INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands
Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928
Website: www.icj-cij.org Twitter Account: @CIJ_ICJ YouTube Channel: CIJ ICJ
LinkedIn page: International Court of Justice (ICJ)

Summary

Not an official document

Summary 2018/4
23 July 2018

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)

The Court begins by recalling that, on 11 June 2018, Qatar instituted proceedings against the United Arab Emirates 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"). Qatar contends in its Application that since 5 June 2017 the UAE has enacted and implemented a series of discriminatory measures directed against Qataris based on their national origin. It maintains in particular that the UAE has expelled all Qataris within its borders and prohibited them from entering the UAE, thereby violating certain rights guaranteed by CERD, including the right to marry and choose a spouse, the right to public health and medical care, the right to education and training, the right to property, work and equal treatment before tribunals. The Application was accompanied by a request for the indication of provisional measures seeking protection of the rights of Qatar under CERD pending a decision on the merits of the case.

1. Prima facie jurisdiction (paras. 14-41)

The Court first observes that it may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford 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. It notes that in the present case, Qatar seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD[1]. The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

A. Existence of a dispute concerning the interpretation or application of CERD

Having noted that Qatar and the UAE are both parties to CERD, the Court observes that Article 22 of the Convention makes its jurisdiction conditional on the existence of a dispute arising

[1] Article 22 of CERD reads as follows:

"Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

out of the interpretation or application of CERD. The Court therefore examines whether the acts complained of by Qatar are prima facie capable of falling within the provisions of CERD and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain.

The Court considers that, as evidenced by the arguments advanced and the documents placed before it, the Parties differ on the nature and scope of the measures taken by the UAE beginning on 5 June 2017, as well as on the question whether they relate to rights and obligations under CERD. It notes that Qatar contends that the measures adopted by the UAE purposely targeted Qataris based on their national origin. Consequently, according to Qatar, the UAE has failed to respect its obligations under Articles 2 (condemnation of racial discrimination), 4 (prohibition of incitement to racial discrimination), 5 (prohibition of racial discrimination in the enjoyment of a number of civil, economic, social and cultural rights), 6 (effective protection and remedies against any acts of racial discrimination) and 7 (undertaking to adopt measures to combat racial discrimination) of CERD. The Court observes that Qatar maintains in particular that, because of the measures taken on 5 June 2017, UAE-Qatari mixed families have been separated, medical care has been suspended for Qataris in the UAE, depriving those who were under medical treatment from receiving further medical assistance, Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere, since UAE universities have refused to provide them with their educational records, and that Qataris have not been granted equal treatment before tribunals and other judicial organs in the UAE. For its part, the UAE firmly denies that it has committed any of these violations.

In the Court's view, the acts referred to by Qatar, in particular the statement of 5 June 2017 — which allegedly targeted Qataris on the basis of their national origin — whereby the UAE announced that Qataris were to leave its territory within 14 days and that they would be prevented from entry, and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal treatment before tribunals, are capable of falling within the scope of CERD ratione materiae. The Court considers that, while the Parties differ on the question whether the expression "national . . . origin" mentioned in Article 1, paragraph 1, of CERD, encompasses discrimination based on the "present nationality" of the individual, it need not decide at this stage of the proceedings, in view of what is stated above, which of these diverging interpretations of the Convention is the correct one.

The Court finds that the above-mentioned elements are sufficient at this stage to establish the existence of a dispute between the Parties concerning the interpretation or application of CERD.

B. Procedural preconditions

The Court recalls that it has previously indicated that the terms of Article 22 of CERD establish procedural preconditions to be met before the seisin of the Court. Under Article 22 of CERD, the dispute referred to the Court must be a dispute "not settled by negotiation or by the procedures expressly provided for in this Convention". In addition, Article 22 states that the dispute may be referred to the Court at the request of any of the parties to the dispute only if the parties have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

Regarding the first precondition, namely the negotiations to which the compromissory clause refers, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked. In order to meet the precondition of negotiation contained in the compromissory clause of a treaty, "the subject-matter of the

negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question". At this stage of the proceedings, the Court first has to assess whether it appears that Qatar genuinely attempted to engage in negotiations with the UAE, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether it appears that Qatar pursued these negotiations as far as possible.

