International Court of Justice — Provisional measures — *Prima facie* jurisdiction — International Convention on the Elimination of All Forms of Racial Discrimination, 1965 ("CERD") — Article 22 — Whether the Court having *prima facie* jurisdiction *ratione materiae* — Distinction between "national origin" and "nationality" under CERD — Whether procedural preconditions to the Court's jurisdiction met — Prior negotiation — Exhaustion of CERD-based procedures — Plausibility — Whether the acts of which Qatar complained were plausibly acts of racial discrimination — Irreparable prejudice — Urgency — Whether evidence submitted by Qatar proving that the rights claimed were under a real and imminent risk of irreparable prejudice — Reports of international organizations as evidence — Unilateral undertaking — Statement of 5 July 2018 by UAE

International Court of Justice — Provisional measures requested by respondent State — Whether extending to protection of procedural rights — Procedural rights arising under Article 22 of CERD — Right to obtain compliance with provisional measures indicated earlier — *Prima facie* jurisdiction — Provisional measures for non-aggravation and non-extension of the dispute — Whether capable of being indicated only if provisional measures for protection of rights also indicated

International Court of Justice — Preliminary objections — Whether Court having jurisdiction under Article 22 of International Convention on the Elimination of Racial Discrimination, 1965 — Whether discrimination based on nationality prohibited by CERD — Whether Qatar's claim of discriminatory measures by United Arab Emirates falling within scope of CERD Treaties — Interpretation — Scope — International Convention on the Elimination of Racial Discrimination, 1965 — Article 1(1) — Meaning of "national origin" — Whether including current nationality — Object and purpose of treaty — *Travaux préparatoires* — Whether CERD intending to prohibit discrimination based on nationality — Whether Qatar's claim of discriminatory measures by United Arab Emirates falling within scope of CERD

Human rights — International Convention on the Elimination of Racial Discrimination, 1965 — Article 1(1) — Meaning of "national origin" — Whether including current nationality —

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Whether discrimination based on nationality prohibited by CERD — Whether Qatar's claim of discriminatory measures by United Arab Emirates falling within scope of CERD

Nationality — Nature of citizenship — Bond between State and citizen — Whether distinct from "national origin" — International Convention on the Elimination of all Forms of Racial Discrimination, 1965, Article 1

International tribunals — United Nations Committee on the Elimination of Racial Discrimination — Weight to be given to practice of Committee — Jurisprudence of regional human rights courts — Relevance — Whether discrimination based on nationality prohibited by CERD

Application of the International Convention on the Elimination of All Forms of Racial Discrimination

(Qatar *v.* United Arab Emirates)[1]

International Court of Justice

First Request for Provisional Measures. 23 *July* 2018

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, *Judges*; Cot, Daudet, *Judges ad hoc*)

Second Request for Provisional Measures. 14 *June* 2019

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa, *Judges*; Cot, Daudet, *Judges ad hoc*)

Preliminary Objections. 4 *February* 2021

[1] A list of counsel participating in the proceedings appears at para. 10 of the Order on Provisional Measures of 23 July 2018, para. 11 of the Order on Provisional Measures of 14 June 2019 and para. 20 of the judgment on Preliminary Objections of 4 February 2021.

For related proceedings before the United Nations Committee on the Elimination of Racial Discrimination, see 203 ILR 562 below.

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(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa, *Judges*; Cot, Daudet, *Judges ad hoc*)[2]

SUMMARY:[3] *The facts*:—On 5 June 2017, the United Arab Emirates ("UAE") issued a statement breaking off diplomatic relations with Qatar. Qatari nationals in the UAE were given fourteen days in which to leave and no further Qatari nationals were permitted to enter the UAE. UAE nationals were likewise banned from remaining in Qatar and from travelling to, or transiting through Qatar. UAE airspace and seaports were closed for all Qataris within twenty-four hours. Qatari means of transport were prohibited from crossing, entering or leaving the territory of the UAE. Qatar claimed that this statement and the ensuing actions of the UAE violated rights guaranteed under the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 ("CERD").

On 11 June 2018, Qatar filed an application instituting proceedings against the UAE, alleging violations of CERD. On the same day, Qatar also filed with the Court a request for the indication of provisional measures, pursuant to Article 41 of the Statute of the International Court of Justice 1945 ("the Statute").

Order on First Request for Provisional Measures (23 July 2018)

Qatar maintained that Article 22 of CERD conferred on the Court *prima facie* jurisdiction to indicate provisional measures. Qatar contended that a dispute existed between the Parties on the interpretation and application of CERD, as the measures implemented since 5 June 2017 discriminated against Qatari citizens on the basis of their nationality in a manner contrary to various provisions of CERD. Qatar argued that the measures taken by the UAE interfered, *inter alia*, with the right to marriage, freedom of expression, the right to medical care and the right to education. The UAE maintained that no dispute existed between the Parties on the interpretation and application of CERD. According to the UAE, all Qataris enjoyed in the UAE all fundamental rights guaranteed under CERD. The UAE contended that there had been no restriction on access to courts, education and medical care by Qataris. Moreover, the UAE argued that "national origin" under Article 1 of CERD was not to be equated with "present citizenship", but was rather a reference to "ethnic origin".

Qatar argued that, before filing the case with the Court and as required under Article 22 of CERD, it had both made genuine attempts at finding a

[2] In the first Request for Provisional Measures of 23 July 2018 and Preliminary Objections of 4 February 2021, Judge ad hoc Daudet was appointed by Qatar and Judge ad hoc Cot was appointed by the United Arab Emirates under Article 31 of the Statute.

[3] Prepared by Dr M. Lando.

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negotiated solution to the dispute, and deposited a communication with the United Nations Committee on the Elimination of Racial Discrimination ("the CERD Committee") in accordance with Article 11 of CERD. Qatar added that whether the two preconditions to the Court's jurisdiction were alternative or cumulative was not to be decided at the provisional measures stage of the proceedings. According to the UAE, the two preconditions were cumulative and that Qatar did not make a genuine attempt at finding a negotiated solution. Moreover, the UAE argued that, once a communication had been deposited with the CERD Committee, Qatar had to await the exhaustion of that procedure before seising the Court, which it failed to do.

Qatar contended that the rights allegedly breached by the UAE's measures were those under Articles 2, 4, 5, 6 and 7 of CERD.[4] According to Qatar, such rights were plausible, and CERD could not be read so as to exclude protection against discrimination based on nationality. In support of its plausibility argument, Qatar submitted the December 2017 report of the Technical Mission despatched by the Office of the United Nations High Commissioner for Human Rights ("OHCHR"). The UAE contended that Qatar had put forward an unacceptably broad interpretation of the rights arising under CERD, and that, as a consequence, the rights asserted by Qatar were not plausible. The UAE also stated that the OHCHR Technical Report on which Qatar relied was dated, having been finalized seven months before the events of which Qatar was complaining before the Court. Qatar maintained that there was a link between the rights claimed on the merits and the provisional measures requested. According to the UAE, the real aim of Qatar's request for provisional measures was to overturn the measures of 5 June 2017, and the measures requested by Qatar were not linked to the rights claimed under CERD.

According to Qatar, without provisional measures it would not be possible to restore the *status quo ante*, should the Court find that the UAE had committed the breaches alleged by Qatar. It followed that there was a real and imminent risk of irreparable prejudice to the rights claimed by Qatar under CERD. According to Qatar, the durable consequences of the alleged breaches by the UAE had been acknowledged by the OHCHR Technical Report. The UAE argued that Qataris continued to enjoy, on the territory of the UAE, all rights protected under CERD. The UAE contended that there had been no steps taken in pursuance of the measures of 5 June 2017 to deport Qataris. The UAE stated that the only restriction implemented was on the entry of Qataris into the UAE, for which permission was to be sought, and almost always granted in practice. The UAE added that a dedicated hotline had been created. As a result, there was no real and imminent risk of irreparable prejudice to the rights claimed by Qatar on the merits.

Held:—(1) (by eight votes to seven, Judges Tomka, Gaja, Bhandari, Crawford, Gevorgian, Salam and Judge ad hoc Daudet dissenting) The

[4] For the text of Articles 2, 4, 5, 6 and 7 of CERD, see para. 50 of the Order of 23 July 2018.

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UAE had to ensure that: (i) families separated by the measures were reunited; (ii) Qatari students affected by the measures were given the opportunity to complete their education in the UAE, or to obtain their educational records if they wished to continue their studies elsewhere; and (iii) Qataris affected by the measures adopted on 5 June 2017 were allowed access to tribunals and other judicial organs of the UAE (para. 79).

(2) (by eleven votes to four, Judges Crawford, Gevorgian, Salam and Judge ad hoc Cot dissenting) Both Parties were to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

(a)(i) The Court could indicate provisional measures only if, *prima facie*, there appeared to be a basis for jurisdiction over the merits of the case. There was a dispute between the Parties regarding the interpretation and application of CERD, since they disagreed on the scope of the measures and on whether they related to rights and obligations under CERD. The acts of which Qatar complained were capable of falling within the scope *ratione materiae* of CERD. It was not necessary to determine, at this stage in the proceedings, whether discrimination based on "national origin" encompassed discrimination based on "nationality" under the terms of CERD (paras. 14-27).

(ii) In order to meet the precondition of prior negotiation, negotiations had to relate to the subject-matter of the dispute between the Parties. Qatari officials had raised issues relating to the measures of 5 June 2017 in international fora. In a letter to the UAE's Foreign Ministry dated 25 April 2018, Qatar had referred to alleged violations of CERD, in a way which amounted to an offer to negotiate the settlement of the dispute between the Parties. Moreover, on 8 March 2018 Qatar had deposited a communication with the CERD Committee. Accordingly, the Court did not need to decide, at the provisional measures stage of the proceedings, whether the two procedural preconditions to the Court's jurisdiction under Article 22 of CERD were cumulative or alternative. Similarly, it was not necessary for the Court to decide whether the *electa una via* principle and *lis pendens* principle were applicable in the present case. It followed that the Court had *prima facie* jurisdiction over the merits of the case (paras. 36-40).

(b) There was a correlation between respect for individual rights, the obligations of States Parties to CERD and the right of such States to seek compliance with those obligations. Since Articles 2, 4, 5, 6 and 7 of CERD protected individuals from racial discrimination, a State could invoke the rights guaranteed under those provisions only if the acts complained of appeared to constitute acts of racial discrimination. The UAE measures targeted only Qataris and were directed at all Qataris present in the UAE without regard to individual circumstances. It followed that some of the rights asserted by Qatar under CERD were plausible. A link existed between the rights claimed by Qatar under CERD and the provisional measures requested (paras. 51-9).

(c) Certain rights claimed by Qatar under CERD were susceptible of suffering irreparable prejudice. As a result of the measures of 5 June 2017,

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the situation of Qataris in the UAE remained vulnerable in respect of their rights under Article 5 of CERD. The evidence suggested that: numerous Qataris residing in the UAE had been forced to leave their place of residence without possibility of return; UAE-Qatari mixed families had been separated; Qatari students in the UAE had been deprived of the opportunity to complete their education; and Qataris had been denied equal access to the UAE's courts. The prejudice which people in such situations could suffer could be considered to be irreparable. The UAE had not taken any official step to repeal the measures. It followed that the rights invoked by Qatar were under a real and imminent risk of irreparable prejudice (paras. 67-71).

(d) The conditions for indicating provisional measures were met, but the provisional measures ordered by the Court did not need to be identical to those requested. In addition to the measures indicated in the operative paragraph, the circumstances of the case were such as to warrant the indication of a provisional measure aimed at preventing the extension or aggravation of the dispute between the Parties (paras. 72-6).

Joint Declaration of Judges Tomka, Gaja and Gevorgian: In indicating provisional measures, the Court should have established whether the dispute between the Parties *prima facie* fell within the scope *ratione materiae* of CERD. Nationality was not listed in Article 1(1) of CERD as a basis on which discrimination was prohibited under CERD. "National origin" could not be equated with "nationality", as was clear from the *travaux préparatoires* of CERD. The CERD Committee had not stated that "national origin" was to be equated with "nationality". The dispute which Qatar had submitted to the Court did not *prima facie* fall within the scope *ratione materiae* of CERD, and the rights claimed by Qatar on the merits were therefore not plausible (paras. 1-7).

Separate Opinion of Judge Cançado Trindade: (1) The principle of equality and non-discrimination lay at the heart of CERD. However, the Parties in the proceedings diverted the Court's attention from this principle to points of no relevance to provisional measures under a human rights treaty. International legal doctrine had similarly not dedicated sufficient attention to this principle. Nonetheless, the jurisprudence of the Inter-American Court of Human Rights determined significant advances in the approach to equality and non-discrimination, stating that they were part of *jus cogens* (paras. 9-19).

(2) The present case also concerned the arbitrariness of certain measures taken allegedly in breach of CERD. Positive law alone could not solve the problems resulting from the arbitrariness inherent in human nature. Law and justice were indissociable. In the dehumanized world of our days, the Court had a mission to contribute to a humanized law of nations (paras. 22-8).

(3) The rule on exhaustion of local remedies should not have been mentioned at the provisional measures stage of the proceedings, as it

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constituted an issue of admissibility of the claim. Exhaustion of local remedies did not have, in the context of human rights protection, the same application as it had in the context of diplomatic protection. Exhaustion of local remedies in human rights protection was victim-oriented, and its rationale was to provide redress. One could not deprive a human rights treaty of *effet utile* by applying the rationale of exhaustion of local remedies of diplomatic protection (paras. 48-55).

(4) The attempt to create the plausibility requirement for indicating provisional measures was regrettable. The Court had not elaborated on what plausibility meant. Provisional measures should have been focused on human beings in situations of vulnerability (paras. 57-60).

(5) The provisional measures indicated by the Court were necessary to protect persons in situations of vulnerability. Human beings in situations of vulnerability were the ultimate beneficiaries of the provisional measures indicated, as subjects of the humanized international law of our times. Provisional measures had a properly tutelary dimension, and not only a precautionary one (paras. 68-73).

(6) An autonomous regime of provisional measures was being developed, which enhanced the preventive dimension of international law. The basic components of this regime were the rights to be protected, the corresponding obligations and the prompt determination of responsibility (paras. 75-6).

(7) The fact that the present case was an inter-State one did not mean that the Court should have reasoned on a strictly inter-State basis. The case was not about the rights of States, but about the rights of human beings. This aspect should have characterized the Court's approach to the request for provisional measures (paras. 94-5).

Dissenting Opinion of Judge Bhandari: The Court should not have indicated provisional measures in the circumstances. The UAE had made unqualified statements before the Court that the measures of 5 June 2017 had not been implemented, and Qatar had not provided cogent evidence to the contrary. After the closure of oral proceedings, the Foreign Ministry of the UAE had made an unqualified undertaking that Qataris already present in the UAE could remain without need for permission. As result of the unilateral undertaking by the UAE, the rights claimed by Qatar on the merits were not under a real and imminent risk of irreparable prejudice. Relevant cases suggested that, in order for an undertaking to remove the real and imminent risk of irreparable prejudice, such an undertaking had to be unqualified (paras. 1-7).

Dissenting Opinion of Judge Crawford: (1) Article 1(1) of CERD distinguished between discrimination based on "national origin", prohibited under CERD, and discrimination based on "nationality", not prohibited as such. Therefore, the discrimination stemming from the measures of 5 June 2017 was not apparently covered by CERD (para. 1).

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(2) It was unclear from the evidence that the measures of 5 June 2017 were still in effect, or that they could cause irreparable prejudice to the rights asserted by Qatar on the merits. No apparent administrative or legislative action was taken to implement those measures. On 5 July 2018, the UAE Foreign Ministry issued a statement clarifying the entry and residence requirements for Qataris. The evidence showed that, also due to the clarifying statement of 5 July 2018, there was no real and imminent risk of irreparable prejudice to the rights claimed by Qatar. Qatar's request for provisional measures failed on the facts (paras. 2-17).

Dissenting Opinion of Judge Salam: The Court did not have *prima facie* jurisdiction *ratione materiae* to indicate provisional measures, as CERD did not prohibit discrimination on the grounds of nationality. In previous cases, the Court had made decisions relating to discrimination on the grounds of ethnic origin, not of national origin, and, as a consequence, had no occasion to decide whether "national origin" is the same as "nationality". The distinction between "national origin" and "nationality" was confirmed by the *travaux préparatoires* of CERD. Its lack of *prima facie* jurisdiction did not prevent the Court from stating, in the reasoning of the Order, that the Parties should not extend or aggravate the dispute (paras. 2-10).

Dissenting Opinion of Judge ad hoc Cot: (1) The plausibility test as framed by the Court was an invitation to applicant States to enter into the merits of the case heard at the provisional measures stage. In cases under CERD, the Court's jurisprudence acknowledged that the Court had to satisfy itself that the acts complained of were plausibly acts of racial discrimination. A number of overlaps existed between the relief requested on the merits and the provisional measures requested by Qatar. It was therefore unclear whether indicating provisional measures would have prejudiced the merits (paras. 5-12).

(2) The rights under Articles 2, 4, 5(a), 5(d)(v), 5(d)(viii), 5(e)(i) and 6 of CERD could not suffer irreparable prejudice, as the *status quo ante* could have been restored in their respect. Even if there had been a risk of irreparable prejudice, that risk was not imminent. Moreover, there existed a presumption that the UAE were acting in good faith in complying with their obligations under CERD (paras. 17-28).

Order on Second Request for Provisional Measures (14 June 2019)

On 22 March 2019, the UAE filed with the Court a request for the indication of provisional measures under Article 41 of the Statute. The UAE maintained that such measures were necessary to preserve the procedural rights of the UAE and prevent Qatar from further aggravating or extending the dispute between the Parties.

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The first provisional measure requested that Qatar immediately withdraw its communication to the CERD Committee. According to the UAE this measure was necessary to preserve procedural fairness for the UAE, to protect its right to present its case before the Court, and to ensure the proper administration of justice. According to the UAE, it had a right not to be compelled to defend itself in two parallel proceedings concerning the same subject-matter and the same Parties. Qatar contended that the procedure before the CERD Committee was neither duplicative, nor abusive. Qatar added that the UAE had not shown that it possessed plausible rights under CERD which were in danger of irreparable damage and that the issues raised by the UAE were questions for the jurisdiction and admissibility phase of the proceedings.

The second provisional measure requested that Qatar immediately desist from hampering UAE efforts to help Qatari citizens. The UAE contended that Qatar's actions impaired its ability to comply with the Order on provisional measures of 23 July 2018. The UAE also maintained that Qatar was fabricating evidence in order to create the misleading impression that the UAE was effectively imposing a travel ban on Qatari citizens. Qatar denied any fabrication of evidence. According to Qatar, even assuming that Qatar were hampering compliance with the Order on provisional measures of 23 July 2018, there were other means by which the UAE could have complied with that Order. Qatar also stated that the issues raised by the UAE in this connection concerned the merits of the case, and were not a matter for provisional measures.

The third and fourth provisional measures requested by the UAE concerned the non-aggravation and non-extension of the dispute between the Parties. The UAE argued that Qatar's national bodies, such as the National Human Rights Committee, and Qatar's State-owned media, were disseminating false information and accusations relating to the dispute pending before the Court. On this basis, the UAE requested the Court to order Qatar to stop such dissemination. Qatar maintained that non-aggravation and non-extension of the dispute was not a standalone basis for indicating provisional measures. Qatar added that the Court, in its Order on provisional measures of 23 July 2018, had already indicated that the Parties had to avoid aggravating or extending the dispute. Qatar thus argued that the request for provisional measures by the UAE in relation to non-aggravation and non-extension of the dispute were without object. Qatar also stated that the issues relating to this request were matters for the merits phase of the proceedings.

Held:—(1) (by fifteen votes to one, Judge ad hoc Cot dissenting) The request for provisional measures by the UAE was rejected.

(a) The duty of the Court to satisfy itself that it had *prima facie* jurisdiction applied irrespective of whether the request for provisional measures had been made by the applicant or by the respondent. There was no reason to depart from the earlier decision of the Court that it had *prima facie* jurisdiction (paras. 15-16).

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(b)(i) At this stage of the proceedings, the Court was called upon to determine whether the rights claimed by the UAE were plausible, having taken into account the basis for the Court's *prima facie* jurisdiction. Moreover, such rights had to have a sufficient link with the subject-matter of the proceedings on the merits (para. 18).

(ii) The first provisional measure requested by the UAE did not concern a plausible right under CERD, as it concerned the interpretation of the compromissory clause in Article 22 of CERD. Consistently with the Order of 23 July 2018, there was no need to decide, at this stage of the proceedings, whether the *electa una via* and *lis pendens* principles were applicable. The second provisional measure requested by the UAE did not concern a plausible right under CERD. This measure instead related to obstacles to the implementation of the Order of 23 July 2018, which would be more appropriately examined at the merits phase of the proceedings. The third and fourth provisional measures were measures for the non-aggravation and non-extension of the dispute, which could have been indicated only if the Court had also indicated provisional measures for the protection of specific rights of the Parties (paras. 25-8).

Declaration of Vice-President Xue: The third and fourth provisional measures requested by the UAE were covered by the Order of 23 July 2018, which was a sufficient reason to reject them. However, stating that the Court might not indicate provisional measures solely for the non-aggravation and non-extension of the dispute could unduly limit the Court's power to indicate provisional measures in the future. While provisional measures generally aimed at ensuring the sound administration of justice, in international dispute settlement the Court also contributed to the maintenance of international peace and security. In situations in which resort to armed force was threatened, the Court not only had a power, but a duty to indicate provisional measures. In such cases, a provisional measure for the non-aggravation or non-extension of the dispute could be necessary. The clarification in the present Order on provisional measures was too big a step, which could tie the Court's hands in the future (paras. 2-8).

Joint Declaration of Judges Tomka, Gaja and Gevorgian: The Court lacked *prima facie* jurisdiction over the merits of the case filed by Qatar. The dispute did not fall within the scope *ratione materiae* of CERD. In relation to its *prima facie* jurisdiction, the Court should also have analysed whether the rights claimed by the UAE were based on CERD (para. 2).

Separate Opinion of Judge Abraham: (1)(a) The Court did not need to address the issue of *prima facie* jurisdiction in this Order, as it had found that one of the requirements for the indication of provisional measures had not

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been met. At the same time, a judge could not have decided on an application without having jurisdiction to do so. However, in the context of provisional measures, the Court did not examine *prima facie* jurisdiction over a request for provisional measures itself, but over the merits of a case. To the contrary, the Court's jurisdiction over a request for provisional measures was not founded on the jurisdictional title invoked by the applicant, but on Article 41 of the Statute, which was an autonomous basis of jurisdiction (paras. 5-9).

(b) The Court should not have reopened the decision made in the Order of 23 July 2018 concerning *prima facie* jurisdiction, as that was a decision relating to the Court's *prima facie* jurisdiction to hear the merits of the very same case. A different decision would have been contrary to the good administration of justice and the equality of arms between the Parties. The banal reason given by the Court to find that it had *prima facie* jurisdiction did not show that, in fact, the Court had no other choice but to make that decision (paras. 13-19).

(2)(a) The words used by the Court to reject the UAE's request for the first and second provisional measures appeared to convey that no such measures could have been indicated for the protection of the UAE's procedural rights. This would have been a restrictive definition of the aim of provisional measures, which would have found no basis either on the Statute and Rules of Court, or in the Court's jurisprudence. Nothing in the text of Article 41 of the Statute excluded the Court's power to indicate provisional measures to protect procedural rights. Although in practice the Court tended to indicate measure for the protection of rights which the applicant asserted to have in its application, this was not a convincing reason for rejecting a request for the protection of rights such as those relating to equality of arms and the good administration of justice (paras. 21-6).

(b) On the facts of the UAE's request, the first and second provisional measures should not have been indicated, not because the rights invoked by the UAE were not plausible under CERD, but because the procedural rights of the UAE were not exposed to any risk of irreparable prejudice as a result of Qatar's conduct (paras. 27-8).

Separate Opinion of Judge Cançado Trindade: (1) In its request resulting in the Order of 23 July 2018, Qatar had been careful to highlight the link between the rights it had claimed on the merits and the provisional measures requested. Conversely, the UAE's request did not concern rights under CERD, but simply alleged the violation of a compromissory clause under that Convention. There was no connection between the provisional measures requested by the UAE and the subject-matter of the dispute before the Court. The UAE did not argue that Qatar had breached any right under CERD, and therefore failed to establish the link requirement for indicating provisional measures (paras. 6-10).

(2) It appeared inconsistent to request the Court to indicate provisional measures, while at the same time objecting to its jurisdiction *ratione materiae*.

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Moreover, the UAE request fell outside the scope of CERD. While in its written submissions the UAE contended that the Court should indicate that Qatar stop the CERD Committee procedure, in the oral proceedings the UAE inconsistently stated that it sought resolution of its dispute with Qatar through that procedure. The Court had already found, in its Order of 23 July 2018, that it was not necessary for it to decide, at this juncture in the proceedings, whether the *electa una via* and *lis pendens* principles applied to the present case (paras. 12-17).

(3) This request for provisional measures was characterized by continuing violations of human rights. The UAE position in the present request did not relate to the vulnerability of human beings. The principle of equality and non-discrimination was of the utmost important in this context, yet it had received much more attention in the request made by Qatar in 2018 that in the present proceedings. The Court had duly devoted its attention to that principle in its Order of 23 July 2018. Given the failure of the UAE to base its request for provisional measures on rights arising under CERD, the Court was not given the chance of commenting on the principles of equality and non-discrimination (paras. 19-39).

Declaration of Judge Salam: The Court had no *prima facie* jurisdiction to indicate the provisional measures requested by the UAE. In any event, the Parties anyway had to refrain from aggravating or extending the dispute between them (paras. 1-2).

