DECLARATION OF JUDGE NOLTE

Prima facie jurisdiction as a precondition for the examination of "circumstances" under Article 41 of the Statute — Logical and substantive priority of certain conditions — Limits of flexibility and judicial economy.

1. I agree with the decision not to indicate provisional measures in this case. However, I am troubled by the way in which the Court cuts short its reasoning to arrive at this result. The Court even seems to announce that this method will be used as a model in future cases. This would mean a significant change in its jurisprudential approach to the rejection of requests for the indication of provisional measures. I think that such a change would go too far.

2. Since its first decision on a request for the indication of provisional measures in the 1951 *Anglo-Iranian Oil* case[1], the Court has gradually identified certain conditions for the application of Article 41 of its Statute (prima facie jurisdiction; plausibility of the rights asserted; link between the plausible rights and the measures requested; urgency in the sense of a real and imminent risk of irreparable harm). These conditions are certainly cumulative, but this does not mean that the Court need only ever find that any one of them has not been fulfilled in order to reject a request for the indication of provisional measures. Rather the different conditions build and depend on each other, at least in part. In particular, the condition of prima facie jurisdiction cannot simply be ignored and superseded by a finding that there is no urgency.

The condition of prima facie jurisdiction

3. In the present case, the Court has not addressed the question whether it possesses prima facie jurisdiction. It is not entirely clear whether the Court leaves this question open or whether a finding to that effect is implied in the Order's reasoning. This is not just a theoretical question. The (lack of) reasoning raises concerns regarding the propriety of any such decision not to indicate provisional measures. In my view, Article 41 of the Statute, in principle, requires that the Court first examine and establish that it has prima facie jurisdiction to adjudicate the merits of the claims before it may assess whether the "circumstances [] require, any provisional measures [] to preserve the respective rights of either party". In the words of Judge Mosler, "provisional affirmation of jurisdiction is . . . not a 'circumstance' contributing to the necessity of provisional measures in the sense of Article 41, but a precondition of the examination whether such circumstances exist"[2].

---

[1] See *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, I.C.J. Reports 1951*, p. 89. The PCIJ received requests for provisional measures in six cases and granted measures in only two (*Denunciation of the Treaty of 2 November 1865 between China and Belgium, Orders of 8 January, 15 February and 18 June 1927, P.C.I.J., Series A, No. 8*, pp. 7-8; *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79*, p. 199).

[2] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of Judge Mosler, p. 25; see also *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, separate opinion of Judge Sir Hersch Lauterpacht, pp. 118-119:

> "The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction."

4. In the present case, the Court holds only that there is no "real and imminent risk of irreparable prejudice" which would justify indicating the requested measures (at paragraph 34). Thus, the Court does not, before arriving at this conclusion, find that it has prima facie jurisdiction. It explains this approach in paragraph 35 by

> "observ[ing] that the 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."

5. However, the cumulative character of the conditions does not exclude that the existence of prima facie jurisdiction is a precondition for the determination of all other conditions. Even a summary pronouncement by the Court on the factual or legal aspects of a situation brought before it constitutes an assumption of jurisdiction. Such a pronouncement requires the Court to have found that it has prima facie jurisdiction[3]. How else can the Court justify an authoritative assessment and determination between two parties that a specific situation is such that it does not require the indication of provisional measures? Could the Court expressly state that it does not need to find that it has prima facie jurisdiction, but that it nevertheless determines that a specific situation is not such as to require the indication of provisional measures?

6. Article 41 of the Statute does not allow the Court to take even a preliminary position on the legal and factual allegations of the parties simply because it has been seised by a State (party). The procedure under Article 41 is not independent from, but incidental to, the procedure on the merits of the case[4]. This is confirmed by the text of Article 41, paragraph 2 ("[p]ending the final decision"), and by the purpose of the measures under that provision, which is "to preserve the respective rights of either party" until the Court decides the merits of the case (Article 41, paragraph 1). Thus, for the Court to exercise jurisdiction under Article 41 — which entails summarily examining allegations of the parties — there must be a prima facie possibility that the case will go to the merits, even if the Court ultimately finds that the circumstances are not such as to require the indication of provisional measures.

7. In the words of Judge Sir Hersch Lauterpacht,

> "Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 [whether by granting the

---

[3] In the past, the Court has often affirmed that it "retains its freedom to select the ground upon which it will base its judgment" (e.g. *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023*, para. 74; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands* v. *Sweden), Judgment, I.C.J. Reports 1958*, p. 62), which includes choosing the order in which it will deal with the questions submitted to it by the parties (e.g. *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023*, para. 74; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 180, para. 37). However, this freedom is limited in those cases where one requirement logically precedes another (see *Legality of Use of Force (Serbia and Montenegro* v. *Portugal), Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, p. 1160, para. 45: "It is the view of the Court that it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Article 36 of the Statute of the Court.").

[4] See also M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. II, Brill, 2016, p. 602: "The characteristic feature of the incidental jurisdiction is that it depends upon its subject matter having a legal connection with the mainline proceedings over which the Court has at least *prima facie* jurisdiction."

