SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the dispositif *of the Order — Reasoning insufficiently explicit on one point — Relationship between the merit of the requesting party's claims and the ordering of the provisional measures — Writers' view as to a clear separation between issues regarding the existence and extent of the disputed rights and issues concerning the need for provisional measures — Misguided nature of this view — Need for the Court to take account of the existence of conflicting rights — Respondent's fundamental right to act as it chooses provided that its actions are in compliance with international law — Connection between the issue under discussion and the mandatory nature of provisional measures, as affirmed in the* LaGrand *Judgment — Need for some minimum review in respect of the existence of the right claimed by the requesting State — Criterion of* fumus boni juris *well known to other courts — Three requirements to be met to enable the Court to impose a provisional measure ordering the respondent to adopt a certain course of conduct — Futility of considering all these requirements where any one of them is unmet.*

1. I fully subscribe to the conclusion reached by the Court in the present Order, i.e., that indicating the provisional measures requested by the Applicant would not have been justified under the circumstances as they now stand. There is however a question of principle in respect of which I do not find the reasoning in the Order sufficiently explicit: the question of the relationship between the merit, or prima facie merit, of the arguments asserted by the party requesting the measures in respect of the right that it claims, which is the subject-matter of the main proceedings, and the ordering of the urgent measures it seeks from the Court.

2. I am well aware that the Court was not required to address this much-debated issue in detail, since the circumstances of the case are such that it could base its decision in law on grounds which were both necessary and sufficient, without the need to decide a point which, while argued by the Parties, could be deferred without impairing the coherence or completeness of the reasoning adopted in reaching the decision rendered.

I am of course not opposed to a certain economy of reasoning, and I do not think it within the Court's duties to propound a general theory on each and every issue argued in the cases before it.

Yet I think that the Court, without departing too far from the sound rule mandating good husbandry of resources, could in the present case have seized the opportunity presented by this Order to shed some light on a question which — it must be admitted — remains quite abstruse.

By means of the following observations, I wish to contribute to the exercise in clarification which the Court itself will inevitably be required sooner or later to see through to completion.

3. The debate is not new and several of my distinguished predecessors have endeavoured in the past to elucidate the crux of it. In truth, my view of the question is not significantly at variance with, for example, that set out by Judge Shahabuddeen in his separate opinion appended to the Order of 29 July 1991 made by the Court in the case concerning *Passage through the Great Belt (Finland* v. *Denmark)* (*Provisional Measures, I.C.J. Reports 1991,* pp. 28-36), and I could nearly confine myself to referring the reader to that opinion. I should like however to add the following comments, which take account in particular of developments in the Court's jurisprudence on provisional measures over recent years.

4. According to a widespread view, and perhaps even that of a majority of the writers, the Court, when called upon to rule on a request for the indication of provisional measures under Article 41 of the Statute, should — and does in fact — refrain from all consideration of the merit of the arguments by the party requesting the measures, usually the Applicant in the main action, in respect of the claimed rights for which it seeks protection through the measures. The Court should — and does in fact — confine itself to ascertaining whether the circumstances are such that the rights claimed, the existence or non-existence of which cannot be determined until the conclusion of the main action, are in danger of irreparable injury in the absence of measures for their interim protection pending the final decision. In other words, the Court should proceed on the basis that the claimed rights do in fact exist and it should consider solely whether, on the assumption that it will ultimately uphold them in its decision on the merits, they are liable to be violated in the interim in such way that the final judgment will be rendered ineffective, at least in part.

5. This definition of the role of a court asked to grant interim relief — which describes the Court when exercising its power under Article 41 of the Statute — is premised on a sharp, clear separation between, on the one hand, issues as to the existence and extent of the disputed rights, issues which cannot be considered, even prima facie, or resolved, even provisionally, before the merits phase, and, on the other, questions as to the need for provisional measures, which can and should be assessed by the Court without any thought to the merit of the arguments advanced in the main proceedings.

I find this separation illusory; even if it were possible, it would be undesirable. Here is why I consider the writers' view I have just summarized to be wrong.

6. The main reason is that the Court is never, and in all logic can never be, confronted solely with rights asserted by only one of the parties, rights which it could (provisionally) assume to be established exclusively

for purposes of ruling as to whether they require protection.

When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties, and it cannot avoid weighing those rights against each other. On one side stands (stand) the right (rights) asserted by the requesting party, which it claims to be under threat and for which it seeks provisional protection, and on the other the right(s) of the opposing party, consisting at a minimum in every case of the fundamental right of each and every sovereign entity to act as it chooses provided that its actions are not in breach of international law. Yet the measure sought by the first party from the Court often — as in the present case — consists of enjoining the other party to take an action which it does not wish to take or to refrain — temporarily — from taking an action which it wishes, and indeed intended, to take. In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise. True, there is nothing out of the ordinary about a judicial body imposing on a party a specific obligation as to conduct, but the obligation thus imposed must rest on sufficiently solid legal ground, especially when the party in question is a sovereign State. In other words, I find it unthinkable that the Court should require particular action by a State unless there is reason to believe that the prescribed conduct corresponds to a legal obligation (and one predating the Court's decision) of that State, or that it should order a State to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.

