

DISSENTING OPINION OF JUDGE SEBUTINDE

The first preliminary objection of the UAE does not, in the circumstances of the present case, have an exclusively preliminary character and should be joined to the merits, pursuant to the provisions of Article 79ter, paragraph 4, of the Rules of Court — In particular, the question of whether or not the measures taken by the UAE against Qatar and Qataris on 5 June 2017 had “the purpose or effect of racial discrimination” within the meaning of Article 1, paragraph 1, of the CERD, is a delicate and complex one that can only be determined after a detailed examination of the evidence and arguments of the Parties during the merits stage — Secondly, the preconditions referred to in Article 22 of the CERD are in the alternative and are not cumulative — The wording of Article 22 of the CERD does not expressly require a party to exhaust the CERD procedures before that party can unilaterally seise the Court — Both Parties acknowledge that the CERD Committee and the Court have related but fundamentally distinct roles relating to resolving disputes between States parties to the CERD — The Committee’s role is conciliatory and recommendatory, while that of the Court is legal and binding — Accordingly, the second preliminary objection should be rejected as there is nothing incompatible about Qatar pursuing the two procedures in parallel — Thirdly, according to the Court’s well-established jurisprudence, a claim based upon a valid title of jurisdiction cannot be challenged on grounds of “abuse of process” unless the high threshold of “exceptional circumstances” has been met — The UAE has not met that threshold — Qatar’s Application is therefore admissible and the third preliminary objection of the UAE should be rejected.

I. Introduction

1. I have not voted with the majority in paragraph 115, as I disagree with the Court’s conclusion in paragraphs 113 and 114 of the Judgment. In my respectful view, the first preliminary objection of the United Arab Emirates (hereinafter the “UAE”) does not, in the circumstances of the present case, have an exclusively preliminary character and should be joined to the merits, pursuant to the provisions of Article 79ter, paragraph 4, of the Rules of Court (as amended on 21 October 2019). That provision requires that: “After hearing the parties, the Court shall decide upon a preliminary question or uphold or reject a preliminary objection. *The Court may however declare that, in the circumstances of the case, a question or objection does not possess an exclusively preliminary character.*” (Emphasis added.)

2. In my view, the majority should not have rushed to conclude that Qatar’s claims fall outside the scope of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “the CERD”) based on the pleadings of the Parties at this early stage of the proceedings, but should have carefully examined the evidence during the merits stage, before reaching a conclusion one way or the other. In particular, the question of whether or not the measures taken by the UAE against Qatar and Qataris on 5 June 2017 had “the purpose or effect of racial discrimination” within the meaning of Article 1, paragraph 1, of the CERD, is a delicate and complex one that can only be determined after a detailed examination of the evidence and arguments of the Parties during the merits stage. Because of the approach taken by the majority, it is regrettable that the other objections raised by the UAE were also not considered. In this separate opinion, I endeavour to show why the first preliminary objection of the UAE does not, in the circumstances of the present case, have an exclusively preliminary character and should instead, be joined to the merits. I also opine on the other preliminary objections raised by the UAE.

II. The submissions of the Parties

A. Qatar's claims and requests

3. 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 towards 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 institutions¹.

4. Accordingly, Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under the 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;

¹ Application of Qatar, para. 65.

- (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 CERD².

5. In its Memorial, Qatar in its own right and as *parens patriae* of its citizens, respectfully requests the Court to adjudge and declare that the UAE, by the acts and omissions of its organs, agents, persons, and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, is responsible for violating its obligations under Articles 2, 4, 5, 6 and 7 of the CERD, including by:

- (a) Expelling, on a collective basis, all Qataris from the UAE;
- (b) Applying the Absolute Ban and Modified Travel Ban in violation of fundamental rights that must be guaranteed equally to all under the CERD, regardless of national origin, including the rights to family, freedom of opinion and expression, education and training, property, work, and equal treatment before tribunals;
- (c) Engaging in, sponsoring, supporting, and otherwise encouraging racial discrimination, including racially discriminatory incitement against Qataris, most importantly by criminalizing "sympathy" with Qatar and orchestrating, funding, and actively promoting a campaign of hatred against Qatar and Qataris, and thereby failing to nullify laws and regulations that have the effect of creating or perpetuating racial discrimination, to take "all appropriate" measures to combat the spread of prejudice and negative stereotypes, and to promote tolerance, understanding and friendship; and
- (d) Failing to provide access to effective protection and remedies to Qataris to seek redress against acts of racial discrimination under the CERD through UAE tribunals or institutions, including the right to seek reparation.