The Court notes that it has not been challenged by the Parties that issues relating to the measures taken by the UAE in June 2017 have been raised by representatives of Qatar on several occasions in international forums, including at the United Nations, in the presence of representatives of the UAE. It further notes that, in a letter dated 25 April 2018 and addressed to the Minister of State for Foreign Affairs of the UAE, the Minister of State for Foreign Affairs of Qatar referred to the alleged violations of CERD arising from the measures taken by the UAE beginning on 5 June 2017 and stated that "it [was] necessary to enter into negotiations in order to resolve these violations and the effects thereof within no more than two weeks". The Court considers that the letter contained an offer by Qatar to negotiate with the UAE with regard to the latter's compliance with its substantive obligations under CERD. In light of the foregoing, and given the fact that the UAE did not respond to that formal invitation to negotiate, the Court is of the view that the issues raised in the present case had not been resolved by negotiations at the time of the filing of the Application.

The Court then turns to the second precondition contained in Article 22 of CERD, relating to "the procedures expressly provided for in the Convention". It is recalled that, according to Article 11 of the Convention, "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention", the matter may be brought to the attention of the CERD Committee. The Court notes that Qatar deposited, on 8 March 2018, a communication with the CERD Committee under Article 11 of the Convention. It observes, however, that Qatar does not rely on this communication for the purposes of showing prima facie jurisdiction in the present case. 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.

The Court thus finds, in view of all the foregoing, that the procedural preconditions under Article 22 of CERD for its seisin appear, at this stage, to have been complied with.

C. Conclusion as to prima facie jurisdiction

In light of the foregoing, the Court concludes 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.

2. The rights whose protection is sought and the measures requested (paras. 43-59)

The Court recalls that its power 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 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. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. It recalls, as it did in past cases in which CERD was at issue, that there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance with the Convention. It observes that Articles 2, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. Consequently, in the context of a request for the indication of provisional measures, a State party to CERD may avail itself of the rights under the above-mentioned Articles only if the acts complained of appear to constitute acts of racial discrimination as defined in Article 1 of the Convention.

In the present case, the Court notes, on the basis of the evidence presented to it by the Parties, that the measures adopted by the UAE on 5 June 2017 appear to have targeted only Qataris and not other non-citizens residing in the UAE. Furthermore, the measures were directed to all Qataris residing in the UAE, regardless of individual circumstances. Therefore, it appears that some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention. Consequently, the Court finds that at least some of the rights asserted by Qatar under Article 5 of CERD are plausible. This is the case, for example, with respect to the alleged racial discrimination in the enjoyment of rights such as the right to marriage and to choice of spouse, the right to education, as well as freedom of movement, and access to justice.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested.

The Court has already found that at least some of the rights asserted by Qatar under Article 5 of CERD are plausible. It recalls that Article 5 prohibits discrimination in the enjoyment of a variety of civil, political, economic, social and cultural rights. The Court considers that the measures requested by Qatar are aimed not only at ending any collective expulsion of Qataris from the territory of the UAE, but also at protecting other specific rights contained in Article 5. The Court concludes, therefore, that a link exists between the rights whose protection is being sought and the provisional measures being requested by Qatar (see Press Release No. 2018/26).

3. The risk of irreparable prejudice and urgency (paras. 60-71)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to the rights in dispute, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights concerned.

The Court considers that certain rights in question in these proceedings — in particular, several of the rights stipulated in Article 5, paragraphs (a), (d) and (e), of CERD — are of such a nature that prejudice to them is capable of causing irreparable harm. On the basis of the evidence presented to it by the Parties, the Court is of the opinion that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain vulnerable with regard to their rights under Article 5 of the Convention. In this regard, the Court observes that, following the statement of 5 June 2017, many Qataris residing in the UAE at that time appeared to have been forced to leave their place of residence without the possibility of return. The Court notes that a number of consequences apparently resulted from this situation and that the impact on those affected seem to persist to this date: UAE-Qatari mixed families have been separated; Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere, since UAE universities have refused to provide them with their educational records; and Qataris have been denied equal access to tribunals and other judicial organs in the UAE.

As the Court has already observed, individuals forced to leave their own place of residence without the possibility of return could, depending on the circumstances, be subject to a serious risk

of irreparable prejudice. The Court is of the view that a prejudice can be considered as irreparable when individuals are subject to temporary or potentially ongoing separation from their families and suffer from psychological distress; when students are prevented from taking their exams due to enforced absence or from pursuing their studies due to a refusal by academic institutions to provide educational records; or when the persons concerned are impeded from being able to physically appear in any proceedings or to challenge any measure they find discriminatory.

