor Allan R. Brewer Carías*, Vol. I, Madrid, Civitas, 2003, p. 460.

in the recent jurisprudence of Venezuela's Supreme Court of Justice, whose Constitutional Chamber, in a judgment of 22 January 2003, notably described the scope of such a "consultation" in the following terms:

> "[E]l resultado del referéndum consultivo previsto en el artículo 71 de la Constitución de la República Bolivariana de Venezuela *no tiene carácter vinculante en términos jurídicos*, respecto de las autoridades legítima y legalmente constituidas, por ser éste un mecanismo de democracia participativa cuya finalidad *no es la toma de decisiones por parte del electorado en materias de especial trascendencia nacional, sino su participación en el dictamen destinado a quienes han de decidir lo relacionado con tales materias*." ("[T]he result of the consultative referendum provided for in Article 71 of the Constitution of the Bolivarian Republic of Venezuela *is not legally binding* on the legitimate and legally constituted authorities, since it is a mechanism of participatory democracy whose object *is not decision-making by the electorate on questions of particular national importance, but the participation of the electorate in the guidance given to those called upon to decide those matters*." *[Translation by the Registry.]*)[41]

The same Chamber expressed itself in similar terms in its judgment of 31 October 2023 on the constitutionality of the proposed referendum and the questions to be put in that context[42]. The nonbinding effects of this referendum were confirmed at the hearings[43]. It follows that, despite stating that "the State of Venezuela w[ould] not turn its back on what the people decide[d] in the referendum"[44], the Venezuela Government will still

[41] Supreme Court of Justice, Constitutional Chamber, Judgment No. 23, 22 January 2003, case No. 03-0017, Part V (emphasis added).

[42] "En consecuencia, con fundamento en los razonamientos precedentes, esta Sala considera necesario reiterar que el resultado del referéndum consultivo previsto en el artículo 71 de la Constitución de la República Bolivariana de Venezuela representa un mecanismo de democracia participativa cuya finalidad *no es la toma de decisiones por parte del electorado en materias de especial trascendencia nacional, sino su participación en el dictamen destinado a quienes han de decidir lo relacionado con tales materias* toda vez que el resultado del referendo consultivo supone un mandato constitucional a través del ejercicio directo de la voluntad popular." (Supreme Court of Justice of Venezuela, Constitutional Chamber, Judgment No. 1469 of 31 October 2023, case No. 23-1081, Part III.) (Emphasis added.)

("Consequently, on the basis of the foregoing reasoning, this Chamber considers it necessary to reaffirm that the result of the consultative referendum provided for in Article 71 of the Constitution of the Bolivarian Republic of Venezuela is a mechanism of participatory democracy whose object *is not decision-making by the electorate on questions of particular national importance, but the participation of the electorate in the guidance given to those called upon to decide those matters*, because the result of the consultative referendum implies a constitutional mandate through the direct exercise of the popular will." *[Translation by the Registry.]*)

[43] See CR 2023/23, p. 22 (Reichler).

[44] CR 2023/24, p. 13, para. 24 (Rodriguez).

be free, in law, to choose the specific action it will take in response to the opinion thus given.

30. While the content and tone of the questions posed may be disconcerting at times, I am not convinced, unlike the authors of the political statement issued by CARICOM on 25 October 2023, that it is possible *a priori* to see therein a strategy aimed at obtaining the support of Venezuelans for the commission of such grave internationally wrongful acts as a future invasion and annexation of the disputed territory[45]. The questions which the Venezuelan authorities have decided to put to the people on 3 December contain no mention of such extreme measures and, indeed, seem to reject such actions by making several express references to the need to respect the 1966 Geneva Agreement and the "Law", in particular as concerns the measures to be taken (first and second questions); and even on occasion — more specifically — to the need to respect "International Law" (fifth question).

31. In reality, the first, second and third questions merely seek — admittedly without always taking into account the decisions already handed down by the Court — the support of the population for the arguments that have for some time been publicly expressed by the Venezuelan authorities, including before the Court itself. The only question that might be a source of some confusion and may require a slightly more in-depth examination seems to me to be the fifth question.