6. Qatar further requests the Court to adjudge and declare that the UAE has violated the Court's Order on Provisional Measures of 23 July 2018; and that the UAE is obligated to cease its ongoing violations, make full reparations for all material and moral damage caused by its internationally wrongful acts and omissions under the CERD, and offer assurances and guarantees of non-repetition.

7. Accordingly Qatar requests the Court to order that the UAE:

- (a) Immediately cease its ongoing internationally wrongful acts and omissions in contravention of Articles 2 (1), 4, 5, 6 and 7 of the CERD;
- (b) Provide full reparation for the harm caused by its actions, including (i) restitution by lifting the ongoing Modified Travel Ban as it applies to Qataris collectively based on their national origin; (ii) financial compensation for the material and moral damage suffered by Qatar and Qataris, in an amount to be quantified in a separate phase of these proceedings; and (iii) satisfaction in the forms of a declaration of wrongfulness and an apology to Qatar and the Qatari people, as requested; and
- (c) Provide Qatar with assurances and guarantees of non-repetition in written form.

² Application of Qatar, para. 66.

B. The preliminary objections of the UAE

8. The UAE raised three preliminary objections against the jurisdiction of the Court and the admissibility of Qatar's claims, namely that:

- (a) The dispute between the Parties falls outside the scope *ratione materiae* of the CERD since the measures of the UAE were directed at Qatari citizens on the basis of their "nationality" and not "national origin"³;
- (b) Qatar has not fulfilled the procedural preconditions of negotiation and the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") procedures prescribed in Articles 11 to 13 of the CERD before resorting to judicial settlement by the Court, as required by Article 22 of the CERD⁴; and
- (c) Qatar's initiation of parallel proceedings before the Court in respect of the same dispute whilst the Article 11 procedure was pending before the CERD Committee renders Qatar's Application inadmissible⁵.

III. The Court's jurisdiction under Article 22 of the CERD

9. Article 22 of the CERD provides 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.*" (Emphasis added.)

10. In light of the written and oral arguments raised by the Parties, a determination of whether or not the Court has jurisdiction *ratione materiae* to entertain the claims of Qatar pursuant to Article 22 of the CERD depends on the determination of the following factors, namely:

- (a) What is the subject-matter of the dispute between Qatar and the UAE?
- (b) Does the dispute concern the interpretation or application of the CERD within the meaning of Article 22 of that Convention *or* do Qatar's claims actually fall outside the scope of the CERD by virtue of the exceptions contemplated in Article 1, paragraphs 2 or 3?
- (c) If so, did Qatar comply with the procedural requirements stipulated in Article 22 of CERD or alternatively did the Parties agree to another mode of settling their dispute, before seising the Court?
- (d) Lastly, are the claims of Qatar admissible?

I will briefly examine each of these in turn, starting with the first.

³ Preliminary Objections of the United Arab Emirates, Part III.

⁴ *Ibid.*, Part IV.

⁵ *Ibid.*, Part V.

A. The subject-matter of the dispute between Qatar and the UAE

11. Article 40, paragraph 1, of the Statute of the Court, and Article 38, paragraph 1, of the Rules of Court require an applicant to indicate the “subject of the dispute” and to specify the “precise nature of the claim”⁶. Furthermore, it is for the Court itself to determine, on an objective basis, the subject-matter of the dispute, isolating the real issue in the case and identifying the object of the claim⁷. The Court does this by examining the dispute as formulated in the application, including the basis that the applicant identifies as the basis of jurisdiction, as well as the written and oral pleadings of the parties⁸.

12. Taking into account the dispute as formulated in Qatar’s Application, the object of Qatar’s claims, the jurisdictional basis upon which those claims are based, and the written and oral pleadings of the Parties, the subject-matter of the dispute is whether the UAE by taking the measures that it did on 7 June 2017 and subsequently, against Qatar and Qataris, violated its obligations under the CERD.

B. Whether the dispute falls within the scope *ratione materiae* of the CERD

13. In order to determine whether or not the dispute in the present case concerns the interpretation or application of the CERD, the Court must determine whether the acts complained of by Qatar (namely, the measures taken by the UAE on 5 June 2017 against Qataris living in the UAE) fall within the scope *ratione materiae* of Article 1, paragraph 1, of the CERD; *or alternatively*, whether those acts fall outside the scope of the CERD by virtue of the exceptions stipulated in Article 1 paragraphs 2 or 3, as argued by the UAE.

14. The Court has stated in *Oil Platforms*⁹ and in *Certain Iranian Assets*¹⁰ that, in order to determine the Court’s jurisdiction *ratione materiae* under a jurisdictional clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains “fall within the provisions” of the treaty containing the clause. At the jurisdictional stage of the proceedings, a detailed examination by the Court of the alleged wrongful acts of the respondent or of the plausibility of the applicant’s claims is not

⁶ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 25; *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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 575, para. 24.

