2 MAY 2019

ORDER

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(QATAR c. ÉMIRATS ARABES UNIS)

2 MAI 2019

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APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judges* ad hoc COT, DAUDET; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. On 11 June 2018, the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates (hereinafter referred to as the "UAE") with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

2. At the end of its Application, Qatar

> "in its own right and as *parens patriae* of its citizens, respectfully requests the Court to adjudge and declare that the UAE, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under Articles 2, 4, 5, 6, and 7 of the CERD by taking, *inter alia*, the following unlawful actions:
>
> *(a)* Expelling, on a collective basis, all Qataris from, and prohibiting the entry of all Qataris into, the UAE on the basis of their national origin;
>
> *(b)* Violating other fundamental rights, including the rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals;
>
> *(c)* Failing to condemn and instead encouraging racial hatred against Qatar and Qataris and failing to take measures that aim to combat prejudices, including by *inter alia*: criminalizing the expression of sympathy toward Qatar and Qataris; allowing, promoting, and financing an international anti-Qatar public and social-media campaign; silencing Qatari media; and calling for physical attacks on Qatari entities; and
>
> *(d)* Failing to provide effective protection and remedies to Qataris to seek redress against acts of racial discrimination through UAE courts and institutions."

Accordingly,

> "Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under CERD and, *inter alia*:
>
> *(a)* Immediately cease and revoke the Discriminatory Measures, including but not limited to the directives against 'sympathizing' with Qataris, and any other national laws that discriminate *de jure* or *de facto* against Qataris on the basis of their national origin;

(b) Immediately cease all other measures that incite discrimination (including media campaigns and supporting others to propagate discriminatory messages) and criminalize such measures;

(c) Comply with its obligations under the CERD to condemn publicly racial discrimination against Qataris, pursue a policy of eliminating racial discrimination, and adopt measures to combat such prejudice;

(d) Refrain from taking any further measures that would discriminate against Qataris within its jurisdiction or control;

(e) Restore rights of Qataris to, *inter alia*, marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals, and put in place measures to ensure those rights are respected;

(f) Provide assurances and guarantees of non-repetition of the UAE's illegal conduct; and

(g) Make full reparation, including compensation, for the harm suffered as a result of the UAE's actions in violation of the CERD."

3. In its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. By an Order dated 23 July 2018, the Court, after hearing the Parties, indicated the following provisional measures:

"(1) The United Arab Emirates must ensure that

(i) families that include a Qatari, separated by the measures adopted by the United Arab Emirates on 5 June 2017, are reunited;

(ii) Qatari students affected by the measures adopted by the United Arab Emirates on 5 June 2017 are given the opportunity to complete their education in the United Arab Emirates or to obtain their educational records if they wish to continue their studies elsewhere; and

(iii) Qataris affected by the measures adopted by the United Arab Emirates on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;

(2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

6. By an Order dated 25 July 2018, the Court fixed 25 April 2019 and 27 January 2020, respectively, as the time-limits for the filing in the case of a Memorial by Qatar and a Counter-Memorial by the UAE.

7. On 22 March 2019, the UAE, also referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, in turn submitted a Request for the indication of provisional measures, in order to "preserve the UAE's procedural rights" and "prevent Qatar from further aggravating or extending the dispute between the Parties pending a final decision in th[e] case".

8. At the end of its Request, the UAE asked the Court to order that:

"(i) Qatar immediately withdraw its Communication submitted to the CERD Committee pursuant to Article 11 of the CERD on 8 March 2018 against the UAE and take all necessary measures to terminate consideration thereof by the CERD Committee;

(ii) Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE;

(iii) Qatar immediately stop its national bodies and its State-owned, controlled and funded media outlets from aggravating and extending the dispute and making it more difficult to resolve by disseminating false accusations regarding the UAE and the issues in dispute before the Court; and

(iv) Qatar refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

9. The Deputy-Registrar immediately communicated a copy of the said Request to the Government of Qatar. He also notified the Secretary-General of the United Nations of the filing of the UAE's Request for the indication of provisional measures.

10. Qatar filed its Memorial in the case on 25 April 2019, within the time-limit fixed by the Court (see paragraph 6 above). On 30 April 2019, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court, the UAE presented preliminary objections to the jurisdiction of the Court and the admissibility of the Application. By an Order of 2 May 2019, the President of the Court fixed 30 August 2019 as the time-limit within which Qatar could present a written statement of its observations and submissions on the preliminary objections raised by the UAE.

11. Public hearings on the UAE's Request for the indication of provisional measures were held from 7 to 9 May 2019, during which oral observations were presented by:

On behalf of the UAE: H.E. Ms Hissa Abdullah Ahmed Al-Otaiba,
Mr. Robert G. Volterra,
Mr. W. Michael Reisman,
Mr. Dan Sarooshi,
Ms Maria Fogdestam-Agius.

On behalf of Qatar: Mr. Mohammed Abdulaziz Al-Khulaifi,
Mr. Vaughan Lowe,
Mr. Lawrence H. Martin,
Ms Catherine Amirfar,
Mr. Pierre Klein.

12. At the end of its second round of oral observations, the UAE asked the Court to order that:

> "(i) Qatar immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination on 8 March 2018 against the UAE and take all necessary measures to terminate consideration thereof by that Committee;
>
> (ii) Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE;
>
> (iii) Qatar immediately stop its national bodies and its State-owned, controlled and funded media outlets from aggravating and extending the dispute and making it more difficult to resolve by disseminating false accusations regarding the UAE and the issues in dispute before the Court; and
>
> (iv) Qatar refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

13. At the end of its second round of oral observations, Qatar requested the Court "to reject the request for the indication of provisional measures submitted by the United Arab Emirates".

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14. By a letter dated 23 May 2019, the UAE submitted "two new pieces of evidence . . . relevant to [its] Request for the Indication of Provisional Measures", stating that "[e]ach piece of evidence is part of a publication that is readily available". For its part, by a letter dated 27 May 2019, Qatar objected to the submission of the two items. By letters dated 7 June 2019, the Registrar informed the Parties that the Court considered that the said items, produced after the closure of the oral proceedings, were not material for deciding on the UAE's Request for the indication of provisional measures.

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* *

I. PRIMA FACIE JURISDICTION

15. The Court may indicate provisional measures only if there is, prima facie, a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. That is so whether the request for the indication of provisional measures is made by the applicant or by the respondent in the proceedings on the merits (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 24).

16. The Court recalls that, in its Order of 23 July 2018 indicating provisional measures in the present case, it concluded that, "prima facie, it has jurisdiction pursuant to Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the 'interpretation or application' of the said Convention" (*I.C.J. Reports 2018 (II)*, p. 421, para. 41). The Court sees no reason to revisit its previous finding in the context of the present Request.

II. THE PROVISIONAL MEASURES REQUESTED BY THE UAE

17. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *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)*, pp. 421-422, para. 43).

18. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which the UAE wishes to see protected exist; it need only decide whether the rights claimed by the UAE, and for which it is seeking protection, are plausible rights, taking account of the basis of the Court's prima facie jurisdiction in the present proceedings (see paragraph 16 above) (*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. 422, para. 44). Thus, these alleged rights must have a sufficient link with the subject of the proceedings before the Court on the merits of the case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, pp. 10-11, paras. 27-30).

* *

19. With respect to the first provisional measure requested, namely that the Court order that Qatar immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") and take all necessary measures to terminate consideration thereof by that Committee, the UAE argues that this request seeks to protect its rights "to procedural fairness, to an equal opportunity to present its case and to proper administration of justice". More specifically, the UAE maintains that it has a right not to be compelled to defend itself in parallel proceedings before the Court and the CERD Committee.

20. Concerning the second measure requested — that "Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE" — the UAE asserts that Qatar's actions compromise the UAE's ability to implement the provisional measures indicated by the Court on 23 July 2018 without interference. It also contends that Qatar is manipulating and fabricating evidence by "creating the false impression that the UAE has imposed in effect a travel ban on Qatari citizens".

21. The third and fourth provisional measures requested by the UAE relate to the non-aggravation of the dispute. With regard to the third provisional measure, the UAE argues that Qatar's national bodies (in particular its National Human Rights Committee) and its State-owned, controlled and funded media outlets are disseminating false accusations regarding the UAE and the issues in dispute before the Court. It requests that Qatar be ordered to stop these actions, which it says have the effect of aggravating the dispute. As to the fourth measure — that "Qatar refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" — the UAE, referring to its factual allegations underpinning the first three measures requested, submits that, if that measure is not granted, Qatar will continue to "adversely affect[] in a significant way the prospects of the resolution of the dispute".

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22. Qatar maintains that the Court should not grant any of the measures requested by the UAE. With regard to the first measure, Qatar asserts, *inter alia*, that the rights alleged by the UAE are not plausible under CERD and that the proceedings in the CERD Committee and the Court are neither duplicative nor abusive. Moreover, in its view, the measure requested by the UAE prejudges questions of jurisdiction and admissibility, which should be decided at the preliminary objections stage.

