SEPARATE OPINION OF JUDGE *AD HOC* COUVREUR

[Translation]

"Procedural loyalty" — Order of 1 December 2023 — New Request for the indication of provisional measures — Recharacterization by the Court — Procedural effects — Link to the initial Request — Reaffirmation of the first measure indicated originally — New measure indicated by the Court — Meaning and scope — Measure merely specifying the implications of the original measure in the new circumstances of the case — Respect for the material limits of the original measure — Utility — Problematic nature of the new measures requested by the Applicant.

I. ORDER OF 1 DECEMBER 2023: BACKGROUND

1. As I explained in the opinion which I appended to the Order of 1 December 2023 relating to Guyana's first Request for the indication of provisional measures in this case, I consider that the establishment of any procedural relationship gives rise, for the parties, to a duty of "procedural loyalty", which finds expression in an immediate and specific obligation not to prejudice the rights at issue *pendente lite*. This is a general procedural principle directly derived from the principle of good faith[1]. When the dispute which has given rise to the proceedings is of a territorial nature, that obligation requires strict respect for the territorial status quo, and entails the freezing of claims to the territory in dispute throughout the proceedings[2].

2. At the end of the aforementioned Order, the Court confined itself to indicating a *general* measure reiterating that obligation as a "precaution", given the particular circumstances of the case, which were characterized by strong tension between the Parties and concern caused by certain public statements made by various organs of the Respondent[3]. Thus, the measure indicated merely sought to prevent "any action which would modify the situation that currently prevails in the territory in dispute, whereby the Co-operative Republic of Guyana administers and exercises control over that area"[4]. Couched in cautious and neutral terms, it sought exclusively to protect the Parties' rights *sub judice* and carefully avoided prejudging or, *a fortiori*, prejudicing those rights. Consequently, I found it justified to vote in favour of such a measure.

3. However, the Court declined to indicate the measures requested by the Applicant which sought to prevent the holding of the consultative referendum planned by the Respondent and to interfere with the wording of the questions to be included in that consultation[5]. I supported that approach by recalling first in some detail, in the aforementioned opinion, the scope and effects of Article 2, paragraph 7, of the Charter (the *domaine réservé* of States), the traditional attitude of the Court towards domestic law, and the relationship between domestic legislation and international lawfulness[6], before examining the nature and object of the disputed referendum[7]. And I concluded that the Court lacked jurisdiction to indicate measures infringing on the *domaine réservé* of the

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[1] See *I.C.J. Reports 2023 (II)*, pp. 676-677, para. 1.

[2] See *ibid.*, p. 676, para. 1.

[3] See *ibid.*, p. 666, paras. 36-37.

[4] *Ibid.*, p. 668, para. 45, point 1.

[5] See *ibid.*, pp. 659-660, para. 11.

[6] See *ibid.*, pp. 678-685, paras. 5-28.

[7] See *ibid.*, pp. 685-688, paras. 29-32.

Respondent[8]; that the measures requested by the Applicant concerning the referendum in question did not have a sufficiently close link to the rights deemed to be "plausible" and could not safeguard those rights, given that the holding of the referendum was in itself incapable of affecting them[9]; and that the mere organization of the referendum in question was even less capable of imminently causing irreparable prejudice to those rights[10].

II. NEW REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES AND RECHARACTERIZATION BY THE COURT

4. On 6 March 2025, Guyana filed a new "Request for the indication of provisional measures". The Court, for the first time in its practice, recharacterized that instrument *proprio motu* as a request "for the modification of the Order of 1 December 2023", despite the title intended by the Applicant and the reference made in the Request, first, to Articles 73 and 74 of the Rules, and then also to Article 76 thereof[11]. Such a recharacterization is not an intervention of a purely formal or strictly ancillary nature[12]. Indeed, it has procedural consequences of some importance. When the Court is seised of a request to indicate provisional measures on the basis of Article 73 of its Rules, the holding of "oral proceedings" is automatic, as is sufficiently evident from the clear wording of Article 74, paragraph 3, of the Rules: moreover, that phrase is borrowed from Article 43 of the Statute, which makes "oral proceedings" in principle an *obligatory* phase of the procedure before the Court[13]. However, when the Court is seised of a request for the "modification" of a previous order, it has greater discretion in the organization of the procedure: Article 76, paragraph 3, of the Rules merely requires, in that case, that it "shall afford the parties an opportunity of presenting their *observations* on the subject" (emphasis added). The reason is obvious: in such a case, the Court's task is regarded as *a priori* more "simple", since the Court is not required to decide *ex nihilo*, but merely to "adapt" a decision that has already been made to the change in circumstances warranting this adaptation. The Court may therefore decide, depending on the context (recency of the previous order, significance of the alleged change in the situation, degree of urgency, etc.), that such "observations" will be written,