The Court notes that the UAE stated, in response to a question posed by a Member of the Court at the end of the oral proceedings, that, following the statement of 5 June 2017 by its Ministry of Foreign Affairs, no administrative orders have been issued under the Immigration Law to expel Qataris. The Court nonetheless notes that it appears from the evidence before it that, as a result of this statement, Qataris felt obliged to leave the UAE resulting in the specific prejudices to their rights described above. Moreover, in view of the fact that the UAE has not taken any official steps to rescind the measures of 5 June 2017, the situation affecting the enjoyment of their above-mentioned rights in the UAE remains unchanged.

The Court thus finds that there is an imminent risk that the measures adopted by the UAE, as set out above, could lead to irreparable prejudice to the rights invoked by Qatar, as specified by the Court.

4. Conclusion and measures to be adopted (paras. 72-76)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. Reminding the UAE of its duty to comply with its obligations under CERD, the Court considers that, with regard to the situation described above, the UAE must, pending the final decision in the case and in accordance with its obligations under CERD, ensure that families that include a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited, that Qatari students affected by those measures are given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere, and that Qataris affected by those measures are allowed access to tribunals and other judicial organs of the UAE.

The Court recalls that Qatar has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the UAE. When it is indicating provisional measures for the purpose of preserving specific rights, the Court 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. In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

5. Operative clause (para. 79)

The full text of the final paragraph of the Order reads as follows:

"For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) By eight votes to seven,

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;

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Abraham, Bennouna, Cançado Trindade, Sebutinde, Robinson; Judge ad hoc Daudet;

AGAINST: Judges Tomka, Gaja, Bhandari, Crawford, Gevorgian, Salam; Judge ad hoc Cot;

(2) By eleven votes to four,

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

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Daudet;

AGAINST: Judges Crawford, Gevorgian, Salam; Judge ad hoc Cot."

Judges TOMKA, GAJA and GEVORGIAN append a joint declaration to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judges BHANDARI, CRAWFORD and SALAM append dissenting opinions to the Order of the Court; Judge ad hoc COT appends a dissenting opinion to the Order of the Court.

_____

Joint declaration of Judges Tomka, Gaja and Gevorgian

Judges Tomka, Gaja and Gevorgian consider that the present dispute does not prima facie fall within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). Qatar has alleged that certain measures taken by the United Arab Emirates which target persons on the basis of their Qatari nationality amount to violations of CERD. However, Article 1, paragraph 1, of CERD only lists "race, colour, descent, or national or ethnic origin" as the potential bases for racial discrimination within the scope of CERD. "National origin" is not identical to "nationality", and these terms should not be understood as synonymous. Given this distinction, Qatar's claims do not amount to discrimination on the basis of a factor prohibited by CERD. Consequently, the requirements for the indication of provisional measures are not met in the present case.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 12 parts, Judge Cançado Trindade begins by pointing out that he has concurred with his vote to the adoption of the present Order indicating Provisional Measures of Protection. He adds that, as he attributes great importance to some related issues in the cas d'espèce, that in his perception underlie the present decision of the ICJ but are left out of the Court's reasoning, he feels obliged to leave on the records, in the present separate opinion, the identification of such issues and the foundations of his own personal position thereon.

2. Those issues are: (a) a new era of international adjudication of human rights cases by the ICJ; (b) the relevance of the fundamental principle of equality and non-discrimination; (c) non-discrimination and the prohibition of arbitrariness; (d) arguments of the contending Parties and their responses to the questions he put to them in the public hearings; (e) general assessment as to the rationale of the local remedies rule in international human rights protection, and as to implications of a continuing situation; (e) the correct understanding of compromissory clauses under human rights Conventions; (f) vulnerability of segments of the population; (g) towards the consolidation of the autonomous legal régime of provisional measures of protection; (h) international law and the temporal dimension; (i) provisional measures of protection in continuing situations; and (j) recapitulation of the key points of the position he sustains in the present separate opinion.

