SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR

Agreement to provide interim measures of protection — Need to clearly define "plausibility" for the purposes of interim protection under Article 41 of the Statute — Disagreement with the second provisional measure — Unsatisfactory treatment of the risk of irreparable prejudice to possible Costa Rican rights and to the "caño" *— The Court should have entrusted to both Parties the responsibility for any measures required to prevent irreparable prejudice to the environment in Isla Portillos.*

1. I agree that interim measures of protection should be afforded by the Court in the present case. Although it would appear rather obvious, it is worth recalling, as the Order does, that the Court has the power to indicate *any* provisional measure it may deem necessary in order to preserve the respective rights of either party, and that the measures indicated may be different, in whole or in part, from those originally requested. Additionally, I do not find it futile to reaffirm, as the Court does on this occasion, that an Order on the indication of provisional measures has a binding effect and that the Parties to the case must comply with any international obligation arising under the Order.

2. In its Order, the Court addresses an important concern: the development of criminal activity in the disputed territory. The Court has decided, and rightly so, to give each Party the responsibility for policing the area over which it unquestionably has sovereignty. It is only to be hoped that the effectiveness of the bilateral collaboration required will be sufficient to keep the operation of organized crime away from this transitory no-man's land.

3. On a different note, I believe the Court should have seized the opportunity to elucidate further the "plausibility requirement" for the purposes of Article 41 of the Statute. The indeterminacy surrounding the concept of plausibility in the Order could prove problematic in future requests for the indication of provisional measures, as will be shown in this Opinion.

4. Although I concur with the need to grant measures of interim protection in the present case, I do not subscribe to the second paragraph of the operative clause of the Order, nor do I share some of the reasons adduced in it as a basis for the Court's decision. I consider insufficient and unsatisfactory the treatment given by the Court in the Order to the imminent risk of irreparable prejudice to the possible rights of Costa Rica. I am of the view that the provisional measures indicated fall far short of what is needed to properly preserve and protect the Humedal Caribe Noreste. It must be recalled that the Humedal is intimately linked to both the Refugio de Vida Silvestre Corredor Fronterizo and the Refugio de Vida Silvestre Río San Juan Ramsar site. The fact that these wetlands are interconnected means that their environmental protection requires a wider bilateral collaboration and the full assistance of the Ramsar Secretariat.

I. "Plausibility" as a pre-condition for the indication of provisional measures

5. In its jurisprudence, the Court has consistently underscored that decisions in incidental proceedings on interim protection in no way prejudge any questions relating to the merits of a dispute submitted to it for consideration. It has repeatedly recalled that, in the exercise of its powers under Article 41 of the Statute, it "cannot make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits,

must remain unaffected by the Court's decision" (*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. 22, para. 44; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 23, para. 43; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, pp. 127-128, para. 41).

6. A slightly different issue — and one which the Court has only recently started to address — is whether, when called upon to rule on a request for the indication of provisional measures, it is appropriate for the Court to make a preliminary assessment of the merits of the rights asserted by the party seeking interim protection (and, if so, to what extent).

7. It is widely held that, in the exercise of its powers under Article 41 of the Statute, the Court should proceed on the assumption that the claimed rights do in fact exist, and confine its inquiry to ascertaining whether those rights are liable to suffer irreparable injury pending the final judgment on the merits, in the absence of measures for their protection.

8. The Court has entertained numerous cases in which the respondent has objected to the request for interim protection filed by the applicant on the grounds that the rights asserted by the claimant do not exist, thus inviting the Court to look at the merits of the case, albeit provisionally, so as to establish whether to exercise its powers under Article 41 of the Statute[1].

9. Only in its recent decision in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* has the Court openly taken a position on this matter and ruled, for the first time, that "the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible"[2].

10. The present Order confirms the stance taken by the Court in *Belgium* v. *Senegal* and goes a step further by appearing to make the "plausibility" of rights a definite requirement for interim protection under Article 41 of the Statute.

11. Whereas I take no issue with the rationale underlying the Court's ruling, there is, in my view, an urgent need to define with greater precision the applicable legal standard for the present purposes. Firstly, "plausible" and "plausibility" are not terms of art, and their ordinary meaning is of limited assistance when it comes to explaining what is legally required by way of a prima facie demonstration of rights in the context of Article 41 of the Statute[3].