32. Nonetheless, a careful reading of its text does not support the conclusion that it is seeking to garner popular support for the purpose of committing an internationally wrongful act in the future. And in no event can this be assumed[46]. Admittedly, it is not easy to discern the exact scope of some of the terms used, such as the adoption of legislative measures for a "comprehensive plan" ("atención integral" in Spanish) for the population of the disputed territory, or the incorporation of the said territory "into the *map* of Venezuelan territory"[47]. But the setting-out in the fifth question of the specific means that would be used to achieve those ends — in particular, the granting of Venezuelan citizenship and identity cards to that population —

[45] Venezuela also expressly ruled out such an eventuality in its Memorandum on the Application of Guyana, dated 28 November 2019 (para. 138), as was recalled during the hearings (CR 2023/24, p. 22). It is worth adding that, in his letter addressed to the Court on 24 July 2020, the Minister of People's Power for Foreign Affairs of Venezuela expressly stated as follows:

> "Venezuela will not resort to force, not only because it is prohibited by the current international law, but also, and specially, because of its own regional policy of peace, integration, and solidarity . . . The treatment of the territorial controversy by Venezuela will always be in accordance with the principles of the UN Charter and the maintenance of peace."

[46] Nor can it be assumed that Venezuela would not enforce the Court's future judgment on the merits, see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 437-438, para. 101.

[47] Emphasis added.

read in conjunction with the previously mentioned reference to the compliance of the measures envisaged with the Geneva Agreement and international law, nevertheless offers some reassurance in this regard[48]. Indeed, such means, in their abstract formulation, would not *a priori* be in themselves contrary to international law, nor likely to cause prejudice — much less irreparable prejudice — to the rights of the Applicant. As I have already recalled, it is the settled jurisprudence of this Court that granting nationality is a discretionary power of the State (which is perfectly free to set the criteria for doing so) and that it falls under its exclusive jurisdiction[49]. This is widely recognized in legal writings, where one can read, for example, that

> "[t]here is no evidence . . . that nationality acquired in defiance of th[e] requirement [that there be a reasonable link between the State granting nationality and the person becoming its national] would not be *validly* acquired or that the State granting it *would have acted unlawfully*"[50].

The effects of such granting within the international legal order and, in particular, its opposability to third States are of course an entirely different matter[51].

E. Conclusions

33. What conclusions should be drawn from these few preliminary considerations?

34. In my opinion, the following:

(1) Venezuela's organization of the proposed referendum is in itself, *a priori*, a matter falling within that State's *domaine réservé*;

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[48] Venezuela also stated at the hearings that "[n]one of these *administrative actions* can affect Guyana's alleged title to the disputed territory", CR 2023/24, p. 20, para. 7 (Mbengue) (emphasis added). It explained that granting identity cards to the frontier population would facilitate the free movement of persons on both sides, and recalled that *Guayana Esequiba* had long been incorporated in Venezuela's official cartography, *ibid*.

[49] See *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20-21:

> "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation . . . The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction . . . When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction."

[50] J. Verhoeven, *Droit international public*, Larcier, 2000, p. 139 (emphasis added).

[51] *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, pp. 21 *et seq*.

(2) Venezuela does not appear to be internationally obliged not to hold such a referendum, which would have "removed" the organization of the latter from that State's exclusive jurisdiction in order to be governed by international law;
(3) The organization of the referendum in question does not appear to be contrary to any international obligation of Venezuela of a different nature: even if it were ultimately pursuing an unlawful goal — which has not been established — the holding of the referendum, which would be regrettable in that event, cannot, as such, be characterized from the outset as an internationally wrongful act;
(4) When the domestic law of a State has given rise to an unlawful act, the Court has invariably concerned itself with the concrete measures implementing the legislation in question, rather than the legislation itself; any remedies indicated have always taken the form of obligations of result, with the Court taking great care not to interfere directly with the domestic legal order of the State involved; and,
(5) The referendum envisaged, in view of its constitutional characterization, will leave the Venezuelan Government free, in law, to determine the specific action to be taken in response, by the means and within the time frame that it deems appropriate.

II. Whether the Conditions Necessary for the Indication of the Requested Provisional Measures Were Met in This Case

35. Having made those few preliminary remarks, and bearing them in mind, I can now examine whether the measures requested by the Applicant could have satisfied the now well-established conditions enabling them to be indicated by the Court.

A. First Condition

36. The *first condition*, as is well known, *is that the Court appears "*prima facie*" to have jurisdiction to entertain the merits.* This long-standing formula[52] is the best compromise the Court has found between respecting as far as possible the requirements of the consent-based system established by the Statute and simultaneously allowing the Court to take immediate action to preserve the rights in dispute *pendente lite*.