23. With respect to the second provisional measure requested, Qatar submits that it blocked the visa application website for legitimate security reasons and strongly denies any "manipulation and fabrication of evidence", maintaining that the UAE's assertions in this regard are pure speculation and concern issues to be determined at the merits stage. It adds that there are in any event other means that could be used by the UAE to comply with the provisional measures indicated in the 23 July 2018 Order, and that the question of whether it interfered with the UAE's ability to comply with these measures is also one for the merits. In any case, Qatar states that it will unblock the website as soon as the security risks have been addressed by the UAE.

24. As to the third and fourth measures requested by the UAE, Qatar contends that the Court's jurisprudence makes clear that "non-aggravation" of the dispute does not provide a stand-alone basis for provisional measures and that such measures cannot be granted in the absence of the indication of measures satisfying the Court's settled criteria and aimed at preserving the rights in dispute. It also observes that, in its 23 July 2018 Order, the Court already indicated a non-aggravation measure that binds both Parties; the present requests concerning non-aggravation are thus, in its view, without object. Qatar adds that any claim that a party is violating an existing provisional measure is a matter for the merits phase.

* *

25. The Court considers that the first measure requested by the UAE does not concern a plausible right under CERD. This measure rather concerns the interpretation of the compromissory clause in Article 22 of CERD and the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter. The Court has already examined this issue in its Order of 23 July 2018 on the Request for the indication of provisional measures submitted by Qatar. In that context, the Court noted that:

> "Although the Parties disagree as to whether negotiations and recourse to the procedures referred to in Article 22 of CERD constitute alternative or cumulative preconditions to be fulfilled before the seisin of the Court, the Court is of the view that

> it need not make a pronouncement on the issue at this stage of the proceedings . . . Nor does it consider it necessary, for the present purposes, to decide whether any *electa una via* principle or *lis pendens* exception are applicable in the present situation." (*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)*, pp. 420-421, para. 39.)

The Court does not see any reason to depart from these views at the current stage of the proceedings in this case.

26. The Court considers that the second measure requested by the UAE relates to obstacles allegedly created by Qatar to the implementation by the UAE of the provisional measures indicated in the Order of 23 July 2018. It does not concern plausible rights of the UAE under CERD which require protection pending the final decision of the Court in the case. As the Court has already stated, "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" (*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), Judgment, I.C.J. Reports 2015 (II)*, p. 713, para. 126).

27. Since the first two provisional measures requested do not relate to the protection of plausible rights of the UAE under CERD pending the final decision in the case, the Court considers that there is no need for it to examine the other conditions necessary for the indication of provisional measures.

28. As to the third and fourth measures requested by the UAE, which relate to the non-aggravation of the dispute, the Court recalls that, when it is indicating provisional measures for the purpose of preserving specific rights, it may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. Such measures can only be indicated as an addition to specific measures to protect rights of the parties (see, for example, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J Reports 2007 (I)*, p. 16, paras. 49-51). With regard to the present Request, the Court has not found that the conditions for the indication of specific provisional measures are met and thus it cannot indicate measures solely with respect to the non-aggravation of the dispute.

29. The Court further recalls that it has already indicated in its Order of 23 July 2018 that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*I.C.J. Reports 2018 (II)*, p. 434, para. 79 (2)). This measure remains binding on the Parties.

III. CONCLUSION

30. The Court concludes from the foregoing that the conditions for the indication of provisional measures under Article 41 of its Statute are not met.

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* *

31. The decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, any questions relating to the admissibility of the Application, or any issues to be decided at the merits stage. It leaves unaffected the right of the Governments of Qatar and the UAE to submit arguments in respect of those questions.

*

* *

32. For these reasons,

THE COURT,

By fifteen votes to one,

Rejects the Request for the indication of provisional measures submitted by the United Arab Emirates on 22 March 2019.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc Cot.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourteenth day of June, two thousand and nineteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the State of Qatar and the Government of the United Arab Emirates, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President XUE appends a declaration to the Order of the Court; Judges TOMKA, GAJA and GEVORGIAN append a joint declaration to the Order of the Court; Judges ABRAHAM and CANÇADO TRINDADE append separate opinions to the Order of the Court; Judge SALAM appends a declaration to the Order of the Court; Judge *ad hoc* COT appends a dissenting opinion to the Order of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.C.

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, paragraph 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 circumstances 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, separate 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. 402, 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, p. 252, 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 Buergenthal, pp. 21-25, separate opinion of Judge *ad hoc* Torres Bernárdez, p. 26, para. 46; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Modification 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, 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.

JOINT DECLARATION OF JUDGES TOMKA, GAJA AND GEVORGIAN

Dispute should prima facie fall within the scope of the treaty containing the compromissory clause — Discrimination based on nationality does not prima facie fall within the scope of CERD.

1. We voted with the majority in favour of the rejection of the Respondent's Request for the indication of provisional measures, but we are unable to agree with the statement made in the Order with regard to jurisdiction prima facie (Order, paragraph 16). As we observed last year in our joint declaration concerning the Request for the indication of provisional measures submitted by the Applicant,

> "[w]hen assessing prima facie its jurisdiction and the plausibility of the rights invoked by the requesting Party in view of the adoption of provisional measures, the Court has to ascertain that prima facie the dispute falls within the scope of the treaty that contains the compromissory clause conferring jurisdiction on the Court and that the claimed rights are plausibly based on that treaty" (*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. 435, para. 1).

2. Since, for the reasons explained in our previous declaration, the dispute does not fall within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), we came to the conclusion that the Court prima facie lacks jurisdiction (*ibid.*, p. 437, para. 7). We consider that the same conclusion should be reached when the Court examines further requests for the indication of provisional measures submitted in the same case by the Applicant or, as in this instance, by the Respondent. In our opinion, the dispute still does not fall within the scope of CERD, so that the Request for provisional measures has to be rejected for the same reason, irrespective of the fact that it was submitted by the other Party a few months later. Moreover, before reaching a conclusion on this point in the present Order, the Court should have completed its analysis in view of assessing whether the rights claimed by the Respondent are based on CERD.

(Signed) Peter TOMKA.

(Signed) Giorgio GAJA.

(Signed) Kirill GEVORGIAN.

SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the operative part of the Order — Reservations about the Court's treatment of the question of "prima facie jurisdiction" — Court not required to address this question in so far as the other conditions necessary for the indication of provisional measures are not met — Distinction between the Court's jurisdiction under Article 41 of the Statute to entertain a request for provisional measures and its jurisdiction to entertain the principal proceedings — Court has no choice in the present case but to find that it has prima facie jurisdiction — Reservations about the reasons for rejecting the first two measures requested — Definition of the purpose of provisional measures proceedings too restrictive — Unjustified exclusion of provisional protection of a party's procedural rights during the judicial process itself — Procedural rights of the UAE in the present case not exposed to any risk of irreparable harm.

1. I voted in favour of the Court's rejection of the provisional measures requested by the UAE, and I have not the slightest doubt that the request was bound to fail.

However, as regards the reasoning by which the present Order justifies the rejection of the measures requested, I would like to express some reservations and add some nuances here.

2. The following observations address two points: the manner in which the Order deals with the question of "prima facie jurisdiction" and the reasons for which the Order finds the first two measures requested unfounded.

I. "Prima facie jurisdiction"

3. The question of "prima facie jurisdiction" is dealt with briefly in paragraphs 15 and 16 of the Order. Having recalled that it may indicate provisional measures only if there is, prima facie, a basis of jurisdiction enabling it to entertain the merits of the case, and having noted that this is so whether the request for provisional measures is made by the applicant or by the respondent in the principal proceedings (paragraph 15), the Court refers to its Order of 23 July 2018 on the Request submitted by Qatar in the same case, in which it concluded that it had such "prima facie jurisdiction", and adds that it "sees no reason to revisit its previous finding in the context of the present Request" (paragraph 16).

4. I believe that, in expressing itself thus, the Court has said either too much or too little.

5. It could have said less. Indeed, in my opinion, the Court did not have to address the question of "prima facie jurisdiction" in the context of the present Order, in so far as it found in the ensuing paragraphs that some or all of the other conditions required to order the measures requested were not met. When there are cumulative conditions for a request to be upheld, it is sufficient for one of them not to be met to make it unnecessary to examine the others. In this instance, since the UAE failed to demonstrate the existence of plausible rights that would have called for provisional protection in the form of the first two measures requested, and since, for the reasons set out in the Order, the third and fourth measures had to be rejected in consequence, there was no need to determine whether or not the other conditions to which the indication of provisional measures is subject, including "prima facie jurisdiction", were satisfied (no inference is drawn in the Order from the fact that this particular condition is met in this instance, since, in its operative

part, the Order rejects the measures requested in the same terms that it would have used in any event).

6. But perhaps it is necessary here to clear up a confusion which is rather easily made.

7. It is clear that a court may rule on a request (to uphold or reject it) only if it has a title of jurisdiction enabling it to entertain that request. The Court has often recalled that it must always satisfy itself that it has jurisdiction, if necessary *proprio motu*, before undertaking any examination of the merits of a request. It must therefore have jurisdiction to rule on a request for provisional measures, in order to be able to decide whether or not the request meets the conditions allowing it to be upheld.