Dissenting Opinion of Judge ad hoc Cot: (1) The Court should have indicated at least the first provisional measure requested by the UAE. The status of *lis pendens* in international law was unclear, as it did not appear in the Statute or in the Rules of Court, nor was it accepted by the Court or the Permanent Court of International Justice ("PCIJ") as being applicable to proceedings before them. However, the PCIJ's reasoning in *Certain German Interests in Polish Upper Silesia*[5] did not exclude that the doctrine of *lis pendens* could apply in cases before it. In its communication to the CERD Committee, Qatar requested that the UAE take all measures to end the alleged violations of CERD, which was sufficient to hold that the remedies requested before that Committee and before the Court were essentially identical. In international law, it was unclear that the only conflicts between decisions to be avoided were those between decisions made by judicial organs. The CERD Committee procedure had a quasi-judicial character, and it would have been too formalistic to find that States could ignore the recommendations made by the CERD Committee, if such recommendations had been in conflict with a decision of the Court (paras. 1-10).

[5] *Certain German Interests in Polish Upper Silesia,* 3 ILR 424.

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(2) A possible interpretation of Article 22 of CERD was that States Parties had to exhaust the procedure provided for in that Convention before seising the Court with an application. If a treaty included, in a certain order, a number of means to settle a dispute under that treaty, States could have a procedural right to see this order respected. The Court's Order did not exclude that the procedural rights invoked by the UAE were, in fact, plausible, as whether the asserted procedural rights existed depended essentially on the possibility of bringing parallel proceedings before the Court and before the CERD Committee. In any case, the conclusion that the procedural rights were plausible did not prevent the Court from reaching a different conclusion on the same point later in the proceedings (paras. 14-17).

(3) Beyond plausibility, the other requirements for indicating provisional measures were also met, including *prima facie* jurisdiction and the link between the rights asserted and the provisional measures requested. The existence of parallel proceedings could have irreparably prejudiced the asserted procedural rights of the UAE. However, the immediate withdrawal of the CERD communication by Qatar was not the only means to ensure the protection of those rights. The Court could have indicated that the CERD Committee procedure be suspended pending the Court's disposal of the case before it (paras. 18-22).

Judgment on Preliminary Objections (4 February 2021)

Qatar based the Court's jurisdiction on Article 22 of CERD. The UAE raised objections to the Court's jurisdiction and the admissibility of Qatar's application.

The UAE argued that the term "national origin" under Article 1(1) of CERD did not include current nationality, because the latter concept referred to the relationship of citizenship between an individual and a State. The distinction was clear on the face of Article 1(1)[6] and (3),[7] which used the terms "national origin" and "nationality" in a way which plainly distinguished between them. The preamble also indicated that the Convention did not prohibit discrimination on the basis of current nationality. That understanding was confirmed by the *travaux préparatoires*. Concerning the practice of the CERD Committee, the UAE stated that it could not be subsequent practice for the interpretation of CERD, as it was not the practice of States parties to the Convention. The UAE also disputed the relevance of the jurisprudence of regional human rights courts for the interpretation of CERD.

Qatar submitted that a person's current nationality fell within the grounds on which discrimination was prohibited under CERD. According to Qatar,

[6] For the text of Article 1(1) of CERD, see para. 74 of the judgment on Preliminary Objections of 4 February 2021.

[7] For the text of Article 1(3) of CERD, see para. 82 of the judgment on Preliminary Objections of 4 February 2021.

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the concept of "nationality" did not refer only to the immutable characteristics of a person, and that, if the UAE's view were correct, Articles 1(2) and 1(3) of CERD would be deprived of *effet utile*. Qatar added that the intention of CERD's drafters was for the Convention not to be static, but to create a comprehensive network of protection against racial discrimination. Qatar further submitted that to consider that "national origin" did not include "nationality" would allow States to discriminate against individuals on the basis of the latter while, at the same time, targeting individuals that effectively possess the characteristics on the basis of which discrimination was prohibited under Article 1(1) of CERD: States could therefore justify discriminatory policies by reference to "nationality", while such policies actually target individuals based on the characteristics protected under CERD. Qatar asserted that its views were confirmed by the drafting history of CERD, the practice of the CERD Committee and the approach of regional human rights courts.

According to the UAE, Qatar's claim that its measures had infringed the right to freedom of expression of Qatari media fell outside the scope of CERD because corporations were not covered by the Convention. The UAE added that Qatar's allegations of indirect discrimination fell outside the scope of CERD, because the measures of which Qatar complained were not based on any of the grounds listed in Article 1(1) of CERD. Qatar rejected both these arguments.

Held:—(1) (by eleven votes to six, President Yusuf, Judges Cançado Trindade, Sebutinde, Bhandari, Robinson and Iwasawa dissenting) The first preliminary objection raised by the UAE was upheld.

(2) (by eleven votes to six, President Yusuf, Judges Cançado Trindade, Sebutinde, Bhandari, Robinson and Iwasawa dissenting) The Court lacked jurisdiction to entertain the application filed by Qatar on 11 June 2018.

(a)(i) To decide whether it had jurisdiction under Article 22 of CERD, the Court had to interpret the term "national origin" under Article 1(1) of CERD. The word "origin" denoted a person's bond to a national or ethnic group at birth, while "nationality" was a legal attribute within a State's power to change in a person's lifetime. Article 1(2) and 1(3) of CERD confirmed that "national origin" did not include current nationality, because they expressly excluded measures based on nationality from the scope of racial discrimination prohibited under the Convention. The object and purpose of CERD was to bring to an end all practices that sought to discriminate between groups of persons based on their inherent characteristics or to establish systems of racial discrimination or segregation. CERD was thus not intended to prohibit differences based on nationality, which were commonly included in the legislation of most of its States parties (paras. 75-87).

(ii) The *travaux préparatoires* of CERD showed that its drafters had in mind differences between "national origin" and "nationality", as indicated by the debates as to whether to include the latter concept in the definition of "racial discrimination" for the purposes of the Convention. The *travaux*

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préparatoires confirmed that CERD was not intended to prohibit discrimination based on nationality (paras. 93-7).

(iii) Although the practice of the CERD Committee had to be given "great weight", it did not change the view that "national origin" did not include "nationality" under CERD. The jurisprudence of regional human rights courts was of little help to clarify the meaning of the relevant terms under CERD, because regional human rights instruments aimed to ensure a wider protection than that guaranteed by the Convention (paras. 100-4).

(b) CERD applied to individuals or groups of individuals, as indicated by the text of Articles 1, 4 and 14 of the Convention and, therefore, Qatar's claim that the UAE measures discriminated against Qatari media corporations fell outside the scope of CERD (para. 108).

(c) Although the UAE measures based on Qatari nationality could have collateral effects on persons born in Qatar or to Qatari parents, or on their family members, such effects did not constitute racial discrimination within the meaning of CERD; moreover, declarations criticizing a State for its policies could not amount to racial discrimination under CERD. The Court lacked material jurisdiction to entertain Qatar's claims for indirect discrimination, because the measures of which Qatar complained did not entail, by their purpose or effect, racial discrimination within the meaning of Article 1 (1) of CERD (paras. 112-13).

Declaration of President Yusuf: In its pleadings, Qatar had consistently claimed that the UAE measures discriminated on the basis of "national origin". By not considering these claims, the Court mischaracterized the subject-matter of the dispute. If the Court had considered Qatar's claims, it would have concluded that they did not fall outside the scope of CERD. The distinction between "direct" and "indirect" discrimination had no basis in the text of the Convention. Although the Court had to decide the preliminary objections raised by the UAE, it had made a factual assessment of whether the UAE's measures constituted racial discrimination under CERD, which was properly a matter for the merits. The Court offered no meaningful analysis for its decision on the issue of indirect discrimination (paras. 4-15).

Dissenting Opinion of Judge Sebutinde: (1) The subject-matter of the dispute was whether, by adopting the measures of 5 June 2017 and subsequent ones, the UAE had breached its obligations under CERD. To determine whether it had jurisdiction *ratione materiae*, the Court either had to determine whether Qatar's claims "fell within the provisions" of CERD, or had to determine whether such claims fell within the exceptions to the application of CERD under Article 1(2) or 1(3) of the Convention. There was no reason for the Court to depart from its finding, made at the provisional measures stage, that there was a dispute between the parties concerning the interpretation or application of CERD. Whether the UAE's measures had the "purpose or

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effect" of discriminating against persons of Qatari national origin was a matter to be decided on the evidence at the merits stage. There was no reason for the Court to depart from its finding, made at the provisional measures stage, that some of the acts of which Qatar complained were plausibly acts of racial discrimination under CERD. The objection that the claims of Qatar fell within the scope of Article 1(2) of CERD was not exclusively preliminary in character (paras. 12-23).

(2) Qatar had engaged in negotiations with the UAE and brought the dispute before the CERD Committee; therefore it had satisfied the procedural preconditions for the Court to have jurisdiction under Article 22 of CERD. Moreover, Qatar was not under an obligation to exhaust conciliation procedures before filing a case with the Court. Qatar's claims were not an abuse of process, which could only exist in the presence of "exceptional circumstances" justifying a decision that claims are made in an abusive manner (paras. 25-35).

Dissenting Opinion of Judge Bhandari: The Court was called upon to decide whether the term "national origin" included "nationality", as its jurisdiction depended on whether the UAE's measures were based on the grounds listed in Article 1(2) of CERD. On its ordinary meaning, the concept of "national origin" could be construed in either way argued by the Parties, but the definition of the words "national" and "origin" indicated that the concept of "national origin" referred to a person's belonging to a country or nation. Article 1(2) and (3) of CERD did not envisage broad and unqualified distinctions between citizens and non-citizens. Furthermore, Article 1(1) of CERD protected against "all forms" of racial discrimination, which could not be achieved if States were allowed to make unqualified distinctions as the UAE had done in respect of Qatari citizens. The context of the term "national origin" and the object and purpose of CERD showed that "national origin" included "nationality". Contrary to the Court's decision, the *travaux préparatoires* of CERD confirmed that "national origin" could include "nationality". The Court had insufficiently addressed its own jurisprudence showing willingness to take into account the work of United Nations human rights supervisory bodies. The Court should have given greater weight to the CERD Committee's view that "nationality" was one of the grounds of prohibited racial discrimination under CERD (paras. 4-29).

Dissenting Opinion of Judge Robinson: (1) The Court was wrong to conclude that the first and third claims of Qatar fell outside the scope of CERD. There was nothing in the ordinary meaning of the term "national origin" that would make it inapplicable to a person's current "nationality", but the Court had made a stark distinction between the two concepts which did not reflect their nuances. Both "national origin" and "nationality" could be connected to the place where one was born. Read in its context and in light of the object and purpose of the

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Convention, "national origin" appeared to encompass "nationality". This view was confirmed by the *travaux préparatoires* of CERD and the approach of the CERD Committee (paras. 4-18).

(2) Qatar had given clear examples of how the UAE's measures indirectly discriminated on the basis of national origin. Nevertheless, the Court had failed properly to address such examples and, instead, concluded that the measures of which Qatar complained did not amount to racial discrimination within the meaning of CERD; this finding was problematic because Qatar's claim for indirect discrimination was not based on "nationality", and was thus independent of the Court's decision on the meaning of "national origin" (paras. 25-6).

Separate Opinion of Judge Iwasawa: (1) The first preliminary objection did not possess an exclusively preliminary character. Although non-citizens were entitled to human rights under international law, international law allowed States to make distinctions between citizens and non-citizens in respect of certain rights, such as political rights or rights to enter a country. Even in respect of rights to which non-citizens were entitled under international law, States could distinguish between different nationalities (paras. 2-19).

(2) For the Court to have jurisdiction under CERD, the measures had to amount to racial discrimination under the Convention. Article 1(1) of CERD indicated that the list of grounds on which discrimination was prohibited, which did not include "nationality", was exhaustive. The Court was correct in holding that "national origin" did not include "nationality". Yet, the claim of Qatar for indirect discrimination required a detailed examination at the merits stage. Indirect discrimination, as a concept developed by human rights courts and monitoring bodies, existed when an apparently neutral rule or policy had an unjustifiable and prejudicial impact on a certain protected group, which required comparing the treatment of different groups. The Court was called upon to decide whether the measures had an unjustifiably disproportionate prejudicial impact on an identifiable group distinguished by national origin. This decision required extensive factual analysis, which could be undertaken only after the parties have argued the merits of the case. For this reason, the first objection of the UAE was not exclusively preliminary in character (paras. 22-72).

Declaration of Judge ad hoc Daudet: If the Court had addressed the second preliminary objection, which concerned the procedural preconditions under Article 22 of CERD, it should have rejected it. Not only did Qatar engage in negotiation, but it also brought the matter before the CERD Committee. Even though one could question whether the interpretation of Article 1(1) of CERD required an analysis of the evidence, this was not the case because the concept of "nationality" was well established in international law, which meant that the first objection was exclusively preliminary in character (paras. 4-10).

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The orders and judgment of the court, and declarations, separate opinions and dissenting opinions are set out as follows:

The following is the text of the order of the Court on the First Request for Provisional Measures:

ORDER ON FIRST REQUEST FOR PROVISIONAL MEASURES (23 JULY 2018)

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[407] Whereas:

1. On 11 June 2018, the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates (hereinafter referred to as the "UAE") 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").

[408] 2. At the end of its Application, 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 toward 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 institutions.

Accordingly,

Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under 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

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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;

[409] 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;

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 CERD.

3. In its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request for the indication of provisional measures, Qatar asked the Court to indicate the following provisional measures:

(a) The UAE shall cease and desist from any and all conduct that could result, directly or indirectly, in any form of racial discrimination against Qatari individuals and entities by any organs, agents, persons, and entities exercising UAE governmental authority in its territory, or under its direction or control. In particular, the UAE shall immediately cease and desist from violations of the human rights of Qataris under the CERD, including by:
   i. suspending operation of the collective expulsion of all Qataris from, and ban on entry into, the UAE on the basis of national origin;
   ii. taking all necessary steps to ensure that Qataris (or persons with links to Qatar) are not subjected to racial hatred or discrimination, including by condemning hate speech targeting Qataris, ceasing publication of anti-Qatar statements **[410]** and caricatures, and refraining from any other incitement to racial discrimination against Qataris;
   iii. suspending the application of its Federal Decree-Law No (5) of 2012, On Combatting Cybercrimes, to any person who "shows sympathy . . . towards Qatar" and any other domestic laws that (*de jure* or *de facto*) discriminate against Qataris;

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iv. taking the measures necessary to protect freedom of expression of Qataris in the UAE, including by suspending the UAE's closure and blocking of transmissions by Qatari media outlets;
v. ceasing and desisting from measures that, directly or indirectly, result in the separation of families that include a Qatari, and taking all necessary steps to ensure that families separated by the Discriminatory Measures are reunited (in the UAE, if that is the family's preference);
vi. ceasing and desisting from measures that, directly or indirectly, result in Qataris being unable to seek medical care in the UAE on the grounds of their national origin and taking all necessary steps to ensure that such care is provided;
vii. ceasing and desisting from measures that, directly or indirectly, prevent Qatari students from receiving education or training from UAE institutions, and taking all necessary steps to ensure that students have access to their educational records;
viii. ceasing and desisting from measures that, directly or indirectly, prevent Qataris from accessing, enjoying, utilizing, or managing their property in the UAE, and taking all necessary steps to ensure that Qataris may authorize valid powers of attorney in the UAE, renew necessary business and worker licenses, and renew their leases; and
ix. taking all necessary steps to ensure that Qataris are granted equal treatment before tribunals and other judicial organs in the UAE, including a mechanism to challenge any discriminatory measures.

(b) The UAE shall abstain from any measure that might aggravate, extend, or make more difficult resolution of this dispute; and

[411] (c) The UAE shall abstain from any other measure that might prejudice the rights of Qatar in the dispute before the Court.

6. The Registrar immediately communicated to the Government of the UAE the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request by Qatar.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application and the Request.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge ad hoc to sit in the case. Qatar chose Mr Yves Daudet and the UAE Mr Jean-Pierre Cot.

9. By letters dated 14 June 2018, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had

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fixed 27, 28 and 29 June 2018 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Qatar:	Mr Mohammed Abdulaziz Al-Khulaifi, Mr Donald Francis Donovan, Ms Catherine Amirfar, Mr Pierre Klein, Lord Peter Goldsmith, Mr Lawrence H. Martin.
On behalf of the UAE:	HE Mr Saeed Ali Yousef Alnowais, Mr Alain Pellet, Mr Tullio Treves, Mr Simon Olleson, Mr Malcolm Shaw, Mr Charles L. O. Buderi.

11. At the end of its second round of oral observations, Qatar asked the Court to indicate the following provisional measures:

(a) The UAE shall cease and desist from any and all conduct that could result, directly or indirectly, in any form of racial discrimination against Qatari individuals and entities by any organs, agents, persons, and entities exercising UAE governmental authority in its territory, or under its direction or control. In particular, **[412]** the UAE shall immediately cease and desist from violations of the human rights of Qataris under the CERD, including by:
   i. suspending operation of the collective expulsion of all Qataris from, and ban on entry into, the UAE on the basis of national origin;
   ii. taking all necessary steps to ensure that Qataris (or persons with links to Qatar) are not subjected to racial hatred or discrimination, including by condemning hate speech targeting Qataris, ceasing publication of anti-Qatar statements and caricatures, and refraining from any other incitement to racial discrimination against Qataris;
   iii. suspending the application of its Federal Decree Law No (5) of 2012, On Combatting Cybercrimes, to any person who "shows sympathy . . . towards Qatar" and any other domestic laws that (*de jure* or *de facto*) discriminate against Qataris;
   iv. taking the measures necessary to protect freedom of expression of Qataris in the UAE, including by suspending the UAE's closure and blocking of transmissions by Qatari media outlets;
   v. ceasing and desisting from measures that, directly or indirectly, result in the separation of families that include a Qatari, and taking all necessary

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steps to ensure that families separated by the Discriminatory Measures are reunited (in the UAE, if that is the family's preference);

vi. ceasing and desisting from measures that, directly or indirectly, result in Qataris being unable to seek medical care in the UAE on the grounds of their national origin and taking all necessary steps to ensure that such care is provided;

vii. ceasing and desisting from measures that, directly or indirectly, prevent Qatari students from receiving education or training from UAE institutions, and taking all necessary steps to ensure that students have access to their educational records;

viii. ceasing and desisting from measures that, directly or indirectly, prevent Qataris from accessing, enjoying, utilizing, or managing their property in the UAE, and taking all necessary steps to ensure that Qataris may authorize valid powers **[413]** of attorney in the UAE, renew necessary business and worker licenses, and renew their leases; and

ix. taking all necessary steps to ensure that Qataris are granted equal treatment before tribunals and other judicial organs in the UAE, including a mechanism to challenge any discriminatory measures.

(b) The UAE shall abstain from any measure that might aggravate, extend, or make more difficult resolution of this dispute; and

(c) The UAE shall abstain from any other measure that might prejudice the rights of Qatar in the dispute before the Court.

12. At the end of its second round of oral observations, the UAE requested the Court "to reject the request for the indication of provisional measures submitted by the State of Qatar".

13. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Under Article 72 of the Rules of Court, each Party presented written comments on the written replies received from the other.

* * *

I. PRIMA FACIE JURISDICTION

1. General introduction

14. The Court 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

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case (see, for example, *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ Reports 2017*, p. 236, para. 15).

15. 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 (see paragraph 3 above). 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.

[414] 16. Qatar and the UAE are parties to CERD. Qatar acceded to that instrument on 22 July 1976, without entering any reservation; the UAE did so on 20 June 1974, without entering a reservation to Article 22 or any other relevant reservation for the present purposes.

17. Article 22 of CERD provides that:

> 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.

2. *Existence of a dispute concerning the interpretation or application of CERD*

18. Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute arising out of the interpretation or application of CERD. A dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (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, ICJ Reports 2017*, p. 115, para. 22, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950*, p. 74). The claim of one party must be "positively opposed" by the other (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, ICJ Reports 1962*, p. 328). In order to determine whether a dispute exists, the Court "cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it" (*Immunities and Criminal Proceedings*

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(Equatorial Guinea v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1159, para. 47). Since Qatar has invoked as a basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether "the acts complained of by [the Applicant] are prima facie capable of falling within the provisions of that instrument and . . . [whether,] as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" (*ibid.*).

* *

19. Qatar contends that a dispute exists between the Parties concerning the interpretation and application of CERD. It asserts that, beginning on **[415]** 5 June 2017, the UAE took discriminatory measures against Qataris and their families in violation of the provisions and principles underlying CERD. More specifically, Qatar states that, on 5 June 2017, the UAE "expelled all Qataris within its territory, giving them only 14 days to leave" and that it continues to prohibit Qataris from entering the UAE. Qatar observes that such measures do not apply to other non-citizens residing in the UAE. It therefore contends that the Respondent has targeted Qataris on the basis of their national origin, in violation of Article 1, paragraph 1, of CERD. Relying, *inter alia*, on General Recommendation XXX of the CERD Committee, Qatar argues that the Convention applies to discriminatory conduct based on Qatari national origin or nationality.

20. According to Qatar, because of the measures taken by the UAE, "[t]housands of Qataris are unable to return to the UAE, are separated from their families there, and are losing their homes, their jobs, their property, access to medical care, and the opportunity to pursue their education". It adds that there is no opportunity for Qataris to seek justice for these violations. The Applicant thus submits that the UAE is interfering with Qataris' basic human rights under Articles 2 and 5 of CERD. More specifically, it contends that the Respondent is violating—vis-à-vis Qataris—their right to marriage and choice of spouse; their right to freedom of opinion and expression; their right to public health and medical care; their right to education and training; their right to property; their right to work and their right to equal treatment before tribunals.

21. Qatar also maintains that the UAE has violated its obligations under Articles 4 and 7 of CERD "by failing to condemn racial hatred and prejudice and by inciting such hatred and prejudice against Qatar and Qataris". It further asserts that the UAE has failed to provide Qataris within its jurisdiction with effective protection and

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remedies against acts of racial discrimination, in violation of Article 6 of CERD.

*

22. The UAE contends that there is no dispute between the Parties concerning the interpretation or application of CERD. It states that there has been no mass expulsion of Qataris from the UAE, that all Qataris in the UAE continue to enjoy the full rights granted by law to all residents of or visitors to the country and that Qataris live with their families, attend school, and have access to health care as well as government services. The UAE explains that the measures it adopted in June 2017 were **[416]** "to impose additional requirements on the entry or re-entry into [its] territory by Qatari nationals".

23. The UAE further contends that no Qatari citizens have been prevented from seeking legal remedies for any matter and that there has been no interference in the business affairs of Qatari nationals. The UAE maintains that it has not engaged in any media campaign against Qataris based on their nationality. Moreover, according to the UAE, there is no dispute falling within the scope of CERD as regards any alleged interference with freedom of expression.

24. In addition, the UAE asserts that, "even taking the factual allegations made by Qatar at face value", those allegations do not concern prohibited "racial" discrimination as defined in the Convention or other prohibited measures falling within the scope of the Convention. The UAE considers that the term "national origin" in Article 1, paragraph 1, of CERD is "twinned with" "ethnic origin" and that "national origin" is not to be read as encompassing "present nationality". It explains that such an interpretation flows from the ordinary meaning of that provision, when read in its context and in light of the object and purpose of the Convention. The UAE also considers that its interpretation is confirmed by the *travaux préparatoires*. It thus argues that Qatar's claims relating to alleged differences of treatment of Qatari nationals based solely on their present nationality fall outside the scope *ratione materiae* of CERD.

* *

25. 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. Paragraph 2 of the statement made by the UAE on 5 June 2017 envisages the following measures:

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Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.

26. The Court 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, 4, 5, 6 and 7 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 **[417]** 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 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 the violations set out above.

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.

3. Procedural preconditions

29. The Court recalls that it has previously indicated that the terms of Article 22 of CERD establish procedural preconditions to be met

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before the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 128, para. 141). 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.

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[418] 30. Concerning the first precondition under Article 22, Qatar asserts that it made "genuine attempts to negotiate with the UAE in order to bring an end to the dispute and to the human rights violations that continue to impose suffering on its people". It adds that it has repeatedly raised questions of specific human rights violations resulting from unlawful acts of discrimination by the UAE against Qataris, since June 2017. More specifically, the Applicant refers to declarations made by high-ranking State officials, in particular an address made on 25 February 2018 to the United Nations Human Rights Council by Qatar's Minister for Foreign Affairs. Qatar asserts moreover that its Minister of State for Foreign Affairs, by a letter dated 25 April 2018, expressly referred to violations of specific provisions of CERD through the UAE's actions of 5 June 2017, and called on the UAE "to enter into negotiations in order to resolve these violations and the effects thereof". The Applicant indicates that, although the invitation asked for a reply within two weeks, the UAE never responded. The Applicant therefore considers that the UAE has either rebuffed or ignored Qatar's efforts to negotiate a peaceful resolution to the dispute and that the Parties have not consequently been able to settle their dispute, despite genuine attempts by Qatar to negotiate.

31. With regard to the second precondition included in Article 22 of CERD, namely the use of the procedures expressly provided for in the Convention, Qatar states that it deposited, on 8 March 2018, a communication with the CERD Committee under Article 11 of the Convention. It argues, however, that initiation or completion of that procedure is not a precondition to the Court's exercise of jurisdiction in the present case. It also points out that it does not rely on this communication for the purposes of showing prima facie jurisdiction.

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32. The Applicant finally expresses the view that, in any event, the question whether the two preconditions included in Article 22 of CERD have a cumulative and successive character should not be decided by the Court at this stage.

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33. In response to Qatar's arguments concerning the fulfilment of the preconditions included in Article 22 of CERD, the UAE first of all contends that they are cumulative and must be fulfilled successively before the seisin of the Court.

34. As far as the fulfilment of the first precondition is concerned, the UAE argues that, despite its allegations, Qatar has never made a "genuine attempt to negotiate" regarding the application of CERD. According to the UAE, the statements relied on by Qatar only relate very broadly to routine allegations of human rights violations and when, in passing, these **[419]** documents mention CERD, the reference is not accompanied by any form of proposal to negotiate. It adds that none of these statements can be considered as an offer to negotiate with a view to settling the dispute alleged by Qatar under Article 22 of CERD. With regard to Qatar's letter dated 25 April 2018, which was received, according to the Respondent, on 1 May 2018, the UAE states that this document once again concerns alleged human rights violations in general, and makes no mention of Article 22 of CERD. The UAE asserts that this alleged offer took the form of an "ultimatum", and underlines that it was sent almost a year after the Ministry of Foreign Affairs of the UAE made a statement asking Qataris to leave the country within 14 days. The UAE explains that it neither accepted nor refused Qatar's alleged invitation. It affirms that it was informed only on 7 May 2018 that Qatar had addressed a communication to the CERD Committee. It also points out that Qatar submitted to the Court, on 11 June 2018, its Application instituting the proceedings in the present case and at the same time requested provisional measures without waiting for the outcome of the procedure before the CERD Committee. The UAE therefore concludes that, while it is true that the alleged dispute has not been settled by negotiation, "there has been no 'genuine attempt' to do so".