3. To start with, he recalls that this is the third case on Application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD Convention — Qatar versus UAE) lodged with the International Court of Justice (ICJ) under the United Nations CERD Convention, following the Court's decisions in the cases of Georgia versus Russian Federation (2008-2011) and of Ukraine versus Russian Federation (2017). Furthermore — he proceeds — there have been other cases brought before the ICJ, and decided by it, along the last eight years, concerning also other human rights treaties (e.g. the cases of the Obligation to Prosecute or Extradite, 2009-2012, under the U.N. Convention against Torture; and the case of A.S. Diallo, (2010-2012, in respect of, inter alia, the U.N. Covenant on Civil and Political Rights, which he examines in part II).

4. Such cases disclose, in Judge Cançado Trindade's perception, that "we are already within the new era of international adjudication of human rights cases by the ICJ" (para. 8), and this new case of Application of the CERD Convention (Qatar versus UAE) bears witness of that. He then moves to the relevance of the fundamental principle of equality and non-discrimination (part III), a

point which deserved greater attention in the cas d'espèce, as this principle lies in the foundations of the protected rights under human rights treaties (like CERD Convention). He warns:

> "It is the principle of equality and non-discrimination which here calls for attention, there being no place for devising or imagining new 'preconditions' for the consideration of provisional measures of protection under a human rights Convention; it makes no sense to intermingle at this stage the consideration of provisional measures with so-called 'plausible admissibility'" (para. 10).

5. He then examines the history of the principle of equality and non-discrimination in the evolution of the law of nations, and its central place in the International Law of Human Rights and in the Law of the United Nations (paras. 11-15). U.N. supervisory organs, like the CERD Committee, have been giving their constant contribution — of growing importance — to the prohibition of the discrimination de facto or de jure, in their faithful exercise of their functions of protection of the human person (paras. 16-17).

6. Judge Cançado Trindade then surveys the advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels (e.g. the case-law of the Inter-American Court of Human Rights — IACtHR). He warns that such advances have not yet been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle: this is "one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention" (paras. 18-21).

7. In sequence, he observes that the protection being sought before the ICJ in the cas d'espèce, under the CERD Convention, is furthermore against arbitrary measures, against arbitrariness (part IV), a point which has not escaped the attention of international human rights tribunals (e.g. the European Court of Human Rights — (ECtHR), particularly in cases of "collective" expulsions (of aliens) (paras. 22-28). Arbitrariness — he continues — is "an issue which has marked presence everywhere along the history of humankind" (para. 28). It is thus not surprising — he adds — that the ancient Greek tragedies (such as Sophocles's Antigone, 441 b.C.; and Euripides's Suppliant Women (424-419 b.C.), have, along the centuries and until nowadays, always remained contemporary, in the perennial struggle against arbitrariness (paras. 24-27).

8. He then recalls that, already in his Separate Opinion appended to the ICJ's Judgment on the case of A.S. Diallo (merits, of 30.11.2010), he devoted much attention to the prohibition of arbitrariness in the International Law of Human Rights, and examined the jurisprudential construction on the matter (also of the ECtHR and the IACtHR), pondering, inter alia, that human rights treaties "conform a Law of protection (a droit de protection), oriented towards the safeguard of the ostensibly weaker party, the victim" (paras. 29-31). Hence "the imperative of access to justice lato sensu, the right to the Law (le droit au Droit), the right to the realization of justice in a democratic society" (para. 32).

9. Next, after surveying the arguments of the Parties in the public hearings before the Court (part V), and the responses of the contending Parties to the questions he addressed to them in the ICJ public hearing of 29.06.2018 (part VI, paras. 37-47), Judge Cançado Trindade then presents his own general reassessment of the matter, i.e. the two points addressed, namely, the rationale of the local remedies rule in international human rights protection (paras. 48-56), and the implications of a continuing situation affecting human rights (paras. 57-61).

10. As to the first point, Judge Cançado Trindade recalls that the local remedies rule is a condition of admissibility of international claims, and that it cannot be invoked as a "precondition" for the consideration of urgent requests of provisional measures of protection. He stresses that the two domains, of international human rights protection and of diplomatic protection, are quite distinct, and the incidence of the local remedies rule in one and the other is certainly distinct — the rule applying with lesser rigour in the former, and greater rigour in the latter (paras. 48-49). And then Judge Cançado Trindade firmly sustains that the rationale of the rule

> "is quite distinct in the two contexts. In the domain of the safeguard of the rights of the human person, attention is focused on the need to secure the faithful realization of the object and purpose of human rights treaties, and on the need of effectiveness of local remedies; attention is focused, in sum, on the needs of protection. The rationale of the local remedies rule in the context of diplomatic protection is entirely distinct, focusing on the process of exhaustion of such remedies. (…)
>
> The local remedies rule has a rationale of its own under human rights treaties; this cannot be distorted by the invocation of the handling of inter-State cases in the exercise of diplomatic protection, where the local remedies rule has an entirely distinct rationale. The former stresses redress, the latter outlines exhaustion. One cannot deprive a human rights Convention of its effet utile by using the distinct rationale of the rule in diplomatic protection" (paras. 50 and 55).