8. But it would be wrong to confuse this question with that of "prima facie jurisdiction". In the jurisprudence of the Court, the latter concept is used not to determine whether the Court has jurisdiction to entertain a request for provisional measures, but to ascertain whether it has jurisdiction to entertain the principal proceedings: it is necessary and sufficient for the Court to have prima facie jurisdiction for that purpose, and, in this regard, it will refer to the basis (or bases) of jurisdiction invoked in support of the principal claim.

9. The Court's jurisdiction to entertain a request for provisional measures, for its part, does not derive from the jurisdictional basis invoked in the proceedings on the merits (in the present case, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)). It is based directly on Article 41 of the Court's Statute, which gives the Court the power, when seised of a case, to indicate any provisional measures which ought to be implemented to preserve the rights of either party.

This basis of jurisdiction is entirely independent of that relied on, by the applicant or by both parties, in the context of the principal proceedings.

10. What, then, is the raison d'être of the concept of "prima facie jurisdiction"? It is not intended to found the Court's jurisdiction to rule on a request for provisional measures (for which Article 41 of the Statute is sufficient). Rather, it is one of the cumulative conditions that must be met for a provisional measure to be indicated (a condition which is all the more essential since, the provisional measures indicated by the Court being binding on the States to which they are addressed, it would be inconceivable for the Court to impose obligations on them if its jurisdiction to entertain the principal proceedings was not to some extent likely to be established).

As the Court consistently states in its orders (and as it states here in paragraph 15 of the present Order), prima facie jurisdiction to entertain the merits of the case is a necessary condition for the Court to be able to *indicate* provisional measures (and not: for the Court to be able to entertain a request for provisional measures).

11. Thus, if "prima facie jurisdiction" is regarded as one of the cumulative conditions necessary for the indication of a provisional measure (and not as the condition for the Court's jurisdiction to rule on a request for provisional measures), the logical conclusion is as follows: for such a measure to be ordered, the Court must establish that all the conditions — including, first of all, the one relating to "prima facie jurisdiction" — are satisfied; however, for a measure that has been requested to be rejected, it is sufficient that one of the conditions (for example, the risk of irreparable harm to a plausible right) is not met for the Court to be dispensed from ruling on the

others (including the one relating to "prima facie jurisdiction"). The Court could have taken this approach in this instance.

12. That being said, there is no bar on the Court including legally superfluous reasoning in its decisions. One can understand the judicial policy reasons for which the Court, in its orders on requests for provisional measures, has made a habit of ruling first, and in all instances, on the question of "prima facie jurisdiction", both when it decides to indicate such measures (in which case it is required to establish prima facie jurisdiction) and when it decides to reject the request outright on another ground (in which case it could dispense with ruling on this question).

13. The Court chose here, in keeping with its usual practice, to note that the condition relating to "prima facie jurisdiction" is met, even though the Order subsequently finds that other indispensable conditions are not.

14. I would have nothing to say on the matter if I did not find the reasoning the Court gives in paragraph 16 of its Order somewhat brief.

15. Referring to its Order of 23 July 2018 in the same case, the Court recalls that, on that occasion, it concluded that it had prima facie jurisdiction to entertain the case (that is, the proceedings instituted by Qatar against the UAE) on the basis of Article 22 of CERD, and adds that it "sees no reason to revisit its previous finding in the context of the present Request".

16. In my view, not only did the Court have no reason to revisit its previous finding, it had an excellent reason not to call it into question.

17. In its 2018 Order, the Court ordered the UAE to implement certain provisional measures at Qatar's request (and with a view to protecting the latter's rights). In reaching this decision, it found (as it was required to do) that it had prima facie jurisdiction to entertain the case on the merits. It is difficult to see how the Court, when later seised of a request for provisional measures from the other Party, could have reconsidered its previous position, reversed it, and consequently rejected the UAE's request. Not only would such an approach hardly have been compatible with the consistency and continuity expected of the Court in the exercise of its judicial function (even if it is not legally bound to follow its precedents, and especially its orders indicating provisional measures, which are not *res judicata*), but, above all, it would have seriously conflicted with the rules of procedural fairness and the principle of equality between the parties to proceedings. A decision rejecting the measures requested by the UAE on the ground that the Court lacked prima facie jurisdiction to entertain the principal proceedings, while the measures ordered in 2018 in Qatar's favour on the basis of the opposite position would have remained in force, would have been unacceptable in terms of judicial fairness.

18. Of course, the Court was in no way tempted to take this approach (especially since, at this stage, neither Party was arguing a lack of prima facie jurisdiction). But I find it regrettable that the standard reasoning set out in paragraph 16 of the Order does not make it sufficiently clear that, in the present case, the Court really had no room for choice: it could only conform to what it had ruled one year earlier; even if it had seen a "reason to revisit its previous finding", it would not have been able to take it into account.

II. The reasons for rejecting the first two provisional measures requested by the UAE

19. The first provisional measure requested sought to have the Court order Qatar to withdraw its Communication to the Committee on the Elimination of Racial Discrimination (the CERD Committee), which concerns the same facts as those submitted to the Court. According to the UAE, the existence of these parallel proceedings (before the Committee) placed it at a disadvantage in the proceedings before the Court and violated its rights to procedural fairness and to a proper administration of justice.

The second provisional measure sought to have the Court order Qatar to unblock Qatari citizens' access to the website set up by the UAE, in execution of the Court's 2018 Order, in order to enable some of those citizens to apply for a permit to return to the UAE. According to the UAE, Qatar, by its conduct, is compromising the UAE's ability to implement the provisional measures ordered by the Court one year ago.

20. The Court rejects both these requested measures by way of similarly worded reasoning: "the first measure requested . . . does not concern a plausible right under CERD" (paragraph 25 of the Order); "the second measure requested . . . does not concern plausible rights of the UAE under CERD which require protection pending the final decision . . ." (paragraph 26).

These formulations echo that used by the Court in paragraph 18 of the Order, where it sets out, in general terms, the conditions that had to be met in order for the measures requested by the UAE to be upheld: "the Court . . . need[s] . . . [to] decide whether the rights claimed by the UAE, and for which it is seeking protection, are plausible rights, taking account of the basis of the Court's prima facie jurisdiction in the present proceedings . . . Thus, these alleged rights must have a sufficient link with the subject of the proceedings before the Court on the merits of the case . . .".

21. Taken literally, these formulations seem to exclude the possibility of provisional measures proceedings being instituted by a party with a view to obtaining provisional protection for its procedural rights during the judicial process itself. They appear to limit the provisional measures that the Court may order to those aimed at provisional protection of the rights which the parties assert — or may plausibly assert — in the proceedings on the merits, that is to say, the rights which the parties hold — or may plausibly claim to hold — under the legal instrument that forms the basis of the Court's jurisdiction and determines the substantive law applicable to the merits of the case (if that instrument is a treaty, as it is here).

22. That would be a particularly restrictive definition of the purpose of provisional measures proceedings, which would have no foundation in either the Court's Statute or its jurisprudence (although I admit there is some ambiguity regarding this latter point).

23. The Statute gives the Court "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party" (Article 41, paragraph 1). There is nothing in either the letter or the spirit of the text to suggest that "the respective rights of either party" referred to here ("droit de chacun" in the French version) should be understood to mean only the rights at issue on the merits of the case (those which form the subject-matter of the dispute), to the exclusion of each party's procedural rights during the judicial process before the Court.

24. It is true that, in practice, when a party asks the Court to indicate provisional measures, it is usually to protect the rights it claims in the principal proceedings, on the basis of the substantive law that the Court is to apply in settling the dispute. That is why the Court, always bearing in mind the case at hand, generally uses the formulation adopted in the present Order (or one that is similar): the rights claimed, for which provisional protection is sought, must be plausible, taking account of the basis of the Court's prima facie jurisdiction, that is to say that they must have a sufficient link with the subject-matter of the proceedings before the Court on the merits of the case.

25. However, this is not a convincing reason to exclude, on principle, provisional measures aimed at protecting other types of rights: the right to procedural fairness, the right to equality of arms or the right to sound administration of justice, which may also — albeit exceptionally — be affected by one party's conduct towards another. It is true that, in some instances, situations in which such rights are at risk of being irreparably harmed, to a party's detriment, could be adequately dealt with by the Court, if necessary *proprio motu*, on the basis of its general power as to the conduct of a case. However, this is not sufficient to exclude the option of recourse to provisional measures available, under Article 41 of the Statute, to protect the "respective rights of either party". This is especially so given that, while it is readily conceivable that the Court has the necessary powers, without having recourse to provisional measures, to counter, if necessary, conduct by a party which has allegedly harmed the other party's procedural rights during the judicial process, the same cannot be said where such harm results from a party's extrajudicial conduct, that is, an act external to the judicial process itself. In that case, recourse to provisional measures proceedings is the only effective means by which the other party may protect its rights. Would such a case be so rare in practice as to be all but hypothetical? It should be reserved all the same.