35. Regarding the second precondition included in Article 22 of CERD, namely the use of the procedures expressly provided for in the Convention, the UAE submits that Qatar must exhaust the procedure in the CERD Committee before seising the Court. In the alternative, the Respondent considers that the way in which Qatar has proceeded is

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incompatible with both the *electa una via* principle and the *lis pendens* exception, as the same claim has been submitted to two different bodies by the same applicant against the same respondent.

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36. 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" (see *Application of the International* **[420]** *Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 133, para. 161). 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.

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,

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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 the 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.

39. The Court now 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 **[421]** 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, ICJ Reports 2017*, pp. 125-6, 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.

4. Conclusion as to prima facie jurisdiction

41. 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

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to the extent that the dispute between the Parties relates to the "interpretation or application" of the said Convention.

* * *

42. The Court notes that the UAE has contended that Qatar had to prove that its citizens had exhausted local remedies before it seised the Court and that Qatar has denied that the exhaustion of local remedies is a precondition for the seisin of the Court in the present case. The Court observes that, in the current proceedings, Qatar asserts its rights on the basis of alleged violations of CERD by the UAE. The Court further notes that the UAE did not indicate any effective local remedies that were available to the Qataris that have not been exhausted. The Court is of the view that, at this stage of the proceedings relating to a request for the indication of provisional measures, the issue of exhaustion of local remedies need not be addressed by the Court.

II. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE MEASURES REQUESTED

43. The power of the Court 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. **[422]** It follows that the Court 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 (see, for example, *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, ICJ Reports 2017*, p. 126, para. 63).

44. At this stage of the proceedings, the Court, however, is not called upon to determine definitively whether the rights which Qatar wishes to see protected exist; it need only decide whether the rights claimed by Qatar on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 64).

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45. In its Application, Qatar asserts rights under Articles 2, 4, 5, 6 and 7 of CERD. In its Request for the indication of provisional measures, in order to identify the rights which it seeks to protect pending a decision on the merits, Qatar refers to Articles 2, 4, 5 and 6 of the Convention and, in the course of the oral proceedings on its Request, it also referred to Article 7 of the Convention. In those hearings, Qatar asserted that the UAE was violating the Convention's prohibition on collective expulsion, interfering with Qataris' basic human rights under Articles 2 and 5, inciting and failing to condemn racial hatred and prejudice under Articles 4 and 7, and denying effective protection and remedies against acts of racial discrimination under Article 6.

46. Qatar states that the alleged rights are plausible in so far as they are "grounded in a possible interpretation" of the treaty invoked. For Qatar, the definition of racial discrimination under Article 1, paragraph 1, of the Convention "is a question of plausibility of the rights asserted". Qatar submits that "the measures imposed by the UAE on 5 June 2017 and thereafter make clear their purpose: racial discrimination based on national origin". In the second round of oral observations, Qatar added that "the Convention cannot be read to exclude discriminatory conduct based on Qatari national origin or nationality". Qatar argues that its "claims that the UAE is singling out Qataris and only Qataris en masse for discriminatory treatment raise plausible rights supporting an indication of provisional measures".

[423] 47. With regard to evidence adduced to demonstrate the plausibility of the rights it claims, Qatar refers in particular to the December 2017 report of the Technical Mission despatched by the Office of the United Nations High Commissioner for Human Rights (hereinafter "OHCHR") which concluded that the measures put in place by the UAE had "a potentially durable effect on the enjoyment of the human rights and fundamental freedoms of those affected". Qatar argues, in conclusion, that the rights it claims clearly fulfil the condition of plausibility.

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48. The UAE, for its part, contends that in making its claim, and in attempting to provide a basis for the measures requested, Qatar seeks to give an unacceptably broad interpretation to a number of the obligations enumerated in Article 5 of the Convention, and that, as a consequence, the rights on which it seeks to rely are not plausible. It submits that the definition of "racial discrimination" in Article 1,

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paragraph 1, of CERD does not apply to differences of treatment on the basis of "present nationality" (see paragraph 24 above).

49. The UAE also argues that the lack of evidence supporting Qatar's claims calls into question the plausibility of the rights asserted by Qatar. In particular, it maintains that the report of the Technical Mission of the OHCHR relates to events which occurred over seven months earlier and that its relevance to the circumstances prevailing at this moment is highly questionable.

* *

50. 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. Article 1 of CERD defines racial discrimination in the following terms:

> 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.

Articles 2, 4, 5, 6 and 7 of the Convention, invoked by Qatar, read as follows:

Article 2

> 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating **[424]** racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> *(a)* Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
> *(b)* Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
> *(c)* Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
> *(d)* Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

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(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

. . .

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial **[425]** discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

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distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular:
  (i) The right to freedom of movement and residence within the border of the State;
  (ii) The right to leave any country, including one's own, and to return to one's country;
  (iii) The right to nationality;
  (iv) The right to marriage and choice of spouse;
  (v) The right to own property alone as well as in association with others;
  (vi) The right to inherit;
  (vii) The right to freedom of thought, conscience and religion;
  (viii) The right to freedom of opinion and expression;
  (ix) The right to freedom of peaceful assembly and association;
(e) Economic, social and cultural rights, in particular:
  (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against **[426]** unemployment, to equal pay for equal work, to just and favourable remuneration;
  (ii) The right to form and join trade unions;
  (iii) The right to housing;
  (iv) The right to public health, medical care, social security and social services;
  (v) The right to education and training;
  (vi) The right to equal participation in cultural activities;
(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

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Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

51. The Court 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 therewith (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, ICJ Reports 2017*, p. 135, para. 81).

[427] 52. The Court notes 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.

53. In this regard, the Court recalls its conclusion that it need not decide at this stage of the proceedings between the divergent views of the Parties on whether the expression "national . . . origin" in Article 1, paragraph 1, of CERD encompasses discrimination based on "present nationality" (see paragraph 27 above).

54. 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.

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

* *

56. Qatar contends that there is clearly a link between all the measures requested and the various rights arising out of CERD whose protection it seeks, including the general prohibition of racial discrimination, the prohibition of hate speech, and the enjoyment of civil and political rights, as well as economic, social and cultural rights referred to in Article 5 of the Convention.

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57. The UAE, for its part, contends that the requisite link between the rights relied upon and the measures sought is not present. In particular, it argues that the principal aim of the provisional measures being requested is the overturning of the alleged limitations on the entry of Qatari nationals to the UAE; however, according to the UAE, the measures sought are as such insufficiently linked to the rights which Qatar asserts are at issue.

* *

[428] 58. The Court has already found (see paragraph 54 above) 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 and political rights and economic, social and cultural rights. The Court considers that the measures requested by Qatar (see paragraph 11 above) 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.

59. The Court concludes, therefore, that a link exists between the rights whose protection is being sought and the provisional measures being requested by Qatar.

III. RISK OF IRREPARABLE PREJUDICE AND URGENCY

60. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings (see, for example, *Jadhav (India* v. *Pakistan), Provisional Measures, Order of*

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18 May 2017, ICJ Reports 2017, p. 243, para. 49; *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, ICJ Reports 2017*, p. 136, para. 88).

61. However, the 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 (*Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ Reports 2017*, p. 243, para. 50; *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, ICJ Reports 2017*, p. 136, para. 89). The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court rules on the merits (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1169, para. 90). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

62. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect **[429]** of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

63. Qatar submits that irreparable prejudice is the natural consequence of violations of the rights before the Court in this case and that no decision of the Court on the merits—whenever it is rendered—could "wipe out" all of this damage and "restore" the *status quo ante*. Qatar is of the view that, in the present case, the Court does not need to determine whether there is a risk of irreparable prejudice to those rights, since the evidence shows that this type of prejudice exists today and continues to be manifest, as a result of the UAE's refusal to comply with CERD. Qatar thus emphasizes the continuous nature of the

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violations of the fundamental rights alleged, namely the rights to movement and residence, family reunification, education, work, freedom of opinion and expression, health, freedom of religious practice, private property and the right to access courts in the UAE to protect Qatari property and assets or to challenge any discriminatory measures. Qatar stresses that the "durable consequences" of the continuous violation of the right to movement and residence on the right to work and to access property, as well as on the right to family reunification, was acknowledged in the report of the Technical Mission despatched by the OHCHR and, therefore, "cannot be questioned". Citing a report of Amnesty International dated 5 June 2018, Qatar asserts that, a year on, the situation has not improved and that residents of the region are still left facing uncertain futures. Qatar concludes that, since the damage is present and ongoing, the condition of imminence is also plainly fulfilled.

64. Qatar claims that the UAE has resisted all requests to terminate the discriminatory measures. It refers in particular to the issuance by the UAE of 13 demands on 23 June 2017, supplemented by six demands on 5 July 2017, requesting, *inter alia*, that Qatar align itself with the other Gulf and Arab countries militarily, politically, socially, and economically, as a precondition for the lifting of the discriminatory measures. Qatar submits that, in doing so, the UAE has aggravated the dispute. Qatar contends that, in light of the UAE's refusal to suspend or withdraw its illegal acts, the people of Qatar could see an indefinite violation of their rights and would suffer damage and distress as a result. Accordingly, it considers that provisional measures are "urgently required to compel the UAE to abide by its international obligations under the CERD".

*

[430] 65. The UAE denies that there exists a risk of irreparable prejudice to the rights of the Applicant under CERD. Challenging the reliance and independence of the evidence submitted to the Court by Qatar, it asserts that Qataris continue to enjoy the full rights granted by law to all residents of or visitors to the UAE. Although the UAE does not deny that it has severed relations with Qatar due to national security concerns, in particular its alleged support for terrorism and extremism, it asserts that the statement of 5 June 2017, whereby its Ministry of Foreign Affairs announced that Qataris were to leave the UAE within 14 days and that they would be prevented from entry, was carefully measured to have the least possible impact on the people of

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Qatar. The UAE asserts that there were in fact no legal steps taken by its Government to deport Qataris who remained after the 14-day period; restrictions were only imposed on Qataris wishing to enter the UAE, who were required to seek prior permission, which was almost always granted. The UAE adds that measures have been taken to deal with the problem of separation of families that include Qataris. Thus, a presidential directive, issued on 6 June 2017, instructed the authorities to take into account the humanitarian circumstances of UAE-Qatari mixed families, and a special telephone line was established to deal with such cases and to ensure that appropriate action was taken. The UAE argues that, even if the Court were to find that there is a risk of prejudice caused to the rights alleged by Qatar as a result of the actions of the UAE, the prejudice would not be irreparable.

66. The UAE further asserts that the situation is not urgent as alleged by Qatar. In addition to referring to the remedial measures already taken, as described in paragraph 65 above, it observes that the Request for provisional measures was filed by Qatar on 11 June 2018, i.e. more than a year after the Ministry of Foreign Affairs of the UAE made a statement asking Qatari nationals to leave the country within 14 days.

* *

67. 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 (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, ICJ Reports 2017*, p. 138, para. 96). **[431]** 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.

68. In this regard, the Court observes that, following the statement of 5 June 2017, whereby the Ministry of Foreign Affairs of the UAE announced that Qataris were to leave the territory within 14 days and that they would be prevented from entry, 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

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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.

69. 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 (*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, ICJ Reports 2008*, p. 396, para. 142). 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.

70. 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.

[432] 71. 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 (see paragraph 54 above).

IV. CONCLUSION AND MEASURES TO BE ADOPTED

72. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate

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provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Qatar, as identified above (see paragraph 54 above).

73. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *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, ICJ Reports 2017*, p. 139, para. 100).

74. In the present case, having considered the terms of the provisional measures requested by Qatar and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

75. 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.

76. 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 **[433]** considers that the circumstances so require (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, ICJ Reports 2017*, p. 139, para. 103). In this case, having considered all the circumstances, in addition to the specific measures it has decided to

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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.

* * *

77. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, ICJ Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

* * *

78. The Court further reaffirms that 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. It leaves unaffected the right of the Governments of Qatar and the UAE to submit arguments in respect of those questions.

* * *

79. 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 **[434]** on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;

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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.

[435] JOINT DECLARATION OF JUDGES TOMKA, GAJA AND GEVORGIAN

We have not been able to support the Court's Order for the reasons explained below. Our vote, however, does not imply that we have no understanding for the humanitarian considerations underlying a call that the mixed Qatari-Emirati families remain united or, if they were separated, be able to reunite, that Qatari students be able to continue their studies in the United Arab Emirates (hereinafter "UAE") or elsewhere and that Qataris have access, in case of need, to tribunals and other judicial organs in the UAE. We do hope that the rights of these people are respected. However, we believe that certain legal requirements for the Court to indicate provisional measures are not met in the present case.

1. When 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

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compromissory clause conferring jurisdiction on the Court and that the claimed rights are plausibly based on that treaty. Thus, for instance, in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)* the Court found that "prima facie, a dispute capable of falling within the provisions of the Convention against Transnational Organized Crime and therefore concerning the interpretation or the application of Article 4 of that Convention d[id] not exist" (*Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1160, para. 50). Similarly, in *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)*, the Court concluded that "the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT are not met" (*Provisional Measures, Order of 19 April 2017, ICJ Reports 2017*, p. 132, para. 76).

[436] 2. In the present case, Qatar alleges certain violations by the UAE of obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), which contains in Article 22 a compromissory clause with respect to disputes concerning the interpretation or application of CERD.

3. The basis of the alleged discrimination in the treatment of individuals by the UAE of which Qatar has complained consists in the Qatari nationality of the persons concerned. However, CERD only applies to some specific factors of discrimination: "race, colour, descent, or national or ethnic origin". Nationality is not listed in Article 1, paragraph 1, among the bases of discrimination to which CERD applies.

4. When the Convention considers "national origin" as one of the prohibited bases for discrimination, it does not refer to nationality. In our view, the two terms are not identical and should not be understood as synonymous. The *travaux préparatoires* support this view and indicate that States sought to exclude distinction on the basis of nationality from the scope of CERD. In the discussions of the draft Convention in the Third Committee of the General Assembly, an amendment specifying that "the expression 'national origin' does not mean 'nationality' or 'citizenship'" was withdrawn by their sponsors, but this was done only in favour of the final text of Article 1, which evidently was considered to make matters equally clear (United Nations doc. A/6181, pp. 12-13). The omission of a reference to nationality may be easily explained. Should CERD be considered as covering also discrimination based on nationality, the Convention would be a far-reaching instrument, that contains a clause providing that, with regard to the wide array of civil rights that are protected under CERD, all foreigners

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must be treated by the host State in the same way as nationals of the State who enjoy the most favourable treatment.

5. The CERD Committee has taken the view—in particular, in paragraph 4 of its General Recommendation No XXX on discrimination against non-citizens—that the Convention should be interpreted as covering also differences of treatment on the basis of nationality. However, the CERD Committee has not stated in as many words that nationality is equivalent to national origin. It has rather identified certain conditions for the prohibition of discrimination that are specific to nationality and immigration and do not apply when the bases of discrimination listed in Article 1, paragraph 1, are in question. It would be difficult to give weight to this view of the CERD Committee since it gives no reason for its interpretation that different treatment based on nationality constitutes racial discrimination under CERD, albeit only to a certain extent.

[437] 6. It is true that, when Article 1, paragraph 2, sets forth that CERD does not apply to differences of treatment between citizens and non-citizens, it does not exclude that the Convention applies to differences between a group of foreigners and another group of foreigners. However, even in that case, in order to be relevant under CERD, discrimination must rest on one of the bases listed in Article 1, paragraph 1. Differences of treatment of persons of a specific nationality may target persons who also have a certain ethnic origin and therefore would come under the purview of CERD, but this possibility has not been suggested by Qatar.

7. These remarks lead to the conclusion that the dispute of which the Court is seised does not fall prima facie within the scope of CERD and that the rights that are invoked under CERD are not plausible. This does not mean that the conduct of the UAE could not be viewed as inconsistent with other rules of international law, but in the present case the Court is called to examine only the claims put forward under CERD.

[438] SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. Prolegomena

1. I have concurred, with my vote, for the adoption today, 23 July 2018, by the International Court of Justice (ICJ), of the present Order **[439]** indicating provisional measures of protection in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* [hereafter *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*]. The ICJ has rightly ordered today, with my support, provisional measures of protection, under the CERD Convention. Additionally, as I attribute great importance to some related issues in the *cas d'espèce*, that in my perception underlie the present decision of the ICJ but are left out of the Court's reasoning, I feel obliged to leave on the records, in the present separate opinion, the identification of such issues and the foundations of my own personal position thereon.

2. I do so, under the merciless pressure of time, moved by a sense of duty in the exercise of the international judicial function, even more so as some of the lessons I extract from the matter forming the object of the

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present decision of the Court are not explicitly dealt with in the Court's reasoning in the present Order. This grows in importance in a case, like the present one (and two other cases before—cf. *infra*), lodged with the ICJ under a core human rights treaty like the CERD Convention.

3. This being so, I shall develop my reflections, initially, in the following sequence: *(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; and *(c)* non-discrimination and the prohibition of arbitrariness. I shall then examine the arguments made by the contending Parties in the public hearings before the ICJ, and the written responses they presented to the questions that I have deemed it fit to put to them; following that, I shall provide my general assessment as to the rationale of the local remedies rule in international human rights protection, and as to implications of a continuing situation.

4. Following that, I shall develop my further reflections on the remaining points to consider, namely: *(a)* the correct understanding of compromissory clauses under human rights conventions; *(b)* vulnerability of segments of the population; *(c)* the consolidation of the autonomous legal regime of provisional measures of protection; *(d)* international law and the temporal dimension; and *(e)* provisional measures of protection in continuing situations. Last but not least, in an epilogue, I shall conclude with a recapitulation of the key points of the position I sustain in the present separate opinion.

5. To start with, may I recall that, in a relatively brief period of time (2011-2018), the *cas d'espèce* on *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* is the third case lodged with the ICJ under the United Nations CERD Convention. The present Order follows chronologically the Court's decisions in the cases of *Georgia* v. *Russian Federation* **[440]** (preliminary objections, 2011)[1] and of *Ukraine* v. *Russian Federation* (provisional measures of protection, 2017).[2]

[1] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 70, preceded by the ICJ's Order of provisional measures of protection, *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, ICJ Reports 2008*, p. 353, wherein the Court acknowledged that there was an ongoing unresolved problem in the conflict in the region, and the persons affected remained vulnerable (*ICJ Reports 2008*, p. 396, paras. 142-3).

[2] *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, ICJ Reports 2017*, p. 104, to which I appended a separate opinion; earlier, to the ICJ's judgment of 1 April 2011, I appended a dissenting opinion (*ICJ Reports 2011 (I)*, p. 70).

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6. In addition to those three cases under the CERD Convention, there have been other cases brought before the ICJ, and decided by it, along the last eight years, concerning also other human rights treaties. May I recall, in this respect, the case on *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (merits, 2012), under the UN Convention against Torture. Another example is provided by the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (merits, 2010, and reparations, 2012), in respect of, *inter alia*, the UN Covenant on Civil and Political Rights (cf. *infra*).

II. A new era of international adjudication of human rights cases by the ICJ

7. To the ICJ's Judgment on the merits (of 30 November 2010) in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, I appended a separate opinion, wherein, *inter alia*, I deemed it fit to draw attention to the advent of a new era of international adjudication of human rights cases by the ICJ (*ICJ Reports 2010 (II)*, pp. 807-11, paras. 232-45). In particular, I singled out, that it was the first time in its history that "the World Court has expressly taken into account the contribution of the case law of two international human rights tribunals, the European and the Inter-American Courts, to the perennial struggle of human beings against *arbitrariness*". In effect, I added, paragraph 65 of its Judgment referred to "the protection of the human person against arbitrary treatment, encompassing the prohibition of arbitrary expulsion"[3] (*ibid.*, p. 809, para. 237). I then concluded that

[441] It is indeed reassuring that the ICJ has disclosed a new vision of this particular issue, in so far as international human rights tribunals are concerned. This is particularly important at a time when States rely, in their submissions to this Court, on relevant provisions of human rights conventions, as both Guinea and the DRC have done in the present case, in their arguments centred on the UN Covenant on Civil and Political Rights and the

[3] Particularly relevant, for a study of the right to freedom of movement and residence under Article 22 of the American Convention on Human Rights, are the judgment of the Inter-American Court of Human Rights (IACtHR) of 15 June 2005, in the case of the *Moiwana Community* v. *Suriname* (paras. 107-21), as well as the IACtHR's order (on provisional measures of protection), of 18 August 2000, in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (paras. 9-11), and concurring opinion of Judge A. A. Cançado Trindade (paras. 2-25).

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African Charter on Human and Peoples' Rights (in addition to the relevant provision of the Vienna Convention on Consular Relations, in the framework of the international protection of human rights).

This is not the only example wherein this has occurred. On 29 May 2009, the ICJ delivered its Order (on provisional measures) in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, wherein Belgium and Senegal presented their submissions concerning the interpretation and application of the relevant provisions of the 1984 UN Convention against Torture. And, very recently, a few days ago, in the public sittings before this Court of 13 to 17 September 2010, Georgia and the Russian Federation submitted their oral arguments in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, another UN human rights treaty. It is reassuring that States begin to rely on human rights treaties before this Court, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The international juridical conscience has at last awakened to the fulfillment of this need.

The ICJ, in the exercise of its contentious as well as advisory functions in recent years, has referred either to relevant provisions of a human rights treaty such as the Covenant on Civil and Political Rights, or to the work of its supervisory organ, the Human Rights Committee. These antecedents are not to pass unnoticed, in acknowledging the turning point which has just occurred in the present *Diallo* case: the Court, in the Judgment being delivered today, 30 November 2010, has gone much further, beyond the United Nations system, in acknowledging the contribution of the jurisprudential construction of two other international tribunals, the Inter-American [IACtHR] and the European [ECtHR] Courts of Human Rights. It has also dwelt upon the contribution of an international human rights supervisory organ, the African Commission on Human and Peoples' Rights. The three regional human rights systems operate within the framework of the universality of human rights.

. . .

By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals **[442]** will provide avenues not only for States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice. They will thus be enlarging and strengthening the aptitude of contemporary international law to resolve disputes occurred not only at *inter*-State level, but also at *intra*-State level. And they will thus be striving towards securing to States as well as to human beings what they are after: the realization of justice. (*ICJ Reports 2010 (II)*, pp. 809-11, paras. 241-3 and 245.)

8. In the light of the aforementioned, and bearing in mind all that has been happening here at the Grande Salle de Justice in the Peace Palace at The Hague in the last nine years, one is to acknowledge that we are already *within* the new era of international adjudication of

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human rights cases by the ICJ. The present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)* bears witness of that. Having pointed this out, I can now move to the next point to consider in this separate opinion, namely, the relevance of the fundamental principle of equality and non-discrimination.

III. The relevance of the fundamental principle of equality and non-discrimination

9. In the *cas d'espèce*, Qatar's Request for the indication of provisional measures of protection (of 11 June 2018) identifies the rights it seeks to protect against discriminatory measures that "violate the customary international law principle of non-discrimination as well as the specific obligations enumerated in CERD [Convention] Articles 2, 4, 5, 6, 7" (p. 8, para. 12).[4] The principle of equality and non-discrimination lies indeed in the foundations of the protected rights under the CERD Convention. This is a point which should have been attentively addressed by the contending Parties in the course of the current proceedings,[5] which were largely consumed by diverting attention to points with no bearing at all on the consideration of provisional measures of protection under a human rights convention.

10. This being so, I feel obliged to fill the gap, as I nourish the hope that this unfortunate diversion does not happen again in cases of the kind before the ICJ, where the applicable law is a human rights convention, and not at all diplomatic protection rules. 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 **[443]** 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" (cf. Section VI, *infra*).

11. In focusing attention, thus, on the principle of equality and non-discrimination, it should not pass unnoticed, to start with, that the idea of human equality marked presence already in the origins of the law of nations (*droit des gens*), well before finding expression in the international instruments which conform its *corpus juris gentium*, as

[4] Cf. likewise Qatar's Application instituting proceedings (of 11 June 2018) p. 50, para. 58; and cf. pp. 58-9, para. 65.

[5] There are three brief references, in the oral pleadings of Qatar, to the principle of respect for the "dignity and equality inherent in all human beings"; cf. CR 2018/12, of 27 June 2018, pp. 32, 35 and 59.

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known in our times. The idea of *human equality* was underlying the original conception of the *unity of human kind* (present, for example, in the pioneering thinking of Francisco de Vitoria and Bartolomé de Las Casas in the sixteenth century).

12. The fundamental principle of equality and non-discrimination is nowadays a basic pillar of the UN CERD Convention, and of the whole *corpus juris* of the international law of human rights. The expression of such principle emanated from human conscience, and projected itself in the evolving law of nations from the seventeenth to the twenty-first centuries. The principle of equality and non-discrimination has a long history, accompanying the historical formation and evolution of the law of nations itself.

13. By the mid-twentieth century, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Art. 1). It added that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination" (Art. 7).

14. And the 1945 Charter of the United Nations began by asserting the determination of "the peoples of the United Nations" to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (second preambular paragraph). Nowadays, the fundamental principle of equality and non-discrimination lies also in the foundations of the law of the United Nations itself.

15. The gradual consolidation of the mechanisms of international protection of human rights, moreover, has much contributed to a growing awareness of the importance of the prevalence of the basic principle of equality and non-discrimination. Certain expressions were to emerge (e.g., "equality before the law" and "equal protection of the law"), on the basis of human values, and associated to the corresponding obligations of States Parties to human rights treaties.

16. Supervisory organs of such treaties 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 **[444]** of protection of the human person.[6] The

[6] Cf., e.g., A. A. Cançado Trindade, "Address to the UN Human Rights Committee on the Occasion of the Commemoration of Its 100th Session", 29 *Netherlands Quarterly of Human Rights* (2011), pp. 131-7.