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[1]See, for instance, case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*; case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*; case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009*.

[2]*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[3]This is the case in English at least. According to the *Oxford English Dictionary Online*, "plausible" may have any of the following meanings: Acceptable, agreeable, pleasing, gratifying; winning public approval, popular (1.a.); Expressing applause or approbation; plausive, applausive (2); Deserving of applause or approval; praiseworthy, laudable, commendable (3); Of an argument, an idea, a statement, etc.: seeming reasonable, probable, or truthful; convincing, believable; (formerly) *spec.* having a false appearance of reason or veracity; specious (4.a.).

12. Are States which request the indication of provisional measures expected to show prima facie the validity of their claims on the merits, or is *fumus non mali juris* sufficient, i.e., is it enough to ascertain that the claimed rights are not patently non-existent according to the information available to the Court?[4] Does it suffice to demonstrate the *possibility* or *reasonableness* of the existence of a right[5], or is *probability* the relevant standard?

13. These are not academic subtleties. The answers are likely to have direct implications on how requests for provisional measures will be pleaded in the future and on the degree to which the Court considers the merits of the case in the course of the incidental proceedings on interim protection.

14. The Court should have seized the opportunity to clarify these matters, *inter alia*, by refining the language used to describe the "plausibility requirement". To this effect, it would have been preferable to avoid the perpetuation of indeterminate terminology which, arguably, only adds confusion to an already complex topic.

15. I fear that the imprecision surrounding the "plausibility requirement" and the unwarranted emphasis placed upon that in this Order might ultimately encourage States seeking interim protection to over-address the substance of the dispute at an early stage and, as a result, overburden proceedings under Article 41 of the Statute with matters that should actually be dealt with by the Court when adjudicating on the merits.

16. This Order should not be read as introducing a new requirement under Article 41 of the Statute, or interpreted as signalling a departure from the Court's jurisprudence on provisional measures. Rather, as I see it, it should be understood as an attempt on the part of the Court to "name" or "label" a requirement already implicit in the Court's case law. As already noted, greater definition is required in order to ensure that consideration of the merits remains within the strict limits called for in proceedings under Article 41 of the Statute.

II. Risk of irreparable prejudice in relation to the environmental consequences of the *caño*

17. Overall, the "irreparable prejudice" requirement should have been the object of closer examination and more thorough analysis on the part of the Court. Notwithstanding the importance of this issue in the oral proceedings, and in contrast to the prominence accorded to the question of "plausibility", this matter has been only cursorily addressed in this Order.

18. And yet the crucial question in this case is whether, as claimed by Costa Rica, the now navigable *caño* connecting the San Juan river to the Harbor Head lagoon poses a risk of irreparable prejudice to its rights by reason of the possible threat of irreparable environmental damage to a portion of territory which the Court may ultimately adjudge to belong to the Applicant in its decision on the merits.

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[4]Case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, separate opinion of Judge Abraham, p. 140, para. 10.

[5]Case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, separate opinion of Judge Shahabuddeen.

19. In its final submissions, Costa Rica requested the Court to indicate provisional measures ordering Nicaragua not to undertake, *inter alia*, any of the following activities in the area comprising the entirety of Isla Portillos (Order, paragraph 73):

(i) engage in the construction or enlargement of a canal;

(ii) fell trees or remove vegetation or soil;

(iii) dump sediment.

20. At the hearings, it became apparent that the "cleaning and clearing operations" conducted by Nicaragua in the disputed area were over and finished. Consequently, Nicaragua observed that the issue of the felling of trees and the dumping of sediment in certain areas along the *caño* "no longer arises" (Order, paragraph 71).

21. The fact that the very situation that Costa Rica had sought to avert with its request for interim protection has materialized prior to the Court's Order does not render the indication of provisional measures without object, if the Court considers that such measures are still required in order to preserve the rights at issue.

22. It is well established that the Court is not bound by the Parties' requests and "Article 75, paragraph 2, of the Rules of Court recognizes the power of the Court, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 347, para. 47; see also *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 145).

23. Whether, as asserted by the Applicant, Nicaragua has constructed an artificial canal within Costa Rican territory or, as claimed by the Respondent, Nicaragua has limited itself to clearing a pre-existing canal connecting the San Juan river to the Harbor Head lagoon, is something to be decided in the merits phase, and has no bearing on the Court's ruling on Costa Rica's request at this stage of the proceedings.