26. In his declaration appended to the Order of 23 January 2007 on a request for provisional measures submitted by the respondent in the case concerning *Pulp Mills on the River Uruguay* (*(Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 21, para. 3), my distinguished colleague Judge Buergenthal already clearly demonstrated that there were two types of provisional measures: those which derive from an "urgent need . . . because of the risk of irreparable prejudice or harm to the rights that are the subject of the dispute over which the Court has prima facie jurisdiction", and those which aim to "prevent a party to a dispute before it from interfering with or obstructing the judicial proceedings by coercive extrajudicial means, unrelated to the specific rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case".

I can but refer the reader to my predecessor's demonstration.

27. To return to the present case, I am of the view that although the first two measures requested by the UAE had to be rejected, it is not because the rights which the requested measures sought to protect were not plausible "under CERD". It is true that these alleged rights — the right to procedural fairness and the right not to suffer any interference with the implementation of a provisional measure ordered by the Court — do not, in the UAE's case, derive from CERD itself (not, in any event, from its substantive provisions): these are rights — the first, certain, but the second, questionable — that the State would have in its capacity as a party to the judicial proceedings on the basis of the Statute, not the provisions of the treaty with which compliance constitutes the subject-matter of the dispute. However, in my opinion, this is not the right reason for rejecting the measures requested.

28. These measures had to be rejected — and I fully agree with the Court in having done so — because the UAE's procedural rights in the judicial proceedings pending before the Court are clearly not exposed to any risk of irreparable harm as a result of Qatar's alleged conduct.

For one thing, I fail to see how the existence of parallel proceedings before the CERD Committee would risk breaching procedural fairness and equality of arms between the Parties before the Court.

For another, assuming that Qatar is preventing the UAE from implementing a provisional measure ordered by the Court in the interest of Qatar and its citizens, the Respondent would have to demonstrate this at a later stage of the proceedings, if the Court were seised of a request from Qatar seeking a finding that the measure in question had not been completely and effectively implemented. Until then, the UAE's procedural rights are fully protected.

(Signed) Ronny ABRAHAM.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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Paragraphs

I. *PROLEGOMENA*.

1. In the handling of the present case of the *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD Convention) (Qatar *versus* United Arab Emirates - UAE), the International Court of Justice (ICJ) has had to face an unfortunate sequence with the lodging with it of the present request. The inevitable decision it has just taken draws attention to the importance of the provisional measures of protection that it indicated in its previous Order of 23.07.2018, the compliance with which is obligatory. They duly safeguard human rights under the CERD Convention.

2. In addition to the present Order dismissing the UAE's *Request*, I feel obliged to leave on the records, under the relentless pressure of time, in the present Separate Opinion, my personal considerations on the matter dealt with, moved by a sense of duty in the exercise of the international judicial function. I am encouraged to do so since the ICJ has had to decide on a request which has not invoked human rights protected under a core human rights treaty like the CERD Convention.

3. This being so, I shall develop my reflections in the following sequence: a) provisional measures of protection already ordered to secure respect for some human rights safeguarded under the CERD Convention; b) the problem of the absence of link in the present request; c) the problem of its inconsistencies as to the CERD Convention and as to the CERD Committee; d) relevance and persistence of provisional measures of protection of persons in continuing situations of vulnerability; and e) the longstanding importance of the fundamental principle of equality and non-discrimination. Last but not least, in an epilogue, I shall conclude with a recapitulation of the key points that I sustain in the present Separate Opinion.

4. There is an additional point to make here. I reach the conclusion, like the ICJ, that the present *Request* is not grounded for the ordering of provisional measures under the CERD Convention. Yet, as in my perception the reasoning of the Court itself is not always sufficiently clear in reaching this decision, and unnecessarily generates uncertainties, I deem it fit, furthermore, to fulfil the need to clarify some points along the present Separate Opinion, also drawing attention to the provisional measures of protection already indicated by the ICJ in its previous Order of 23.07.2018, which remain in force and are to be complied with.

II. PROVISIONAL MEASURES OF PROTECTION ALREADY ORDERED TO SECURE RESPECT FOR CERTAIN RIGHTS SAFEGUARDED UNDER THE CERD CONVENTION.

5. To start with, this is a case of human rights protection under the CERD Convention, - like other cases lodged before with the ICJ. The provisional measures of protection already ordered by the ICJ on 23.07.2018 remain in force, so as to secure the safeguard of the rights protected under Articles 2, 4, 5, 6 and 7 of the CERD Convention and the corresponding obligations. This was duly requested by Qatar, as acknowledged by the ICJ's Order of 23.07.2018[1]. There is a clear distinction in the positions upheld by the two contending parties.

6. Qatar has been attentive in its endeavours to sustain a clear link between the provisional measures of protection requested and the rights invoked under the CERD Convention (para. 56), and the ICJ held that "a link exists between the rights whose protection is being sought and the provisional measures being requested by Qatar" (para. 59). In effect, in its original *Application* (of 11.06.2018), Qatar asserts rights under Articles 2, 4, 5, 6 and 7 of the CERD Convention and under the customary international law principle of non-discrimination (para. 58).

7. For its part, the UAE does not invoke acts appearing to amount to racial discrimination as defined in Article 1 of CERD Convention, which would then concern the rights under Articles 2, 4, 5, 6 and 7 of CERD Convention. The UAE's *Request* thus appears unrelated to the claims made by Qatar as to the merits phase, and does not concern rights under the CERD Convention which may subsequently be adjudged by the Court. It can clearly be seen that the UAE's *Request* of provisional measures does not invoke rights to be protected under CERD Convention, but simply alleges a violation of the compromissory clause (Article 22) of the CERD Convention.

8. In the *cas d'espèce* on the *Application of the CERD Convention*, unlike the present *Request* of the UAE, the previous *Request* of Qatar of provisional measures has raised the need of protection of some rights set forth in the CERD Convention, under Articles 2, 4, 5, 6 and 7[2]. There is thus no link between the measures presently requested by the UAE and the subject-matter of the

[1] Paragraphs 2, 20, 21, 26, 45, 50, 52, 54, 56, 58 and 67.

[2] Qatar's *Request* of 11.06.2018, para. 12.

dispute, which concerns the protection of some human rights of Qataris under the CERD Convention. This deserves attention on the part of the ICJ.

III. THE PROBLEM OF THE ABSENCE OF LINK IN THE PRESENT REQUEST.

9. In effect, the faculty of the ICJ to indicate provisional measures under Article 41 of the Statute aims at the preservation of the rights invoked by the parties in the *cas d'espèce*, pending its decision on the merits thereof. Accordingly, the ICJ, in its recent Order of Provisional Measures of 19.04.2017, in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine *versus* Russian Federation), has held that it

> "must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. (…)
>
> A link must therefore exist between the rights whose protection is sought and the provisional measures being requested" (paras. 63-64).

10. In the present case opposing Qatar to the UAE, concerning also the *Application of the CERD Convention*, although the subject-matter of the dispute concerns the interpretation and the application of substantive obligations under the CERD Convention, the request for the indication of provisional measures filed by the UAE does not allege that Qatar violated any substantive rights set forth under the CERD Convention. The request of the UAE therefore does not establish the existence of a link between the rights whose protection is sought and the provisional measures requested.

IV. THE PROBLEM OF INCONSISTENCIES, IN THE PRESENT REQUEST, AS TO THE CERD CONVENTION AND AS TO THE CERD COMMITTEE.

11. It should not pass unnoticed that arguments that have been presented to the Court in the present *Request* of provisional measures disclose certain inconsistencies, which pertain to the rights (under the CERD Convention) to be protected, as well as to proceedings before the CERD Committee. May I thus briefly consider such inconsistencies, recalling at first that the Court's Order of 23.07.2018 aims at the safeguard of some rights under the CERD Convention duly identified in the previous Qatar's *Request*.

1. Inconsistencies in the Request as to the ICJ's Order of 23.07.2018, in Respect of the CERD Convention.

12. Contrariwise, the present request by the UAE does not correspond to the human rights protected under the CERD Convention; it does not even refer to them. Moreover, it is permeated with inconsistencies, in relation to distinct points. To start with, it appears inconsistent to request the ICJ - as the UAE does - to order provisional measures by extending its *prima facie* jurisdiction and, at the same time, to object to its jurisdiction *ratione materiae*.

13. Moreover, the UAE's request, on the basis of the ICJ's jurisdiction under Article 22 of the CERD Convention, should concern a dispute arising out of the interpretation or the application of the CERD Convention. Yet, it does not address the safeguard of the human rights set forth in the CERD Convention; its request appears thus to fall outside the scope of the CERD Convention.

14. In its *Request*, the UAE, while pretending to pursue the interests of Qatari citizens (paras. 8, 11 and 23(ii)), asks the Court to order Qatar to withdraw its submission before the CERD Committee and "terminate consideration thereof by the CERD Committee" (para. 74(i)). In its *oral arguments* before the ICJ, Qatar sustains that it is contradictory to allege that participating in such procedure would aggravate the dispute[3], and adds that what it seeks is the settlement of the dispute through the procedure of the CERD Committee[4].