11. Still on the first point, he adds that the aforementioned rationale of the local remedies rule (rationale of effectiveness of such remedies and redress) has been consistently sustained by international human rights tribunals as well as U.N. human rights supervisory organs (like the CERD Committee) (paras. 53-56). After all, local remedies

> "form an integral part of the very system of international human rights protection, the emphasis falling on the element of redress rather than on the process of exhaustion. The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection. We are here before a droit de protection, with a specificity of its own, fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States" (para. 51).

12. As to the second point, Judge Cançado Trindade finds "regrettable" the attempt to create, as from the so-called "plausibility of rights", which is an "unfortunate invention", yet "an additional precondition for provisional measures of protection"; in a continuing situation, as in the cas d'espèce: the rights here requiring protection "are clearly known, their being no sense to wonder whether they are 'plausible'" (para. 57-58). He adds that no one knows what exactly "plausibility" means, and, to invoke it as a new "precondition", creating undue difficulties for the granting of provisional measures of protection in relation to a continuing situation, "is misleading, it renders a disservice to the realization of justice" (para. 59).

13. He adds that the rights to be protected in the cas d'espèce are clearly those invoked under the CERD Convention (Articles 2, 4, 5, 6 and 7), which are rights of individuals (experiencing a continuing situation of vulnerability affecting them), and not of States. This is so, irrespective of the matter having been brought to the ICJ by a State Party to the Convention; in doing so,

> "the State Party exercises a collective guarantee under the CERD Convention, making use of its compromissory clause in Article 22, which is not amenable to interpretation raising 'preconditions'. The compromissory clause in Article 22 is to be interpreted bearing in mind the object and purpose of the CERD Convention" (paras. 60-61).

14. Judge Cançado Trindade observes that, just as he pointed out in his lengthy Dissenting Opinion in the earlier case on Application of the CERD Convention (Georgia versus Russian Federation, Judgment of 01.04.2011), compromissory clauses in human rights treaties, like the CERD Convention, have to be correctly understood, keeping in mind the nature and substance of those treaties, as well as to their object and purpose (para. 62).

15. Rather than pursuing an essentially inter-State, and mostly bilateral, outlook, on the basis of allegedly unfulfilled "preconditions" — he continues — attention is to be turned to "the sufferings and needs of protection of the affected segments of the population", seeking to secure the effet utile to the pioneering and universal CERD Convention (paras. 64-67). One is to avoid rendering access to justice under human rights Conventions particularly difficult.

16. In sequence, he considers the issue of the situation of vulnerability of segments of the population (part VIII), rendering necessary provisional measures of protection (para. 68). Cases as the present one of Application of the CERD Convention (Qatar versus UAE) — he proceeds — like the aforementioned previous cases before the ICJ also under the CERD Convention (as well as under other human rights treaties),

> "disclose the centrality of the position of the human person in the overcoming of the inter-State paradigm in contemporary international law. The request of provisional measures of protection is here intended to put an end to the alleged vulnerability of the affected persons (potential victims).
>
> 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" (para. 69-70).

17. Particularly attentive to human beings in situations of vulnerability — he adds — provisional measures of protection under human rights treaties, "endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension" (paras. 72-73 and 77). Judge Cançado Trindade then expresses his confidence that we are at last moving towards the consolidation of the autonomous legal régime of provisional measures of protection, thus enhancing the preventive dimension of international law (part IX).

18. In his understanding, the component elements of this autonomous legal régime are: the rights to be protected (not necessarily the same as those pertaining to the merits); the corresponding obligations; the prompt determination of responsibility (in case of non-compliance), with its legal consequences, encompassing the duty of reparation for damages (without necessarily waiting for the decision on the merits) (paras. 74-76).