24. The important question, and the one on which the Parties fundamentally disagree, is whether the mere existence of the *caño* as a navigable channel across Isla Portillos poses a risk of irreparable environmental damage, taking into consideration that the disputed territory is part of the "Humedal Caribe Noreste" wetland, which Costa Rica designated for inclusion on the List of Wetlands of International Importance in 1996, in accordance with Article 2 of the Convention on Wetlands of 1971 ("Ramsar Convention"), to which Nicaragua is also a Contracting Party.

25. In my view, the evidence before the Court supports the conclusion that even in its current state — i.e., even if Nicaragua does not pursue any further "clearing activities" or other works in the area — the *caño* poses an imminent risk of irreparable damage to the ecological characteristics of Isla Portillos and, therefore, provisional measures are required in order to prevent the materialization of such a risk.

26. This is not tantamount to saying that the clearing or construction of the *caño* has *already* caused irreparable environmental damage to Isla Portillos. For the purposes of interim protection under Article 41 of the Statute, irreparable prejudice does not have to be established, just the risk thereof.

27. Of particular importance in this regard are the findings of the report prepared by the Ramsar Advisory Mission on the basis of Article 3 (2) of the Ramsar Convention (hereinafter the "Ramsar Report"), and submitted to the Court in the course of the proceedings.

28. Firstly, the report identifies a threat of damage to the ecology of the wetland in the medium and long term, including through a loss of habitat for terrestrial fauna, progressive erosion and changes in the groundwater aquifer recharge beneath the wetland.

29. Moreover, it points out that the ecology of the Harbor Head lagoon, which is not part of the disputed territory and is located in another Ramsar wetland of international importance, namely the Refugio Vida Silvestre Río San Juan in Nicaragua, is most at risk as a result of the hydraulic connection made between the San Juan river and the lagoon by the clearing or construction of the *caño*. In particular, it is estimated that "the sandbank currently separating [the Harbor Head lagoon] from the Caribbean Sea is in danger of being breached due to the change in hydrodynamic balance that maintains it between the flow of the San Juan River and the tidal limit" (Ramsar Report, at para. 32). As a result, the Harbor Head lagoon could be partially or completely lost within six to twelve months.

30. The foregoing underscores the interconnectedness between the protection of the environment in Isla Portillos, on the one hand, and the protection of the adjacent wetland located in what is indisputably Nicaraguan territory, on the other.

31. According to the report, "[d]ue to its geographical location and dynamics closely linked to the Refugio de Vida Silvestre Corredor Fronterizo and to the Refugio de Vida Silvestre Río San Juan Ramsar site, the preservation of Humedal Caribe Noreste calls for substantial cooperation and collaboration between the two bordering countries of both Ramsar sites" (Ramsar Report at p. 35).

32. Significantly, the Court falls short of declaring the existence of an imminent risk of irreparable prejudice to Costa Rica's rights in connection with the clearing or construction of the *caño*. And yet the Applicant alone is allowed to dispatch civilian personnel to "avoid irreparable prejudice being caused to" the wetland in the disputed area, without the Court having first established that there is indeed a risk that such a prejudice may actually occur.

33. In the light of the first provisional measure, designed to exclude the presence of both Parties in the disputed territory, it is difficult to discern the rationale behind the second measure indicated by the Court. One is left to wonder whether the Court may not in fact have assessed the "plausibility" of the Parties' claims (*both* the Applicant's *and* the Respondent's) in far broader terms than those advanced in paragraphs 53 to 62 of the Order and, as a result, anticipated a decision on the merits in favour of Costa Rica. This, it is submitted, is not the proper role of "plausibility" in the context of Article 41 of the Statute.

34. To conclude, the Court should have acknowledged that there is indeed an imminent risk of irreparable prejudice to Costa Rica's possible rights by reason of the clearing or construction of the *caño*. However, given the interconnectedness between the Humedal Caribe Noreste and the Refugio de Vida Silvestre Río San Juan, the Court should have entrusted to both Parties, in consultation with the Ramsar Secretariat, the responsibility for taking the necessary measures to avoid irreparable prejudice being caused in the disputed territory.

(Signed) Bernardo SEPÚLVEDA-AMOR.