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obligation of non-discrimination as related to the substantive rights protected under those treaties draws attention to the *positive obligations* of the States Parties to secure the protection of the human beings under their jurisdiction against the discrimination in all ambits of human relations.[7]

17. For its part, the Committee on the Elimination of Racial Discrimination, for example, has in this respect issued General Recommendations orienting its own interpretation of the relevant provisions of the CERD Convention. Among them, there are those which have an incidence in the consideration of the present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, namely: General Recommendation No 30 (of 19 August 2004), on discrimination against non-citizens; General Recommendation No 35 (of 26 September 2013), on combatting racist hate speech; General Recommendation No 25 (of 20 March 2000), on gender-related dimensions of racial discrimination; General Recommendation No 22 (of 23 August 1996), on Article 5 of the CERD Convention in relation to refugees and displaced persons.

18. The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels,[8] have not, however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of law. This is one of the rare examples of international case law preceding international legal doctrine, and requiring from it due and greater attention.

19. A significant jurisprudential advance is found in the ground-breaking Advisory Opinion No 18 (of 17 September 2003) of the IACtHR, on the *Juridical Condition and Rights of Undocumented Migrants*, upholding the view that the fundamental principle of equality and non-discrimination had entered the realm of *jus cogens*, thus enlarging its material content (paras. 97-101 and 110-11).[9] In the IACtHR's understanding, States cannot discriminate, nor tolerate discriminatory situations to the detriment of those persons; they had a duty to guarantee **[445]** them the due process of law, irrespective of

[7] Including at inter-individual level; cf. W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerp/Oxford, Intersentia, 2005, pp. 23 and 215.

[8] To the study of which I have dedicated my extensive book: A. A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

[9] The IACtHR upheld that, accordingly, any discriminatory treatment of undocumented migrants or aliens would generate the international responsibility of States.

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their migratory status. States can no longer subordinate or condition the observance of the principle of equality before the law and non-discrimination to the objectives of their migratory or other policies.

20. For my part, I focused on this significant jurisprudential advance in my concurring opinion appended to the aforementioned Advisory Opinion No 18 of the IACtHR, wherein I stressed, in support of the Court's position, the relevance of the basic principle of equality and non-discrimination, enlarging the material content of *jus cogens*, and permeating, together with other general principles of law, the whole juridical order itself, conforming its substratum (paras. 44-6, 52-8, 65 and 72).[10] Without such principles, there is ultimately no legal order at all. I developed my whole reasoning in the line of jusnaturalist thinking, which marked the origins and historical evolution of the law of nations (*droit des gens*), in the framework of the *civitas maxima gentium* and of the universality of humankind.

21. The path was then paved for jurisprudential developments also in the international adjudication of contentious cases pertaining to the basic principle of equality and non-discrimination.[11] In effect, this fundamental principle has been addressed—in Judgments on contentious cases as well as in Advisory Opinions—in face of *social marginalization* (IACtHR, cases of *Servellón-García et al.*, 2006, and of *Sawhoyamaxa Indigenous Community*, 2006); of *prohibition of arbitrariness* (*Ahmadou Sadio Diallo*, merits, 2010, and reparations, 2012; Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010; and the case concerning the *CERD Convention (Georgia* v. *Russian Federation)*, 2011), as well as in face of *procedural equality* (IACtHR, case *Loayza Tamayo*, 1997; and the Advisory Opinion on *Judgment No 2867 of the Administrative Tribunal of the International* **[446]** *Labour*

[10] For a study of the matter, cf., e.g., A. A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l'homme", 19 *Revue trimestrielle des droits de l'homme*, Brussels (2008), No 74, pp. 289-328.

[11] Ever since the IACtHR upheld, in its Advisory Opinion No 18 (of 17 September 2003), that the fundamental principle of equality and non-discrimination entered into the domain of *jus cogens* (*supra*), in the adjudication of successive contentious cases I stressed the need to enlarge further the material content of *jus cogens*, so as to encompass likewise the right of access to justice, and fulfil the pressing needs of protection of the human person. I did so, *inter alia*, in my separate opinion (dedicated on the right of access to justice *lato sensu*) in the Court's judgment (of 31 January 2006) in the case of the *Massacre of Pueblo Bello* v. *Colombia*, drawing attention to the utmost importance of the right of access to justice *lato sensu,* encompassing its full realization (para. 64). I further stressed, on successive occasions, the special needs of protection of victims in situations of vulnerability; cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional—Memorias de la Corte Interamericana de Derechos Humanos*, 5th rev. ed., Belo Horizonte, Edit. Del Rey, 2018, Chap. XXIV, pp. 219-26.

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Organization upon a Complaint Filed against the International Fund for Agricultural Development, 2012).

IV. Non-discrimination and the prohibition of arbitrariness

22. The protection being sought before the ICJ in the *cas d'espèce*, under the CERD Convention, is furthermore against arbitrary measures, against arbitrariness. Brief references were made to this in the course of the present oral pleadings before the ICJ.[12] This point has not escaped the attention of other international tribunals, under other human rights conventions: for example, *inter alia*, in its Judgment (merits, of 3 July 2014) on the case of *Georgia* v. *Russia*, the European Court of Human Rights (ECtHR) singled out the duty under the European Convention on Human Rights (ECHR) "to protect the individual from arbitrariness", and found that the arrests and detentions that preceded "collective" expulsions (of nationals of the applicant State) amounted to "an administrative practice" in breach of Article 5(1) and (4) of the ECHR (paras. 182 and 186-8).

23. Subsequently, in its Judgment (merits, of 23 August 2016) on the case of *J. K. and Others* v. *Sweden*, concerning expulsion of non-citizens (the applicants being Iraqi nationals), the ECtHR held that, if deported, they would face a risk of being subjected to treatment in breach of Article 3 of the ECHR (para. 123) in the destination country. In effect, non-discrimination and the prohibition of arbitrariness are a point which cannot be overlooked, also in a wider framework, in time and space. After all, in the relations between human beings and public power, arbitrariness is an issue which has marked presence everywhere along the history of humankind. It has been a source of concern over the centuries. This is why the tragedies written and performed in ancient Greece remain so contemporary in our days, after so many centuries.

24. Suffice it here to recall, e.g., in Sophocles's *Antigone* (441 BC), the arbitrariness of the ruler Creon's decree prohibiting Antigone to bury the corpse of one of her deceased brothers (Polynices), and her determination nevertheless to do so in pursuance of justice; or else further to recall, some years later, e.g., in Euripides's *Suppliant Women* (424-419 BC), the arbitrariness that led to the grief and lamentation of

[12] Cf., on the part of the applicant State, CR 2018/12, of 27 June 2018, pp. 22-3; CR 2018/14, of 29 June 2018, p. 30.

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the women whose **[447]** deceased children had been separated from them, and their corpses then needed to be buried.

25. Sophocles's *Antigone*, in particular, has been rewritten, in successive centuries, by several other authors, bearing in mind their respective contemporary manifestations of arbitrariness. Although the ancient Greeks had eyes mainly for justice rather than law (and only later on, Romans of the ancient Empire began to distinguish between law and justice), there are those who seek to associate the tragedy of Sophocles with the seeds or origins of the distinction between natural law and positive law.

26. In any case, arbitrariness, as history shows, is unfortunately part of human nature, and the discrimination that ensues therefrom is both *de facto* and *de jure*. If we look at the world nowadays, marked by a serious crisis of values, we can see, on all continents, the inhumane split of families in frontiers, in particular those of migrants or non-citizens. Positive law alone cannot solve the problems created at times by itself, to the detriment of human beings in situations of vulnerability (cf. *infra*). Law and justice go together, they are indissociable, in the line of the more lucid jusnaturalist thinking.

27. It is important to keep those ancient Greek tragedies in mind to also face so-called "globalization", a misleading and false neologism *en vogue* in the twenty-first century. Such neologism hides the marginalization and social exclusion of increasingly greater segments of the population (including migrants). Frontiers have been opened to capital and goods, but are sadly being closed down to human beings (with the split of families, new walls, fences and detention centres, on distinct continents).

28. The material progress of some has been accompanied by the exploitation of many (including undocumented migrants). Some human beings (especially powerholders) have placed most fellow human beings on a scale of priority inferior to that attributed to capital and goods. Nothing has been learned from the sufferings of past generations; hence the need to remain attached to the goal of the realization of justice, bearing in mind that law and justice go indissociably together. The ICJ has a mission to keep on endeavouring to contribute to a *humanized* law of nations, in the dehumanized world of our days.

29. In my aforementioned separate opinion appended to the ICJ's Judgment on the case of *Ahmadou Sadio Diallo* (merits, of 30 November 2010), concerning the arbitrary detentions followed by expulsion of a foreigner from his country of residence, I devoted an entire Section (VI) to "The prohibition of *arbitrariness* in the

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international law of human rights" (paras. 107-42), wherein I examined the doctrinal development and the jurisprudential construction on the matter. I pondered, *inter alia*, that, as human rights treaties

> conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim, it is not at **[448]** all surprising that the prohibition of *arbitrariness* (. . .) covers arrests and detentions, as well as other acts of the public power, such as expulsions. (*ICJ Reports 2010 (II)*, p. 763, para. 109.)

30. Such has in fact been the understanding of international tribunals entrusted with the interpretation and application of human rights treaties, like the ICJ in the present case of the *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*. As I pointed out in that separate opinion in the case of *Ahmadou Sadio Diallo*, the case law of international human rights tribunals is quite clear in this respect. No one can be deprived of liberty in an arbitrary way (cf. e.g., ECtHR, case of *Amuur* v. *France*, judgment of 25 June 1996). No one can be detained or arrested, even when this is considered as "legal", when it is incompatible with the provisions of human rights treaties and carried out with arbitrariness (e.g., IACtHR, case of the *"Street Children" Villagrán Morales and Others* v. *Guatemala,* merits, judgment of 19 November 1999; cases of *Bámaca Velásquez* and of *Maritza Urrutia* v. *Guatemala*, judgments of 25 November 2000 and 27 November 2003, respectively).

31. The prohibition of arbitrariness, I proceeded, stands not only in respect of the right to personal liberty, but also in relation to all other rights protected under human rights treaties,[13] so as to secure the prevalence of the rule of law (*la prééminence du droit*). Epistemologically, this is the correct posture in this respect, given the universally acknowledged interrelatedness and indivisibility of all human rights. Arbitrariness amounts, in effect, to an *abus de pouvoir* on the part of the State agents. Accordingly, a domestic law or an administrative act, concerning migrants or non-citizens, cannot be applied when incompatible with the provisions of human rights treaties.

32. And in that separate opinion, I concluded, on the extent of the prohibition of arbitrariness, that

> Human nature being what it is, everyone needs to guard protection against arbitrariness on the part of State authorities. In a wider horizon, human beings

[13] Such as, e.g. the right not to be expelled arbitrarily from a country, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, or any other protected right.

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need protection ultimately against themselves, in their relations with each other. There is hardly any need to require an express provision to the effect of prohibiting arbitrariness in respect of distinct rights, or else to require the insertion of the adjective "arbitrary" in distinct provisions, in order to enable the exercise of protection against arbitrariness, in any circumstances, under human rights treaties. The letter together with the spirit of those provisions under human rights treaties, converge in pointing to the same direction: the **[449]** absolute prohibition of arbitrariness, under the international law of human rights as a whole. Underlying this whole matter is the imperative of access to justice *lato sensu*, the *right to the law (le droit au droit*, *el derecho al derecho)*, the right to the realization of justice in a democratic society. (*ICJ Reports 2010 (II)*, p. 777, para. 142.)

V. Arguments of the Parties in the public hearings before the Court

33. The prohibition of arbitrariness brings to the fore the issue of the *vulnerability* of those affected by discriminatory measures. Before examining this point (cf. Section VII, *infra*), may I now turn to the arguments of the Parties during the oral pleadings which have just taken place before the ICJ. In the course of the public hearings (first round) before the Court, the applicant State presented (on 27 June 2018) its own understanding of the factual context of the *cas d'espèce* within a temporal dimension.

34. Qatar argued that the "collective expulsion" of Qataris from the UAE as a discriminatory measure was ongoing, affecting continuously some of their rights under the CERD Convention (e.g., with the separation of families and loss of work); this was leading to the prolongation and indefinite duration[14] of harm or damage, in the human tragedy[15] of the numerous and vulnerable victims.[16] There was need for urgent regard to human suffering; the *continuing vulnerability* of segments of the population required urgently, in its view, provisional measures of protection.

35. In the following public hearings before the Court (still first round, on 28 June 2018), the respondent State did not address such issue of a *continuing situation* raised by Qatar; the UAE focused instead on other aspects, attempting to minimize and dismiss the Request for

[14] CR 2018/12, of 27 June 2018, pp. 16-19, 22, 29-30, 38-40, 42, 46, 50, 52-8 and 62-4 (on the continuity of violations).
[15] *Ibid.*, pp. 59-60 (on the "tragedy of the victims").
[16] *Ibid.*, pp. 61-62 (on the "vulnerability of the population").

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provisional measures of protection.[17] It consumed much of the time of those public hearings raising the point (responded by the applicant State—*infra*), *inter alia*, of the rule of exhaustion of local remedies.[18]

36. In the second and last round of public hearings before the Court (on 29 June 2018) the local remedies rule continued to be addressed, this **[450]** time by both the applicant State, in response to the argument of the respondent State, and by this latter once again.[19] The applicant State, furthermore, consistently reiterated its understanding of a *continuing situation* of ongoing alleged violations of human rights requiring "humanitarian considerations".[20]

VI. Questions put to the Parties in the public hearings before the Court

1. Questions and answers

37. Those arguments advanced by the contending Parties led me to address the following questions to both of them, at the end of the public hearings (on 29 June 2018):

1. Does the local remedies rule have the same rationale in diplomatic protection and in international human rights protection? Does the *effectiveness* of local remedies have an incidence under the United Nations Convention on the Elimination of All Forms of Racial Discrimination and other human rights treaties?

2. Is it necessary to address the so-called plausibility of rights in face of a *continuing situation* allegedly affecting the rights protected under a human rights treaty like the United Nations Convention on the Elimination of All Forms of Racial Discrimination?

3. What are the implications or effects, if any, of the existence of a *continuing situation* allegedly affecting rights protected under a human rights convention, for requests of provisional measures of protection?[21]

38. In the course of the following week, the contending Parties provided the Court with their respective written answers (of 3 July 2018) to my questions, first, as to the rationale of the local remedies

[17] CR 2018/13, of 28 June 2018, p. 15 (on "uncertainty of facts"), p. 31 (on "prima facie determination on the admissibility of the claims" and so-called plausibility of admissibility), and pp. 22-35 (on preconditions of admissibility).

[18] *Ibid.*, pp. 28-35.

[19] Cf., on the part of Qatar, CR 2018/14, of 29 June 2018, pp. 17-20; and cf., on the part of the UAE, CR 2018/15, of 29 June 2018, pp. 17-18.

[20] Cf., on the part of Qatar, CR 2018/14, of 29 June 2018, pp. 36-7 and 39-41.

[21] CR 2018/15, of 29 June 2018, p. 45.

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rule in diplomatic protection and in international human rights protection, and then, on the implications of a continuing situation. In respect of the *first question*, the applicant State, in its detailed written answer, first recalled that international human rights supervisory organs have stressed that the local remedies rule here requires "actual redress" for victims of human rights violations, determining the obligation of States Parties to **[451]** human rights treaties to provide them with effective remedies.[22] And it proceeded:

This added element of "actual redress" finally echoes the differences in the function of the local remedies rule in both systems, illustrated by Judge Cançado Trindade's seminal 1983 monograph on the subject.[23] In diplomatic protection, the local remedies rule ensures that disputes are not elevated onto the international plane before the authorities of the offending State have had an adequate opportunity to address them by their own means. It can thus be said that in diplomatic protection, the local remedies rule operates *preemptively.*

In international human rights protection, the focus of the rule is different. As explained above, under most major international human rights instruments, States have bound themselves to international obligations to respect and ensure human rights, including by subjecting those obligations to the scrutiny of national tribunals and other State institutions. By asking that such tribunals and other State institutions be resorted to before the violations are entrusted to the international machinery for their implementation, the rule thus operates *protectively*.[24,25]

39. And the applicant State added that, under the CERD Convention and all other major human rights treaties, the local remedies rule only applies if remedies are effective, this being in accordance with general international law; the "principle of effectiveness" is here "fully applicable".[26] In view of the foregoing, it submitted that

although there is a certain degree of overlap in the rationale of the local remedies rule in the fields of diplomatic protection and international human rights protection, in the latter, the rule is also underscored by an element of "actual redress". Such redress must, furthermore, be effective.[27]

[22] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, pp. 1-2, paras. 3-4.

[23] See A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), pp. 39, 51-2, 56.

[24] This added purpose for the local remedies rule necessarily informs its application under the Convention and other human rights treaties, as Qatar will explain at the appropriate stage of these proceedings.

[25] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, p. 3, paras. 5-6.

[26] *Ibid.*, pp. 4-6, paras. 7-8 and 11.

[27] *Ibid.*, pp. 6-7, para. 12.

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40. For its part, the respondent State, in its brief written answer to the first question, also of 3 July 2018, argued that the rule of exhaustion of local remedies has the "same rationale" underlying it in the two contexts of "broadened" diplomatic protection and in international human rights **[452]** protection.[28] Yet, it added, under the CERD Convention and other human rights treaties, and under general international law, the effectiveness of local remedies is a component of that rule, which, e.g., determines that such remedies cannot be "unreasonably prolonged".[29]

41. As to the *second question*, the applicant State contended that the purpose of the inquiry on "plausibility" of rights, as found in the Court's recent case law, is a "limited one", not engaging "in any extensive evidentiary inquiry" and not undertaking any "in-depth factual assessment" at the stage of provisional measures; it can only be "a very low threshold".[30] It added that such very low threshold applies, whether the Court puts the requisite "in terms of 'plausibility of rights' or 'vulnerability of populations'" to be protected under a human rights treaty like the CERD Convention.[31]

42. The respondent State, for its part, accepted that "violations of human rights" in a "continuing situation" have to be "of concern to the Court". However, it added, the issue would "have to be placed within the vision of the Court", i.e., in its view,

> Only States can be parties before the Court in contentious proceedings and the Court when called upon to adjudicate upon a matter has to do so in the light of the rights and duties of those States that are before the Court seeking a legal determination.[32]

43. The respondent State added that, as part of ensuring the balance between, on the one hand, vulnerable individuals and groups, and, on the other hand, the "adjudication between States in the light of their rights and obligations under international law" has made the Court to have "recourse *inter alia* to the doctrine of plausibility". This is, in its view, "a necessary hurdle to be surmounted before tackling substantive issues of protection" of the "rights or interests of individuals, groups or States under perceived threat"; in sum, the consideration of the "plausibility of the rights" at issue is "an indispensable preliminary step needed

[28] ICJ doc. 2018/24, of 3 July 2018, response in letter of the UAE, p. 1.
[29] *Ibid.*, p. 2.
[30] *Ibid.*, response in letter of Qatar, pp. 10-16, paras. 19, 21, 23 and 28.
[31] *Ibid.*, pp. 13-16, paras. 26-9.
[32] *Ibid.*, response in letter of the UAE, p. 3.

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in order to address claimed violations of rights, whatever their origin".[33]

44. As to the *third question*, the applicant State upheld the view that, when there is a *continuing situation* alleged affecting rights protected under a human rights convention, "the requirement of a real and imminent **[453]** risk is necessarily satisfied", and "irreparable prejudice is the natural consequence of restrictions on those rights".[34] In such circumstances, "any assessment of risk of harm is necessarily met", and the evidence provided (reports "showing continuing harm throughout the past thirteen months", as from 5 June 2017) has been, in its view, "more than sufficient" for the Court "to make a finding of urgency", given the "imminent risk of irreparable harm".[35]

45. For its part, the respondent State argued that, even in case of a continuing situation, the ICJ is to exercise its own functions which are "different from those" of international human rights tribunals at regional levels. Provisional measures, it added cannot be indicated if the Court is not persuaded that the rights invoked are "at least plausible". In its view, "the existence of a continuing situation allegedly affecting rights protected under a human rights treaty does not as such change or modify the conditions required for the indication of provisional measures of protection".[36]

46. Still in the same week, the contending Parties provided the Court, two days later, with their additional written comments (of 5 July 2018) to each other's respective answers (cf. *supra*) to my questions. The applicant State recalled the components of effectiveness of local remedies and redress in the rationale of the local remedies rule under human rights treaties, and welcomed the UAE's acceptance of it as well as of the Court's need to be "sensitive and attentive" to a continuing situation in breach of human rights, wherein the harm is "not merely imminent by *presently occurring*", requiring attention also to "the vulnerability of the affected individuals".[37]

47. The respondent State, for its part, insisted on the requirement of exhaustion of local remedies, and on its position that "doctrine of plausibility" constitutes a "balance" between the claimed violation of rights and the "procedural requirements" to adjudicate inter-State cases.[38] Besides questioning the evidence produced, it did not accept

[33] *Ibid.*
[34] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, p. 17, paras. 31-2.
[35] *Ibid.*, pp. 19-20, paras. 35-6.
[36] And it added that "[t]he UAE is focused upon the importance of the implementation of binding treaties and the fight against terrorism". *Ibid.*, response in letter of the UAE, p. 5.
[37] ICJ doc. 2018/25, of 5 July 2018, comment in letter of Qatar, pp. 1-4, paras. 2-5 and 7-8.
[38] *Ibid.*, comment in letter of the UAE, pp. 1-3.

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the "low threshold" advanced by Qatar, asserting that there "has to be a tangible or plausible basis" for the claims at issue. And it concluded that, in its view, there is no "different approach" to the grant of provisional measures of protection in cases under human rights treaties.[39]

[454] *2. General assessment: Rationale of the local remedies rule in international human rights protection*

48. May I now proceed to my own assessment of the arguments surveyed above, presented by the contending Parties in their written responses to my questions (*supra*). To start with, in my understanding, the raising of the rule of exhaustion of local remedies at this early stage is surprising, besides regrettable, due to the fact that the present proceedings are on a request for provisional measures of protection, not on admissibility. The local remedies rule is a condition of admissibility of international claims; it cannot be invoked as a precondition for the consideration of urgent requests of provisional measures of protection.

49. The incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of diplomatic protection of nationals abroad; the rule at issue is far from having the dimensions of an immutable or sacrosanct principle of international law. Moreover, the two domains—human rights protection and diplomatic protection—are also distinct, and there is nothing to hinder the application of that rule with greater or lesser rigour in such different domains.

50. Its rationale 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.

51. Local remedies, in turn, 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

[39] *Ibid.*, pp. 4-8.

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and domestic law in the present context of protection.[40] 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. Such rights are accompanied by obligations of States.

[455] 52. Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily undergo, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights.

53. In the handling of successive cases under the CERD Convention, for example, the Committee on the Elimination of Racial Discrimination (CERD Committee) has deemed it necessary to single out that petitioners are only required to exhaust "remedies that are *effective* in the circumstances" of the *cas d'espèce* (cases of *M. Lacko* v. *Slovakia*, decision of 9 August 2001, para. 6.2; and of *Zentralrat Deutscher Sinti und Roma et al.* v. *Germany*, decision of 22 February 2008, para. 7.3).

54. In another case (of *Dragan Durmic* v. *Serbia and Montenegro*), the CERD Committee pointed out that local remedies need not be exhausted if their application "is unreasonably prolonged" (decision of 6 March 2006, para. 6.5). And, in yet another case (of *D. R.* v. *Australia*), the CERD Committee considered that none of the proposed local remedies could be effective, and reiterated (decision of 14 August 2009) that

> domestic remedies need not be exhausted if they objectively have no prospect of success. This is the case where under applicable domestic law, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result (paras. 6.4-6.5).

55. 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

[40] Cf. A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 1-445; A. A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2nd ed., Brasília, Edit. University of Brasília, 1997, pp. 1-327; A. A. Cançado Trindade, "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law", 12 *Revue belge de droit international/Belgisch Tijdschrift voor international Recht*, Brussels (1976), pp. 499-527.

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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.

56. Contemporary international tribunals share the common mission of realization of justice. There is here a fundamental unity of conception and mission. International human rights tribunals, created by conventions at regional levels, operate within the conceptual framework of the *universality* of human rights. International human rights tribunals have been faithful to the rationale of effectiveness of local remedies and **[456]** redress.[41] There is in this respect a *complementarity* in outlook between mechanisms of dispute-settlement at UN and regional levels, all operating under the conceptualized universality of the rights inherent to the human person.

3. *General assessment: Implications of a continuing situation*

57. In my understanding, the attempt to create another precondition for provisional measures, as from the so-called "plausibility" of rights, is regrettable. The test of so-called "plausibility" of rights is, in my perception, an unfortunate invention—a recent one—of the majority of the ICJ. In the present proceedings, the so-called "plausibility" of admissibility[42] is a new and additional unfortunate attempt, this time by the respondent State, to invent an additional "precondition" for provisional measures of protection. In a *continuing situation*, the rights requiring protection are clearly known, there being no sense to wonder whether they are "plausible".

58. In the consideration of the present Request for provisional measures of protection in the case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, the question of a *continuing situation* allegedly affecting the rights of vulnerable persons has deserved particular attention, mainly on the part of the applicant State (which

[41] To this effect, cf., for an analysis of the vast case law of the ECtHR on the matter, e.g., P. van Dijk, F. van Hoof, A. van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerp/Oxford, Intersentia, 2006, pp. 125-61 and 560-3; D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, 2009, pp. 759-76; as to the case law of the IACtHR, cf. A. A. Cançado Trindade, *El Agotamiento de los Recursos Internos en el Sistema Interamericano de Protección de los Derechos Humanos,* San José/C.R., IIDH, 1991, pp. 1-60; and as to the case law of the African Court on Human and Peoples' Rights (AfCtHPR), cf. M. Löffelmann, *Recent Jurisprudence of the African Court on Human and Peoples' Rights—Developments 2014 to 2016*, Arusha, Tanzania/Eschborn, Germany, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2016, pp. 1-63, esp. pp. 5-8, 22, 24-6 and 29-30.