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[8] See *ibid.*, p. 690, para. 38.

[9] See *ibid.*, pp. 691-692, para. 42.

[10] See *ibid.*, p. 693, para. 45.

[11] In fact, the Court normally only makes an order accepting or rejecting a request for the "modification" of a previous order indicating provisional measures when the request *expressly* seeks such a "modification" and is based *exclusively* on Article 76 of the Rules (sometimes, if the case so requires, with an additional reference to Article 75). See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Requests for the Modification of the Order Indicating Provisional Measures of 8 March 2011, Order of 16 July 2013, I.C.J. Reports 2013*, p. 230; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II)*, p. 578, and *Request for the Modification of the Order Indicating a Provisional Measure, Order of 6 July 2023, I.C.J. Reports 2023 (II)*, p. 403; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, and *Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024.*

[12] It is, therefore, the prerogative of the Court in its composition *for the purposes of the case concerned.*

[13] In this case, Guyana had moreover expressly requested that hearings be convened in para. 12 of its new Request.

as in this case[14], or oral, or even written *and* oral[15]; it goes without saying that whichever choice is made, the procedure organized, however brief, must be consistent with the requirements of a sound administration of justice, and must fully respect the principles of equality between the parties and adversarial proceedings[16].

III. REAFFIRMATION OF THE FIRST MEASURE INDICATED IN 2023 AND SPECIFICATION OF ITS IMPLICATIONS IN THE CURRENT CIRCUMSTANCES

5. In any event, the Court's decision to recharacterize Guyana's new Request for the indication of provisional measures demonstrates the close link that it has discerned to the initial Request. In fact, in today's Order, the Court begins by reaffirming the main measure that it had indicated in 2023[17]. At that time, I explained in ample detail the reasons, briefly recalled above, why I had voted in favour of that measure. Those same reasons underpin my vote today, even though I am not fully convinced that repeating such orders is ultimately more likely to increase their effectiveness than to betray a degree of uncertainty in that respect. In addition, the Court has sought in this Order to *specify,* in the light of the new concerns expressed by Guyana — relating to the announcement of the holding, by Venezuela, of elections "in" the territory in dispute as early as 25 May 2025 — the scope, in that context, of the first measure thus reaffirmed, by indicating an additional measure which remains rigorously within the material limits of the first[18]. There is no doubt that *acts of coercion*[19] carried out pursuant to the Organic Law of 3 April 2024 *on* the territory in dispute, as part of the organization of the planned elections, would modify "the situation . . . in [that] territory" and risk causing irreparable prejudice to the Applicant's "plausible" rights before the Court is able to rule on the merits. In the absence of any details about the arrangements for the preparation and conduct of the

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[14] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, paras. 9-10. The phrase indicating that the Court will hear the Parties "by means of a written procedure" (para. 14 of today's Order) is unusual in this context and rather strange given the wording of Art. 76, para. 3, of the Rules. That expression is normally used in other situations, namely when the Rules stipulate that the Court will decide "after *hearing* the parties" (emphasis added), as is the case in Art. 35, para. 4, in the context of objections to the appointment of a judge *ad hoc*; Art. 56, para. 2, concerning the production of "new documents" after the closure of the written proceedings; and Art. 80, para. 3, relating to the admissibility of counter-claims as such.

[15] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Request for the Modification of the Order of 28 March 2024, Order of 24 May 2024*, paras. 15-16. Curiously enough, this Order, which makes reference only to Art. 76 of the Rules in its opening recitals, justifies the convening of hearings by referring to Art. 74 of the Rules (*ibid.*, para. 15).