15. Qatar contends that the UAE incurs into contradictions in alleging that "Qatar must exhaust the CERD procedures before coming to the Court", and, at the same time, requesting that the Court "order Qatar to put an end to the very procedures that it says must be exhausted as a prerequisite to the Court's jurisdiction"[5]. Qatar furthermore recalls that, during the proceedings with respect to the provisional measures that it requested in July 2018, the UAE referred to the CERD Committee as "the principal custodian of the Convention" and stated that it is "compulsory to refer to the Committee in all events"[6]. The UAE has thus raised contradictory arguments in respect of Qatar's request of provisional measures in 2018, and in respect of its own present request in 2019.

2. Inconsistencies in the Request as to the ICJ's Order of 23.07.2018, in Respect of the CERD Committee.

16. During the proceedings relating to the first request of provisional measures presented by Qatar, the UAE notably raised the argument that Qatar should have exhausted the procedure before the CERD Committee before seizing the Court; it argued that, in its view, seizing both at the same time would be incompatible with the *electa una via* principle and the *lis pendens* exception[7].

17. On this point, in its Order of 23.07.2018, the ICJ stated that it was not necessary "to decide whether any *electa una via* principle or *lis pendens* exception [were] applicable in the present situation" (para. 39). Yet, the UAE again raises a similar argument in its own present request of provisional measures, arguing that Qatar has "created a *lis pendens*" constituting "an abuse of the CERD dispute resolution mechanism" (para. 41), with a risk of "conflicting" decisions (para. 42).

18. May it be recalled that, on 08.03.2018, Qatar filed a communication with the CERD Committee under Article 11 of the CERD Convention[8]. After the ICJ's Order of 23.07.2018, Qatar has lodged a new communication with the CERD Committee on 29.10.2018, in application of Article 11(2) of the CERD Convention, as it has considered the UAE "unwilling to engage

[3] ICJ, doc. CR 2019/6, of 08.05.2019, p. 25, para. 46.

[4] ICJ, doc. CR 2019/6, of 08.05.2019, p. 12, para. 8.

[5] ICJ, doc. CR 2019/6, of 08.05.2019, p. 34, para. 28.

[6] ICJ, doc. CR 2019/6, of 08.05.2019, p. 12, para. 9.

[7] Cf. ICJ's Order of 23.07.2018, para. 35.

[8] Qatar's communication, *in* UAE's *Request,* Annex 20.

constructively with [it] to settle the matter"[9]. It does not seem that this would depart from, or contradict, the ICJ's Order of 23.07.2018.

V. Relevance and Persistence of Provisional Measures of Protection in Continuing Situations.

19. In the present case of *Application of the CERD Convention* (Qatar *versus* UAE), the relevance of the provisional measures of protection in force since the ICJ's Order of 23.07.2018 is underlined by the consideration of a *continuing situation* affecting some human rights under the CERD Convention. I have addressed this point in my previous Separate Opinion appended to that Order, and I deem it appropriate to retake the matter here.

20. May I recall, in this respect, that in my previous Separate Opinion I have pondered, *inter alia*, that

> "In effect, the *continuing situation* in breach of human rights is a point which has had an incidence in other cases before the ICJ as well, at distinct stages of the proceedings. May I briefly recall here three examples, along the last decade. In the case concerning the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), as the ICJ in its Order of 28.05.2009 decided not to indicate provisional measures, I appended thereto a Dissenting Opinion, wherein - as already pointed out (para. 79, *supra*) - I drew attention to the *décalage* to be bridged between the time of human beings and the time of human justice (paras. 35-64).
>
> Urgency and probability of irreparable damage, - I proceeded, - were quite clear, in the *continuing situation* of lack of access to justice of the victims of the Hissène Habré regime (1982-1990) in Chad. This right of access to justice assumed a 'paramount importance' (paras. 29 and 74-77), - I added, - in the *cas d'espèce*, under the U.N. Convention against Torture; furthermore, I dwelt upon the component elements of the autonomous legal regime of provisional measures of protection (paras. 8-14, 26-29 and 65-73). Such measures were necessary for the safeguard of the right to the realization of justice (paras. 78-96 and 101).
>
> In the case on *Jurisdictional Immunities of the State* (Germany *versus* Italy), as the ICJ, in its Order of 06.07.2010 found the counter-claim of Italy inadmissible, once again I appended thereto a Dissenting Opinion, wherein I examined at depth the notion of '*continuing situation*' in the factual context of the *cas d'espèce*, as debated between the contending parties (paras. 55-59 and 92-100). My Dissenting Opinion encompassed the origins of a 'continuing situation' in international legal doctrine (paras. 60-64); the configuration of a 'continuing situation' in international litigation and case-law (paras. 65-83); the configuration of a 'continuing situation' in international legal conceptualization at normative level (paras. 84-91).
>
> And, once again, I warned against the pitfalls of State voluntarism (paras. 101-123). Suffice it here only to refer to my lengthy reflections on the notion of 'continuing situation' in the case on *Jurisdictional Immunities of the State*, as I see no need to reiterate them *expressis verbis* herein. What cannot pass unnoticed is that a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to decisions - as just seen - on provisional measures and counter-claim (*supra*), it has also been addressed in decision as to the merits" (paras. 89-92).

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[9] Qatar's *Note Verbale* to the CERD Committee, *in* UAE's *Request*, Annex 21.

21. May I add, in the present Separate Opinion, that I further addressed the matter at issue in my extensive Dissenting Opinion (paras. 17 and 301) in the ICJ's Judgment (of 03.02.2012) in the same case of *Jurisdictional Immunities of the State*[10], just as I did also in my Separate Opinion (paras. 165-168) in the aforementioned case of the *Obligation to Prosecute or Extradite* (merits, Judgment of 20.07.2012).

22. Furthermore, there have been other occasions when I addressed the importance of provisional measures of protection in respect of human rights Conventions. May I also refer, e.g., to my Separate Opinion in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, merits, Judgment of 30.11.2010), wherein I dedicated a part of it (IX) to the notion of "continuing situation", with the projection of human rights violations in time[11] (paras. 189-199).

23. Shortly afterwards, in the ICJ's Judgment on reparations (of 19.06.2012) in the same case of *A.S. Diallo*, I appended a new Separate Opinion, wherein I drew attention to the "centrality of the victims" singling out their pressing need of rehabilitation (para. 83). And I added:

> "(…) Restorative justice has made great advances in the last decades, due to the evolution of the International Law of Human Rights, humanizing the law of nations (the *droit des gens*). (…) The universal juridical conscience seems to be at last awakening as to the need to honour the victims of human rights abuses and to restore their dignity.
>
> Rehabilitation of the victims acquires a crucial importance in cases of grave violations of their right to personal integrity. In effect, there have been cases where medical and psychological assistance to the victims has been ordered (…). Such measures have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity. Rehabilitation of the victims mitigates their suffering and that of their next of kin, thus irradiating itself into their social *milieu*.
>
> Rehabilitation, discarding the apparent indifference of their social *milieu*, helps the victims to recuperate their self-esteem and their capacity to live in harmony with the others. Rehabilitation nourishes the victims' hope in a minimum of social justice. (…) In sum, rehabilitation restores one's faith in human justice" (paras. 83-85).

24. More recently, in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ dismissed the case in its restrictive Judgment of 03.02.2015, to which I have appended an extensive Dissenting Opinion; once again, I addressed therein, *inter alia*, the problem of *continuing* violations of human rights, in distinct forms, such as, e.g., missing persons in enforced disappearances (paras. 292-293, 298-302, 314-316 and 535), victims of torture and inhuman treatment (paras. 317-320, 470 and 534).

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[10] For a case-study, cf. A.A. Cançado Trindade, *La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indebida de Inmunidades Estatales*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2013, pp. 5-305.

[11] The griefs suffered by the victim *extended in time*, in breach of the relevant provisions of human rights treaties (the U.N. Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights) as well as Article 36(1)(b) of the Vienna Convention on Consular Relations. The victim's griefs, surrounded by arbitrariness on the part of State authorities, amounted to a wrongful *continuing situation*, marked by the prolonged lack of access to justice.

25. In that Dissenting Opinion, moreover, I have deemed it fit to warn, *inter alia*, that despite the endeavours of human thinking, along history, to provide an explanation for evil,

> "it has not been able to rid humankind of it. (…) Whenever individuals purport to subject their fellow human beings to their 'will', placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R.P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of human kind has accounted for the continuous presence of that concern throughout the history of human thinking[12]" (para. 473)[13].

26. As I have already pointed out, in another aforementioned Dissenting Opinion that I presented, in the case of *Jurisdictional Immunities of the State* (para. 21, *supra*), a *continuing situation* affecting or in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ, namely, in provisional measures (like in the present case of the *Application of the CERD Convention*, twice already), as well as in counter-claims, merits, and reparations.