37. In this case, there is no question that this condition is duly satisfied, the Court having already found in its Judgment of 18 December 2020 that it has jurisdiction to entertain the question of the validity of the Arbitral Award

[52] See the joint dissenting opinion of Judges Winiarski and Badawi Pacha appended to the Order of 5 July 1951 in the case concerning the *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, pp. 96-98, and the orders made in the cases concerning *Fisheries Jurisdiction*, e.g. *United Kingdom* v. *Iceland (Interim Protection, Order of 17 August 1972), I.C.J. Reports 1972*, p. 15, para. 15.

of 3 October 1899, and "the related question of the definitive settlement of the land boundary dispute" between the two Parties[53]. That decision, however questionable its basis, has acquired the force of *res judicata* and is thus a more "solid" foundation for the indication of any provisional measures than mere "prima facie" jurisdiction. Nevertheless, the Court also clearly lacks jurisdiction to consider the *maritime boundary* problem as such — the subject of the fourth question in the proposed referendum — and it therefore cannot indicate any provisional measures in this regard, even if that problem is the source of much tension. Although Guyana revisited this question during the hearings, it nonetheless recognized that it could not request provisional measures in this connection[54].

38. However, *jurisdiction to entertain the merits of a case* and *jurisdiction to indicate certain provisional measures* are not the same thing. Having prima facie jurisdiction to entertain the merits logically allows a court to protect the rights claimed before it, prior to ruling on those rights definitively. But it does not of course authorize it to indicate *any* measure to that end. The Court can only exercise the powers conferred on it by Article 41 of its Statute in strict compliance with the Charter, to which that Statute is annexed. In particular, it was therefore required to refrain from indicating measures that would infringe on the *domaine réservé* referred to in Article 2, paragraph 7, of the Charter, as it is to be understood today. This is a general limitation on any form of action by the Court[55]. In this instance, the decision of the Venezuelan authorities to hold a referendum within Venezuela's undisputed territory in accordance with Venezuelan constitutional law falls within the exclusive domestic jurisdiction of that State, as does determining the questions to be asked, as long as it is not established that this matter has been "removed" from that jurisdiction because of international obligations incumbent on Venezuela. I would thus have considered it problematic, to say the least, for the Court to indicate any of the first three provisional measures requested by the Applicant, which concerned, respectively, preventing the holding of the referendum on 3 December 2023 in its envisaged form, modifying the wording of the questions to be posed in that context and, more widely, prohibiting the Venezuelan State from consulting its population on any of the legal questions of which the Court is seised. Such measures would have gone far beyond any previously indicated by the Court.

39. Last but not least, I would recall that Article 41 of the Statute obliges the Court *also* to protect the rights of *all* parties. And, as I shall demonstrate shortly, while the measures requested by the Applicant could not have safeguarded the rights it invokes, it is clear that they could have caused prejudice to those of the Respondent.

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[53] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 493, para. 138 (1).

[54] See CR 2023/23, pp. 25 (Reichler) and 29-30 (Pellet).

[55] Cf. S. Rosenne, *The Law and Practice of the International Court*, Nijhoff, 2005, p. 394.

B. Second Condition

40. The *second condition* to which the indication of provisional measures is traditionally[56] subject *is that of the "plausibility" of the rights invoked on the merits* whose protection is sought. Although much has been said about this condition[57], it too appears to be more than reasonable (since the Court cannot protect the "improbable" rights of one party without causing prejudice to the rights of the other) and — in theory at least — fairly clear[58].

41. Nor does there seem to be any doubt in this case that the rights Guyana is seeking to protect are "*plausible*" within the meaning of the jurisprudence of the Court, since they are based on an international act, in this instance an arbitral award, that has given rise to a situation of control — at least *de facto* — over the territory in dispute, even though the validity of that act is called radically into question by the Respondent. It goes without saying that such a finding in no way prejudges the merits at this stage, since it does not affect in any way *the equal plausibility* of the rights claimed by the Respondent[59].

42. This condition goes hand in hand with another, however. It is also necessary, for the indication of the requested measures, for them *to have a sufficiently close link to the protection of the alleged rights on the merits*, recognized as being "plausible". In this regard, I fear that indicating any of the first three provisional measures requested by Guyana would also have proved problematic. Indeed, as is clear from the foregoing, the "consultative" referendum that the Venezuelan authorities intend to hold, and the questions they thereby intend to put to the Venezuelan people, are acts of domestic jurisdiction and of domestic law alone, and are not capable, *as such*, of causing prejudice to the Applicant's rights in the "external sphere"; the same reasoning also applies in respect of the answers given to those

[56] Although only expressly stated for the first time in the Court's Order of 28 May 2009 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 151-152, paras. 57 and 60, satisfying this condition had, logically, already been required in essence previously (see e.g. *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 17, paras. 21-22, and separate opinion of Judge Shahabuddeen, *ibid*., pp. 28 *et seq*.).