19. Accordingly, the notion of victim (or potential victim) itself marks presence already at this stage, irrespective of the decision as to the merits (cf. supra). Hence the autonomy of the international responsibility that non-compliance with provisional measures of protection promptly generates. A study of the matter, pursuant to an essentially humanist outlook, encompasses the general principles of law, always of great relevance (paras. 76-77).

20. A consideration of the aforementioned preventive dimension, furthermore, brings to the fore the relationship between international law and the temporal dimension (part X), ineluctably encompassing provisional measures of protection (paras. 78-79). Keeping the passage of time in mind — Judge Cançado Trindade continues — "it is important to prevent or avoid harm that may occur in the future (hence the acknowledgment of potential or prospective victims), as well as to put an end to continuing situations already affecting individual rights. Past, present and future come and go together" (para. 81).

21. He then points to another element of provisional measures of protection in continuing situations (part XI): in the present case of Application of the CERD Convention (Qatar versus UAE), there have been U.N. reports and other documents (e.g., of the U.N. High Commissioner for Human Rights, the U.N. Special Procedures Mandate Holders of the U.N. Human Rights Council), as well as of experienced non-governmental organizations (e.g. Amnesty International, Human Rights Watch), giving accounts of a continuing situation affecting human rights under the CERD Convention (paras. 82-88).

22. And he further observes that 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, — and then surveys those ICJ cases, and the humanist position he sustained in each of them (paras. 89-93). The cas d'espèce, opposing Qatar to the UAE — he adds — is

> "the third case under the CERD Convention in which provisional measures of protection have been rightly ordered by the ICJ, in this new era of its international adjudication of human rights cases. The fact that a case is an inter-State one, characteristic of the contentieux before the ICJ, does not mean that the Court is to reason likewise on a strictly inter-state basis. Not at all. It is the nature of a case that will call for a reasoning, so as to reach a solution. The present case of Application of the CERD Convention (Qatar versus UAE) concerns the rights protected thereunder, which are the rights of human beings, and not rights of States" (para. 94).

23. This, in his perception, has a direct bearing on the consideration of a request for provisional measures of protection under a human rights Convention. In the epilogue of the present Separate Opinion, Judge Cançado Trindade proceeds, last but not least, to a recapitulation of the main points he has made, and the foundations of his position, on provisional measures of protection, under a human rights treaty like the CERD Convention (part XII). In his understanding, in sum, the determination and ordering of provisional measures of protection under human rights Conventions can only be properly undertaken "from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarism" (para. 104).

Dissenting opinion of Judge Bhandari

Judge Bhandari could not join the majority of his colleagues in indicating provisional measures. According to Judge Bhandari, there was no sufficiently compelling evidence that the declaration made by the UAE on 5 June 2017 had been implemented. The UAE argued that no implementation followed that declaration, and Qatar could not provide convincing evidence showing the contrary. Judge Bhandari also considered that the statement made by the UAE's Ministry of Foreign Affairs on 5 July 2018 constituted a unilateral undertaking under international law, which removed the risk of irreparable prejudice to the rights of Qatar under CERD. Moreover, the lack of irreparable prejudice also determined the lack of urgency in the request for provisional measures submitted by Qatar.

Dissenting opinion of Judge Crawford

Judge Crawford states that it is not clear from the evidence that the measures announced by the UAE against Qatari nationals on 5 June 2017 are still in effect, or that the measures that are in effect could cause irreparable prejudice to the rights which are the subject of these proceedings. Judge Crawford notes that many of the consequences of the statement of June 2017 (such as family separation, difficulties accessing courts, etc.) appear to have flowed from the fact that Qataris were located outside the UAE and it is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018.

On 5 July 2018 the UAE issued an official statement clarifying that Qatari citizens already resident in the UAE do not need to apply for permission to continue residence in the UAE and that applications for entry clearance to the UAE should be made via a telephone hotline that had been announced in June 2017. The Court does not mention this statement of 5 July 2018. Furthermore, the Court does not deal with the UAE's evidence that Qataris have entered or exited the UAE more than 8,000 times since June 2017 and that over 1,300 applications via the hotline system to enter the UAE have been granted.

Judge Crawford concludes that the evidence before the Court, including the statement of 5 July 2018, does not warrant a finding that there is a real and imminent risk of irreparable prejudice to the rights which are the subject of these proceedings. The risks that the Court seeks to curb through the measures ordered have been to a large extent removed.

