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 United Arab Emirates (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 (Order, para. 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" (*ibid.*, para. 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" (paragraph 16 of the Order).

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 . . ." (Order, para. 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" (Art. 41, para. 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)*, 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" (*Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007 (I)*, p. 21, para. 3, 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 spe-

cific rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case" (*I.C.J. Reports 2007 (I)*, pp. 22-23, para. 6).

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.