> request for an indication of interim measures or by declining it[5]] in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits."[6]

8. This is the reason for the Court's long-standing practice of satisfying itself that it has prima facie jurisdiction, even in cases in which it subsequently dismisses the request for the indication of provisional measures on other grounds[7]. For example, in *Belgium* v. *Senegal*, the Court determined that it had prima facie jurisdiction before rejecting the request for provisional measures owing to a lack of urgency[8]. In that Order, the Court even concluded its examination of prima facie jurisdiction by stating that "in the light of the findings it has reached in paragraphs 53 and 54 above [where it finds that it has prima facie jurisdiction], the Court may examine the Request for the indication of provisional measures". Thus, the Court has held that only if it finds that it has prima facie jurisdiction may it examine the substantive conditions for giving effect to the request[9].

9. It is true that there have been three cases in which the Court has exceptionally dismissed requests for lack of urgency without addressing the condition of prima facie jurisdiction. The 1976 Order in the *Aegean Sea Continental Shelf* case[10] and the parallel 1992 Orders in the *Lockerbie* cases[11] are notable because the United Nations Security Council had, in the meantime, exercised its responsibility for the maintenance of international peace and security under the United Nations

---

[5] *Interhandel (Switzerland* v. *United States of America), Interim Protection, Order of 24 October 1957, I.C.J. Reports 1957*, separate opinion of Judge Sir Hersch Lauterpacht, p. 119.

[6] *Ibid.*, p. 118.

[7] See e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, paras. 53-55; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, paras. 25-26; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 129, para. 59; *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 106, paras. 20-21; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 200, paras. 67-68; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Provisional Measures, Order of 2 March 1990, I.C.J. Reports 1990*, pp. 68-69, para. 20.

[8] *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. 147-151, paras. 40-55.

[9] The Court's relevant jurisprudence started with *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34, para. 18; and *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 101, para. 13.

[10] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 8, para. 21.

[11] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 127, para. 45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, para. 42.

Charter. In *Aegean Sea*, the Court found that the parties had accepted the recommendations of the United Nations Security Council set out in its resolution 395 (1976)[12]. The Court stated that:

> "Whereas both Greece and Turkey, as Members of the United Nations, have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; whereas, in the above-mentioned resolution, the Security Council has recalled to them their obligations under the United Nations Charter with respect to the peaceful settlement of disputes, in the terms set out in paragraph 39 above; whereas, furthermore, as the Court has already stated, these obligations are clearly imperative in regard to their present dispute concerning the continental shelf in the Aegean; and whereas it is not to be presumed that either State will fail to heed its obligations under the Charter of the United Nations or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute"[13].

10. It was on that basis that the Court stated that it was "not called upon to decide any question of its jurisdiction to entertain the merits of the case"[14]. In *Lockerbie*, the Court found, without going into the question of jurisdiction, that binding decisions of the Security Council had imposed obligations overriding those under the Montreal Convention, such that "the rights claimed by Libya under the Montreal Convention cannot now [since the Security Council had acted] be regarded as appropriate for protection by the indication of provisional measures"[15]. The Orders in *Aegean Sea* and *Lockerbie* are thus exceptional because the Court had a special reason to refrain from addressing the question of its prima facie jurisdiction. This reason consisted in the interest of avoiding addressing a potential intra-institutional conflict between the Court and the United Nations Security Council as regards their respective responsibilities for the maintenance of international peace and security. In the present case, there is no such good reason for refraining from examining prima facie jurisdiction.

11. The Order of 30 April 2024 in *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua* v. *Germany)* is the third exception. There, the Court did not give *any* explicit legal reason for dismissing Nicaragua's request[16]. However, it is precisely for this reason that this Order cannot and should not be the point of departure for a new general approach by the Court when rejecting requests for the indication of provisional measures. Its hopefully exceptional lack of reasoning[17] prevents that Order from becoming a methodological precedent.

12. The practical significance of my concerns may be illustrated, *inter alia*, by the possibility that Mexico later files a second request for the indication of provisional measures, this time with

---

[12] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 12, paras. 38-40.

[13] *Ibid.*, p. 13, para. 41.

[14] *Ibid.*, p. 13, paras. 42-44, in particular para. 44.

[15] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, para. 43.

[16] I agree with Judge Iwasawa that the Court implicitly held that, under the circumstances, there was no real and immediate risk (see *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua* v. *Germany), Order of 30 April 2024*, separate opinion of Judge Iwasawa, paras. 13-14).

[17] Article 56, paragraph 1, of the Statute of the Court provides: "The judgment shall state the reasons on which it is based." This requirement is not limited to judgments but applies to all decisions by the Court given that the Court itself has previously stated that "it [is] of the essence of judicial decisions that they should be reasoned" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 210, para. 94).

good reasons for urgency. In that event, it would be difficult for the Court to reject the second request for lack of prima facie jurisdiction. Were it to do so, the Court would be conceding that it could, and should, have rejected the first request for lack of prima facie jurisdiction, which would have prevented the filing of a second request. This shows that adopting an undifferentiated approach, by which the Court permits itself a free choice of which conditions to examine for rejecting an application for the indication of provisional measures (see paragraph 37 of the present Order), is not advised. Such an approach would not serve judicial economy but would give the Court excessive flexibility at the expense of legal certainty.

