

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.