[42] Cf., on the part of the UAE, CR 2018/15, of 29 June 2018, p. 16.

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dwelt upon it), but also on the part of the respondent State. Yet, the handling of the matter consumed much time in addressing points which have nothing to do with provisional measures of protection,—such as the undue invocation of the rule of exhaustion of local remedies at this stage of provisional measures, as well as the undue attempt to link the so-called "plausibility" of rights to the so-called "plausibility" of admissibility, as presumed interrelated requirements.

59. It appears that each one feels free to interpret so-called "plausibility" of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such "plausibility" means. To invoke "plausibility" as a new "precondition", creating **[457]** 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. I shall develop further reflections on provisional measures of protection in continuing situations subsequently in the present separate opinion (cf. Section XI, *infra*).

60. The rights to be protected in the *cas d'espèce* are clearly those invoked under the CERD Convention (Arts. 2, 4, 5, 6 and 7). The so-called "plausibility" of rights is surrounded by uncertainties, which are much increased in trying to add to it the so-called "plausibility" of admissibility, undermining provisional measures of protection as jurisdictional guarantees of a preventive character. It is time to awaken and to concentrate attention on the nature of provisional measures of protection, particularly under human rights treaties, to the benefit of human beings experiencing a *continuing situation* of vulnerability affecting their rights.

61. In the present case we are not [dealing with the] rights of States; the rights under the CERD Convention are *rights of individuals* (accompanied by obligations of States), 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.

VII. The correct understanding of compromissory clauses under human rights conventions

62. I have dwelt upon this particular point in depth in my lengthy dissenting opinion in the earlier case on *Application of the CERD*

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Convention (Georgia v. *Russian Federation)* (Judgment of 1 April 2011), where the Court upheld the second preliminary objection and found itself without jurisdiction to examine the case. In my dissenting opinion (paras. 1-214), I warned at first that the *punctum pruriens judicii* was the proper understanding of the compromissory clause (Art. 22) of the CERD Convention, for which it is necessary to be attentive to the nature and substance of a human rights treaty like the CERD Convention.

63. Regrettably, in that Judgment of 2011, the Court's majority set a very high threshold (as to the requirement of prior negotiations) for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention, losing sight of the *nature* of this important UN human rights treaty, endowed with universality. It advanced the view that **[458]** Article 22 of the CERD Convention establishes "preconditions" to be fulfilled by a State Party before it may have recourse to this Court, thus rendering access to the ICJ particularly difficult. I added, in my dissenting opinion, that this was not in accordance with the Court's (PCIJ and ICJ) own earlier *jurisprudence constante*, which had never ascribed to that factual element the character of a "precondition" that would have to be fully satisfied, for the exercise of its jurisdiction.[43]

64. It was necessary,—I proceeded,—to turn attention to the sufferings and needs of protection of the affected segments of the population; yet, the Court's majority pursued unfortunately an essentially inter-State, and mostly bilateral, outlook, on the basis of allegedly unfulfilled "preconditions" of its own construction; instead of setting up a higher standard of protection, under the CERD Convention, of individuals in a continuing situation of great vulnerability, it applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction.

65. One cannot erect, in pursuance of a strictly textual or grammatical reasoning relating to the compromissory clause (Art. 22) of the CERD Convention, a mandatory "precondition" for the exercise of the Court's jurisdiction (such as that of prior negotiations), as this amounts to erecting a groundless and most regrettable obstacle to justice. This "precondition", I proceeded, finds no support in the Court's own earlier *jurisprudence constante*, nor in the legislative history of the CERD Convention.

[43] Both the PCIJ and the ICJ have been quite clear in holding that an *attempt* of negotiation is sufficient, there being no mandatory "precondition" at all of *resolutory* negotiations for either of them to exercise jurisdiction in a case they had been seized of.

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66. I then pointed out, in my aforementioned dissenting opinion, that, already at the time that the CERD Convention was being elaborated there were those who supported the compulsory settlement of disputes by the Court. Underlying the general rule of treaty interpretation is the principle *ut res magis valeat quam pereat* (the so-called *effet utile*), of much importance in respect of human rights treaties, amongst which the CERD Convention. This latter is a pioneering human rights convention, endowed with universality, occupying a prominent place in the law of the United Nations itself. It cannot be a hostage of State consent or discretion (as in the entirely distinct domain of diplomatic protection), in its interpretation and application.

67. Before moving to the next point, may I here add that all obligations under the CERD Convention (including those of providing redress by means of effective local remedies, and of dispute-settlement in inter-State cases thereunder) have a rationale of their own, proper of human rights treaties. There was awareness of that since the time of the *travaux* **[459]** *préparatoires* of the CERD Convention,[44] so as to secure its effectiveness, and safeguard it from attempts at conceptual deconstruction (such as the devising of additional so-called "preconditions").[45]

VIII. Vulnerability of segments of the population

68. In the present Order that the ICJ has just adopted today, in the case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, the Court has correctly granted provisional measures of protection under the CERD Convention, to ensure that families including a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited; that Qatari students, affected by the same measures, complete their education in the UAE, or, if they wish, obtain their educational records to continue their studies elsewhere; and that

[44] Cf., on this particular point, e.g., N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (reprint revised), Leiden, Brill/Nijhoff, 2014, pp. 81 and 98; A. A. Cançado Trindade, "Exhaustion of Local Remedies under the United Nations Convention on the Elimination of All Forms of Racial Discrimination", 22 *German Yearbook of International Law/ Jahrbuch für internationales Recht*, Kiel (1979), pp. 374-83.

[45] Cf. recent assessments by, e.g., M. Dubuy, "Application de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires: Un formalisme excessif au service du classicisme?", 57 *Annuaire français de droit international* (2011), pp. 183-212; P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination—A Commentary*, Oxford University Press, 2016, pp. 472-83 (on Article 22).

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Qataris, affected by the same measures, have access to national tribunals in the UAE. The CERD Convention itself determines that States Parties are to assure to everyone within their jurisdiction "effective protection and remedies" before national tribunals against any acts of discrimination (Art. 6). The provisional measures, as requested in the *cas d'espèce*, become necessary for the protection of persons in a situation of vulnerability.

69. I have already addressed the principle of non-discrimination and the prohibition of arbitrariness (Section III, *supra*), and my reflections thereon lead me to the next related point to be here considered. Cases as the present one of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, 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).

70. 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 **[460]** human person in any circumstances of vulnerability. This is a point which I have been making in successive individual opinions in previous decisions of the ICJ; I feel it sufficient only to refer to them now, with no need to extend further thereon in the present separate opinion.

71. To summarize, in my previous separate opinion appended to the ICJ's recent Order (of 19 April 2017) on provisional measures of protection—also under the CERD Convention—in the case of *Ukraine* v. *Russian Federation*, I pondered:

> As I have been sustaining along the years, time and time again, provisional measures of protection have an *autonomous legal regime* of their own. This being so, it is clear to me that human vulnerability is a test even more compelling than "plausibility" of rights for the indication or ordering of provisional measures of protection. In so acknowledging and sustaining, one is contributing to the ongoing historical process of *humanization* of contemporary international law. (*ICJ Reports 2017*, p. 171, para. 44.)

72. Anticipatory in nature, provisional measures of protection are intended to prevent and avoid irreparable harm in situations of gravity

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(probability of irreparable harm) and urgency. The extreme vulnerability of the affected persons is an aggravating circumstance, rendering such provisional measures imperative. These latter, in my perception, are not "*mesures conservatoires*" (as in traditional, old-fashioned and unsatisfactory language), as they do require *change*, as in the *cas d'espèce*, so as to put an end to a *continuing situation* (cf. *infra*) affecting the rights of persons in utter vulnerability, if not defencelessness.

73. For years I have been sustaining that provisional measures of protection, needed by human beings (under human rights treaties, like the CERD Convention in the *cas d'espèce*), may become even more than *precautionary*, being in effect *tutelary*, particularly for vulnerable persons (potential victims), and directly related to realization of justice itself. Obligations emanating from such ordered measures are not necessarily the same as those ensuing from a Judgment as to the merits (and reparations), they may be entirely distinct (cf. *infra*). Particularly attentive to human beings in situations of vulnerability, provisional measures of protection, endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension.

IX. Towards the consolidation of the autonomous legal regime of provisional measures of protection

74. This is one of the aspects, and a significant one, of what I have been calling,—in several (more than twenty) of my individual opinions, **[461]** successively within two international jurisdictions, in the period 2000-2018,[46] the needed conformation of the *autonomous legal regime of provisional measures of protection*.[47] As I pointed out in my dissenting opinion in an ICJ Order (of 16 July 2013), at an early stage of the handling of two merged cases opposing two Central American States, even "the notion of victim (or of *potential* victim[48]), or injured

[46] Such individual opinions on the matter are reproduced in the collections: *(a) Judge A. A. Cançado Trindade—The Construction of a Humanized International Law—A Collection of Individual Opinions (1991-2013)*, Vol. I (IACtHR), Leiden, Brill/Nijhoff, 2014, pp. 799-852; Vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 1815-64; Vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 733-64; and *(b) Vers un nouveau* jus gentium *humanisé—Recueil des opinions individuelles du Juge A. A. Cançado Trindade [CIJ]*, Paris, L'Harmattan, 2018, pp. 143-224 and 884-6; and *(c) Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos [del Juez A. A. Cançado Trindade] en la Corte Interamericana de Derechos Humanos, 1991-2008)*, Vols. I-III, 2nd rev. ed., Mexico D.F., Ed. Cám. Dips., 2015, Vol. III, pp. 77-399.

[47] Cf. A. A. Cançado Trindade, *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

[48] On the notion of *potential* victims in the framework of the evolution of the notion of victim or the condition of the complainant in the domain of the international protection of human rights, cf.

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party, can (. . .) emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*"[49] (*ICJ Reports 2013*, p. 269, para. 75).

75. I am confident that we are at last moving towards the consolidation of the autonomous legal regime of provisional measures of protection, thus enhancing the preventive dimension of international law. After all, contemporary international tribunals have an important contribution to give to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of human beings, and to secure due compliance with the ordered provisional measures of protection.[50]

[462] 76. The component elements of this autonomous legal regime are: the rights to be protected; the corresponding obligations; the prompt determination of responsibility (in case of non-compliance), with its legal consequences, encompassing the duty of reparation for damages. Rights and obligations concerning provisional measures of protection are not the same as those pertaining to the merits of the cases, and the configuration of responsibility with all its legal consequences is prompt, without waiting for the decision on the merits. The notion of victim (or potential victim) itself—may I stress this point—marks presence already at this stage, irrespective of the decision as to the merits (cf. *supra*).

77. Provisional measures have, in recent years, been protecting growing numbers of persons in situations of vulnerability, transformed into a true jurisdictional *guarantee* of preventive character.[51] Hence the

A. A. Cançado Trindade, "Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit International de La Haye* (1987), Chap. XI, pp. 243-99, esp. pp. 271-92.

[49] Cf. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 16 July 2013, ICJ Reports 2013*, dissenting opinion of Judge Cançado Trindade, p. 269, para. 75.

[50] Cf., to this effect, (merged) cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica) Provisional Measures, Order of 22 November 2013, ICJ Reports 2013*, separate opinion of Judge Cançado Trindade, pp. 378-85, paras. 20-31 and p. 387, para. 40. The right of access to justice, also in the present domain (cf. para. 68, *supra*), is to be understood *lato sensu*, encompassing not only the formal access to a competent tribunal, but also the due process of law (equality of arms), and the faithful compliance with the decision; for a general study, cf. A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd ed., Santiago de Chile, Ed. Librotecnia, 2012, pp. 79-574; A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, pp. 1-236.

[51] Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-3; A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Brussels, Bruylant/

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autonomy of the international responsibility that non-compliance with them promptly generates. A study of the matter encompasses the general principles of law, always of great relevance.[52] Attention is to be focused on the common mission of contemporary international tribunals of realization of justice[53] as from an essentially humanist outlook.[54]

X. International law and the temporal dimension

78. A consideration of the aforementioned preventive dimension, furthermore, brings to the fore the time factor, and in particular the relationship **[463]** between international law and the temporal dimension. Such relationship is an ineluctable one, requiring far more attention than the one dispensed to it by international legal doctrine so far. In effect, the temporal dimension underlies the whole domain of international law, being interpreted and applied within time.

79. It ineluctably encompasses provisional measures of protection. In my dissenting opinion appended to the ICJ's Order of 28 May 2009 in the case of the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I warned *inter alia* that "[i]t is imperative to reduce or bridge the *décalage* between the time of victimized human beings and the time of human justice" (*ICJ Reports 2009*, p. 183, para. 49). Subsequently, I devote the whole of my separate opinion (*ICJ Reports 2011 (II)*, p. 566-607, paras. 1-117) appended to the ICJ's Order of 18 July 2011 in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)* to distinct

Nemesis, 2005, pp. 145-63; A. A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal*, Strasbourg/Kehl (2003), No 5-8, pp. 162-8; A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117.

[52] Cf., e.g., *inter alia*, A. A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2nd rev. ed., Brasília, FUNAG, 2017, pp. 25-454; A. A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", in *XXX Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, OAS (2003), pp. 359-415.

[53] A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça,* 2nd ed., Belo Horizonte, Edit. Del Rey, 2017, pp. 29-468.

[54] Cf. A. A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, The Hague/Fortaleza, IBDH/IIDH, 2016, pp. 11-283; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

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aspects of the temporal dimension in international law and its incidence on the granting of provisional measures of protection.[55]

80. After all, it is in the nature of law to accompany the regulatory function in society undergoing changes, contrary to what legal positivists assume in their static view of the legal order. The evolution of international law—acknowledged by the ICJ in an *obiter dictum* of its *célèbre* Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (of 21 June 1971, para. 53)—responds to the changing needs of all subjects of international law (including individuals) and of the international community as a whole.

81. The evolving international law is permeated by a major enigma, which, for its part, also permeates the existence of all subjects of law (including individuals): the passage of time. International law, emerging ultimately from human conscience, the universal juridical conscience, also has a *protective* function endowed with a preventive dimension, as illustrated by the significant expansion of provisional measures of protection in recent years.[56] Keeping the passage of time in mind, 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.

[464] *XI. Provisional measures of protection in continuing situations*

82. In the present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, at this stage of request of provisional measures of protection, there are some other considerations that I deem it fit to present, in this separate opinion, with regard to the alleged *continuing situation* in breach of human rights, in addition to those I have already made (cf. Section VI(3) *supra*). Even if the evidence already presented to the ICJ so far may appear insufficient, there are

[55] I pondered *inter alia* that, when the protection by means of provisional measures is intended to extend to "the *spiritual* needs of human beings", bringing to the fore, as in the *cas d'espèce*, "the safeguard of cultural and spiritual world heritage", the time dimension is even wider, bringing back "timelessness" (*ICJ Reports 2011 (II)*, p. 600, para. 101).

[56] Cf. A. A. Cançado Trindade, *International Law for Humankind—Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/Hague Academy of International Law, 2013, pp. 31-4, 38-47 and 50-1.

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sources of it that may be regarded relevant to the consideration of such a *continuing situation* at this stage.

83. In this respect, for example, the Report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) of December 2017,[57] brought to the attention of the ICJ in the present proceedings, gave an account of a *continuing situation* (an "ongoing crisis on human rights", with "continuing implications", and "cases of temporary or potentially durable separation of families", among other "long-standing human rights issues", to the detriment, e.g., of "migrant workers").[58]

84. The OHCHR, having decided to monitor *in loco* the consequences on human rights of the UAE's decision or announcement of 5 June 2017, reported, one semester later, on the suspension and "considerable restrictions" on freedom of movement "to and from Qatar" (paras. 23 and 26), with "continuing implications to date"; such restrictions disrupted family life, affected the right to education, as Qatari students were prevented from pursuing their studies where they were (paras. 26 and 50). The aforementioned OHCHR Report (of December 2017) referred to "cases of temporary or potentially durable separation of families", with all their consequences (para. 32).

85. There was also an impact on the right to health, with humanitarian consequences (para. 43), as some people had to travel abroad to receive their medical treatment or to undergo surgery (para. 44). As to the restrictions on freedom of expression, the OHCHR reported that the unilateral measures have been accompanied by a "widespread defamation and hatred campaign against Qatar and Qataris in various media" (paras. 14 and 19). The Report, furthermore, addressed another long-standing human rights issue, affecting the rights of migrant workers and non-citizens **[465]** (paras. 54-8). The Report at last considered the restrictive unilateral measures as arbitrary (para. 60).

86. Likewise, a Joint Communication from the UN Special Procedures Mandate Holders of the UN Human Rights Council to the UAE,[59] of 18 August 2017, the Special Rapporteurs warned that

[57] The OHCHR Technical Mission visited Qatar on 17-24 November 2017, where it conducted its research on documents provided by distinct entities, besides interviews with "about 40 individuals" (paras. 4-6).

[58] Paragraphs 4(i), 26, 32-3 and 54, respectively. The Report reiteratedly referred to the problem of continuing separations of families (paras. 32-3, 37 and 64). It warned that "measures targeting individuals on the basis of their Qatari nationality or their links with Qatar can be qualified as non-disproportionate and discriminatory" (para. 61). It further warned that such unilateral measures were "premeditated" and "accompanied by a widespread defamation and hatred campaign" (paras. 14-15).

[59] Namely: Special Rapporteur on the human rights of migrants; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the

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the decision announced by the UAE on 5 June 2017 "has threatened the most vulnerable groups, including women, children, persons with disabilities and older persons" (p. 1). It has, furthermore, it continued, led to the separation of families, the interruption of studies in schools or universities, and has also affected the right to health (pp. 2-3 and 5), among others. The Special Rapporteurs then drew attention to "the urgency of the matter" and the "extreme gravity" of the situation, and urged that "all necessary interim measures be taken to halt the alleged violations and prevent their reoccurrence" (p. 7).

87. Among other reports referred to in the course of the present proceedings before the ICJ, were those of non-governmental organizations (NGOs) with much experience at international level, such as, *inter alia*, Amnesty International and Human Rights Watch. In its very recent Report (of 5 June 2018), Amnesty International referred to the situation of continuity harming separated families, and individuals (among whom migrant workers, children and students).[60] Accordingly, it called upon the States concerned[61] to "immediately lift all arbitrary restrictions" imposed on Qatari nationals, and to respect human rights.[62]

88. For its part, Human Rights Watch, in its earlier Report (of 12 July 2017), likewise warned against "human rights violations" in the separation of families, the deprivation of migrant workers, the discrimination against women, the interruption of medical treatment, and the interruption of education.[63] Both Human Rights Watch and Amnesty International **[466]** have provided accounts, in their respective reports, of information obtained from interviews with those victimized *in loco*.

89. In effect, 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. May I briefly recall here three examples, along the last decade. In the case concerning the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, as the ICJ in its Order of 28 May 2009 decided not to indicate

right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on the promotion and protection of human rights while countering terrorism; and Special Rapporteur on the right to education (pursuant to UN Human Rights Council resolutions 34/18, 33/9, 34/21, 34/35, 31/3, and 26/17).

[60] Amnesty International, [Report:] "One Year Since the Gulf Crisis, Families Are Left Facing an Uncertain Future", of 5 June 2018, p. 1.

[61] The UAE, Saudi Arabia and Bahrain.

[62] Amnesty International, *op. cit. supra* note 60, p. 3.

[63] Human Rights Watch, [Report:] "Qatar: Isolation Causing Rights Abuses", dated 12 July 2017, pp. 1, 3-4 and 6-10 (Application instituting proceedings, Annex 10).

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provisional measures, I appended thereto a dissenting opinion, wherein —as already pointed out (para. 79, *supra*)—I drew attention to the *décalage* to be bridged between the time of human beings and the time of human justice (paras. 35-64).

90. Urgency and probability of irreparable damage, I proceeded, were quite clear, in the *continuing situation* of lack of access to justice of the victims of the Hissène Habré regime (1982-1990) in Chad. This right of access to justice assumed a "paramount importance" (paras. 29 and 74-7), I added, in the *cas d'espèce*, under the UN Convention against Torture; furthermore, I dwelt upon the component elements of the autonomous legal regime of provisional measures of protection (paras. 8-14, 26-9 and 65-73). Such measures were necessary for the safeguard of the right to the realization of justice (paras. 78-96 and 101).

91. In the case on *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as the ICJ, in its Order of 6 July 2010 found the counter-claim of Italy inadmissible, once again I appended thereto a dissenting opinion, wherein I examined at depth the notion of "*continuing situation*" in the factual context of the *cas d'espèce*, as debated between the contending Parties (paras. 55-9 and 92-100). My dissenting opinion encompassed the origins of a "continuing situation" in international legal doctrine (paras. 60-4); the configuration of a "continuing situation" in international litigation and case law (paras. 65-83); the configuration of a "continuing situation" in international legal conceptualization at normative level (paras. 84-91).

92. And, once again, I warned against the pitfalls of State voluntarism (paras. 101-23). Suffice it here only to refer to my lengthy reflections on the notion of "continuing situation" in the case on *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as I see no need to reiterate them *expressis verbis* herein. What cannot pass unnoticed is that a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to decisions—as just seen—on provisional measures and counter-claim (*supra*), it has also been addressed in decision as to the merits.

93. This is illustrated by the aforementioned case of *Ahmadou Sadio Diallo* (*(Republic of Guinea* v. *Democratic Republic of the Congo)*, merits, **[467]** judgment of 30 November 2010). Its factual context disclosed a *continuing situation* of breaches of Mr Ahmadou Sadio Diallo's individual rights in the period extending from 1988 to 1996. The griefs suffered by the victim *extended in time* (the arrests and detentions of 1988-1989 followed by those of 1995-1996, prior to his expulsion

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from the country of residence), in breach of the relevant provisions of human rights treaties (the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights) as well as Article 36(1)*(b)* of the Vienna Convention on Consular Relations. His griefs were surrounded by arbitrariness on the part of State authorities,[64] and amounted to a wrongful *continuing situation*, marked by the prolonged lack of access to justice.

XII. Epilogue: A Recapitulation

94. This is, as seen, 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* v. *United Arab Emirates)* concerns the rights protected thereunder, which are the rights of human beings, and not rights of States.

95. This has a direct bearing on the consideration of a request for provisional measures of protection under a human rights convention. Provisional measures, with a preventive dimension, have been undergoing a significant evolution, moving further towards the consolidation of the autonomous legal regime of their own, to the benefit of the *titulaires* of rights. In another endeavour to keep paving this path, may I, last but not least, proceed to a brief recapitulation of the main points I deemed it fit to make, particularly in respect of such provisional measures, under the CERD Convention, in the course of the present separate opinion.

[468] 96. *Primus*: The principle of equality and non-discrimination lies in the foundations of the rights protected under the CERD Convention also by means of provisional measures. The historical formation of the *corpus juris* of international protection of human rights

[64] At the time of his arrests and detention. Mr Ahmadou Sadio Diallo was not informed of the charges against him, nor could he have availed himself without delay of his right to information on consular assistance. For its part, the CERD Committee, in its practice, has also been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, e.g., migrants); cf. R. de Gouttes, "Regards comparatifs sur deux organes internationaux chargés de la lutte contre le racisme: le Comité des Nations Unies pour l'Elimination de la Discrimination Raciale (CERD) et la Commission Européenne contre le Racisme et l'Intolérance (ECRI)", in *Réciprocité et universalité: Sources et regimes du droit international des droits de l'homme—Mélanges en l'honneur du Prof. E. Decaux*, Paris, Pedone, 2017, pp. 1015-22, esp. pp. 1017 and 1020.

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has much contributed to a growing awareness of the importance of the prevalence of the basic principle of equality and non-discrimination. *Secundus*: The work of UN supervisory organs—among which the CERD Committee—bears witness of such growing awareness.

97. *Tertius*: It is necessary nowadays that the advances in respect of the basic principle of equality and non-discrimination, at normative and jurisprudential levels, are also accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle. *Quartus*: The protection sought under the CERD Convention is also against arbitrariness, as in the *cas d'espèce*. This point has not escaped the attention of other international tribunals, entrusted with the interpretation and application of distinct human rights conventions.

98. *Quintus*: Human rights treaties, including the CERD Convention, conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party (the real or potential victim), and the prohibition of arbitrary measures, so as also to secure the prevalence of the rule of law (*la prééminence du droit*). *Sextus*: As to the points discussed in the present proceedings of the *cas d'espèce*, there are two of them that require clarification: the rationale of the local remedies rule in the international protection of human rights, and the implications of a continuing situation affecting or breaching human rights.

99. *Septimus*: The local remedies rule, as a condition of admissibility of international claims, cannot be invoked as a "precondition" for the consideration of urgent requests of provisional measures of protection. *Octavus*: The rationale of the local remedies rule in human rights protection is entirely distinct from that of its application in the practice of diplomatic protection of nationals abroad: in human rights protection the rule is focused on effectiveness of local remedies and *redress*, while in diplomatic protection it is focused on the process of *exhaustion* of such remedies.

100. *Nonus*: The CERD Committee itself has underlined the components of effectiveness of local remedies and redress. Human rights protection is victim-oriented, it is a law of protection of the weaker party (*droit de protection*), as upheld by international human rights tribunals; discretionary diplomatic protection, for its part, remains State-oriented. *Decimus*: There is no ground for attempting to add, to the so-called "plausibility" of rights, the so-called "plausibility" of admissibility, as an additional "precondition" for provisional measures of protection.

[469] 101. *Undecimus*: In a *continuing situation*, the rights requiring protection are clearly known, there being no sense to wonder whether

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they are "plausible". *Duodecimus*: The proper understanding of compromissory clauses under human rights conventions is necessarily attentive to the nature and substance of those conventions, as well as to their object and purpose; such clauses cannot be interpreted attempting to find "preconditions", rendering access to justice under human rights conventions particularly difficult.

102. *Tertius decimus*: The aforementioned prohibition of arbitrariness brings to the fore the issue of the *vulnerability* of those affected by discriminatory measures; requests of provisional measures of protection, in cases like the present, are intended to put an end to a continuing situation of vulnerability of the affected persons (potential victims). *Quartus decimus*: Human vulnerability is a test more compelling than so-called "plausibility" of rights for the ordering of provisional measures of protection under human rights treaties.