VI. Relevance of Provisional Measures of Protection of Rights of Persons in Situations of Vulnerability.

27. A *continuing situation* affecting human rights under the CERD Convention - duly stressed by Qatar in its own *Request* which led to the ICJ's Order of 23.07.2018 - leads to the *continuing vulnerability* of victimized human beings, or potential victims. Under the CERD Convention and other human rights treaties, attention is focused on human beings affected, - not on their States, nor on strictly inter-State relations.

28. On the occasion of the proceedings of the previous Order in the *cas d'espèce*, such continuing situation of human vulnerability - related to rights protected under the CERD Convention - was properly addressed by Qatar but not by the UAE, as I pointed out in my previous Separate Opinion (paras. 35-36 and 44-46). The aim is - I continued - to set up "a higher standard of protection, under the CERD Convention, of individuals in a continuing situation of great vulnerability" (para. 64). And I added:

> "For years I have been sustaining that provisional measures of protection, needed by human beings (under human rights treaties, like the CERD Convention in the *cas d'espèce*), may become even more than *precautionary*, being in effect *tutelary*, particularly for vulnerable persons (potential victims), and directly related to realization of justice itself. Obligations emanating from such ordered measures are not necessarily the same as those ensuing from a Judgment as to the merits (and reparations), they may be entirely distinct (…). Particularly attentive to human beings in situations of vulnerability, provisional measures of protection, endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension" (para 73).

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[12] R.P. Sertillanges, *Le problème du mal - l'histoire*, Paris, Aubier, 1948, pp. 5-412.

[13] For a case-study, cf. A.A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza/Brazil, IBDH/IIDH, 2015, pp. 9-265;

29. Hence the provisional measures of protection which were ordered by the ICJ last 23.07.2018, which remain in force, so as to safeguard some of the rights protected under the CERD Convention. The present *Request* by the UAE, - unlike the previous *Request* by Qatar, - does not refer to those rights. The question of human vulnerability counts on the attention of both contending parties in the present proceedings, but in distinct factual contexts addressed by the UAE and Qatar.

30. Qatar keeps on invoking the protection of rights under the CERD Convention. But, in the case of the position of the UAE, it does not relate vulnerability to the rights safeguarded under the CERD Convention. The UAE's present *Request* cannot thus be dealt with by the ICJ in the same way as the previous *Request* by Qatar. Hence the distinct decisions of the Court as to one request and the other. The important point is that the provisional measures of protection indicated in the ICJ's Order of last 23.07.2018 remain in force, to the benefit of human beings protected under the CERD Convention in respect of some rights (under Articles 2, 4, 5, 6 and 7).

VII. THE LONGSTANDING IMPORTANCE OF THE FUNDAMENTAL PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION.

31. In that previous Order, the ICJ has noted that Articles 2, 4, 5, 6 and 7 of the CERD Convention "are intended to protect individuals from racial discrimination", and hence the incidence also of Article 1 of the Convention (para. 52). The issue of continuing human vulnerability is not the only one that has not sufficiently received the needed attention in the present proceedings in respect - as I see them - of some of the rights protected under the CERD Convention.

32. In effect, the fundamental principle of equality and non-discrimination is of the utmost importance in the present context. Yet, this fundamental principle has received much more attention in the proceedings pertaining to the previous Order of the ICJ (of 23.07.2018, as to Qatar's *Request*), than in the current proceedings (as to the UAE's *Request*). In its practice, the CERD Committee has understandably been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, e.g., migrants).

33. This can be said also of the practice of other Committees under U.N. human rights Conventions, e.g., the Human Rights Committee, the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), among others[14]. In cases pertaining to the protection of human rights, the ICJ has been attentive to the work and decisions of such U.N. Committees.

34. For example, in its Judgment of 20.07.2012 (merits) in the aforementioned case of the *Obligation to Prosecute or Extradite*, the ICJ duly took note of a decision (of 17.05.2006) of the CAT Committee on a complaint filed with it by several Chadian nationals (S. Guengueng *et alii*) against Hissène Habré for crimes committed in Chad during his violent regime there (para. 27). There is thus nothing to hinder the ICJ to take into account decisions of U.N. Committees under human rights Conventions, so as to secure protection for the rights thereunder.

[14] E.g., the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances.

35. The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, constitute a point which cannot be overlooked, in time and space. After all, in the relations between human beings and public power, arbitrariness is a problem which has marked presence, and has been a source of concern, everywhere along the history of humankind. Hence the permanent need to protect human beings against discrimination and arbitrariness.

36. This is yet another point which I deem it sufficient to refer to in the present Separate Opinion, as I have already addressed it at length in my previous Separate Opinion appended to the ICJ's Order of provisional measures of protection of 23.07.2018, in the *cas d'espèce* of the *Application of the CERD Convention* (parts III-IV, paras. 9-32). After all, the idea of human equality, underlying the conception of the unity of the human kind, has marked its presence since the historical origins of the law of nations up to the present (paras. 11-12).

37. In recent years, the principle of equality and non-discrimination, and the prohibition of arbitrariness, have also marked presence in international case-law, including that of the ICJ (as I have pointed out, e.g., in my Separate Opinion in the ICJ's Judgments on the case of *A.S. Diallo*, merits, 2010, and reparations, 2012 [Guinea *versus* D.R. Congo]; in my Separate Opinion in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo*, 2010; in my Dissenting Opinion in the case of the *Application of the CERD Convention*, 2011 [Georgia *versus* Russian Federation]; in my Separate Opinion in the ICJ's Advisory Opinion on *Judgment of the ILO Administrative Tribunal on a Complaint against IFAD*, 2012; in my Dissenting Opinion in the case of the *Application of the Convention against Genocide*, 2015 [Croatia *versus* Serbia]; in my three Dissenting Opinions in the three cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, 2016 [Marshall Islands *versus* United Kingdom, India and Pakistan][15]; and in my Separate Opinion in the ICJ's very recent Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, of 25.02.2019).

38. This issue has been properly addressed in the ICJ's prior Order of last 23.07.2018 in the present case of the *Application of the CERD Convention*; I have devoted much attention to it in my Separate Opinion appended thereto, wherein I have warned, *inter alia*, that

> "The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels[16], have not, however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of Law. This is one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention" (para. 18).

39. There remains thus a long way to go. In the present case of the *Application of the CERD Convention*, in pursuance to Qatar's *Request*, the ICJ indicated provisional measures of protection of some rights under the CERD Convention. The present *Request* by the UAE does not provide the Court the occasion to do the same, as it makes no reference to rights protected under the CERD Convention. In dismissing this request, the ICJ could have made it clearer that the provisional

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[15] For a case-study, cf. A.A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasília, FUNAG, 2017, pp. 41-224.

[16] To the study of which I have dedicated my extensive book: A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st. ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

measures that it has already ordered (on 23.07.2018) remain in force, and are to be complied by the contending parties, to the benefit of human beings protected under the relevant provisions of the CERD Convention (*supra*).

VIII. The Fundamental Character, Rather than "Plausibility", of Human Rights Protected Under the CERD Convention.

40. The rights protected under the CERD Convention, in the light of the relevant and basic principle of equality and non-discrimination, are endowed with a fundamental character, with all legal consequences ensuing therefrom. I find it disheartening that, in its reasoning in the present Order, the ICJ once again indulges repeatedly into what it beholds as "plausible rights" (paras. 17, 21, 24, 25 and 26). Fundamental rights protected under the CERD Convention cannot be regarded or labelled as "plausible" or "implausible": they are fundamental rights.

41. I have been advancing my position in this respect for a long time within this Court. Instead of reiterating here all I have been stating along the years, may I here briefly refer to a couple of very recent examples. In my Separate Opinion appended to the ICJ's Order of 18.05.2017, in the case of *Jadhav* (India *versus* Pakistan), e.g., I have devoted a whole part (V) of it to "The Fundamental (Rather than 'Plausible') Human Right to Be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character" (paras. 19-23).

42. In my Separate Opinion appended to the ICJ's Order of 19.04.2017, in the aforementioned case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the U.N. Convention on the Elimination of All Forms of Racial Discrimination*, I have likewise dedicated a whole part (V) of it to "The Decisive Test: Human Vulnerability over 'Plausibility' of Rights" (paras. 36-44); additionally, recalling the relevant case-law on the matter[17], I have devoted three other parts (III, IV and IX) of it to provisional measures of protection in face of the tragedy of the utmost vulnerability of segments of the population (paras. 12-26, 27-35 and 62-67).

43. And, in the present case of *Application of the CERD Convention*, in the Separate Opinion that I have appended to the ICJ's previous Order of 23.07.2018, I have also drawn attention to the relevance of the fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness (parts III-IV, paras. 9-21 and 22-32), as well as to the relevance of provisional measures of protection in face of a continuing situation of vulnerability of segments of the population (parts VIII and XI, paras. 68-73 and 82-93). I have pondered, *inter alia*, that

> "Human beings in vulnerability are the ultimate beneficiaries of compliance with the ordered provisional measures of protection. However vulnerable, they are subjects of international law. We are here before the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. This is a point which I have been making in successive Individual Opinions in previous decisions of the ICJ; I feel it sufficient only to refer to them now, with no need to extend further thereon in the present Separate Opinion" (para. 70).