[57] See e.g. R. Kolb, "Digging deeper into the 'plausibility of rights' — criterion in the provisional measures jurisprudence of the ICJ", *The Law and Practice of International Courts and Tribunals*, 2020, Vol. 19, pp. 365-387.

[58] The practical application of this "test" has nonetheless revealed, according to some authors, a kind of conceptual confusion between "plausibility of rights" and "plausibility of claims", see e.g. Ph. Couvreur, "La confiance dans la Cour internationale de Justice et ses procédures" in *La confiance dans les procédures devant les juridictions internationales*, Proceedings of the international conference in Nice, 3 and 4 June 2021, Pedone, 2022, pp. 102 *et seq*.

[59] Cf. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 58.

questions. Not only will the disputed referendum have no direct effect in the domestic legal order of the Respondent, but, as we have seen, even if the majority of the answers to the selected questions were in the affirmative, and even if the Venezuelan Government decided to take concrete measures on that basis, there is nothing to suggest at this stage that those measures would be in breach of international law or otherwise capable of affecting Guyana's rights[60]. The first three measures requested in this case could not safeguard the rights at issue (sovereignty over the disputed territory), because the object of those measures (the holding of the referendum) was not capable of affecting those rights. The direct link that must exist between the rights invoked on the merits and the protective measures sought was therefore lacking, in my opinion. The logical relationship between the two was far too vague. As the Court concluded in the case concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*, "any such measures could not be subsumed by the . . . judgment on the merits"[61].

43. As for Guyana's concern that Venezuela might withdraw from the proceedings, it is clear that this concern, assuming it to be founded, cannot be the subject of provisional measures, since failure to appear, as regrettable as it may be on principle for the sound administration of justice, is a right protected under Article 53 of the Statute.

C. Third Condition

44. Lastly, the *third condition* that must be satisfied in order for the Court to be able to indicate provisional measures —and which is fundamental in all systems of law — is the existence of a *risk of irreparable prejudice to the rights invoked on the merits and urgency.* This essential condition has been formulated in various ways in the jurisprudence of the Court. Its two components — irreparable prejudice and urgency — have been both set apart (one or the other being disregarded on occasion) and joined together. It was in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* that the Court developed the two general formulations relating to the risk of irreparable prejudice and urgency, whose substance is now reproduced in its orders. "[T]he Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings" and

> "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

[60] As the Court noted, *inter alia*, in its Order of 11 September 1976 on the provisional measures requested by Greece in the case concerning the *Aegean Sea Continental Shelf*, "it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations", *I.C.J. Reports 1976*, p. 13, para. 41.

[61] *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, p. 70, para. 26.

imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision"[62].

45. I admit that I found it somewhat difficult, at this stage, to foresee any "real and imminent" risk of "irreparable prejudice" to the "rights in dispute" in this case arising directly as a result of the holding of the proposed referendum *as such*. The only objectively "imminent" event, given the decision of 31 October of the Constitutional Chamber of the Supreme Court of Justice of Venezuela, is in fact the referendum itself. For the rest, even if the Court had the power to seek to prevent the adoption of a domestic act of sovereignty unaccompanied by implementing measures affecting the "external sphere" — *quod non* — the immediate effects of the planned consultation seemed to me, in view of the content of the questions posed and the lack of certainty as to the actions the Venezuelan authorities will take in response, to be too speculative at this point for that consultation to be regarded as constituting or creating, *per se*, a *proven and imminent* risk of irreparable prejudice to the Applicant's rights. I did not find evidence in the case file to suggest that holding the disputed referendum was bound or sufficiently likely to be the final stage of a process that would inevitably lead to the commission of such serious wrongful acts as the invasion and annexation of the disputed territory. Consequently, I could see no legal basis for indicating the measures sought in this respect either.

III. General Conclusions

46. Although I am of the opinion that the requested measures aimed at influencing the holding of the referendum announced by Venezuela (or of any other concerning the case pending before the Court) could not be indicated for the reasons set out above, I nevertheless shared the Court's view that the situation of heightened tension which, moreover, currently exists between the Parties — and which certain public statements risk exacerbating further — is a legitimate cause for concern and justifies the indication, on a precautionary basis, of what are essentially protective measures, reflecting the general obligation of restraint incumbent on all parties to proceedings as a matter of principle, and aimed at protecting, in equally general terms, the territorial rights of the two Parties, without affecting those of either.

(Signed) Philippe Couvreur.

[62] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 21, paras. 63-64.