[16] That means in particular that each party has the same number of opportunities to present its views, within consecutive time-limits of the same length, and that the general schema adopted in the Statute for that purpose, namely that the applicant pleads first and the respondent last, is duly respected. The procedure exceptionally followed in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, and moreover agreed between the Parties, was justified by the fact that each Party had successively filed a Request for the modification of the Order of 8 March 2011 (see *Requests for the Modification of the Order Indicating Provisional Measures of 8 March 2011, Order of 16 July 2013, I.C.J. Reports 2013*, p. 232, paras. 9 and 11).

[17] See para. 46, point 1, of the Order.

[18] See paras. 32 and 42 of today's Order. Thus, even though, formally, this new decision "modifies" the previous one, since it makes an addition to it, the latter is purely explanatory in nature and not substantially novel.

[19] See the Court's famous dictum in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, according to which the principle of non-intervention or non-interference in the affairs of another State applies *exclusively to acts of coercion*:

> "the principle forbids all States . . . to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must . . . be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. *Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force*" (*Merits, Judgment, I.C.J. Reports 1986*, p. 108, para. 205; emphasis added).

planned elections, and without it being possible to prejudge whether such acts would be carried out[20], this reminder, as a form of interim protection, seemed reasonable to me. It also did not appear fruitless, since the "new" measure offered an opportunity to spell out clearly the scope and precise implications of the initial measure (the specific acts that it covers and those which it does *not* cover) in the particular context of the announced elections. *Ubi claritas, ibi utilitas*. I therefore also voted in favour of the clarifications provided by this "new" measure, although I do not claim that it was in strict law indispensable, since it was already contained, *in substance*, within the measure indicated in 2023. In any event, it is plain from the wording of the said "new measure" that it in no way affects Venezuela's *domaine réservé* or, in particular, the exercise of its constitutional prerogatives[21], be it the normative activity which led to the adoption of the Organic Law of 3 April 2024 or which was intended to develop it, or any measures which might be taken to implement that Law *on undisputed Venezuelan territory*, provided that they are not accompanied by direct or indirect acts of coercion (or the threat thereof) *on the disputed territory*[22]. Nor does the "new" measure indicated by the Court prohibit the lawful exercise — that is to say, still without any element of coercion — of the *personal jurisdiction* of the State of Venezuela *beyond* its undisputed boundaries[23].

IV. MEASURES REQUESTED BY THE APPLICANT

6. Having said this, I would not have been able to support the indication of most of the new, very detailed measures requested by Guyana, which, in my view, unlike the one decided by the Court, would have unduly impinged on the Respondent's rights under international law and breached the terms of Article 41 of the Statute.

7. For instance, the first of those measures sought to have the Court prohibit Venezuela from conducting *any* election "*in, or in respect of*, any part of the territory on Guyana's side of the boundary line as established by the 1899 Arbitral Award" (emphasis added). Again, while it seems obvious that there might be good reason to prohibit the organization and conducting, by the Respondent, of any election whatsoever *on and in respect of the territory in dispute* by carrying out unlawful acts of coercion on that territory, the same would not necessarily apply to the mere organization and conducting, by Venezuela, *on territory which is indisputably its own*, of general elections which, formally, *encompass* the territory in dispute. As regrettable as it might appear in the prevailing climate of tension between the Parties — and bearing in mind that the Court urged them, in its Order of December 2023, to refrain from any action which might aggravate the dispute — such an operation in itself may well, in theory, have no effect on the territory in dispute and, as such, could scarcely be capable of causing any irreparable prejudice whatsoever to the Applicant's "plausible" rights; indicating a measure seeking to prohibit such elections would have risked impinging on Venezuela's *domaine réservé*, while proving incapable of protecting Guyana's "plausible" rights on the territory in dispute. Moreover, in this context, prohibiting the *specific acts* listed in paragraph 35 (1) of Guyana's new Request by means of provisional measures would not have been unproblematic either. First, it would not have been certain that those acts, taken individually, and

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[20] Cf. e.g. *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 13, para. 41. Moreover, in the present case we cannot disregard the fact that the Organic Law of 3 April 2024 expressly stipulates, in its transitional provisions, that the elections concerning "Guayana Esequiba" will be conducted "in accordance with the Geneva Agreement and international law", and that "[u]ntil a practical and mutually acceptable solution is found with the Co-operative Republic of Guyana in respect of the territorial dispute, the seat of the public authorities of the State of Guayana Esequiba will be the town of Tumeremo" *[translation by the Registry]*, which is indisputably located in Venezuela, in the State of Bolívar.

