DISSENTING OPINION OF JUDGE *AD HOC* COT

[Translation]

Vote against the operative part — Prejudgment of the question on the merits — Identity between the request for the indication of provisional measures and the claims on the merits — Existence of irreparable prejudice — Imminent risk — Unnecessary Order — Presumption of good faith at the provisional measures stage — Length of time between this Order and the next phase of the proceedings.

INTRODUCTION

1. To my great regret, I voted against the operative part of today's Order indicating provisional measures. I would therefore like to explain in particular why, in my view, the request in question does not satisfy the requirement of imminent risk of irreparable prejudice and why this Order is not necessary for the settlement of the dispute.

I. THE PRESENT PROCEEDINGS MUST NOT PREJUDGE THE QUESTION ON THE MERITS

2. In provisional measures proceedings, the applicant must not prejudge the question on the merits (A). Nor should the request for the indication of provisional measures itself prejudge the question relating to the merits (B).

A. The Applicant must not prejudge the question on the merits in these proceedings

3. It is customary in an order indicating provisional measures for the Court to note in the following terms that its conclusion in that order in no way prejudges the merits of the case:

> "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 or any questions relating to the admissibility of the Application or to the merits themselves." (See, for example, *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 245, para. 60; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1171, para. 98.)

4. Accordingly, pursuant to Practice Direction XI, which the President reads out at the opening of the public hearings, the parties must not enter into the merits of the case:

> "In the oral pleadings on requests for the indication of provisional measures, the parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose."

5. The temptation for parties to enter into the merits of a case comes from the Court's jurisprudence, according to which the plausibility of the rights claimed by the applicant — which is inevitably linked to questions on the merits — must be demonstrated at the provisional measures

stage. The respondent may also "have an interest in showing that the requesting State has failed to demonstrate a possibility of the existence of the right sought to be protected" (Separate Opinion of Judge Shahabuddeen, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 29). One proposed solution is to consider the standard of proof for plausibility as having a fairly low threshold, which, it is argued, would deter the parties from examining the merits of a claim (Separate Opinion of Judge Owada, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 144-145, para. 10, and p. 147, paras. 19-20).

6. However, the Court's jurisprudence acknowledges that, in provisional measures proceedings involving rights under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the question whether the alleged acts may constitute acts of racial discrimination can and must be examined:

> "The Court notes that Articles 2 and 5 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 Articles 2 and 5 only if it is plausible that the acts complained of constitute acts of racial discrimination under the Convention" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 135, para. 82).

7. Therefore, the Parties to this dispute may address the question of the interpretation and application of the Convention in so far as it is necessary to assess whether the alleged acts of the UAE are capable of constituting acts of racial discrimination.

8. That said, some of the arguments raised by Qatar during the oral proceedings appear to go beyond what is required for an examination of the plausibility of the rights claimed. In particular, it might be asked to what extent the detailed references to the general recommendations of the CERD Committee are needed here (see, for example, CR 2018/12, pp. 37-38, paras. 21-23, and p. 40, paras. 27-29 (Amirfar), and p. 47, paras. 3 and 5 (Klein)).

9. The Court does not have the power to prevent parties from engaging in such conduct during the hearings. There are no precedents of parties being penalized for adopting such a practice. One way to avoid prejudging the merits of a case is thus simply to ignore such arguments in the reasoning of the order indicating provisional measures. In the *Ukraine* v. *Russian Federation* case, for example, despite the detailed arguments put forward by the parties on the interpretation of two international conventions at issue, the Court generally confined itself to the wording of the relevant provisions of the conventions and reached its conclusion through simple and succinct reasoning (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, paras. 74-76, and p. 135, paras. 81-83). In any event, the Parties to the present case were certainly not encouraged to address the interpretation of the Convention in detail.

B. Identity between the request for the indication of provisional measures and the claims on the merits

10. It is not only the parties' oral arguments which must not prejudge the merits of a case, the same applies to the request for the indication of provisional measures itself.

11. In the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica),* the Court considered whether the provisional measures requested "prejudge[d] the merits of the case" and found that:

> "this request is exactly the same as one of Nicaragua's claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as well as technical reports at this stage of the proceedings would therefore amount to prejudging the Court's decision on the merits of the case" (*Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013,* p. 404, para. 21).

In other words, the Court found that, in principle, if a request for the indication of provisional measures "is exactly the same as one of [the] claims on the merits", it prejudges the merits of the case and must therefore be rejected.