Judge Crawford identifies a legal difficulty with Qatar's request, namely that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (prohibited per se) and differentiation on grounds of nationality (not prohibited as such). Prima facie at least, the UAE's measures target Qataris on account of their present nationality, not their national origin and this differentiation is not apparently covered by the CERD. However, it is unnecessary to decide this issue in view of Judge Crawford's conclusion that there is no risk of irreparable prejudice in this case.

Dissenting opinion of Judge Salam

Judge Salam voted against the indication of provisional measures because he does not agree with the conclusions reached by the majority on the prima facie jurisdiction of the Court. In his view, the dispute between the Parties does not appear to fall within the scope ratione materiae of CERD.

He points out that Article 1 of CERD states that the expression "racial discrimination" refers to any distinction "based on race, colour, descent, or national or ethnic origin" and makes no mention of discrimination on the basis of "nationality".

Reading that provision in light of Article 31 of the 1969 Vienna Convention on the Law of Treaties, Judge Salam notes that the terms "national or ethnic origin" used in CERD differ in their ordinary meaning to the term nationality, and that, as reflected in its Preamble, CERD was adopted in the historical context of decolonization and post-decolonization, and was thus part of the effort to eliminate all forms of discrimination and racial segregation. He observes that the aim of CERD is to bring an end to all discriminatory manifestations and governmental policies based on racial superiority or hatred, and that it does not concern questions relating to nationality. He concludes that it is forms of "racial" discrimination that constitute the specific object of CERD, and not any form of discrimination "in general".

According to Judge Salam, the distinction that must be made between "nationality" and "national origin" is clear and is, moreover, confirmed by the travaux préparatoires of CERD.

Although this is the conclusion he has reached, Judge Salam has taken account of Qatar's claim that Qataris residing in the United Arab Emirates have been in a vulnerable situation since 5 June 2017. In this regard, he observes that, even if the Court should have found that it lacked prima facie jurisdiction to indicate provisional measures, this would not have prevented it from underlining, in its reasoning, the need for the Parties not to aggravate or extend the dispute and to ensure the prevention of any human rights violations, as it has done previously in the cases concerning the Legality of Use of Force (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 839, paras. 37-40) and 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, p. 250, para. 93).

Dissenting opinion of Judge ad hoc Cot

1. Judge ad hoc Cot voted against both points of the operative clause. In his view, the Court should have rejected Qatar's request for the indication of provisional measures, mainly because there is no imminent risk of irreparable prejudice to the rights claimed by the Applicant, and because provisional measures are unnecessary in the present circumstances of the case, since they go against the principle of presumption of good faith of States.

2. With regard to the lives of UAE-Qatari mixed families, Judge ad hoc Cot considers that, although the long-term separation of a family may have an irreparable effect on its unity and integrity, that effect is unlikely to become permanent in the few years before the Court renders its final decision. In other words, he is of the view that it can be concluded that the risk of prejudice to that right, even if it were irreparable, is not imminent.

3. As regards the right to education and training, Judge ad hoc Cot notes that the Respondent has presented evidence that the Emirati authorities have asked all post-secondary institutions in the UAE to monitor the situation of Qatari students. According to Judge ad hoc Cot, since the UAE authorities are taking measures to remedy the situation, it may be concluded or at least assumed that, even if it existed, the risk of irreparable prejudice to students is not imminent.

4. With respect to equal treatment before tribunals and the right to effective protection and remedies, Judge ad hoc Cot considers that, while their absence may cause prejudice to other rights capable of causing irreparable harm, the right of Qatari nationals in the UAE to effective protection and remedies through UAE courts can, as such, theoretically be restored.

5. Judge ad hoc Cot is also concerned that this Order indicating provisional measures is not only unnecessary but counter-productive to the settlement of the dispute, since the Court's conclusion on the risk of irreparable prejudice runs counter to the principle of good faith in public international law. He notes that the Court, after finding that the risk in question is one of irreparable prejudice, failed to ascertain whether that risk is in fact "imminent". According to Judge ad hoc Cot, if the principle of good faith had been duly applied at this provisional measures stage, the Court would have been unable to confine itself to such a conclusion. In his view, that is particularly true where the UAE has shown genuine commitment towards its human rights

obligations, as demonstrated by the arguments of its Agent and the reply to the joint letter of the six Special Rapporteurs. Judge ad hoc Cot therefore concludes that the Respondent should have been presumed to be acting in good faith.

_____