13. For these reasons, I think that the shortcut that the Court has taken in engaging with Mexico's request should remain an exception. In my view, the present Order should be read as implicitly determining that the Court has prima facie jurisdiction. Indeed, the Court could have easily explained that it possesses prima facie jurisdiction. Since Ecuador has not called the existence of a legal "dispute" into question, it is reasonable to assume, on a prima facie basis, that Ecuador's reference to the "extraordinary" or "wholly exceptional" nature of the police operation of 5 April 2024 is an as yet unspecified justification of that operation and not a recognition of its illegality[18]. Also, the requirement of "direct negotiations", as set out in Article II of the Pact of Bogotá, has prima facie been met. In *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, the Court found Article II to be "a condition precedent to recourse to the pacific procedures of the Pact in all cases"[19]. According to the Court, it is

> "necessary to consider whether the 'opinion' of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it."[20]

14. In that case, the Court accepted that this condition was met as the parties had not contemplated "direct negotiations" on the date of the application[21]. The condition of prior negotiation under Article II of the Pact of Bogotá differs from other compromissory clauses, in particular Article 22 of CERD and Article 30 of CAT, in that it makes the possibility of resolving the dispute by negotiation dependent on the subjective perspective of the parties[22]. In the present case, the conduct of both Parties indicates prima facie that the dispute over Ecuador's right to enter the premises of the embassy and the legality of its conduct, "in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels". The Court could have easily made these relatively simple determinations explicitly to find that it has prima facie jurisdiction.

Other conditions and conclusion

15. It is certainly debatable whether, among the other conditions for the exercise of the Court's powers under Article 41 (plausibility of the rights alleged; the link between the plausible rights and

---

[18] CR 2024/26, p. 12, para. 2, p. 21, para. 54 (Crosato); p. 36, para. 15 (Wood).

[19] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 94, para. 62.

[20] *Ibid.*, pp. 94-95, para. 65.

[21] *Ibid.*, p. 99, paras. 75-76.

[22] As opposed to determining whether there is "evidence of a genuine attempt to negotiate" "with a view to resolving their dispute concerning the [other party's compliance with the international legal rules in question]" and "whether the negotiations failed, became futile, or reached a deadlock" (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 133-134, paras. 159-162).

the measures requested; and urgency in the sense of a real and imminent risk of irreparable harm), "none has a logical priority with respect to another", and whether "to refuse interim measures it suffices for only one of the relevant circumstances to be absent"[23]. However, I do see that the condition of plausibility of rights has a certain logical and substantive priority over the requirement of a real and imminent risk of irreparable harm. Indeed, to what does the examination of a "real and imminent risk of irreparable harm" refer, if not to plausible rights? In this sense, any examination of urgency presupposes the existence of plausible rights. Another reason for the condition of plausibility of rights having logical and substantive priority is that it is closely linked to the condition of prima facie jurisdiction. After all, there is a significant overlap between the question whether the rights invoked by one party are prima facie capable of falling within the scope *ratione materiae* of the jurisdictional basis and the question whether the rights alleged plausibly exist in law. It was for this reason that the Court addressed the condition of plausibility of rights in *Belgium* v. *Senegal* before dismissing the request based on a lack of urgency. However, I acknowledge that there may be legitimate reasons of judicial economy to leave open certain questions relating to the plausibility of rights in law and, *a fortiori*, in fact, when a request is clearly not urgent.

16. It is not necessary to further develop such questions now. I want to emphasize, however, that the Court's exercise of its powers under Article 41 is "exceptional"[24]. Article 41 and its underlying general principle of law[25] do not confer unlimited discretion on the Court to decide on a request for provisional measures, even in rejecting such a request. For this reason, the Court has over the years identified and refined conditions for the application of Article 41. These conditions define the scope and limits of the Court's powers under Article 41 of its Statute. The need for a proper and consistent application of these established conditions has become particularly clear since the binding legal character of provisional measures, compliance with which may ultimately be determined in the main proceedings[26], was recognized in *LaGrand* in 2001[27]. This need has become more acute given the increased recourse by States to requests for the indication of provisional measures in recent years. That increase may justify a less elaborate style of reasoning, but not a flexibility permitting the Court to skip over conditions which have a logical and substantive priority. This is not the time to take shortcuts with respect to the examination of the conditions that have been carefully developed over the past seven decades, even when rejecting a request.

(Signed) Georg NOLTE.

---

[23] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019 (I)*, separate opinion of Judge Abraham, p. 378, para. 5; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of President Jiménez de Aréchaga, pp. 15-16.

[24] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 32.

[25] *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199: "the above quoted provision of the Statute [Article 41, paragraph 1, of the PCIJ Statute] applies the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party — 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 and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".

[26] See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment of 31 January 2024*, paras. 375-403, 404 (5), (6) and (7).

[27] *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.