[17] For a recent study, cf. A.A. Cançado Trindade, cf. *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

44. In effect, continuing human vulnerability has marked permanent presence in human history, drawing attention to the need of protection of vulnerable persons and groups. Awareness of human vulnerability can be clearly found, e.g., in ancient Greek tragedies, which remain so contemporary in our days. Those tragedies contain warnings as to human vulnerability, even more so in situations of violence and armed attacks. For example, Euripides expresses a humanist outlook, his concern with the conflict between might and right, and his disillusionment with so-called "rational" decision-making in relation to armed confrontation (*Children of Heracles*, *circa* 430 b.C., and, as to extreme violence, *Medea*, 431 b.C.). In the XXIst. century, human vulnerability persists, and seems to increase.

IX. EPILOGUE: A RECAPITULATION.

45. This is the third recent case under the CERD Convention; provisional measures of protection (requested by Qatar) have already been indicated by the ICJ in the *cas d'espèce*, in its previous Order of 23.07.2018, and remain in force. The present case of *Application of the CERD Convention* concerns the rights protected thereunder, which are the rights of human beings, and not rights of States. The present request by the UAE of provisional measures, dismissed by the ICJ, does not invoke any of the human rights protected under the CERD Convention.

46. The ICJ has rightly dismissed the request. In doing so, in the course of the present Order, the Court made references (paras. 16-18, 25-26 and 29) to its previous Order of 23.07.2018. Yet, in my understanding, the Court could have gone further beyond that, in expressly stressing the maintenance of the provisional measures of protection that it had previously ordered, to be duly complied with, given the importance of the human rights safeguarded under the CERD Convention.

47. Keeping this in mind, may I, last but not least, proceed to a brief recapitulation of the main points that I have deemed it fit to make in the course of the present Separate Opinion. *Primus*: In the *cas d'espèce*, provisional measures of protection have already been ordered by the ICJ on 23.07.2018, at the prior request of Qatar, in order to safeguard certain human rights under the CERD Convention. *Secundus*: The UAE's current request does not even invoke human rights under the CERD Convention. *Tertius*: Moreover, unlike the previous request of Qatar, the present request of the UAE does not set up the existence of a link between the rights whose protection is sought and the provisional measures requested.

48. *Quartus*: The ICJ has thus faced, in the UAE's request, inconsistencies in respect of the CERD Convention (as to jurisdiction) as well as in respect of the operation of the CERD Committee. Hence the ICJ's decision to dismiss the present request. *Quintus*: The existence, as in the *cas d'espèce*, of a *continuing situation* affecting some human rights under the CERD Convention underlines the relevance of the provisional measures of protection in force since the ICJ's Order of 23.07.2018.

49. *Sextus*: Such continuing situation brings to the fore the *continuing vulnerability* of the affected human beings, or potential victims. *Septimus*: The rights safeguarded are the ones invoked by Qatar under the CERD Convention; the UAE, for its part, does not even refer to those rights. *Octavus*: The provisional measures of protection indicated by the ICJ's Order of 23.07.2018 remain in force. *Nonus*: Provisional measures of protection safeguard rights under U.N. Conventions of human rights, such as the CERD Convention.

50. *Decimus*: The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, lying in the foundations of the CERD Convention itself, require particular attention. *Undecimus*: Such attention is already present at normative and jurisprudential levels, but it remains still insufficiently examined by the international legal doctrine, which should become more attentive and devoted to the matter. *Duodecimus*: The provisional measures of protection indicated by the ICJ's Order of 23.07.2018, - may I reiterate, - remain in force and are to be duly complied with.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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DECLARATION OF JUDGE SALAM

1. I maintain my position on the Court's lack of jurisdiction in these proceedings, as expressed in my dissenting opinion appended to the Court's Order of 23 July 2018 indicating provisional measures in the present case. Consequently, I have voted in favour of the operative clause of the present Order rejecting the requested measures as I am of the view that it still lacks jurisdiction to do so.

2. However, notwithstanding the Court's statement that measures with respect to the non-aggravation of a dispute can be indicated only as an addition to specific measures to protect the rights of the parties (see paragraph 28 of the present Order), I would like, in turn, to join the Court in emphasizing the need for the Parties to refrain from any action which might aggravate or extend the present dispute; and I do so in keeping with my above-mentioned opinion.

(Signed) Nawaf SALAM.

DISSENTING OPINION OF JUDGE *AD HOC* COT

[Translation]

Vote against the operative part — Lis pendens — *Essential elements of* lis pendens — *Relevance of the relief* — Lis pendens *and quasi-judicial bodies — Settlement of CERD-related disputes — Plausible interpretation of Article 22 — Other conditions for the indication of provisional measures — Suspension of the proceedings.*

INTRODUCTION

1. I regret that I am unable to support the conclusions reached by the majority of the Court. In my opinion, the Court should have upheld at least the first provisional measure requested by the UAE. I believe that, in light of the doctrine of *lis pendens*, the procedural rights asserted by the UAE are at least plausible under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (I), and that the other conditions for the indication of provisional measures are also met (II).

I. *LIS PENDENS* AND THE PLAUSIBILITY OF THE RIGHTS CLAIMED

2. As regards the first provisional measure requested by the UAE, namely that the Court order Qatar to immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (the CERD Committee), both Parties referred to the notion of *lis pendens*, but disagreed about its relevance to Article 22 of CERD. The UAE asserts that the doctrine of *lis pendens* requires the Court to order Qatar not to proceed with the parallel proceedings before the Committee (Request, para. 42). Qatar, for its part, considers that this doctrine, if it exists, is not applicable to the dispute settlement mechanisms provided for by the Convention (CR 2019/6, p. 23, paras. 33-35 (Lowe)).

3. The status of the doctrine of *lis pendens* in public international law is not entirely clear. Unlike the principle of *res judicata*, the doctrine of *lis pendens* does not have its textual basis in the Statute or the Rules of Court. Neither the Court nor its predecessor has ever affirmed or rejected the applicability of the doctrine of *lis pendens* in a case brought before it. However, in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court did consider, when interpreting the request of the Polish Government (the respondent), "whether the doctrine of *litispendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations" (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 20). The Permanent Court had no difficulty in rejecting Poland's claim that the proceedings brought before the Court by Germany (the applicant) in respect of the factory at Chorzów should be suspended until the Germano-Polish Mixed Arbitral Tribunal had given its judgment on the action relating to the same factory, "because it is clear that the essential elements which constitute *litispendance* are not present" (*ibid*., p. 20).

4. The Permanent Court did not make any general pronouncements about the nature and status of the doctrine of *lis pendens* before it. Nevertheless, the reasoning outlined above suggests that it did not rule out the possibility of the doctrine being applied in a case submitted to it, if the "essential elements" were present. The first question, therefore, is what are the "essential elements" for the doctrine of *lis pendens* to be applied (A). The second is whether the provisions of CERD, in particular Article 22, allow such an application (B).

A. The "essential elements" of *lis pendens*

5. In rejecting the applicability of *lis pendens* in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court referred to the fact that the parties were not the same, the actions were not identical and the Mixed Arbitral Tribunal and the Permanent Court were "not courts of the same character" (*ibid*., p. 20). While the first element needs no explanation, the other two are not as clear-cut and call for further clarification. In particular, the question arises as to whether, in addition to the facts and legal arguments, the relief sought in the two actions must also be the same for the proceedings to be regarded as identical (1). Moreover, as regards two courts being "of the same character", this depends on whether the doctrine of *lis pendens* is applicable only in respect of concurrency between two judicial organs, to the exclusion of parallel proceedings between a judicial body and a quasi-judicial one (2).

1. Relevance of the relief sought

6. Qatar asserts that the relief it is seeking before the Court is not the same as that which it is seeking before the CERD Committee, because, in its Communication, it has simply asked the Committee to transmit that Communication to the UAE for that State to *(a)* respond within the three-month time-limit and *(b)* take all necessary steps to end the coercive measures. Qatar further maintains that its Note Verbale of 29 October 2018, transmitted to the Committee, was simply a request for the assistance of a conciliation commission. In its view, this is not the same as the relief sought in the present case, in which it has asked the Court to adjudge and declare a series of breaches of international law and to order the UAE to take a series of steps (CR 2019/6, p. 24, paras. 38-40 (Lowe)).

7. However, Qatar's request for its Communication to be transmitted to the UAE and the request made in its Note Verbale of 29 October 2018 were merely procedural steps to be followed under Article 11, paragraphs 1 and 2, of the Convention. They are not relief as such. In its substance, Qatar's Communication to the CERD Committee complains that the UAE has violated its obligations under, *inter alia*, CERD Articles 2, 4, 5 and 6 (see paragraph 57 of the Communication). The Parties do not appear to disagree that the factual bases of these allegations are virtually identical to those which appear in the Application submitted to the Court. Qatar then asks the UAE to take all necessary steps to end the coercive measures which, in its view, are in violation of international law and its obligations under CERD (see paragraph 123 of the Communication). In my opinion, this is sufficient to conclude that the relief sought by Qatar before the Committee is essentially the same as that sought before the Court. Consequently, the relief sought by Qatar, if it is relevant to the application of the doctrine of *lis pendens*, confirms that the claims submitted by Qatar before the two bodies are the same.