103. *Quintus decimus*: There has been an advance towards the consolidation of what I have been calling, along the years, the *autonomous legal regime* of provisional measures of protection. *Sextus decimus*: Provisional measures of protection have, in recent years, been protecting growing numbers of persons in situations of vulnerability; they have thus been transformed into a true jurisdictional *guarantee* of preventive character. *Septimus decimus*: Such preventive character brings to the fore the temporal dimension in the application of the provisional measures of protection, e.g., when they are intended, as in the present case, to put an end to a continuing situation affecting individual rights.

104. *Duodevicesimus*: In respect of the present case, there have been UN reports and other documents giving accounts of a *continuing situation* affecting human rights under the CERD Convention. *Undevicesimus*: The *continuing situation* in breach of human rights is a point which has had an incidence in earlier cases before the ICJ as well, at distinct stages of the proceedings. *Vicesimus*: 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.

[470] DISSENTING OPINION OF JUDGE BHANDARI

1. On a close and careful examination of the pleadings, documents and submissions, I came to the conclusion that, in the facts and circumstances of this case, the Court should not have indicated provisional measures.

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2. The case of Qatar is based on the UAE's declaration of 5 June 2017, which is reproduced in relevant part as under:

UAE affirms its complete commitment and support to the Gulf Cooperation Council and to the security and stability of the GCC States. Within this framework, and based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements, it has been decided to take the following measures that are necessary for safeguarding the interests of the GCC States in general and those of the brotherly Qatari people in particular:

(1) In support of the statements issued by the sisterly Kingdom of Bahrain and sisterly Kingdom of Saudi Arabia, the United Arab Emirates severs all relations with the State of Qatar, including breaking off diplomatic relations, and gives Qatari diplomats 48 hours to leave UAE.
(2) Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.
(3) Closure of UAE airspace and seaports for all Qataris in 24 hours and banning all Qatari means of transportation, coming to or leaving the UAE, from crossing, entering or leaving the UAE territories, and taking all legal measures in collaboration with friendly countries and international companies with regards to Qataris using the UAE airspace and territorial waters, from and to Qatar, for national security considerations.

The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to Doha and its Complementary Arrangement in **[471]** 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its sustained endeavours to promote the ideologies of Daesh and Al Qaeda across its direct and indirect media.[1]

3. The UAE made unqualified statements that the declaration of 5 June 2017 has not been implemented or given effect to.[2] Conversely, Qatar could not produce sufficiently cogent evidence, in writing or orally, to demonstrate that the declaration of 5 June 2017 has been implemented. Furthermore, on 5 July 2018, after the closure of the oral proceedings, the UAE's Ministry of Foreign Affairs made an unqualified undertaking. The relevant portion of this undertaking states that:

[1] Qatar's Application instituting proceedings, p. 22, para. 22.
[2] CR 2018/13, p. 63, para. 25 (Shaw); *ibid.*, p. 64, para. 26 (Shaw); CR 2018/15, p. 39, para. 12 (Shaw).

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[s]ince its announcement on June 5, 2017, pursuant to which the United Arab Emirates (UAE) took certain measures against Qatar for national security reasons, the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE Government.

The UAE Ministry of Foreign Affairs and International Cooperation wishes to confirm that Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory.

4. In view of the UAE's explanation that the declaration of 5 June 2017 has not been implemented, and of the unilateral undertaking of 5 July 2018, the risk of irreparable prejudice to the rights of Qatar is not apparent. Unilateral undertakings before the Court can create obligations under international law, as the Court confirmed in *Nuclear Tests (Australia* v. *France)*,[3] *Nuclear Tests (New Zealand* v. *France)*,[4] and *Maritime Dispute (Peru* v. *Chile)*.[5] Such undertakings can also have an impact on provisional measures proceedings, if made in the context of such proceedings, as it emerges from the jurisprudence of the Court and of the International Tribunal for the Law of the Sea (ITLOS).

[472] 5. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the Co-Agent of Senegal made a solemn declaration under which: "Senegal will not allow Mr. Habré to leave Senegal while the present case is pending before the Court. Senegal has not the intention to allow Mr. Habré to leave the territory while the present case is pending before the Court."[6]

The Court held that, "taking note of the assurances given by Senegal ... the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order".[7] In *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the Attorney General of Australia made a written undertaking, under which the documents seized from Timor-Leste's legal counsel would "not be used by any part of the Australian Government for any purpose other than national security purposes".[8]

[3] *Nuclear Tests (Australia* v. *France), Judgment, ICJ Reports 1974*, p. 267, para. 43.
[4] *Nuclear Tests (New Zealand* v. *France), Judgment, ICJ Reports 1974*, p. 472, para. 46.
[5] *Maritime Dispute (Peru* v. *Chile), Judgment, ICJ Reports 2014*, p. 34, para. 78.
[6] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, ICJ Reports 2009*, p. 154, para. 68.
[7] *Ibid.*, p. 155, para. 72.
[8] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, ICJ Reports 2014*, p. 156, para. 38.

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The Court held that, "[g]iven that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material … there remains a risk of disclosure of this potentially highly prejudicial information".[9]

6. In *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*, heard by ITLOS under Article 290 of the United Nations Convention on the Law of the Sea,[10] the Agent of Singapore made a "commitment", according to which:

> [i]f … Malaysia believes that Singapore had missed some point or misinterpreted some data and can point to a specific and unlawful adverse effect that would be avoided by suspending some part of the present works, Singapore would carefully study Malaysia's evidence. If the evidence were to prove compelling, Singapore would seriously re-examine its works and consider taking such steps as are necessary and proper, including a suspension, … to deal with the adverse effect in question.[11]

[473] ITLOS placed on record the commitment made by Singapore.[12] However, it seems that ITLOS did not consider that such a commitment was sufficient to remove the risk of irreparable prejudice, since it unanimously prescribed provisional measures.[13]

7. The jurisprudence suggests that, in order to remove the risk of irreparable prejudice, an undertaking or commitment must be unqualified. Australia's solemn undertaking was insufficient because it stated that the documents allegedly belonging to Timor-Leste could be used if national security so required. Similarly, Singapore's commitment appears to have been insufficient because it was worded in vague terms, as it stated that Singapore "would carefully study" available evidence, and only "[i]f the evidence were to prove compelling", Singapore pledged that it "would seriously re-examine its works". By contrast, the undertaking of the Co-Agent of Senegal was unqualified, as it did not list any circumstances under which Mr Habré would have been allowed to leave Senegal.

8. In the present case, the unqualified undertaking included in the statement of the UAE's Ministry of Foreign Affairs of 5 July 2018 does not seem to have been qualified by any exceptions. In this sense, it is similar to the undertaking in *Questions relating to the Obligation to*

[9] *Ibid.*, p. 158, para. 46.
[10] United Nations, *Treaty Series (UNTS)*, Vol. 1833, p. 3.
[11] *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 24, para. 85.
[12] *ITLOS Reports 2003*, p. 25, para. 88.
[13] *Ibid.*, pp. 26-8, para. 106.

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Prosecute or Extradite (Belgium v. *Senegal)*, and different from the undertakings in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)* and *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*. Qataris already residing in the UAE "need not apply for permission to continue residence in the UAE", while only being encouraged to "obtain prior permission for re-entry into UAE territory". Based on this wording, it would appear that Qataris residing in the UAE, but currently located outside the UAE, can re-enter the UAE without hindrance. Qataris residing overseas are required "to obtain prior permission for entry into the UAE". The granting of right to entry and right of abode to any foreign citizen is a prerogative falling within the reserved domain of the UAE. Consequently, that "permission may be granted . . . at the discretion of the UAE Government" could not be seen as an exception to the undertaking that residing Qataris may continue legally to reside in the UAE, and that non-residing Qataris need to obtain permission to enter the UAE. In the light of this undertaking, it is my view that there is no irreparable prejudice in the circumstances of this case.

9. The existence of urgency in a request for provisional measures is fundamentally fact-dependent. The unqualified undertaking by the UAE, **[474]** which I believe to have removed the risk of irreparable prejudice in the circumstances, has an impact on urgency. If there is no irreparable prejudice, there can be no urgency, since urgency is to be understood as an attribute of irreparable prejudice. In the most recent orders on provisional measures, the Court has consistently stated that urgency is a "real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision".[14] In its orders on provisional measures, the Court itself examines these two requirements together. Without irreparable prejudice, there can be no urgency.

[14] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, ICJ Reports 2009*, p. 152, para. 62; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, ICJ Reports 2011 (I)*, p. 21, para. 64; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, ICJ Reports 2014*, p. 154, para. 32; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1168, para. 83; *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, ICJ Reports 2017*, p. 136, para. 89; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ Reports 2017*, p. 243, para. 50.

10. For these reasons, it is my view that, in the facts and circumstances of the present case, the Court ought not to have exercised its power to indicate provisional measures under Article 41 of the Statute.

[475] DISSENTING OPINION OF JUDGE CRAWFORD

1. Qatar's Request for provisional measures faces two principal difficulties, one legal, the other evidential. The legal difficulty is 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 (equated to racial discrimination and prohibited per se) and differentiation on grounds of nationality (not prohibited as such). Moreover, that distinction finds its reflection in widespread State practice giving preferences to nationals of some countries over others in matters such as the rights to enter or to reside, entitlement to social security, university fees and many other things, in peace and during armed conflict. Prima facie at least, the UAE measures at issue here, deriving from the statement of 5 June 2017, target Qataris on account of their present nationality, not their national origin. This does not mean that collective expulsion of persons of a certain nationality is lawful under international law; it is not. It is simply that it is not apparently covered by the CERD, the only basis for jurisdiction relied on by Qatar.

2. The factual difficulty is that it is not clear from the evidence that the measures announced against Qatari nationals on 5 June 2017 are still in effect, or that any of the measures that are in effect could cause irreparable prejudice to the rights which are the subject of these judicial proceedings.

3. The UAE Ministry of Foreign Affairs and International Cooperation announced in its statement of 5 June 2017 that it was taking "measures that are necessary for safeguarding the interests" of the Gulf Cooperation Council States. One of the measures, announced in paragraph 2 of the statement, was:

> Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE **[476]** 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.

4. Unlike the inter-State measures (closure of UAE airspace and seaports, etc.) set out in the statement, it appears that no legislative or

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administrative action was taken to give effect to paragraph 2. The UAE's Agent stated in oral argument that no Qataris were deported or expelled pursuant to paragraph 2.[1] Qatar did not contradict this statement, although it argued that the statement of 5 June 2017 itself amounted to an "order of expulsion".[2]

5. However that may be, paragraph 2 stood as a statement of policy and it appears that a significant number of Qataris left the UAE on the strength of the statement. To evidence this departure, Qatar presented a number of reports by national and international human rights organizations. A report by the Office of the United Nations High Commissioner for Human Rights noted that Qataris previously resident in the UAE had left the UAE following the statement of June 2017, leaving behind families, businesses, employment, property and studies.[3] Further reports contain accounts of interviews with Qataris who had similarly left the UAE.[4] Overall the Qatari National Human Rights Committee estimates that it received 1,052 complaints in relation to the impact of the statement of 5 June 2017, in the period to May 2018.[5] Many of these complaints were from individuals in mixed Qatari-Emirati marriages who insisted they were no longer able to live with their family members due to the measures contained in the statement.

6. On 11 June 2017 the Ministry of Interior of the UAE set up a hotline to assist with the "humanitarian circumstances of Emirati-Qatari joint families", specifically to provide a procedure through which individuals separated from their families could apply for a permit to enter the **[477]** UAE.[6] The UAE supplied evidence that of 1,390 requests for permits, 1,378 have been approved.[7] Qatar argued that approvals for Qataris to enter the UAE were temporary and needed to

[1] CR 2018/13, p. 12, para. 11 (Alnowais).
[2] CR 2018/14, p. 35, para. 19 (Goldsmith).
[3] Office of the United Nations High Commissioner for Human Rights (OHCHR) Technical Mission to the State of Qatar, 17-24 November, "Report on the Impact of the Gulf Crisis on Human Rights", dated December 2017, p. 5 (Application of Qatar, hereinafter "AQ", Annex 16).
[4] See, for example, Human Rights Watch (HRW), "Qatar: Isolation Causing Rights Abuses", dated 12 July 2017, p. 7 (AQ, Annex 10); Qatar's National Human Rights Committee (NHRC), "100 Days under the Blockade, Third Report on Human Rights Violations Caused by the Blockade Imposed on the State of Qatar", dated 30 August 2017, p. 7 (AQ, Annex 12); NHRC, "'Six Months of Violations, What Happens Now?' The Fourth General Report on the Violations of Human Rights Arising from the Blockade of the State of Qatar", dated 5 December 2017, p. 7 (AQ, Annex 17).
[5] NHRC, "Fifth General Report, Continuation of Human Rights: A Year of the Blockade Imposed on Qatar", dated June 2018, p. 13 (AQ, Annex 22).
[6] Exhibit 2 of the documents deposited by the UAE, 25 June 2018.
[7] Exhibit 3 of the documents deposited by the UAE, 25 June 2018.

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be sought for every proposed entry into the UAE.[8] Qatar further described the hotline as a "police security channel" provided by the Abu Dhabi police.[9] In this respect there is evidence that some individuals are wary of contacting the hotline because they are worried that it will be used to identify Qataris who have not returned to Qatar.[10]

7. Of those Qatari nationals who left the UAE, a significant number have returned to the UAE. The UAE's Agent stated that thousands of applications by Qataris for permits to enter the UAE have been approved, and that Qatari nationals have entered and exited the UAE on over 8,000 occasions, since June 2017.[11]

8. Many of the consequences of the statement of June 2017 (family separation, difficulties in accessing property and courts, access to education and transcripts, and access to medical care) appear to have flowed from the fact that Qataris were located outside the UAE, rather than from deliberate policy—though these consequences were unfortunate and harmful to those concerned.

9. It is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018. Most of the reports by national and international human rights organizations submitted by Qatar relate to the period June to August 2017.[12] While Qatar has provided a recent (fifth) report by its National Human Rights Committee, 896 of the 1,052 complaints received by the Committee in the period June 2017 to May 2018 had already been received by the end of August 2017, according to an earlier (third) report by the Committee.[13] The most recent (fifth) report by Qatar's National Human Rights Committee reiterates findings **[478]** of earlier reports by other human rights organizations, without specifically identifying cases of forced departures of Qataris from the UAE that occurred in recent months.[14]

[8] CR 2018/14, p. 37, para. 25 (Goldsmith).
[9] *Ibid.*, p. 36, para. 22 (Goldsmith).
[10] HRW, "Qatar: Isolation Causing Rights Abuses", p. 6 (AQ, Annex 10).
[11] CR 2018/13, p. 13, paras. 13-14 (Alnowais). The UAE also stated that the number of Qataris living in the UAE now is "about the same as before 5 June 2017": CR 2018/15, p. 27, para. 6 (Buderi). The UAE Federal Authority for Identity and Citizenship estimated that as at 20 June 2018 there were 2,194 Qataris in the UAE: Exhibit 11, documents deposited by the UAE, 25 June 2018.
[12] Namely, Annexes 5, 6, 8, 10, 11 and 12 of Qatar's Application.
[13] NHRC, "100 Days under the Blockade, Third Report on Human Rights Violations Caused by the Blockade Imposed on the State of Qatar", dated 30 August 2017, p. 4 (AQ, Annex 12). Nine hundred and ninety-seven of the total number of complaints had been received by December 2017, according to the Committee's fourth report, 5 December 2017, p. 5 (AQ, Annex 17).
[14] NHRC, "Fifth General Report, Continuation of Human Rights: A Year of the Blockade Imposed on Qatar", dated June 2018, pp. 15-16 (AQ, Annex 22).

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10. At the end of the oral hearings, I asked the Parties *(a)* whether the UAE's statement of 5 June 2017, and in particular its paragraph 2, was still in effect and *(b)* whether the UAE had made any further announcement clarifying that Qataris residing in the UAE could elect to stay in the UAE. The UAE responded that the statement had been issued by the Ministry of Foreign Affairs and International Cooperation, which did not have the legislative authority to establish the measures set out in the statement. The UAE maintained therefore that there was no need for an announcement clarifying the entry and residence requirements applicable to Qatari nationals in the UAE.[15]

11. Qatar on the other hand contended that the UAE has failed to disavow the statement of 5 June 2017 and that the policy reflected in the statement continues to have a detrimental effect on Qataris. Qatar maintains that the continuing situation has not been resolved and necessitates the indication of provisional measures.[16]

12. Despite its response to my question, the UAE Ministry of Foreign Affairs and International Cooperation did issue an official statement clarifying to some extent the entry and residence requirements applicable to Qataris in the UAE on 5 July 2018. That statement is publicly available on the website of the Ministry and contains the following:

> Since its announcement on June 5, 2017 ... the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE government.
>
> The UAE Ministry of Foreign Affairs and International Cooperation wishes to confirm that Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory.
>
> All applications for entry clearance may be made through the telephone hotline announced on June 11, 2017.

13. It is established that the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there **[479]** is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives

[15] Response of the UAE to the question of Judge Crawford, 3 July 2018.
[16] Comments of Qatar on the written reply of the UAE, 5 July 2018.

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its final decision.[17] The power of the Court to indicate provisional measures has as its object to ensure that such prejudice does not occur.[18]

14. The Court accepts that certain rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm (Order, para. 67). I do not disagree with this general statement. However, the Court fails to identify any evidence to support the further statement 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 CERD. Most importantly, the UAE's statement of 5 July 2018 is not mentioned. The UAE's recent statement clarifies the legal position of Qataris living in the UAE, namely that they "need not apply for permission to continue residence in the UAE". The statement further clarifies that Qataris can apply for entry clearance to the UAE via a hotline.

15. The further announcement in the UAE statement of 5 July 2018 that applications for entry clearance may be made via the telephone hotline is supported by 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 (see above paras. 6-7). This evidence is again not dealt with by the Court.

16. Whilst there can be no doubt that the process for Qatari nationals seeking to enter the UAE has become more difficult, the state of affairs confirmed by 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 that irreparable harm will be caused to the rights in dispute before the Court gives its final decision on the merits, unless measures are ordered. The risks that the Court seeks to curb through the provisional measures ordered have been to a large extent removed. The Court cannot ignore developments in this case since the Request for the indication of provisional measures. One role of the Court is the peaceful settlement of disputes and if States are willing to address problems through actions or commitments, that is to be encouraged.

[17] See among many others, *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, ICJ Reports 2017*, p. 136, para. 89, quoting *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1168, para. 83.

[18] *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, ICJ Reports 2008*, p. 388, para. 118.

[480] 17. In view of the conclusion that there is no risk of irreparable prejudice in this case, it is unnecessary to consider the legal question identified in paragraph 1 of this opinion, viz., whether the UAE's statement of 5 June 2017 plausibly implicates rights under the CERD as invoked by Qatar, which equated national origin with present nationality. Qatar's Request for the indication of provisional measures fails on the facts.

18. Finally, I note that the provisional measures ordered by the Court are in themselves not objectionable. It is clear that the situation of Qataris still residing in the UAE, or wishing to travel to the UAE, became more difficult after 5 June 2017 and I trust that any remaining difficulties will be alleviated by the imposition of these measures by the Court. However, the legal requirements for the indication of provisional measures are binding. In this case, the requirement of irreparable prejudice and urgency is not met.

[481] DISSENTING OPINION OF JUDGE SALAM

1. I regret that I am unable to support the conclusions reached by the majority on the prima facie jurisdiction of the Court to indicate the provisional measures requested by Qatar, which seeks to found the Court's jurisdiction in this case on Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD").

2. I am convinced that the Court does not have prima facie jurisdiction *ratione materiae*, in so far as the dispute between the Parties does not appear to concern the interpretation or application of CERD. It is clear from Article 1 of CERD that this Convention applies to "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin". There is, however, no mention of discrimination on the basis of "nationality", the object of the Applicant's complaints.

3. Moreover, when I read that provision in the light of Article 31 of the 1969 Vienna Convention on the Law of Treaties, which calls for a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", I feel bound to make the following observations:

(a) The terms "national or ethnic origin" used in the Convention differ in their ordinary meaning to the term nationality.
(b) As regards context, CERD was adopted against a historical background of decolonization and post-decolonization and was part of

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that effort to eliminate all forms of discrimination and racial segregation. Indeed, its preamble states:

> Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,
>
> . . .
>
> Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,
>
> **[482]**
>
> . . .
>
> Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation.

(c) The aim of CERD is thus to bring an end, in the decolonization and post-decolonization period, to all manifestations and governmental policies of discrimination based on racial superiority or hatred; it does not concern questions relating to nationality.

(d) It is thus forms of "racial" discrimination that constitute the specific object of the Convention, and not any form of discrimination "in general". Otherwise, reference would have been made to other types of serious discrimination based on a marker of a group's identity, such as religion, which is not the case here. Moreover, there are other international instruments which address questions relating to nationality, or discrimination in general such as the Universal Declaration of Human Rights and the two international covenants of 1966.[1]

4. Furthermore, I would note that in the case concerning the *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)*, the dispute related to the question of racial discrimination against Crimean Tatars and "ethnic Ukrainians" (not Ukrainian

[1] See, in particular, Article 13 of the International Covenant on Civil and Political Rights.

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nationals) in Crimea (*Provisional Measures, Order of 19 April 2017, ICJ Reports 2017*, p. 120, para. 37). Similarly, in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the parties disagreed as to whether the events which took place in South Ossetia and Abkhazia involved racial discrimination of "ethnic Georgians" (and not Georgian nationals) living in those regions (*Provisional Measures, Order of 15 October 2008, ICJ Reports 2008*, p. 387, para. 111). The Court has thus only had occasion to rule on cases concerning discrimination based on ethnic origin, not "national origin", and has therefore not had to address the question whether this notion is distinct from that of "nationality".

5. This question of the distinction between "nationality" and "national origin" should not, in my view, admit of any confusion. They are two different notions. An example that clearly illustrates this difference is the **[483]** well-known case of American citizens of Japanese origin who were incarcerated following the attack on Pearl Harbor during the Second World War. Despite having American nationality, these citizens were subject to racial discrimination based on their "national origin", not their nationality, and were rounded up and held in "War Relocation Camps".[2] A similar type of discrimination based on "national origin" also affected a large number of individuals of German origin, "regardless of their nationality at that time", in several countries after both the First and Second World Wars.

6. I would also point out that the distinction to be drawn between "nationality" and "national origin" is confirmed by the *travaux préparatoires* of CERD, particularly the proposed amendments to the wording of Article 1.[3]

7. In any event, had States wanted to say "nationality" rather than "national origin" in Article 1 of CERD, they could have done so. Likewise, they could have used the wording "nationality and national origin" had they intended to include both categories, which they did not do.

8. I would further note that, regardless of the "great weight" that should be ascribed to the work of an "independent body" such as the CERD Committee (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, p. 664, para. 66), the fact remains that the recommendations of that

[2] For background on this matter, see the report of the US Congress Commission on Wartime Relocation and Internment of Civilians (CWRIC), published on 24 February 1983 and entitled "Personal Justice Denied", https://www.archives.gov/research/japanese-americans/justice-denied.

[3] See, among others, UN docs. A/C.3/SR.1304, A/C.3/SR.130 and A/6181.

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Committee cannot be considered to be an expression of a subsequent practice of the parties to CERD (in the sense of Article 31, paragraph 3*(b)*, of the 1969 Vienna Convention on the Law of Treaties).

9. In conclusion, although in my opinion the dispute between the Parties does not fall within the scope of CERD, I would note that in the case concerning the *Legality of Use of Force (Yugoslavia* v. *United Kingdom)*, while the Court found that it lacked prima facie jurisdiction to entertain Yugoslavia's Application and "[could not] therefore indicate any provisional measure whatsoever" (*Provisional Measures, Order of 2 June 1999, ICJ Reports 1999 (II)*, p. 839, para. 37), it nonetheless pointed out that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" (*ibid.*, para. 40). With that in mind, it requested that the parties "take care not to aggravate or extend the dispute" (*ibid.*, para. 41). The Court adopted the same approach in the case concerning *Armed Activities on the Territory of the Congo (New* **[484]** *Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*: while also finding in this case that it did not have prima facie jurisdiction to indicate provisional measures (*Provisional Measures, Order of 10 July 2002, ICJ Reports 2002*, p. 249, para. 89), the Court stressed "the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently" (*ibid.*, p. 250, para. 93).

10. By the same token, and taking account of Qatar's claim that Qataris residing in the United Arab Emirates have been in a vulnerable situation since 5 June 2017, although I believe that 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.

11. The conclusion I have reached makes it unnecessary for me to address the other conditions mentioned in Article 22 of CERD.

[485] DISSENTING OPINION OF JUDGE AD HOC COT

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

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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 (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ Reports 2017*, p. 245, para. 60; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, ICJ Reports 2016 (II)*, p. 1171, para. 98.)

4. Accordingly, pursuant to Practice Direction XI, which the President **[486]** 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 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*

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v. *Denmark), Provisional Measures, Order of 29 July 1991, ICJ 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, ICJ Reports 2017*, pp. 144-5, 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, ICJ 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 **[487]** 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. 37-8, paras. 21-3, and p. 40, paras. 27-9 (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

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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, ICJ Reports 2017*, pp. 131-2, paras. 74-6, and p. 135, paras. 81-3). 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)* and *Certain Activities Carried Out by* **[488]** *Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, ICJ 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.)

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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,

> the 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 (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ 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, ICJ 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, ICJ Reports 2008*, p. 396, para. 142).

[489] 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, ICJ 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.

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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 (paragraph 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 **[490]** 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

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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, Annex 16 to the Application, paras. 43-4) 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 **[491]** 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

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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, ICJ Reports 1950*, p. 229) and bad faith must not be presumed (United Nations, *Tacna-Arica Question (Chile, Peru), Award of 4 March 1925, Report of International Arbitral Awards, (RIAA)*, Vol. II, p. 930; *Affaire du Lac Lanoux (Spain, France), Award of 16 November 1957*, *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, PCIJ, 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)* and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, ICJ 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 67-71 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, p. 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 **[492]** continues to uphold those [human rights] treaties and is fully aware of its obligations and

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commitments in this regard" (HRC/NONE/2017/112 (18 September 2017), p. 3; Annex 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*" (paragraph 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. 606-7). 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

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relation to a **[493]** 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.