7. In this regard one cannot help but see a connection between the issue under discussion here and the Court's affirmation in its Judgment of 27 June 2001 in *LaGrand (Germany* v. *United States of America)* (*Judgment, I.C.J. Reports 2001*, p. 466) of the mandatory nature of measures prescribed by the Court in its Orders under Article 41 of the Statute.

8. Until that Judgment was handed down, many, if not most, States, along with a very substantial body of scholarly opinion, thought that provisional measures indicated by the Court were recommendations lacking binding force. Although serious doubt can be entertained as to the proposition that even before the *LaGrand* Judgment the Court, in making an order indicating provisional measures, was in practice indifferent to the prima facie merit of the parties' arguments in the main dispute, it could conceivably have been accepted at that time that the Court did not consider the merits before serving the parties with invitations to act — or to refrain from acting — which were commonly but wrongly thought to be without mandatory force. Where a mere suggestion is being made to a State, there is hardly any need to ensure that it is not liable to trespass upon the sovereign rights of the State: the recipient of the recommendation is free to act upon it as it deems

appropriate and, in determining its response, can factor in its assessment of the strength of its position and the importance of the interests at stake. In summary, the doctrine as to a clear separation of the issues on the merits from those concerning provisional protection, which I have always found to be misguided, might conceivably have been seen as in keeping with the widespread belief, before the *LaGrand* Judgment, that the Court's orders were not binding.

With the Judgment of 27 June 2001, that ceased to be the case. It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated — and irreparably so — in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.

9. Carrying out some minimum review, or giving some thought to the substance, obviously does not mean arriving at a complete, final view as to the merits of the dispute which the Court will — perhaps — later have to decide. It is self-evident that it is neither possible nor desirable for the Court to develop a firm opinion about the case, let alone to express one, during the first phase of the proceedings. But, in conducting some review, by nature limited, of the prima facie validity of the requesting party's case, the Court does not overstep the bounds of its mission as a jurisdiction appealed to for interim relief; on the contrary, it is sensibly fulfilling that mission. The existence of *fumus boni juris* as a requisite for the ordering of binding provisional measures is firmly recognized by some international courts (for example, the Court of Justice of the European Communities; see, *inter alia*, the interesting order of the President of the CJEC dated 19 July 1995 in *Commission* v. *Atlantic Container Line AB and Others*, C-149/95), as well as in many national judicial systems. In fact, it is inescapable, mandated as it were by logic.

10. Admittedly, this requirement can be defined in terms of varying strictness.

The party requesting the measures might be required to show the prima facie validity of its claims on the merits, i.e., to establish a particular degree of probability that it holds the right claimed and a particular degree of probability that the right is likely to be infringed through the other party's conduct. This is a rather exacting approach and I am not sure of the need to go this far.

It might be enough to ascertain that the claimed right is not patently non-existent and that, according to the information available to the Court at the particular stage in the proceedings, the possibility of the

other party's conduct infringing that right is not manifestly to be ruled out. The requirement of *fumus boni juris* then gives way to that of *fumus non mali juris*. But, in all honesty, these are subtleties and there exists a great range of intermediate degrees, each capable of expression in somewhat vague terms: the requesting party should establish the possible existence of the right claimed, or the apparent existence of such right, etc.

In my view, the most important point is that the Court must be satisfied that the arguments are sufficiently serious on the merits — failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law.

11. To sum up, I would say that the Court must satisfy itself of three things before granting a measure ordering the respondent to act or to refrain from acting in a particular way, so as to safeguard a right claimed by the applicant.

Firstly, that there is a plausible case for the existence of the right.

Secondly, that it may reasonably be argued that the respondent's conduct is causing injury, or is liable to cause imminent injury, to the right.

Thirdly and finally, that the circumstances of the case are such that urgency justifies a protective measure to safeguard the right from irreparable harm.

12. As these three requirements are cumulative, the Court is not always compelled to rule on the satisfaction of each: where any one remains unmet, the Court is relieved of the need to examine the other two.

13. This is especially the case when the third requirement is not satisfied: where urgency has not been shown, it does not matter whether the respondent is violating the applicant's rights; that issue does not reacquire relevance until the merits are considered. In the present case, the Court has essentially based its decision on the lack of urgency and the absence of any demonstrated danger of irreparable harm, thus making it possible to avoid most of the issues on the merits, and I am in full agreement with this approach.

(Signed) Ronny ABRAHAM.