12. In this case, there appear to be a number of overlaps between the claims made in the Application and the provisional measures sought by Qatar (compare, for example, paragraph 65 of the Application with paragraph 19 of the Request). At the same time, the terms used in the Request ("suspend", "cease and desist", "take necessary measures", etc.) appear to have been carefully chosen to suggest that the provisional measures sought are temporary and without permanent effect, and a different set of terms is used in the Application ("cease and revoke", "restore", "comply with", etc.). The question thus could have been asked whether these differences in terminology were sufficient to conclude that the provisional measures requested, were they to be indicated, would not prejudge the merits of the case.

II. THE EXISTENCE OF IRREPARABLE PREJUDICE

13. In light of its jurisprudence, the Court should have found that there was no imminent risk of irreparable prejudice in this case.

14. According to the Court's jurisprudence,

> "[t]he power of the Court to indicate provisional measures 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 in dispute before the Court gives its final decision" (see, for example, *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,* p. 243, para. 50).

15. Regarding the rights referred to in the Convention, the Court has noted, in particular, that the political, civil, economic, social and cultural rights mentioned in Article 5, paragraphs *(b), (c), (d)* and *(e),* of the Convention are of such a nature that prejudice to them is capable of causing irreparable harm (*Application of the International Convention for the Suppression of the Financing*

of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142).

16. On another occasion, the Court found that there was a real risk of irreparable prejudice to the right in question if it were "not . . . possible to restore the situation to the *status quo ante*" (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1169, para. 90).

17. I am inclined to think that, even if the underlying facts were duly established, the following rights in respect of which Qatar has sought provisional measures are not of such a nature that prejudice to them is capable of causing irreparable harm.

18. As regards the right not to be subject to racial discrimination (Arts. 2 and 4) and the right to freedom of opinion and expression (Art. 5 *(d)* (viii)), the *status quo ante*, in which Qatari nationals residing in the UAE were not the subject of hatred, and "sympathy" towards Qataris was not a crime, can, at least in theory, be restored. It is also noted that the Respondent contests this claim, contending that "[t]he statement of the Attorney General is . . . not a law" (CR 2018/13, p. 65, para. 35 (Shaw)).

19. Concerning the right to work (Art. 5 *(e)* (i)) and the right to own property (Art. 5 *(d)* (v)), the *status quo ante*, in which Qatari nationals residing in the UAE could work and enjoy their property, can, theoretically, be restored, if the measure prohibiting Qataris entry to the UAE is lifted.

20. With respect to the right to equal treatment before tribunals (Art. 5 *(a)*) and the right to effective protection and remedies (Art. 6), 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.

21. However, the Court has found today that prejudice to those rights before tribunals, as well as to the right to family and the right to education and training, may be irreparable (para. 69 of the Order). I do not agree with this finding; moreover, the Court's reasoning fails to consider whether such prejudice, even if it were irreparable, is "imminent".

III. IMMINENT RISK

22. It goes without saying that the irreparable nature of the prejudice caused to these rights is not on a par with the harm caused by the execution of the death penalty or the performance of a nuclear test. Furthermore, examining the other aspect of the third condition for the indication of provisional measures may lead the Court to conclude that the alleged risk is not imminent.

23. With regard to the lives of UAE-Qatari mixed families, 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, it can be concluded that the risk of prejudice to this right, even if it were irreparable, is not imminent.

24. As regards the right to education and training, it is to be noted 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 (CR 2018/13, p. 69, para. 51 (Shaw)). Since the UAE authorities have taken measures to remedy the situation, it may be concluded or at least presumed that, even if it existed, the risk of irreparable prejudice to students is not imminent.

25. Lastly, regarding the right to public health and medical care (Art. 5 *(e)* (iv)), the evidence adduced by Qatar (OHCHR Technical Mission Report, Ann. 16 to the Application, paras. 43-44) shows that patients who were forced to leave the UAE subsequently received medical treatment in other countries, such as Germany, Turkey and Kuwait. Although some inconvenience may have been caused to those patients, this account suggests that, even if it existed, the risk of irreparable prejudice to them is not imminent.

IV. THE ORDER IS UNNECESSARY

A. The presumption of good faith at the provisional measures stage

26. I am 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. This principle finds expression in Article 26 of the 1969 Vienna Convention on the Law of Treaties, which provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." It is also set forth in Article 2, paragraph 2, of the Charter of the United Nations, which is reflected in the declaration on friendly relations between States (resolution 2625 (XXV) adopted by the General Assembly on 24 October 1970).