[Report: *ICJ Reports* 2018, p. 406]

[The following is the text of the order of the Court on the Second Request for Provisional Measures:]

[361] ORDER ON SECOND REQUEST FOR PROVISIONAL MEASURES (14 JUNE 2019)

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[362] Whereas:

1. On 11 June 2018, the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings **[363]** against the United Arab Emirates (hereinafter referred to as the "UAE") 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").

2. At the end of its Application, 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;

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(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 toward 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 institutions.

Accordingly,

Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under 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;
[364] *(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;
(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 CERD.

3. In its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

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5. By an Order dated 23 July 2018, the Court, after hearing the Parties, indicated the following provisional measures:

(1) 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; [. . .]

[365] (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

6. By an Order dated 25 July 2018, the Court fixed 25 April 2019 and 27 January 2020, respectively, as the time-limits for the filing in the case of a Memorial by Qatar and a Counter-Memorial by the UAE.

7. On 22 March 2019, the UAE, also referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, in turn submitted a Request for the indication of provisional measures, in order to "preserve the UAE's procedural rights" and "prevent Qatar from further aggravating or extending the dispute between the Parties pending a final decision in th[e] case".

8. At the end of its Request, the UAE asked the Court to order that:

(i) Qatar immediately withdraw its Communication submitted to the CERD Committee pursuant to Article 11 of the CERD on 8 March 2018 against the UAE and take all necessary measures to terminate consideration thereof by the CERD Committee;
(ii) Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE;
(iii) Qatar immediately stop its national bodies and its State-owned, controlled and funded media outlets from aggravating and extending the dispute and making it more difficult to resolve by disseminating false accusations regarding the UAE and the issues in dispute before the Court; and
(iv) Qatar refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

9. The Deputy-Registrar immediately communicated a copy of the said Request to the Government of Qatar. He also notified the

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Secretary-General of the United Nations of the filing of the UAE's Request for the indication of provisional measures.

10. Qatar filed its Memorial in the case on 25 April 2019, within the time-limit fixed by the Court (see paragraph 6 above). On 30 April 2019, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court, the UAE presented preliminary objections to the jurisdiction of the Court and the admissibility of the Application. By an Order of 2 May 2019, the President of the Court fixed 30 August 2019 as the time-limit within which Qatar could present a written statement of its observations and submissions on the preliminary objections raised by the UAE.

[366] 11. Public hearings on the UAE's Request for the indication of provisional measures were held from 7 to 9 May 2019, during which oral observations were presented by:

On behalf of the UAE:	H.E. Ms Hissa Abdullah Ahmed Al-Otaiba, Mr Robert G. Volterra, Mr W. Michael Reisman, Mr Dan Sarooshi, Ms Maria Fogdestam-Agius.
On behalf of Qatar:	Mr Mohammed Abdulaziz Al-Khulaifi, Mr Vaughan Lowe, Mr Lawrence H. Martin, Ms Catherine Amirfar, Mr Pierre Klein.

12. At the end of its second round of oral observations, the UAE asked the Court to order that:

(i) Qatar immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination on 8 March 2018 against the UAE and take all necessary measures to terminate consideration thereof by that Committee;
(ii) Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE;
(iii) Qatar immediately stop its national bodies and its State-owned, controlled and funded media outlets from aggravating and extending the dispute and making it more difficult to resolve by disseminating false accusations regarding the UAE and the issues in dispute before the Court; and
(iv) Qatar refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

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13. At the end of its second round of oral observations, Qatar requested the Court "to reject the Request for the indication of provisional measures submitted by the United Arab Emirates".

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14. By a letter dated 23 May 2019, the UAE submitted "two new pieces of evidence ... relevant to [its] Request for the indication of provisional measures", stating that "[e]ach piece of evidence is part of a publication **[367]** that is readily available". For its part, by a letter dated 27 May 2019, Qatar objected to the submission of the two items. By letters dated 7 June 2019, the Registrar informed the Parties that the Court considered that the said items, produced after the closure of the oral proceedings, were not material for deciding on the UAE's Request for the indication of provisional measures.

* * *

I. PRIMA FACIE JURISDICTION

15. The Court may indicate provisional measures only if there is, prima facie, 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. That is so whether the request for the indication of provisional measures is made by the applicant or by the respondent in the proceedings on the merits (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, p. 10, para. 24).

16. The Court recalls that, in its Order of 23 July 2018 indicating provisional measures in the present case, it concluded 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" (*ICJ Reports 2018 (II)*, p. 421, para. 41). The Court sees no reason to revisit its previous finding in the context of the present Request.

II. THE PROVISIONAL MEASURES REQUESTED BY THE UAE

17. The power of the Court 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

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merits thereof. It follows that the Court 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 (see, for example, *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, ICJ Reports 2018 (II)*, pp. 421-2, para. 43).

[368] 18. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which the UAE wishes to see protected exist; it need only 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 (see paragraph 16 above) (*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, ICJ Reports 2018 (II)*, p. 422, para. 44). Thus, these alleged rights must have a sufficient link with the subject of the proceedings before the Court on the merits of the case (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, pp. 10-11, paras. 27-30).

* *

19. With respect to the first provisional measure requested, namely that the Court order that Qatar immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") and take all necessary measures to terminate consideration thereof by that Committee, the UAE argues that this request seeks to protect its rights "to procedural fairness, to an equal opportunity to present its case and to proper administration of justice". More specifically, the UAE maintains that it has a right not to be compelled to defend itself in parallel proceedings before the Court and the CERD Committee.

20. Concerning the second measure requested—that "Qatar immediately desist from hampering the UAE's attempts to assist Qatari citizens, including by un-blocking in its territory access to the website by which Qatari citizens can apply for a permit to return to the UAE"—the UAE asserts that Qatar's actions compromise the UAE's ability to implement the provisional measures indicated by the Court on 23 July 2018 without interference. It also contends that Qatar is

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manipulating and fabricating evidence by "creating the false impression that the UAE has imposed in effect a travel ban on Qatari citizens".

21. The third and fourth provisional measures requested by the UAE relate to the non-aggravation of the dispute. With regard to the third provisional measure, the UAE argues that Qatar's national bodies (in particular its National Human Rights Committee) and its State-owned, controlled and funded media outlets are disseminating false accusations regarding the UAE and the issues in dispute before the Court. It requests that Qatar be ordered to stop these actions, which it says have the effect of aggravating the dispute. As to the fourth measure—that "Qatar **[369]** refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve"—the UAE, referring to its factual allegations underpinning the first three measures requested, submits that, if that measure is not granted, Qatar will continue to "adversely affect[ ] in a significant way the prospects of the resolution of the dispute".

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22. Qatar maintains that the Court should not grant any of the measures requested by the UAE. With regard to the first measure, Qatar asserts, *inter alia*, that the rights alleged by the UAE are not plausible under CERD and that the proceedings in the CERD Committee and the Court are neither duplicative nor abusive. Moreover, in its view, the measure requested by the UAE prejudges questions of jurisdiction and admissibility, which should be decided at the preliminary objections stage.

23. With respect to the second provisional measure requested, Qatar submits that it blocked the visa application website for legitimate security reasons and strongly denies any "manipulation and fabrication of evidence", maintaining that the UAE's assertions in this regard are pure speculation and concern issues to be determined at the merits stage. It adds that there are in any event other means that could be used by the UAE to comply with the provisional measures indicated in the 23 July 2018 Order, and that the question of whether it interfered with the UAE's ability to comply with these measures is also one for the merits. In any case, Qatar states that it will unblock the website as soon as the security risks have been addressed by the UAE.

24. As to the third and fourth measures requested by the UAE, Qatar contends that the Court's jurisprudence makes clear that "non-aggravation" of the dispute does not provide a stand-alone basis for provisional measures and that such measures cannot be granted in the

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absence of the indication of measures satisfying the Court's settled criteria and aimed at preserving the rights in dispute. It also observes that, in its 23 July 2018 Order, the Court already indicated a non-aggravation measure that binds both Parties; the present requests concerning non-aggravation are thus, in its view, without object. Qatar adds that any claim that a Party is violating an existing provisional measure is a matter for the merits phase.

* *

25. The Court considers that the first measure requested by the UAE does not concern a plausible right under CERD. This measure rather **[370]** concerns the interpretation of the compromissory clause in Article 22 of CERD and the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter. The Court has already examined this issue in its Order of 23 July 2018 on the Request for the indication of provisional measures submitted by Qatar. In that context, the Court noted that:

> 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 . . . 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. (*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, ICJ Reports 2018 (II)*, pp. 420-1, para. 39.)

The Court does not see any reason to depart from these views at the current stage of the proceedings in this case.

26. The Court considers that the second measure requested by the UAE relates to obstacles allegedly created by Qatar to the implementation by the UAE of the provisional measures indicated in the Order of 23 July 2018. It does not concern plausible rights of the UAE under CERD which require protection pending the final decision of the Court in the case. As the Court has already stated, "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, ICJ Reports 2015 (II)*, p. 713, para. 126).

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27. Since the first two provisional measures requested do not relate to the protection of plausible rights of the UAE under CERD pending the final decision in the case, the Court considers that there is no need for it to examine the other conditions necessary for the indication of provisional measures.

28. As to the third and fourth measures requested by the UAE, which relate to the non-aggravation of the dispute, the Court recalls that, when it is indicating provisional measures for the purpose of preserving specific rights, it 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. Such measures can only be indicated as an addition to specific measures to protect rights of the parties (see, for example, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional* **[371]** *Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, p. 16, paras. 49-51). With regard to the present Request, the Court has not found that the conditions for the indication of specific provisional measures are met and thus it cannot indicate measures solely with respect to the non-aggravation of the dispute.

29. The Court further recalls that it has already indicated in its Order of 23 July 2018 that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*ICJ Reports 2018 (II)*, p. 434, para. 79(2)). This measure remains binding on the Parties.

III. CONCLUSION

30. The Court concludes from the foregoing that the conditions for the indication of provisional measures under Article 41 of its Statute are not met.

* * *

31. 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, any questions relating to the admissibility of the Application, or any issues to be decided at the merits stage. It leaves unaffected the right of the Governments of Qatar and the UAE to submit arguments in respect of those questions.

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32. For these reasons,

THE COURT,

By fifteen votes to one,

Rejects the Request for the indication of provisional measures submitted by the United Arab Emirates on 22 March 2019.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cancado Trindade, Donoghue, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* Cot.

[372] Vice-President XUE appends a declaration to the Order of the Court; Judges TOMKA, GAJA and GEVORGIAN append a joint declaration to the Order of the Court; Judges ABRAHAM and CANÇADO TRINDADE append separate opinions to the Order of the Court; Judge SALAM appends a declaration to the Order of the Court; Judge ad hoc Cot appends a dissenting opinion to the Order of the Court.

[373] DECLARATION OF VICE-PRESIDENT XUE

1. I voted for the decision of the Court to reject the UAE's Request for the indication of provisional measures. However, I disagree with some of the Court's reasoning in rejecting the third and fourth measures requested by the UAE.

2. I am of the view that the third and fourth measures, being characterized as relating to the non-aggravation of the dispute (see paragraph 28 of the Order), are sufficiently covered by the Order of 23 July 2018, by which the Parties are required to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" (*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, ICJ Reports 2018 (II)*, p. 434, para. 79(2)). For the present incidental proceedings, the UAE's Request for the indication of provisional measures must be considered in the light of the existing Order of 23 July 2018. Both in law and fact, the UAE's Request is linked with the previous Order. As the measure of non-aggravation is already in place, logically, the third and fourth measures requested by the UAE are superfluous. In my view, this is a sufficient reason to reject these portions of the Request.

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3. In rejecting the UAE's submissions, the Court stated that measures for non-aggravation of the dispute *can only be indicated as an addition to specific measures* to protect rights of the parties (Order, para. 28). Since there are no specific provisional measures indicated, the Court finds that it cannot indicate measures solely with respect to the non-aggravation of the dispute. Notwithstanding the prevailing position adopted by the Court on this question in recent years, this pronouncement deserves a second thought. Adding such a restrictive qualification may unduly restrain the power of the Court under Article 41 of the Statute and Article 75 of the Rules of Court to indicate provisional measures.

4. Interim measures of protection serve to preserve the rights claimed by either of the parties to a dispute against irreparable prejudice, pending the final Judgment of the Court. To indicate such measures, the Court has to decide, according to the settled jurisprudence, that it has jurisdiction prima facie in the case, the rights claimed for protection are plausible, and there is an imminent risk of irreparable prejudice to such rights. In determining these technical prerequisites for the indication of provisional measures, the Court, of course, does not exercise its power in a mechanical way; its examination largely focuses on the specific circumstances **[374]** of the case before it. The Court therefore possesses the power to decide, either *proprio motu* or at the request of either of the parties, whether to indicate provisional measures and what measures are required. Such measures may be, in whole or in part, other than those requested, or that ought to be taken or complied with by the requesting party.

5. This incidental proceeding, which exists in almost all legal systems, is intended to ensure due administration of justice and effective settlement of disputes. As the Permanent Court of International Justice observed in the *Electricity Company of Sofia and Bulgaria* case,

> [Article 41(1) of the Statute] applies the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute. (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, PCIJ, Series A/B, No 79*, p. 199.)

6. This proceeding at the international level, however, has another dimension. As one of the major organs and the principal judicial organ of the United Nations, the Court is entrusted to settle disputes between States in accordance with international law. In carrying out its judicial

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functions, the Court in its own way contributes to the maintenance of international peace and security. Given this general obligation under the Charter of the United Nations, the Court has to be mindful of the broader situation in which a particular case is situated. As was pointed out in the *Frontier Dispute* case, when two States jointly decide to have recourse to the Court for the peaceful settlement of a dispute, incidents may subsequently occur which are not merely likely to extend or aggravate the dispute but also comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes. In these situations, the Court not only has the power, but also the "duty" to indicate, if need be, such provisional measures as may conduce to the due administration of justice (*Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, ICJ Reports 1986*, p. 9, para. 19). In practice, it is not unusual that, in cases involving use of force or serious violations of human rights and international humanitarian law, a provisional measure of non-aggravation of the dispute is requested or considered as the primary measure to be taken in light of the circumstances (see *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, ICJ Reports 1972*, p. 17; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection, Order of 17 August 1972, ICJ Reports 1972*, p. 35; *Nuclear Tests (Australia* v. *France), Interim Protection, Order of* **[375]** *22 June 1973, ICJ Reports 1973*, p. 106; *Nuclear Tests (New Zealand* v. *France), Interim Protection, Order of 22 June 1973, ICJ Reports 1973*, p. 142; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Interim Protection, Order of 5 July 1951, ICJ Reports 1951*, p. 93; *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, ICJ Reports 1986*, pp. 11-12; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, ICJ Reports 1996 (I)*, p. 24, para. 49(1); *Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999 (I)*, p. 374, paras. 36-37; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, ICJ Reports 2000*, p. 129, para. 47(1)). Although in these cases the measure of non-aggravation or extension of the dispute was never indicated alone, and was rather often coupled with specific measures, the weight of such a measure in each case cannot be diminished as secondary. After all, maintenance of international peace and security is the ultimate goal for the judicial settlement of international disputes.

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7. The questions whether, when circumstances so require, a provisional measure of non-aggravation can be indicated alone and whether the Court should exercise its power to do so *proprio motu*, have long been debated among the judges of the Court (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992*, dissenting opinion of Judge Bedjaoui, pp. 158-9, paras. 31-4, dissenting opinion of Judge Weeramantry, p. 181, dissenting opinion of Judge Ajibola, p. 193; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999 (I)*, dissenting opinion of Judge Weeramantry, p. 202, dissenting opinion of Judge Shi, p. 207, dissenting opinion of Judge Vereshchetin, p. 209; *Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999 (I)*, dissenting opinion of Judge ad hoc Kreća, p. 413, para. 7; *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, ICJ Reports 2002*, declaration of Judge Koroma, pp. 254-5, para. 15; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, declaration of Judge Buergenthal, pp. 21-5, dissenting opinion of Judge ad hoc Torres Bernardez, p. 40, para. 46; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Request for the Modification* **[376]** *of the Order Indicating Provisional Measures of 3 March 2014, Order of 22 April 2015, ICJ Reports 2015 (II)*, separate opinion of Judge Cançado Trindade, pp. 564-5, para. 9; *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, ICJ Reports 2018 (II)*, dissenting opinion of Judge Salam, pp. 483-4, paras. 9-10*).* Although the circumstances in which these individual opinions were expressed varied from case to case, these opinions' consideration of the issue generally concerned the judicial role of the Court in the maintenance of international peace and legal order.

8. It is observed that, since the *Pulp Mills* case, the Court has adopted an unequivocal position with regard to the measure of non-aggravation, treating it as ancillary to measures for the purpose of preserving specific rights. It is on the basis of this jurisprudential development that this Order is intended to further clarify the issue. This effort, however, in my opinion, is too big of a step. The Court may find its hands tied when situations arise calling for its active response.

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[377] JOINT DECLARATION OF JUDGES TOMKA, GAJA AND GEVORGIAN

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, para. 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*, *ICJ 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.

[378] SEPARATE OPINION OF JUDGE ABRAHAM

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.

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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 **[379]** 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.

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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 **[380]** 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).

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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).

[381] 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

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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 **[382]** 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

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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 **[383]** 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

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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, ICJ 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 specific **[384]** rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case" (*ICJ Reports 2007 (I)*, pp. 22-3, para. 6).

I can but refer the reader to my predecessor's demonstration.

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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.

[385] SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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[386] *I.* Prolegomena

1. In the handling of the present case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* (hereinafter *Application of the CERD Convention*), the International Court of Justice (ICJ) has had to face an unfortunate sequence with the lodging with it of the present Request. The inevitable decision it has just taken draws attention to the importance of the provisional measures of protection that it indicated in its previous Order of 23 July 2018, the compliance to which is obligatory. They duly safeguard human rights under the CERD Convention.

2. In addition to the present Order dismissing the UAE's Request, I feel obliged to leave on the records, under the relentless pressure of time, in the present separate opinion, my personal considerations on the matter dealt with, moved by a sense of duty in the exercise of the international judicial function. I am encouraged to do so since the ICJ has had to decide on a Request which has not invoked human rights

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protected under a core human rights treaty like the CERD Convention.

3. This being so, I shall develop my reflections in the following sequence: *(a)* provisional measures of protection already ordered to secure respect for some human rights safeguarded under the CERD Convention; *(b)* the problem of the absence of link in the present Request; *(c)* the problem of its inconsistencies as to the CERD Convention and as to the CERD Committee; *(d)* relevance and persistence of provisional measures of protection of persons in continuing situations of vulnerability; and *(e)* the long-standing importance of the fundamental principle of equality and non-discrimination. Last but not least, in an epilogue, I shall conclude with a recapitulation of the key points that I sustain in the present separate opinion.

4. There is an additional point to make here. I reach the conclusion, like the ICJ, that the present Request is not grounded for the ordering of provisional measures under the CERD Convention. Yet, in my perception, as the reasoning of the Court itself is not always sufficiently clear in reaching this decision, and unnecessarily generates uncertainties, I deem it fit, furthermore, to fulfil the need to clarify some points in the present separate opinion, also drawing attention to the provisional measures of protection already indicated by the ICJ in its previous Order of 23 July 2018, which remain in force and are to be complied with.

[**387**] *II. Provisional measures of protection already ordered to secure respect for certain rights safeguarded under the CERD Convention*

5. To start with, this is a case of human rights protection under the CERD Convention, like other cases lodged before with the ICJ. The provisional measures of protection already ordered by the ICJ on 23 July 2018 remain in force, so as to secure the safeguard of the rights protected under Articles 2, 4, 5, 6 and 7 of the CERD Convention and the corresponding obligations. This was duly requested by Qatar, as acknowledged by the ICJ's Order of 23 July 2018.[1] There is a clear distinction in the positions upheld by the two contending Parties.

6. Qatar has been attentive in its endeavours to sustain a clear link between the provisional measures of protection requested and the rights invoked under the CERD Convention (Order, para. 56), and the ICJ held that "a link exists between the rights whose protection is being

[1] Order of 23 July 2018, paras. 2, 20, 21, 26, 45, 50, 52, 54, 56, 58 and 67.

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sought and the provisional measures being requested by Qatar" (*ibid.*, para. 59). In effect, in its original Application (of 11 June 2018), Qatar asserts rights under Articles 2, 4, 5, 6 and 7 of the CERD Convention and under the customary international law principle of non-discrimination (*ibid.*, para. 58).

7. For its part, the UAE does not invoke acts appearing to amount to racial discrimination as defined in Article 1 of the CERD Convention, which would then concern the rights under Articles 2, 4, 5, 6 and 7 of the Convention. The UAE's Request thus appears unrelated to the claims made by Qatar as to the merits phase, and does not concern rights under the CERD Convention which may subsequently be adjudged by the Court. It can clearly be seen that the UAE's Request of provisional measures does not invoke rights to be protected under the CERD Convention, but simply alleges a violation of the compromissory clause (Art. 22) of the Convention.

8. In the *cas d'espèce* on the *Application of the CERD Convention*, unlike the present Request of the UAE, the previous Request of Qatar of provisional measures has raised the need of protection of some rights set forth in the CERD Convention, under Articles 2, 4, 5, 6 and 7.[2] There is thus no link between the measures presently requested by the UAE and the subject-matter of the dispute, which concerns the protection of some human rights of Qataris under the CERD Convention. This deserves attention on the part of the ICJ.

[388] *III. The problem of the absence of a link in the present Request*

9. In effect, the faculty of the ICJ to indicate provisional measures under Article 41 of the Statute aims at the preservation of the rights invoked by the Parties in the *cas d'espèce*, pending its decision on the merits thereof. Accordingly, the ICJ, in its recent Order of provisional measures of 19 April 2017, in the case of the *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)*, has held 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. (. . .)

[2] Qatar's Request for the indication of provisional measures of 11 June 2018, para. 12.

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A link must exist between the rights whose protection is sought and the provisional measures being requested. (*ICJ Reports 2017*, p. 126, paras. 63-4.)

10. In the present case opposing Qatar to the UAE, concerning also the *Application of the CERD Convention*, although the subject-matter of the dispute concerns the interpretation and the application of substantive obligations under the CERD Convention, the Request for the indication of provisional measures filed by the UAE does not allege that Qatar violated any substantive rights set forth under the CERD Convention. The Request of the UAE therefore does not establish the existence of a link between the rights whose protection is sought and the provisional measures requested.

IV. The problem of inconsistencies, in the present Request, as to the CERD Convention and as to the CERD Committee

11. It should not pass unnoticed that arguments that have been presented to the Court in the present Request of provisional measures disclose certain inconsistencies, which pertain to the rights (under the CERD Convention) to be protected, as well as to proceedings before the CERD Committee. May I thus briefly consider such inconsistencies, recalling at first that the Court's Order of 23 July 2018 aims at the safeguard of some rights under the CERD Convention duly identified in Qatar's previous Request.

[389] *1. Inconsistencies in the Request as to the ICJ's Order of 23 July 2018, in respect of the CERD Convention*

12. Contrariwise, the present Request by the UAE does not correspond to the human rights protected under the CERD Convention; it does not even refer to them. Moreover, it is permeated with inconsistencies, in relation to distinct points. To start with, it appears inconsistent to request the ICJ—as the UAE does—to order provisional measures by extending its prima facie jurisdiction and, at the same time, to object to its jurisdiction *ratione materiae*.

13. Moreover, the UAE's Request, on the basis of the ICJ's jurisdiction under Article 22 of the CERD Convention, should concern a dispute arising out of the interpretation or the application of the CERD Convention. Yet, it does not address the safeguard of the human rights set forth in the CERD Convention; its Request appears thus to fall outside the scope of the CERD Convention.

14. In its Request, the UAE, while pretending to pursue the interests of Qatari citizens (paras. 8, 11 and 23(ii)), asks the Court to

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order Qatar to withdraw its submission before the CERD Committee and "terminate consideration thereof by the CERD Committee" (para. 74(i)). In its oral arguments before the ICJ, Qatar sustains that it is contradictory to allege that participating in such procedure would aggravate the dispute,[3] and adds that what it seeks is the settlement of the dispute through the procedure of the CERD Committee.[4]

15. Qatar contends that the UAE incurs into contradictions in alleging that "Qatar must exhaust the CERD procedures before coming to the Court", and, at the same time, requesting that the Court "order Qatar to put an end to the very procedures that it says must be exhausted as a prerequisite to the Court's jurisdiction".[5] Qatar furthermore recalls that, during the proceedings with respect to the provisional measures that it requested in July 2018, the UAE referred to the CERD Committee as "the principal custodian of the Convention" and stated that it is "compulsory to refer to the Committee in all events".[6] The UAE has thus raised contradictory arguments in respect of Qatar's Request of provisional measures in 2018, and in respect of its own present Request in 2019.

2. *Inconsistencies in the Request as to the ICJ's Order of 23 July 2018, in respect of the CERD Committee*

[390] 16. During the proceedings relating to the first Request of provisional measures presented by Qatar, the UAE notably raised the argument that Qatar should have exhausted the procedure before the CERD Committee before seizing the Court; it argued that, in its view, seizing both at the same time would be incompatible with the *electa una via* principle and the *lis pendens* exception.[7]

17. On this point, in its Order of 23 July 2018, the ICJ stated that it was not necessary "to decide whether any *electa una via* principle or *lis pendens* exception [were] applicable in the present situation" (para. 39). Yet, the UAE again raises a similar argument in its own present Request for the indication of provisional measures, arguing that Qatar has "created a *lis pendens*" constituting "an abuse of the CERD dispute resolution mechanism" (Request for the indication of provisional measures, para. 41), with a risk of "conflicting" decisions (*ibid.*, para. 42).

[3] CR 2019/6, of 8 May 2019, p. 25, para. 46 (Lowe).
[4] *Ibid.*, p. 12, para. 8 (Al-Khulaifi).
[5] *Ibid.*, p. 34, para. 28 (Martin).
[6] *Ibid.*, p. 12, para. 9 (Al-Khulaifi).
[7] *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, ICJ Reports 2018 (II)*, p. 419, para. 35.