⁷ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

⁸ See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 602-603, para. 26: “the Court bases itself . . . on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the Applicant identifies as the basis for its claim (see *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 31; pp. 449-450, para. 33)”.

⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16.

¹⁰ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36.

warranted. The Court’s task, as reflected in Article 79 of the Rules of Court, is to consider the questions of law and fact that are relevant to the objection to its jurisdiction¹¹.

15. In the present case, the Court has already stated in its Provisional Measures Order of 23 July 2018 that:

“27. 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, the Court 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.

28. 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.”¹²

At this stage, I see no reason for the Court to depart from its earlier position.

C. *Alternatively, whether Qatar’s claims fall outside the scope of the CERD by virtue of the exceptions contemplated in Article 1, paragraphs 2 or 3*

16. Article 1 (1) of the CERD defines “racial discrimination” to mean:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or *national* or *ethnic origin*, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (emphasis added).

17. Article 1 (2) of the CERD provides that the Convention:

“shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”.

¹¹ *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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 584, paras. 57-58.

¹² *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. 417, paras. 27-28.

18. Article 1 (3) of the CERD provides that:

“Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”

19. The Court has stated in *Ukraine v. Russia* that in order to determine whether it has jurisdiction *ratione materiae* under the CERD, it does not need to satisfy itself that the measures of which the applicant complains actually constitute “racial discrimination” within the meaning of Article 1, paragraph 1, of the CERD; nor does the Court need to establish if and to what extent, certain acts may be covered by Article 1, paragraphs 2 and 3, of the CERD. Both determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by the applicant, and are thus properly a matter for the merits, should the case proceed to that stage. At the current stage of the proceedings, the Court only needs to ascertain whether the measures complained of by Qatar target a protected group on the basis of national or ethnic origin and whether those measures are capable of negatively affecting the enjoyment of rights protected under the Convention¹³.

20. In the present case, Qatar maintains that Qataris are a protected people of a distinct historical-cultural national origin and has submitted expert evidence to support this contention, which the UAE has not rebutted¹⁴. Qatar further maintains that the measures taken by the Respondent against its nationals “had the purpose and effect” of racial discrimination of Qatari nationals within the meaning of Article 1, paragraph 1, of the CERD. This evidence should, of course, be examined and verified on the merits, rather than at this jurisdictional stage of the proceedings. In my view, there is a thin line between “Qatari national origin” and “Qatari nationality or citizenship” and this line is particularly blurred by the circumstances of the case. As earlier stated, the question of whether or not the measures taken by the UAE against Qatar and Qataris on 5 June 2017 had “the purpose or effect of racial discrimination” within the meaning of Article 1, paragraph 1, of the CERD, is a delicate and complex one that can only be determined after a detailed examination of the evidence and arguments of the Parties during the merits stage. In the present Judgment, the majority simply carried out an academic discussion of the terms “current nationality” and “national origin” but has clearly not examined the detailed evidence adduced by the Applicant in support of its claim of “indirect discrimination” before reaching the conclusion in paragraphs 113 and 114 of the Judgment.

21. At an earlier stage of these proceedings, the Court, when examining the plausibility of the rights claimed by Qatar, noted that:

“on the basis of the evidence presented to it by the Parties, . . . 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

¹³ *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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, paras. 94-95.

¹⁴ Memorial of Qatar, Vol. I, pp. 131-134, paras. 3.96–3.100 and Vol. VI, Ann. 162, Expert Report of Dr. J. E. Peterson of 9 April 2019, in which he documents the Qataris as “a distinct people, as a group of individuals who belong to a long-standing historical-cultural community defined by a distinct heritage, particular family or tribal affiliations, shared national traditions and culture, and geographic ties to the peninsular of Qatar”.

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.”¹⁵

22. At this jurisdictional stage of the proceedings, I see no reason to depart from the Court’s earlier finding that at least some of the acts of which Qatar complains are capable of constituting acts of racial discrimination as defined by the Convention. Qatar’s claims therefore fall within the scope *ratione materiae* of CERD. In this regard, I am of the considered view that the approach of the majority whereby the jurisdiction *ratione materiae* of the Court turns on a theoretical definition or analysis of the term “national origin” without taking into account the facts and evidence adduced by Qatar in support of its claims (see paragraphs 75 to 105) is not in the interests of justice. Similarly, the issues discussed in paragraphs 109 to 110 pertaining to the measures that Qatar characterizes as “indirect discrimination” are issues that should have been properly examined during the merits stage in light of the facts, evidence and arguments of the Parties, before drawing the conclusion that these claims fall outside the scope *ratione materiae* of the Court’s jurisdiction.

