DECLARATION OF JUDGE AURESCU

The paramount importance of upholding and strongly defending the norms and principles of the Vienna Convention on Diplomatic Relations.

Unilateral undertakings are binding in international law if they are made publicly and with the intention to be binding — The legal force of unilateral undertakings is the same whether they are made directly to the other party or before the Court — In certain circumstances, the Court could order regular reporting or non-aggravation of a dispute as an independent measure without indicating specific provisional measures.

1. By this declaration I would like to reiterate my support for the decision of the Court not to indicate provisional measures (Order, para. 39). I have voted in favour of this decision and I consider that the unanimity of votes in favour of it is indicative of its legal soundness.

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2. From the outset, I would like to strongly welcome the fact that in its Order the Court has emphasized in its paragraph 37 the importance it attaches to the principles enshrined in the Vienna Convention on Diplomatic Relations (also citing in this respect relevant texts from the landmark *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* case[1]). I cannot stress enough the paramount importance of upholding and strongly defending the principles and norms, including the inviolability, of the Vienna Convention on Diplomatic Relations which allow for the smooth unfolding of interactions between States through stable, safe and secure diplomatic relations.

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3. At the same time, in my view, I consider that a few nuances are important to be stressed in connection with three interconnected aspects related to this Order:

(a) *First*, regarding the reliance by the Court, in taking this decision, on the assurances/undertakings[2] provided by Ecuador both directly to Mexico,

[1] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, paras. 38-39.

[2] In its Order, the Court used the term "assurances".

and before the Court, prior and during the public hearings (see Order, paras. 27, 29, 30 and 31), that the Respondent will provide full protection and security to the premises, property and archives of the diplomatic mission of Mexico in Quito, to prevent any form of intrusion against them; that it will allow Mexico to clear the premises of its diplomatic mission and the private residences of its diplomatic agents; and that it will refrain from any action likely to aggravate or widen the dispute of which the Court is seised, and instead to pursue the peaceful settlement of disputes[3], as well as that Ecuador considers these undertakings as intended to cover the same ground as Article 45 *(a)* of the Vienna Convention on Diplomatic Relations and to extend to inviolability in so far as Article 45 so requires[4];

(b) *Second*, regarding the manner the Court treats such undertakings subsequent to acknowledging that they are binding and create legal obligations for the party which issued them, based, *inter alia*, on the presumption of good faith of that party in complying with the obligations assumed through those undertakings; and

(c) *Third*, regarding the legal force of such undertakings.

4. I fully concur with the observations and conclusions of the Court (Order, paras. 32 and 33) that the undertakings given by Ecuador cover the concerns expressed by Mexico in its request and that these undertakings, which were formulated in an unconditional manner, are binding and create legal obligations for the Respondent. I also fully agree with the conclusion of the Court (*ibid.*, para. 34) that, based on these undertakings, the Court considers that there is at present no urgency, in the sense that there is no real and imminent risk of irreparable prejudice to the rights claimed by the Applicant. And I also support the constant jurisprudence of the Court, reiterated in this Order, which also relies such reasoning on the good faith of the party delivering the undertakings, that is to be presumed as far as its complying with the obligations or commitments stemming from them[5].

5. Without in any way doubting the good faith of the Respondent in delivering the mentioned undertakings and, at this point in time, in the process of subsequent implementation of the legal obligations binding upon it as a result of providing such undertakings, one can however remark the fact that the entry of the Ecuadorian authorities, on 5 April 2024, in the premises of the Mexican Embassy in Quito, without the consent of Mexico, in order to

[3] Note Verbale sent on 9 April 2024 by the Ministry of Foreign Affairs of Ecuador to the Ministry of Foreign Affairs of Mexico; Letter dated 19 April 2024 sent by the Ministry of Foreign Affairs of Ecuador to the Court; CR 2024/26, pp. 8-9, para. 4 (Terán Parral).

[4] CR 2024/26, p. 40, para. 28 (Wood).