27. This fundamental principle not only requires the parties to an international convention to fulfil their international obligations in good faith, it also requires international courts to handle with care cases in which the honour of a State is at issue. In other words, the presumption of good faith prevents a State's honour from being impugned lightly. This presumption, which promotes stability in international dealings and good relations, is invariably important in helping to maintain and reinforce States' confidence in the judicial settlement of disputes, where referral to the courts rests on the consent of the parties to the dispute (Robert Kolb, *La bonne foi en droit international public*, PUF, 2000, p. 126). It follows, *a fortiori*, that this principle should apply, *mutatis mutandis*, even at the provisional measures stage, when the Court must decide whether to make an order promptly, prior to its final determination on jurisdiction. Even if the present proceedings do not prejudge the question of the Court's jurisdiction to deal with the merits of the case, or the questions on the merits themselves, the separate consideration mentioned above requires the principle of good faith to be applied when examining the request for the indication of provisional measures.

28. International jurisprudence on the subject shows that this principle gives rise to the theory that good faith must be presumed (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 229) and bad faith must not be presumed (United Nations, *Tacna-Arica question (Chile, Peru), Award of 4 March 1925, RIAA, Vol. II*, p. 930; *Affaire du Lac Lanoux (Spain/France), Award of 16 November 1956, RIAA, Vol. XII*, p. 305). In any event, one of the consequences of this notion is that it is incumbent on the party which claims that the other has violated the principle of good faith to prove that claim

(*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30). This rule regarding the burden of proof also applies at the provisional measures stage, where it is the applicant who must prove that there is a real and imminent risk of irreparable prejudice to the rights it claims (*Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 407, para. 34). The temporary nature of an order indicating provisional measures should not remove this burden from the applicant.

29. In my opinion, the evidence presented to the Court in these proceedings does not demonstrate that the risk of prejudice is "imminent", even if it were irreparable. This is implicitly illustrated in paragraphs 67 to 71 of today's Order, in which the Court, having concluded that the risk in question is one of irreparable prejudice, fails to ascertain whether that risk is "imminent". 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. That is particularly true where the UAE has shown genuine commitment towards its human rights obligations, as demonstrated by the arguments of its Agent (CR 2018/13, pp. 10-11, para. 3 (Alnowais); CR/2018/15, pp. 42, para. 2, and p. 44, para. 10 (Alnowais)) and the reply to the joint letter of the six Special Rapporteurs, in which the UAE states that "[t]he United Arab Emirates continues to uphold those [human rights] treaties and is fully aware of its obligations and commitments in this regard" (HRC/NONE/2017/112 (18 Sept. 2017), p. 3; Ann. 14 of Qatar's Application). The Respondent should have been presumed to be acting in good faith.

B. The passage of time

30. In my view, when examining the urgency of this case, the Court should have considered how much time would elapse between this Order and the next phase of the proceedings, be it preliminary objections or merits.

31. In the context of provisional measures proceedings, the notion of urgency is defined as a situation in which "irreparable prejudice [is] caused to the rights in dispute *before the Court gives its final decision*" (para. 61 of the Order; emphasis added). In this regard, time is generally considered as a baseline against which change can be measured in a given social context or period (David M. Engel, "Law, Time and Community", *Law & Society Review*, Vol. 21, No. 4 (1987), pp. 606-607). Thus, the question whether a particular situation is urgent or not cannot be determined in the abstract; it must be considered in the light of a reasonably defined time frame. In the case of provisional measures, strictly speaking, the Court could not reach a decision without a fixed time frame or a sense of when the next phase of the proceedings will occur.

32. It would, of course, be too much to expect the Court to provide a precise timetable for a case at this initial stage. However, the apparent nature of a case may give a *prima facie* indication of its complexity, which would make it possible to predict how long proceedings might be expected to last. For example, if the nature of a case suggested a certain degree of complexity, the proceedings would be expected to last longer, and thus urgency would have to be assessed in relation to this longer time frame, during which social change might be more likely. On the other hand, if the case file did not suggest such complexity, a final decision might be expected relatively quickly, and thus urgency would have to be assessed with respect to this short time frame.

33. I am of the opinion that this case falls into the second category rather than the first, given the well-defined scope of the dispute as presented by the Applicant. It should also be noted that,

even though Qatar's Application and request for provisional measures came out of the blue, the Respondent has presented its own view of the dispute, rather than simply rejecting the Applicant's allegations. In any event, the circumstances of the case suggest that it will not require a lengthy time frame, and that, therefore, urgency should have been assessed in relation to a short one. Given the nature of the rights in respect of which the Court has indicated provisional measures, they are less likely to be at risk of irreparable prejudice in the short interval before the case reaches the next phase.

(Signed) Jean-Pierre COT.