23. Regarding the UAE’s preliminary objection based on its argument that Qatar’s claims fall under the exceptions stipulated under Article 1 (2) and therefore outside the scope *ratione materiae* of the CERD, I am of the considered view that this objection does not possess an exclusively preliminary character and can only be properly determined after a detailed examination of the evidence during the merits stage.

24. This brings me to the second preliminary objection of the UAE, namely that Qatar did not fulfil the procedural requirements of Article 22 of the CERD before seising the Court.

D. Whether Qatar fulfilled the procedural requirements of Article 22 of the CERD or, alternatively, whether the Parties agreed to another mode of settling their dispute, before seising the Court

25. In order to answer this question, the Court must address whether Qatar satisfied one of the procedural requirements stipulated in Article 22 before seising the Court. *Alternatively*, in the event that Qatar chose more than one mode of dispute settlement (namely, negotiations, CERD procedures and judicial settlement), the Court must determine whether the Applicant is obliged to exhaust negotiations and the CERD procedures before seising the Court.

26. Both Parties agree that the Court’s jurisdiction pursuant to Article 22 of the CERD is limited to disputes “*not settled by negotiation or by the procedures expressly provided for in [the] Convention*”. The Parties also agree that they have not agreed to “*another mode of [dispute] settlement*”. It is settled jurisprudence in *Ukraine v. Russia* that the preconditions referred to in Article 22 are in the alternative and are not cumulative¹⁶. The Court in that case stated as follows:

¹⁵ *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. 427, para. 54.

¹⁶ *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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, pp. 599-600, paras. 110-113.

“110. The Court therefore considers that ‘negotiation’ and the ‘procedures expressly provided for in [the] Convention’ are two means to achieve the same objective, namely to settle a dispute by agreement. Both negotiation and the CERD Committee procedure rest on the States parties’ willingness to seek an agreed settlement of their dispute. It follows that should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the CERD Committee for further negotiation, again in order to reach an agreed solution. The Court considers that the context of Article 22 of CERD does not support this interpretation. In the view of the Court, the context of Article 22 rather indicates that it would not be reasonable to require States parties which have already failed to reach an agreed settlement through negotiations to engage in an additional set of negotiations in accordance with the modalities set out in Articles 11 to 13 of CERD.

111. The Court considers that Article 22 of CERD must also be interpreted in light of the object and purpose of the Convention. Article 2, paragraph 1, of CERD provides that States parties to CERD undertake to eliminate racial discrimination ‘without delay’. Articles 4 and 7 provide that States parties undertake to eradicate incitement to racial discrimination and to combat prejudices leading to racial discrimination by adopting ‘immediate and positive measures’ and ‘immediate and effective measures’ respectively. The preamble to CERD further emphasizes the States’ resolve to adopt all measures for eliminating racial discrimination ‘speedily’. The Court considers that these provisions show the States parties’ aim to eradicate all forms of racial discrimination effectively and promptly. In the Court’s view, the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative.

112. The Court notes that both Parties rely on the *travaux préparatoires* of CERD in support of their respective arguments concerning the alternative or cumulative character of the procedural preconditions under Article 22 of the Convention. Since the alternative character of the procedural preconditions is sufficiently clear from an interpretation of the ordinary meaning of the terms of Article 22 in their context, and in light of the object and purpose of the Convention, the Court is of the view that there is no need for it to examine the *travaux préparatoires* of CERD.

113. The Court concludes that Article 22 of CERD imposes alternative preconditions to the Court’s jurisdiction. Since the dispute between the Parties was not referred to the CERD Committee, the Court will only examine whether the Parties attempted to negotiate a settlement to their dispute.”

27. In the present case, the Parties did pursue the procedures before the CERD Committee and the Conciliation Commission pursuant to Articles 11 to 13 of the CERD. The question is therefore whether Qatar should have exhausted the preconditions of bilateral negotiations and of conciliation before the CERD Committee, before resorting to judicial settlement.