[5] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 158, para. 44.

forcibly remove Mr Glas Espinel from those premises, occurred after, precisely on the same day, the Ecuadorian Ministry of Foreign Affairs stated in a press release that "in strict compliance with the norms of the Vienna Convention, [Ecuador] will continue to provide protection to the premises of the Mexican Embassy in Quito" (see Order, paras. 19 and 20).

6. Taking into account this element of the factual background of the case, it would have been helpful for the Court — based on these special circumstances and without departing from its established jurisprudence also relying on the presumption of good faith — to consider ordering the Respondent to report regularly on the implementation of its undertakings presented after the incident directly to Mexico and before the Court. This would have provided support to the implementation of the legal obligations resulting from the binding undertakings given by the Respondent.

7. I am making this observation being fully aware that in its established jurisprudence the Court has indicated such reporting, just like the provisional measure preventing the aggravation or extension of the dispute, only as an accompanying provisional measure to specific provisional measures[6]. Also, the Court has never reproduced the content of undertakings provided by a party before the Court in the *dispositif* of an order on provisional measures. However, I believe that the special circumstances of this case could have provided an opportunity for the Court to develop its jurisprudence and order reporting as an independent measure.

8. I am raising this point because I am of the view that there is no difference of legal force between undertakings provided directly to the other party and undertakings given before the Court. As long as they are made publicly and with the intention to be binding, they produce the same legal effects. The Order does not address this issue, but I consider important to provide the following brief considerations.

9. The Court has referred in its Order to the *Nuclear Tests* cases where the Court has developed that unilateral declarations can give rise to legal obligations, that interested States may take cognizance of such unilateral declarations, place confidence in them, and are entitled to require that the obligations thus created be respected (see Order, para. 33). Indeed, in *Nuclear Tests*, the Court found that France's unilateral declarations made both before and after the hearings created legal obligations binding upon France[7]. The Court noted that the statements were made outside the Court, but that they were nevertheless made publicly, *erga omnes*, and were known to Australia[8]. This case thus suggests that whether the statement was made before or outside the Court does not create a difference as far as its legal

[6] See, for example, *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Provisional Measures, Order of 1 December 2023, I.C.J. Reports 2023 (II)*, p. 668, para. 45.

[7] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 269-270, para. 51.

[8] *Ibid.*, pp. 263-264, para. 32 and p. 269, para. 50.

effects, as long as the statement was public and made with the intention to be binding.

10. On numerous occasions, the Court has considered undertakings made by respondents during public hearings on requests for provisional measures. In *Belgium* v. *Senegal*, the Court took into account Senegal's formal undertakings made during the public hearings (that it would not allow Mr Habré to leave its territory before the Court has given its final decision) when concluding that the condition of risk of irreparable harm and urgency was not fulfilled, so it declined to order provisional measures[9]. In *Timor-Leste* v. *Australia*, the Court found that the condition of imminent risk of irreparable harm was still met despite Australia's undertakings, because they were provided in such a way as to not entirely remove the risk of prejudice[10]. Similarly, in *Armenia* v. *Azerbaijan*, the Court found that Azerbaijan's statements "which were made publicly before the Court" contributed towards mitigating the imminent risk of irreparable prejudice, but did not remove the risk entirely, so it ordered provisional measures[11]. While the fact that the statements were made before the Court unambiguously demonstrates the respective State's intent to be bound by them and fulfils the publicity requirement, these cases do not suggest that statements made before the Court have greater legal force per se than unilateral undertakings made outside the Court.

11. From this perspective and, as mentioned above, without putting in question the good faith of Ecuador (see paragraph 5 of this declaration), the fact that the undertakings made directly to Mexico on 5 April 2024 have the same legal force as the undertakings given before the Court would have justified, in my view, a Court decision to order periodical reporting, as referred to in paragraph 6 of this declaration.

(Signed) Bogdan AURESCU.

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[9] *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. 155, paras. 69-72.

[10] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, pp. 158-159, paras. 43-48.

[11] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 17 November 2023, I.C.J. Reports 2023 (II)*, pp. 637-638, paras. 62 and 64; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia* v. *Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023 (I)*, p. 28, para. 56.