[21] See *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.

[22] See fn. 19 above.

[23] Cf. e.g. the final report by Professor François Rigaux, with draft resolution, entitled *Les limites fixées par le droit international à la compétence des États sur les personnes relevant de leur juridiction*, presented at the Berlin Session of the Institut de droit international, *Yearbook*, 1999, Vol. 68 (I), p. 603 (in particular, point I. 3).

even collectively, could have been equivalent to "conduct[ing unlawful] election[s]" *on* the territory in dispute. Next, in the case of most of the acts, it is not impossible that a legal basis could have been identified which would have precluded the Court from prohibiting them, even provisionally. For example, it might seem excessive to seek to prevent *any extension* of "the right to vote in any Venezuelan election . . . to any individuals living within [the] territory [in dispute]", if only because some of those individuals might have held Venezuelan nationality and, in principle, been entitled to participate in elections being conducted in Venezuela. The same would have applied to the prohibition of *any* distribution of electoral material, physical or electronic, to *Venezuelan nationals* established in the territory in dispute. In my view, the measure requested seeking to prohibit *any* act *purporting* to appoint or elect, *even in Venezuela, any* governor or legislative council in respect of the territory in dispute also seemed to go too far. Besides the fact that such a measure could have affected a normative act outside the scope of international law, it would have disregarded the fact that the same international law has long recognized, and has not condemned, the practice of forming governments or other institutions *de facto* abroad. Finally, the measure seeking to prevent *any direct or indirect* communication between Venezuela and *any* individuals residing in the territory in dispute, even Venezuelans, in regard to any election planned by Venezuela with a link to the territory in dispute, seemed to me to be equally problematic: it would in fact have been liable to interfere, in particular, with the exercise by that State of its personal jurisdiction.

8. The second provisional measure requested by the Applicant also had to be rejected, in my view, since its scope was potentially too broad and risked creating more problems than it would have solved. After all, what exactly does it mean to "refrain from taking *any* action *which purports to* annex *de jure* or *de facto* any territory on Guyana's side of the . . . line established by the 1899 Arbitral Award, including by incorporating 'Guayana Esequiba' as part of Venezuela" (emphasis added)? Such a measure would certainly seem to comprise, amongst the actions capable of pursuing such an objective, a very wide range of acts, extremely varied in nature, which, with the necessary imagination, could always have been regarded in one way or another as seeking — even in the distant future — an "annexation", without actually affecting the territorial status quo. This would have applied to acts as harmless for the territory in dispute as mere political statements made in Venezuela, or normative activity by the Respondent on its own undisputed territory, including the decision of the Venezuelan legislator to include "Guayana Esequiba" on the map of Venezuela. It is not unusual for territories in dispute to be included in the territories of competing States on the maps that they produce, with no possibility of objection under international law[24]. Moreover, it is worth recalling that Guyana had already requested a similar measure in 2023, and that the Court had wisely declined to indicate it.

9. Finally, the third measure requested by the Applicant seemed at first sight to be similar to the one already indicated by the Court in its Order of 1 December 2023. In fact, it sought to go much further, by prohibiting *not only*, as in the 2023 Order, any act which "*would modify*" — in actual fact — the territorial status quo, but *also* any act which would merely "*seek* to modify" it, without there being any direct or immediate effect on the territory in dispute. Again, such a measure could have encompassed acts — purely normative acts, for example — which would in themselves be

[24] Clearly, this is completely different from the question of the relevance, in the "external sphere", of such maps, in particular for the purpose of establishing a territorial title, a matter which falls under international law alone (see e.g. in this context the well-known paras. 54 to 56 of the Judgment of the Chamber formed to deal with the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 582-583).

incapable of affecting that territory, and would hardly have been acceptable for the reasons already amply elucidated.

(Signed) Philippe COUVREUR.

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