28. It will also be recalled that Qatar founded the Court’s jurisdiction on the basis of the failed bilateral negotiations envisaged under Article 22, rather than on the exhaustion of the CERD procedures initiated by Qatar on 8 March 2018¹⁷ pursuant to Article 11. Regarding the precondition

¹⁷ On 8 March 2018, Qatar filed a communication with the CERD Committee requesting that the UAE take all necessary steps to end the measures enacted and implemented since 5 June 2017 (see paragraph 31 of the Judgment).

of bilateral negotiations, the Court has in the present case already found in its Provisional Measures Order of 23 July 2018 as follows:

“37. 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 fora, including at the United Nations, in the presence of representatives of the UAE. For example, during the thirty-seventh session of the United Nations Human Rights Council in February 2018, the Minister for Foreign Affairs of Qatar referred to ‘the violations of human rights caused by the unjust blockade and the unilateral coercive measures imposed on [his] country that have been confirmed by the . . . report of the Office of the United Nations High Commissioner for Human Rights Technical Mission’, while the UAE — along with Bahrain, Saudi Arabia and Egypt — issued a joint statement ‘in response to [the] remarks’ made by the Minister for Foreign Affairs of Qatar.

38. The Court 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.”¹⁸

29. Qatar clearly satisfied the precondition of bilateral negotiation before seising the Court. In view of the above, the Court should determine whether in fact Qatar was obliged to exhaust the other procedures expressly provided for in the Convention before seising the Court.

E. Whether Qatar was obligated to exhaust the Conciliation Commission procedures before seising the Court

30. It is not disputed that Qatar referred its claims against the UAE to the CERD Committee before seising the Court. The CERD Committee in turn referred the Parties’ dispute to the Conciliation Commission and to date the processes before that Commission are ongoing and have not been concluded. Both Parties claim that they are fully engaged in those processes “*in good faith*”. Unlike the bilateral negotiations referred to in the earlier part of Article 22 of the CERD, the procedures before the Conciliation Commission are tripartite and conciliatory. In its oral arguments, the UAE maintained that Qatar was obligated to first exhaust the processes before the Conciliation Commission before seising the Court. Citing the principles of *lis pendens*¹⁹ and *electa una via*²⁰, the UAE argues that there remains the possibility of the two processes (conciliation and judicial settlement) yielding contradictory outcomes, and that therefore Qatar should have waited

¹⁸ *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. 420, paras. 37-38.

¹⁹ Meaning “a doctrine under which one purchasing an interest in property involved in a pending suit does so subject to the adjudication of the rights of the parties to the suit”.

²⁰ Meaning “he who has chosen one means of dispute settlement, cannot have recourse to another”.

“to determine whether or not the Conciliation Commission procedures had resulted in a settlement of the dispute” before pursuing judicial settlement²¹.

31. The wording of Article 22 of the CERD does not expressly require a party to exhaust the CERD procedures before that party can unilaterally seise the Court. The wording of that Article cannot be compared, for example, to Article IV of the Pact of Bogotá, which provides that: “Once any pacific procedure had been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, *no other procedure may be commenced until that procedure is concluded.*” (Emphasis added.)

32. Both Parties acknowledge that the CERD Committee and the proceedings before the Court have related but fundamentally distinct roles relating to resolving disputes between States parties to the CERD. The Committee’s role is conciliatory and recommendatory, while that of the Court is legal and binding. Accordingly, there is nothing incompatible about Qatar pursuing the two procedures in parallel.

33. Furthermore, the Court stated in its Provisional Measures Order of 23 July 2018, regarding the second precondition of “*other procedures expressly provided for in the Convention*” as follows:

“39. . . . It is recalled that, according to Article 11 of the Convention, ‘[if] 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 (see *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. 125-126, para. 60). 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.

40. 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.”²² (Emphasis added.)

34. In my view therefore, Qatar was not obligated to exhaust the Conciliation Commission processes before seising the Court. I would therefore dismiss the second preliminary objection of the UAE. This brings me to the third preliminary objection of the UAE, namely whether Qatar’s claims are inadmissible on grounds of alleged abuse of process by Qatar.

²¹ CR 2020/6, pp. 53-67, paras. 1-32 (Forteau).

²² *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.

F. Whether Qatar’s claims are inadmissible on the grounds that Qatar has committed abuse of process

35. During the oral proceedings the UAE abandoned its third preliminary objection pertaining to “abuse of process”²³. However, according to the Court’s well-established jurisprudence, a claim based upon a valid title of jurisdiction cannot be challenged on grounds of “abuse of process” unless the high threshold of “exceptional circumstances” has been met. In my view, Qatar’s alleged abuse of process should not be easily assumed in the absence of clear proof of any exceptional circumstances pointing to such abuse. Qatar’s claims are admissible and the third preliminary objection should have been rejected.

IV. Conclusion

36. In conclusion, the first preliminary objection of the UAE does not possess an exclusively preliminary character and should be joined to the merits. The second and third preliminary objections of the UAE should be dismissed and the Court should find that it has jurisdiction and that Qatar’s claims are admissible.

(Signed) Julia SEBUTINDE.

²³ Oral argument by Sir Daniel Bethlehem.