2. *Lis pendens* and quasi-judicial bodies

8. Qatar maintains that the doctrine of *lis pendens*, if it exists, applies only to questions of pendency between judicial tribunals and is therefore not applicable in this case, since neither the CERD Committee nor the *ad hoc* conciliation commission provided for by Article 12, paragraph 1 *(a)*, of the Convention is a judicial body (CR 2019/6, p. 23, paras. 33-35 (Lowe)). Qatar emphasizes that there is no possibility of conflicting obligations arising in the present circumstances, because the CERD procedure cannot result in the imposition of an obligation on the Parties (CR 2019/8, p. 13, para. 27 (Lowe)).

9. However, it is not clear that it is only conflicting binding decisions that pose problems in international relations and that contradictory non-binding decisions need not be resolved or

avoided. The arbitral tribunal's finding in the *MOX Plant* case that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties" (Order No. 3, suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 24 June 2003, para. 28) holds true regardless of whether the decision in question is binding. Qatar's narrow view appears to ignore the important role of quasi-judicial bodies in the modern international legal order and fails to take account of the growing number of methods of international dispute settlement.

10. The dispute resolution mechanism established by CERD is one such modern method of dispute settlement. An *ad hoc* conciliation commission, provided for by Article 12, paragraph 1 *(a)*, of the Convention, makes its good offices available to the States concerned, with a view to finding an amicable solution "on the basis of respect for this Convention". Furthermore, Article 13, paragraph 1, of the Convention states that a report prepared by an *ad hoc* conciliation commission must embody its findings "on all questions of fact relevant to the issue between the parties" and contain such recommendations "as it may think proper for the amicable solution of the dispute". The inter-State dispute resolution mechanism provided for by CERD thus has a quasi-judicial character, in so far as it makes findings of fact and law on the basis of respect for the applicable provisions of the Convention. It would be too formalistic to assume that a State party to a dispute could ignore a recommendation of an *ad hoc* conciliation commission or the recommendation of the CERD Committee when it contains a conclusion that differs from any decision of the Court.

11. Consequently, I believe that an adaptive approach should be taken to the doctrine of *lis pendens*, so that it may also be applied to issues of concurrency between judicial and quasi-judicial bodies. Such an approach is particularly important when interpreting conventional provisions such as Article 22 of CERD, which provides for multiple methods of dispute settlement, but is rather ambiguous as to how they interrelate. I will address this question in the following section.

B. *Lis pendens* and the settlement of CERD-related disputes

12. Read in light of the doctrine of *lis pendens* considered above, the CERD provisions show that the procedural right not to be forced to defend oneself against the same allegations in parallel proceedings is at least plausible (1). It should also be noted that the Court's Order does not preclude this interpretation (2).

1. A plausible interpretation of Article 22

13. At the provisional measures stage, it is not necessary to conclude definitively whether a claimed right exists. The Court can exercise its power to indicate provisional measures if it is satisfied that the rights asserted are "at least plausible" (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 53). The present Order does not appear to depart from this jurisprudence (see paragraph 18 of the Order).

14. I believe that one possible interpretation of Article 22 of CERD is that the dispute resolution mechanism provided for by the Convention should be exhausted before the case is brought before the Court. In the *Georgia* v. *Russian Federation* case, the Court interpreted "the terms of Article 22 . . . [as] establish[ing] preconditions to be fulfilled *before* the seisin of the Court" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment,*

I.C.J. Reports 2011 (I), p. 128, para. 141; emphasis added). It follows that the proceedings before the CERD Committee, if pending, must be concluded before the Court is seised. This can be viewed as a conventional test for *lis pendens*. In my opinion, if a treaty provides for several methods of dispute settlement to be followed in a certain order, the parties to a dispute concerning that treaty have the procedural right to expect that order to be respected. Accordingly, under Article 22, the parties to a dispute concerning CERD may legitimately expect that the dispute cannot be pending simultaneously before the Court and the CERD Committee.

2. The Court does not preclude this interpretation of Article 22

15. In my view, the Order that the Court has made today does not preclude that this interpretation of Article 22 is at least plausible. The Court has found that the first measure requested "does not concern a plausible right under CERD", and that this measure "rather concerns the interpretation of the compromissory clause in Article 22 of CERD" (see paragraph 25 of the Order). However, in the case concerning *Pulp Mills on the River Uruguay*, the Court concluded that it did have jurisdiction to entertain the request for the indication of provisional measures with respect to "Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 11, para. 29). In other words, the Court found that Article 60 of the 1975 Statute — a compromissory clause enabling the parties to bring a dispute to the Court — confers a procedural right to be able to benefit from the protection of provisional measures. The fact that the rights asserted may relate to the interpretation of a compromissory clause does not, therefore, prevent the Court from concluding that those rights must be protected by provisional measures in so far as they are plausible. In my opinion, the question whether the procedural rights asserted exist is intrinsically linked to "the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter" (see paragraph 25 of the Order).

16. Paragraph 25 of the Order also states that the Court has already examined the question of parallel proceedings in its Order of 23 July 2018 and concludes that the Court "does not see any reason to depart from these views at the current stage of the proceedings in this case". However, in its Order of 23 July 2018, the Court found that it was not necessary to decide whether a *lis pendens* exception would be applicable in the present situation, since the procedural preconditions under Article 22 of CERD for its seisin appear to have been complied with (*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)*, pp. 420-421, paras. 39-40). In my opinion, the Court has never drawn any particular conclusions on whether Article 22 of the Convention comprises the procedural right of States parties not to be forced to defend themselves in parallel proceedings.

17. I would point out that this is just one possible interpretation of Article 22 and that it does not, therefore, prejudge the final finding of the Court at a later stage of the proceedings. The plausibility of a right deriving from a treaty is sometimes founded on a possible interpretation of the provisions of that treaty (see, for example, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 67). Nevertheless, the presentation of such a plausible interpretation at the provisional measures stage does not prevent the Court from subsequently arriving at a different interpretation following a full examination of the case.

II. THE OTHER CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

18. In addition to the plausibility of the procedural right asserted, I believe that the other conditions for the indication of provisional measures are also met. First, the prima facie jurisdiction of the Court to entertain a request for the indication of provisional measures made by the respondent is examined in light of the merits of the case brought by the applicant (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 24), and the Court has already confirmed its prima facie jurisdiction on this basis in its Order of 23 July 2018 (*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. 421, para. 41). The present Order does not appear to depart from that conclusion (see paragraph 16 of the Order).

19. Second, as regards "the link between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 10, para. 27), I am of the view that there is a sufficient link between the procedural right claimed by the UAE and the subject-matter of the proceedings before the Court on the merits of the case, since the right in question is that of the UAE not to be forced to defend itself in the dispute brought by Qatar.

20. Third, I believe that the *lis pendens* situation entails "a risk that irreparable prejudice could be caused" (see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, para. 77), since an unsatisfactory defence on the part of the UAE, as a result of the parallel proceedings, may irreparably influence the final decisions of the Court or the CERD Committee, or both.

21. Having concluded that all the conditions are met, it is my view that the first request of the UAE for the indication of provisional measures should have been granted. The final question, therefore, is what measure should have been adopted to address the *lis pendens* situation in this case appropriately. In this regard, Qatar suggested that the immediate withdrawal of its Communication to the CERD Committee could cause it disproportionate harm (CR 2019/6, pp. 55-56, paras. 1-5 (Klein)).

22. In my opinion, an immediate withdrawal was not the only way to resolve the *lis pendens* situation. If the measure requested by the UAE risked having a disproportionate effect on Qatar, the Court could have made an order providing for the suspension of the proceedings before the CERD Committee, by directing Qatar to take all measures at its disposal to ensure that the proceedings before the Committee are suspended pending the final decision in this case. Alternatively, the Court could have exercised its power under Article 75, paragraph 1, of the Rules of Court to conclude, for example, that it should suspend the present proceedings until the CERD Committee had issued its concluding observations on the Communication submitted by Qatar. There are in fact examples in international practice of proceedings being suspended. The arbitral tribunal in the *MOX Plant* case decided to suspend its own proceedings in a similar situation (Order No. 3, suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 24 June 2003, para. 29). In the case concerning *Certain German Interests in Polish Upper Silesia*, the Polish Government requested a suspension rather than the withdrawal of the proceedings before the Permanent Court in the face of allegedly parallel proceedings before it and the Germano-Polish Mixed Arbitral Tribunal (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 19). Moreover, the UAE itself has, in the present case, mentioned the possibility of suspending the

proceedings (CR 2019/5, p. 29, para. 6 (Reisman)). I believe that such a suspension, instead of a withdrawal, would not cause disproportionate harm to Qatar.

23. In any event, it is my opinion that the Court should have indicated a provisional measure to resolve the *lis pendens* situation, whether the withdrawal or the suspension of the proceedings. For these reasons, I voted against the operative part of the present Order.

(Signed) Jean-Pierre COT.

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