

DECLARATION OF VICE-PRESIDENT XUE

1. I voted for the decision of the Court to reject the UAE's Request for the indication of provisional measures. However, I disagree with some of the Court's reasoning in rejecting the third and fourth measures requested by the UAE.

2. I am of the view that the third and fourth measures, being characterized as relating to the non-aggravation of the dispute (see paragraph 28 of the Order), are sufficiently covered by the Order of 23 July 2018, by which the Parties are required to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*), p. 434, para. 79 (2)). For the present incidental proceedings, the UAE's Request for the indication of provisional measures must be considered in the light of the existing Order of 23 July 2018. Both in law and fact, the UAE's Request is linked with the previous Order. As the measure of non-aggravation is already in place, logically, the third and fourth measures requested by the UAE are superfluous. In my view, this is a sufficient reason to reject these portions of the Request.

3. In rejecting the UAE's submissions, the Court stated that measures for non-aggravation of the dispute *can only be indicated as an addition to specific measures* to protect rights of the parties (Order, para. 28). Since there are no specific provisional measures indicated, the Court finds that it cannot indicate measures solely with respect to the non-aggravation of the dispute. Notwithstanding the prevailing position adopted by the Court on this question in recent years, this pronouncement deserves a second thought. Adding such a restrictive qualification may unduly restrain the power of the Court under Article 41 of the Statute and Article 75 of the Rules of Court to indicate provisional measures.

4. Interim measures of protection serve to preserve the rights claimed by either of the parties to a dispute against irreparable prejudice, pending the final Judgment of the Court. To indicate such measures, the Court has to decide, according to the settled jurisprudence, that it has jurisdiction *prima facie* in the case, the rights claimed for protection are plausible, and there is an imminent risk of irreparable prejudice to such rights. In determining these technical prerequisites for the indication of provisional measures, the Court, of course, does not exercise its power in a mechanical way; its examination largely focuses on the specific circum-

stances of the case before it. The Court therefore possesses the power to decide, either *proprio motu* or at the request of either of the parties, whether to indicate provisional measures and what measures are required. Such measures may be, in whole or in part, other than those requested, or that ought to be taken or complied with by the requesting party.

5. This incidental proceeding, which exists in almost all legal systems, is intended to ensure due administration of justice and effective settlement of disputes. As the Permanent Court of International Justice observed in the *Electricity Company of Sofia and Bulgaria* case,

“[Article 41 (1) of the Statute] applies the principle universally accepted by international tribunals . . . 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” (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199*).

6. This proceeding at the international level, however, has another dimension. As one of the major organs and the principal judicial organ of the United Nations, the Court is entrusted to settle disputes between States in accordance with international law. In carrying out its judicial functions, the Court in its own way contributes to the maintenance of international peace and security. Given this general obligation under the Charter of the United Nations, the Court has to be mindful of the broader situation in which a particular case is situated. As was pointed out in the *Frontier Dispute* case, when two States jointly decide to have recourse to the Court for the peaceful settlement of a dispute, incidents may subsequently occur which are not merely likely to extend or aggravate the dispute but also comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes. In these situations, the Court not only has the power, but also the “duty” to indicate, if need be, such provisional measures as may conduce to the due administration of justice (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 9, para. 19*). In practice, it is not unusual that, in cases involving use of force or serious violations of human rights and international humanitarian law, a provisional measure of non-aggravation of the dispute is requested or considered as the primary measure to be taken in light of the circumstances (see *Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p. 17*; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972, p. 35*; *Nuclear Tests (Australia v. France), Interim Protection, Order of*

22 June 1973, *I.C.J. Reports 1973*, p. 106; *Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 142; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, *Interim Protection, Order of 5 July 1951*, *I.C.J. Reports 1951*, p. 93; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Provisional Measures, Order of 10 January 1986*, *I.C.J. Reports 1986*, pp. 11-12; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Provisional Measures, Order of 15 March 1996*, *I.C.J. Reports 1996 (I)*, p. 24, para. 49 (1); *Legality of Use of Force (Yugoslavia v. France)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999 (I)*, p. 374, paras. 36-37; *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*, p. 129, para. 47 (1)). Although in these cases the measure of non-aggravation or extension of the dispute was never indicated alone, and was rather often coupled with specific measures, the weight of such a measure in each case cannot be diminished as secondary. After all, maintenance of international peace and security is the ultimate goal for the judicial settlement of international disputes.

7. The questions whether, when circumstances so require, a provisional measure of non-aggravation can be indicated alone and whether the Court should exercise its power to do so *proprio motu*, have long been debated among the judges of the Court (see *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*, dissenting opinion of Judge Bedjaoui, pp. 158-159, paras. 31-34, dissenting opinion of Judge Weeramantry, p. 181, dissenting opinion of Judge Ajibola, p. 193; *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999 (I)*, dissenting opinion of Judge Weeramantry, p. 202, dissenting opinion of Judge Shi, p. 207, dissenting opinion of Judge Vereshchetin, p. 209; *Legality of Use of Force (Yugoslavia v. France)*, *Provisional Measures, Order of 2 June 1999*, *I.C.J. Reports 1999 (I)*, dissenting opinion of Judge *ad hoc* Kreća, p. 413, para. 7; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures, Order of 10 July 2002*, *I.C.J. Reports 2002*, declaration of Judge Koroma, pp. 254-255, para. 15; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 23 January 2007*, *I.C.J. Reports 2007 (I)*, declaration of Judge Buergethal, pp. 21-25, dissenting opinion of Judge *ad hoc* Torres Bernárdez, p. 40, para. 46; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, *Request for the Modifi-*

cation of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, I.C.J. Reports 2015 (II), separate opinion of Judge Cançado Trindade, pp. 564-565, para. 9; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, dissenting opinion of Judge Salam, pp. 483-484, paras. 9-10). Although the circumstances in which these individual opinions were expressed varied from case to case, these opinions' consideration of the issue generally concerned the judicial role of the Court in the maintenance of international peace and legal order.

8. It is observed that, since the *Pulp Mills* case, the Court has adopted an unequivocal position with regard to the measure of non-aggravation, treating it as ancillary to measures for the purpose of preserving specific rights. It is on the basis of this jurisprudential development that this Order is intended to further clarify the issue. This effort, however, in my opinion, is too big of a step. The Court may find its hands tied when situations arise calling for its active response.

(Signed) XUE Hanqin.