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18. May it be recalled that, on 8 March 2018, Qatar filed a communication with the CERD Committee under Article 11 of the CERD Convention.[8] After the ICJ's Order of 23 July 2018, Qatar had lodged a new communication with the CERD Committee on 29 October 2018, in application of Article 11(2) of the CERD Convention, as it has considered the UAE "unwilling to engage constructively with [it] to settle the matter".[9] It does not seem that this would depart from, or contradict, the ICJ's Order of 23 July 2018.

V. *Relevance and persistence of provisional measures of protection in continuing situations*

19. In the present case of *Application of the CERD Convention*, the relevance of the provisional measures of protection in force since the ICJ's Order of 23 July 2018 is underlined by the consideration of a *continuing situation* affecting some human rights under the CERD Convention. I **[391]** have addressed this point in my previous separate opinion appended to that Order, and I deem it appropriate to retake the matter here.

20. May I recall, in this respect, that in my previous separate opinion I have pondered, *inter alia*, that

> In effect, 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. May I briefly recall here three examples, along the last decade. In the case concerning the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, as the ICJ in its Order of 28 May 2009 decided not to indicate provisional measures, I appended thereto a dissenting opinion, wherein—as already pointed out (para. 79, *supra*)—I drew attention to the *décalage* to be bridged between the time of human beings and the time of human justice (paras. 35-64).
>
> Urgency and probability of irreparable damage, I proceeded, were quite clear, in the *continuing situation* of lack of access to justice of the victims of the Hissène Habré regime (1982-1990) in Chad. This right of access to justice assumed a "paramount importance" (paras. 29 and 74-7), I added, in the *cas d'espèce*, under the UN Convention against Torture; furthermore, I dwelt upon the component elements of the autonomous legal regime of provisional measures of protection (paras. 8-14, 26-29 and 65-73). Such measures were

[8] Qatar's Communication, in UAE's Request, Annex 20.
[9] Qatar's Note Verbale to the CERD Committee, in UAE's Request, Annex 21.

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necessary for the safeguard of the right to the realization of justice (paras. 78-96 and 101).

In the case of *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as the ICJ, in its Order of 6 July 2010 found the counter-claim of Italy inadmissible, once again I appended thereto a dissenting opinion, wherein I examined at depth the notion of *"continuing situation"* in the factual context of the *cas d'espèce*, as debated between the contending parties (paras. 55-59 and 92-100). My dissenting opinion encompassed the origins of a "continuing situation" in international legal doctrine (paras. 60-64); the configuration of a "continuing situation" in international litigation and case law (paras. 65-83); the configuration of a "continuing situation" in international legal conceptualization at normative level (paras. 84-91).

And, once again, I warned against the pitfalls of State voluntarism (paras. 101-123). Suffice it here only to refer to my lengthy reflections on the notion of "continuing situation" in the case on *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as I see no need to reiterate them *expressis verbis* herein. What cannot pass unnoticed is that a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to **[392]** decisions—as just seen—on provisional measures and counter-claim (*supra*), it has also been addressed in decision as to the merits. (*ICJ Reports 2018 (II)*, p. 466, paras. 89-92.)

21. May I add, in the present separate opinion, that I further addressed the matter at issue in my extensive dissenting opinion (paras. 17 and 301) in the ICJ's Judgment (of 3 February 2012) in the same case of *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*,[10] just as I did also in my separate opinion (paras. 165-8) in the aforementioned case of *Questions relating to the Obligation to Prosecute or Extradite* (merits, judgment of 20 July 2012).

22. Furthermore, there have been other occasions when I addressed the importance of provisional measures of protection in respect of human rights conventions. May I also refer, e.g., to my separate opinion in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (Judgment of 30 November 2010), wherein I dedicated a part of it (IX) to the notion of "continuing situation", with the projection of human rights violations in time[11] (paras. 189-99).

[10] For a case study, cf. A. A. Cançado Trindade, *La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indebida de Inmunidades Estatales*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2013, pp. 5-305.

[11] The grief suffered by the victim *extended in time*, in breach of the relevant provisions of human rights treaties (the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights) as well as Article 36(1)*(b)* of the Vienna Convention on Consular

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23. Shortly afterwards, in the ICJ's Judgment on reparations (of 19 June 2012) in the same case of *Ahmadou Sadio Diallo,* I appended a new separate opinion, wherein I drew attention to the "centrality of the victims" singling out their pressing need of rehabilitation (*ICJ Reports 2012 (I)*, p. 379, para. 83). And I added:

Restorative justice has made great advances in the last decades, due to the evolution of the international law of human rights, humanizing the law of nations (the *droit des gens*). [. . .] The universal juridical conscience seems to be at last awakening as to the need to honour the victims of human rights abuses and to restore their dignity.

Rehabilitation of the victims acquires a crucial importance in cases of grave violations of their right to personal integrity. In effect, there have been cases where medical and psychological assistance to the victims has been ordered (. . .). Such measures have intended to overcome the extreme vulnerability of victims, and to restore their identity and **[393]** integrity. Rehabilitation of the victims mitigates their suffering and that of their next of kin, thus irradiating itself into their social milieu.

Rehabilitation, discarding the apparent indifference of their social milieu, helps the victims to recuperate their self-esteem and their capacity to live in harmony with others. Rehabilitation nourishes the victims' hope in a minimum of social justice. [. . .] In sum, rehabilitation restores one's faith in human justice. (*ICJ Reports 2012 (I)*, pp. 379-80, paras. 83-5.)

24. More recently, in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the ICJ dismissed the case in its restrictive Judgment of 3 February 2015, to which I had appended an extensive dissenting opinion. Once again, I addressed therein, *inter alia*, the problem of *continuing* violations of human rights, in distinct forms, such as, e.g., missing persons in enforced disappearances (*ICJ Reports 2015 (I)*, pp. 303-4, 305-7, 310 and 377, paras. 292-3, 298-302, 314-16 and 535), victims of torture and inhuman treatment (*ibid.*, pp. 310-12, 360 and 377, paras. 317-20, 470 and 534).

25. In that dissenting opinion, moreover, I deemed it fit to warn, *inter alia*, that despite the endeavours of human thinking, along history, to provide an explanation for evil,

we have not been able to rid humankind of evil. (. . .) Whenever individuals purport to subject their fellow human beings to their "will", placing this latter above conscience, evil is bound to manifest itself. In one of the most learned

Relations. The victim's grief, surrounded by arbitrariness on the part of State authorities, amounted to a wrongful *continuing situation*, marked by the prolonged lack of access to justice.

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writings on the problem of evil, R. P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of humankind has accounted for the continuous presence of that concern throughout the history of human thinking.[12] (*Ibid.*, p. 361, para. 473.)[13]

26. As I have already pointed out, in another aforementioned dissenting opinion that I presented, in the case of *Jurisdictional Immunities of the State* (para. 21, *supra*), a *continuing situation* affecting or in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ, namely, in provisional measures (like in the present case of the *Application of the CERD Convention*, twice already), as well as in counter-claims, merits, and reparations.

[394] *VI. Relevance of provisional measures of protection of rights of persons in situations of vulnerability*

27. A *continuing situation* affecting human rights under the CERD Convention—duly stressed by Qatar in its own Request which led to the ICJ's Order of 23 July 2018—leads to the *continuing vulnerability* of victimized human beings, or potential victims. Under the CERD Convention and other human rights treaties, attention is focused on human beings affected, not on their States, nor on strictly inter-State relations.

28. On the occasion of the proceedings of the previous Order in the *cas d'espèce*, such continuing situation(s) of human vulnerability—related to rights protected under the CERD Convention—was properly addressed by Qatar but not by the UAE, as I pointed out in my previous separate opinion (*ICJ Reports 2018 (II)*, pp. 449-50 and 452-3, paras. 35-6 and 44-6). The aim is, I continued, to set up "a higher standard of protection, under the CERD Convention, of individuals in a continuing situation of great vulnerability" (*ibid.*, p. 458, para. 64). And I added:

> For years I have been sustaining that provisional measures of protection, needed by human beings (under human rights treaties, like the CERD Convention in the *cas d'espèce*), may become even more than *precautionary*, being in effect *tutelary*, particularly for vulnerable persons (potential victims), and directly related to realization of justice itself. Obligations emanating from such ordered measures are not necessarily the same as those ensuing from a

[12] R. P. Sertillanges, *Le problème du mal—l'histoire*, Paris, Aubier, 1948, pp. 5-412.

[13] For a case study, cf. A. A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza/Brazil, IBDH/IIDH, 2015, pp. 9-265.

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Judgment as to the merits (and reparations), they may be entirely distinct (. . .). Particularly attentive to human beings in situations of vulnerability, provisional measures of protection, endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension. (*Ibid.*, p. 460, para. 73.)

29. Hence the provisional measures of protection which were ordered by the ICJ last 23 July 2018, which remain in force, so as to safeguard some of the rights protected under the CERD Convention. The present Request by the UAE, unlike the previous Request by Qatar, does not refer to those rights. The question of human vulnerability counts on the attention of both contending Parties in the present proceedings, but in distinct factual contexts addressed by the UAE and Qatar.

30. Qatar keeps on invoking the protection of rights under the CERD Convention. But, in the case of the position of the UAE, it does not relate vulnerability to the rights safeguarded under the CERD Convention. The UAE's present Request cannot thus be dealt with by the ICJ in the same way as the previous Request by Qatar. Hence the distinct decisions of the Court as to one request and the other. The important point is that the **[395]** provisional measures of protection indicated in the ICJ's Order of last 23 July 2018 remain in force, to the benefit of human beings protected under the CERD Convention in respect of some rights (under Articles 2, 4, 5, 6 and 7).

VII. The long-standing importance of the fundamental principle of equality and non-discrimination

31. In that previous Order, the ICJ has noted that Articles 2, 4, 5, 6 and 7 of the CERD Convention "are intended to protect individuals from racial discrimination", and hence the incidence also of Article 1 of the Convention (para. 52). The issue of continuing human vulnerability is not the only one that has not sufficiently received the needed attention in the present proceedings in respect—as I see them—of some of the rights protected under the CERD Convention.

32. In effect, the fundamental principle of equality and non-discrimination is of the utmost importance in the present context. Yet, this fundamental principle has received much more attention in the proceedings pertaining to the previous Order of the ICJ (of 23 July 2018, as to Qatar's Request), than in the current proceedings (as to the UAE's Request). In its practice, the CERD Committee has understandably been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, e.g., migrants).

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33. This can be said also of the practice of other Committees under UN human rights conventions, e.g., the Human Rights Committee, the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), among others.[14] In cases pertaining to the protection of human rights, the ICJ has been attentive to the work and decisions of such UN Committees.

34. For example, in its Judgment of 20 July 2012 (merits) in the aforementioned case of *Questions relating to the Obligation to Prosecute or Extradite*, the ICJ duly took note of a decision (of 17 May 2006) of the CAT Committee on a complaint filed with it by several Chadian nationals (S. Guengueng *et al.*) against Hissène Habré for crimes committed in Chad during his violent regime there (para. 27). There is thus nothing to hinder the ICJ to take into account decisions of UN Committees under human rights conventions, so as to secure protection for the rights thereunder.

35. The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, constitute a point which cannot be over-looked, in time and space. After all, in the relations between human beings and public power, arbitrariness is a problem which has marked **[396]** presence, and has been a source of concern, throughout the history of humankind. Hence the permanent need to protect human beings against discrimination and arbitrariness.

36. This is yet another point which I deem sufficient to refer to in the present separate opinion, as I have already addressed it at length in my previous separate opinion appended to the ICJ's Order of provisional measures of protection of 23 July 2018, in the *cas d'espèce* of the *Application of the CERD Convention* (Parts III-IV, paras. 9-32). After all, the idea of human equality, underlying the conception of the unity of humankind, has marked its presence since the historical origins of the law of nations up to the present (paras. 11-12).

37. In recent years, the principle of equality and non-discrimination, and the prohibition of arbitrariness, have also marked presence in international case law, including that of the ICJ (as I have pointed out, e.g., in my separate opinion in the ICJ's Judgments on the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, merits, 2010, and reparations, 2012; in my separate opinion in the ICJ's Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010; in my dissenting opinion in the case of the

[14] E.g., the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances.

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Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation)*; in my separate opinion in the ICJ's Advisory Opinion on *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, 2012; in my dissenting opinion in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, 2015; in my three dissenting opinions in the three cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, 2016 *(Marshall Islands* v. *United Kingdom) (Marshall Islands* v. *India) (Marshall Islands* v. *Pakistan)*;[15] and in my separate opinion in the ICJ's very recent Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, of 25 February 2019).

38. This issue has been properly addressed in the ICJ's prior Order of last 23 July 2018 in the present case of the *Application of the CERD Convention*; I devoted much attention to it in my separate opinion appended thereto, wherein I warned, *inter alia*, that

> The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels,[16] have not, **[397]** however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of law. This is one of the rare examples of international case law preceding international legal doctrine, and requiring from it due and greater attention. (*ICJ Reports 2018 (II)*, p. 444, para. 18.)

39. There remains thus a long way to go. In the present case of the *Application of the CERD Convention*, in pursuance to Qatar's Request, the ICJ indicated provisional measures of protection of some rights under the CERD Convention. The present Request by the UAE does not provide the Court the occasion to do the same, as it makes no reference to rights protected under the CERD Convention. In dismissing this Request, the ICJ could have made it clearer that the provisional measures that it has already ordered (on 23 July 2018) remain in force, and are to be complied by the contending Parties, to the benefit of

[15] For a case study, cf. A. A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasília, FUNAG, 2017, pp. 41-224.

[16] To the study of which I have dedicated my extensive book: A. A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

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human beings protected under the relevant provisions of the CERD Convention (*supra*).

VIII. The fundamental character, rather than "plausibility", of human rights protected under the CERD Convention

40. The rights protected under the CERD Convention, in the light of the relevant and basic principle of equality and non-discrimination, are endowed with a fundamental character, with all legal consequences ensuing therefrom. I find it disheartening that, in its reasoning in the present Order, the ICJ once again indulges repeatedly into what it beholds as "plausible rights" (paras. 17, 21, 24, 25 and 26). Fundamental rights protected under the CERD Convention cannot be regarded or labelled as "plausible" or "implausible": they are fundamental rights.

41. I have been advancing my position in this respect for a long time within this Court. Instead of reiterating here all I have been stating along the years, may I here briefly refer to a couple of very recent examples. In my separate opinion appended to the ICJ's Order of 18 May 2017, in the case of *Jadhav (India* v. *Pakistan)*, e.g., I have devoted a whole part (V) of it to "The Fundamental (Rather than 'Plausible') Human Right to Be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character" (paras. 19-23).

42. In my separate opinion appended to the ICJ's Order of 19 April 2017, in the aforementioned case of the *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)*, I have likewise dedicated a **[398]** whole part (V) of it to "The Decisive Test: Human Vulnerability over 'Plausibility' of Rights" (paras. 36-44); additionally, recalling the relevant case law on the matter,[17] I have devoted three other parts (III, IV and IX) of it to provisional measures of protection in face of the tragedy of the utmost vulnerability of segments of the population (paras. 12-26, 27-35 and 62-7).

43. And, in the present case of *Application of the CERD Convention*, in the separate opinion that I have appended to the ICJ's previous Order of 23 July 2018, I have also drawn attention to the relevance of

[17] For a recent study, cf. A. A. Cançado Trindade, cf. *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

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the fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness (Parts III-IV, paras. 9-21 and 22-32), as well as to the relevance of provisional measures of protection in face of a continuing situation of vulnerability of segments of the population (Parts VIII and XI, paras. 68-73 and 82-93). I have pondered, *inter alia*, that

> 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. This is a point which I have been making in successive individual opinions in previous decisions of the ICJ; I feel it sufficient only to refer to them now, with no need to extend further thereon in the present separate opinion. (*ICJ Reports 2018 (II)*, pp. 459-60, para. 70.)

44. In effect, continuing human vulnerability has marked permanent presence in human history, drawing attention to the need of protection of vulnerable persons and groups. Awareness of human vulnerability can be clearly found, e.g., in ancient Greek tragedies, which remain so contemporary in our days. Those tragedies contain warnings as to human vulnerability, even more so in situations of violence and armed attacks. For example, Euripides expresses a humanist outlook, his concern with the conflict between might and right, and his disillusionment with so-called "rational" decision-making in relation to armed confrontation (*Children of Heracles*, circa 430 BC, and, as to extreme violence, *Medea*, 431 BC). In the twenty-first century, human vulnerability persists, and seems to increase.

[399] *IX. Epilogue: A recapitulation*

45. This is the third recent case under the CERD Convention; provisional measures of protection (requested by Qatar) have already been indicated by the ICJ in the *cas d'espèce*, in its previous Order of 23 July 2018, and remain in force. The present case of *Application of the CERD Convention* concerns the rights protected thereunder, which are the rights of human beings, and not the rights of States. The present Request by the UAE for provisional measures, dismissed by the ICJ, does not invoke any of the human rights protected under the CERD Convention.

46. The ICJ has rightly dismissed the Request. In doing so, in the course of the present Order, the Court made references (paras. 16-18, 25-6 and 29) to its previous Order of 23 July 2018. Yet, in my

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understanding, the Court could have gone further beyond that, in expressly stressing the maintenance of the provisional measures of protection that it had previously ordered, to be duly complied with, given the importance of the human rights safeguarded under the CERD Convention.

47. Keeping this in mind, may I, last but not least, proceed to a brief recapitulation of the main points that I have deemed it fit to make in the course of the present separate opinion. *Primus*: In the *cas d'espèce*, provisional measures of protection have already been ordered by the ICJ on 23 July 2018, at the prior Request of Qatar, in order to safeguard certain human rights under the CERD Convention. *Secundus*: The UAE's current Request does not even invoke human rights under the CERD Convention. *Tertius*: Moreover, unlike the previous Request of Qatar, the present Request of the UAE does not set up the existence of a link between the rights whose protection is sought and the provisional measures requested.

48. *Quartus*: The ICJ has thus faced, in the UAE's Request, inconsistencies in respect of the CERD Convention (as to jurisdiction) as well as in respect of the operation of the CERD Committee. Hence the ICJ's decision to dismiss the present Request. *Quintus*: The existence, as in the *cas d'espèce*, of a *continuing situation* affecting some human rights under the CERD Convention underlines the relevance of the provisional measures of protection in force since the ICJ's Order of 23 July 2018.

49. *Sextus*: Such continuing situation brings to the fore the *continuing vulnerability* of the affected human beings, or potential victims. *Septimus*: The rights safeguarded are the ones invoked by Qatar under the CERD Convention; the UAE, for its part, does not even refer to those rights. *Octavus*: The provisional measures of protection indicated by the ICJ's Order of 23 July 2018 remain in force. *Nonus*: Provisional measures of protection safeguard rights under UN conventions of human rights, such as the CERD Convention.

50. *Decimus*: The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, lying in the foundations of the CERD Convention itself, require particular attention. **[400]** *Undecimus*: Such attention is already present at normative and jurisprudential levels, but it remains still insufficiently examined by the international legal doctrine, which should become more attentive and devoted to the matter. *Duodecimus*: The provisional measures of protection indicated by the ICJ's Order of 23 July 2018, may I reiterate, remain in force and are to be duly complied with.

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[401] DECLARATION OF JUDGE SALAM

1. I maintain my position on the Court's lack of jurisdiction in these proceedings, as expressed in my dissenting opinion appended to the Court's Order of 23 July 2018 indicating provisional measures in the present case. Consequently, I have voted in favour of the operative clause of the present Order rejecting the requested measures as I am of the view that it still lacks jurisdiction to do so.

2. However, notwithstanding the Court's statement that measures with respect to the non-aggravation of a dispute can be indicated only as an addition to specific measures to protect the rights of the parties (see paragraph 28 of the present Order), I would like, in turn, to join the Court in emphasizing the need for the Parties to refrain from any action which might aggravate or extend the present dispute; and I do so in keeping with my above-mentioned opinion.

[402] DISSENTING OPINION OF JUDGE AD HOC COT

Introduction

1. I regret that I am unable to support the conclusions reached by the majority of the Court. In my opinion, the Court should have upheld at least the first provisional measure requested by the UAE. I believe that, in light of the doctrine of *lis pendens*, the procedural rights asserted by the UAE are at least plausible under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (I), and that the other conditions for the indication of provisional measures are also met (II).

I. Lis pendens *and the plausibility of the rights claimed*

2. As regards the first provisional measure requested by the UAE, namely that the Court order Qatar to immediately withdraw its Communication submitted to the Committee on the Elimination of Racial Discrimination (the CERD Committee), both Parties referred to the notion of *lis pendens*, but disagreed about its relevance to Article 22 of CERD. The UAE asserts that the doctrine of *lis pendens* requires the Court to order Qatar not to proceed with the parallel proceedings before the Committee (Request, para. 42). Qatar, for its part, considers that this doctrine, if it exists, is not applicable to the dispute settlement mechanisms provided for by the Convention (CR 2019/6, p. 23, paras. 33-5 (Lowe)).

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3. The status of the doctrine of *lis pendens* in public international law is not entirely clear. Unlike the principle of *res judicata*, the doctrine of *lis pendens* does not have its textual basis in the Statute or the Rules of Court. Neither the Court nor its predecessor has ever affirmed or rejected the applicability of the doctrine of *lis pendens* in a case brought before it. However, in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court did consider, when interpreting the request **[403]** of the Polish Government (the Respondent), "whether the doctrine of *litispendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations" (*Jurisdiction, Judgment No 6, 1925, PCIJ, Series A, No 6*, p. 20). The Permanent Court had no difficulty in rejecting Poland's claim that the proceedings brought before the Court by Germany (the Applicant) in respect of the factory at Chorzów should be suspended until the Germano-Polish Mixed Arbitral Tribunal had given its judgment on the action relating to the same factory, "because it is clear that the essential elements which constitute *litispendance* are not present" (*ibid.*).

4. The Permanent Court did not make any general pronouncements about the nature and status of the doctrine of *lis pendens* before it. Nevertheless, the reasoning outlined above suggests that it did not rule out the possibility of the doctrine being applied in a case submitted to it, if the "essential elements" were present. The first question, therefore, is what are the "essential elements" for the doctrine of *lis pendens* to be applied (A). The second is whether the provisions of CERD, in particular Article 22, allow such an application (B).

A. The "essential elements" of lis pendens

5. In rejecting the applicability of *lis pendens* in the case concerning *Certain German Interests in Polish Upper Silesia*, the Permanent Court referred to the fact that the parties were not the same, the actions were not identical and the Mixed Arbitral Tribunal and the Permanent Court were "not courts of the same character" (*ibid.*, p. 20). While the first element needs no explanation, the other two are not as clear cut and call for further clarification. In particular, the question arises as to whether, in addition to the facts and legal arguments, the relief sought in the two actions must also be the same for the proceedings to be regarded as identical (1). Moreover, as regards two courts being "of the same character", this depends on whether the doctrine of *lis pendens* is applicable only in respect of concurrency between two judicial organs, to the exclusion of parallel proceedings between a judicial body and a quasi-judicial one (2).

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1. Relevance of the relief sought

6. Qatar asserts that the relief it is seeking before the Court is not the same as that which it is seeking before the CERD Committee, because, in its Communication, it has simply asked the Committee to transmit that Communication to the UAE for that State to *(a)* respond within the three-month time-limit and *(b)* take all necessary steps to end the coercive measures. Qatar further maintains that its Note Verbale of 29 October **[404]** 2018, transmitted to the Committee, was simply a request for the assistance of a conciliation commission. In its view, this is not the same as the relief sought in the present case, in which it has asked the Court to adjudge and declare a series of breaches of international law and to order the UAE to take a series of steps (CR 2019/6, p. 24, paras. 38-40 (Lowe)).

7. However, Qatar's request for its Communication to be transmitted to the UAE and the request made in its Note Verbale of 29 October 2018 were merely procedural steps to be followed under Article 11, paragraphs 1 and 2, of the Convention. They are not relief as such. In its substance, Qatar's Communication to the CERD Committee complains that the UAE has violated its obligations under, *inter alia*, CERD Articles 2, 4, 5 and 6 (see paragraph 57 of the Communication). The Parties do not appear to disagree that the factual bases of these allegations are virtually identical to those which appear in the Application submitted to the Court. Qatar then asks the UAE to take all necessary steps to end the coercive measures which, in its view, are in violation of international law and its obligations under CERD (see paragraph 123 of the Communication). In my opinion, this is sufficient to conclude that the relief sought by Qatar before the Committee is essentially the same as that sought before the Court. Consequently, the relief sought by Qatar, if it is relevant to the application of the doctrine of *lis pendens*, confirms that the claims submitted by Qatar before the two bodies are the same.

2. Lis pendens *and quasi-judicial bodies*

8. Qatar maintains that the doctrine of *lis pendens*, if it exists, applies only to questions of pendency between judicial tribunals and is therefore not applicable in this case, since neither the CERD Committee nor the ad hoc conciliation commission provided for by Article 12, paragraph 1*(a)*, of the Convention is a judicial body (CR 2019/6, p. 23, paras. 33-5 (Lowe)). Qatar emphasizes that there is no possibility of conflicting obligations arising in the present circumstances, because the CERD procedure cannot result in the imposition of an obligation on the Parties (CR 2019/8, p. 13, para. 27 (Lowe)).

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9. However, it is not clear that it is only conflicting binding decisions that pose problems in international relations and that contradictory nonbinding decisions need not be resolved or avoided. The arbitral tribunal's finding in the *MOX Plant* case that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties" (Order No 3, suspension of proceedings on jurisdiction and merits, and request for further provisional **[405]** measures, 24 June 2003, para. 28) holds true regardless of whether the decision in question is binding. Qatar's narrow view appears to ignore the important role of quasi-judicial bodies in the modern international legal order and fails to take account of the growing number of methods of international dispute settlement.

10. The dispute resolution mechanism established by CERD is one such modern method of dispute settlement. An ad hoc conciliation commission, provided for by Article 12, paragraph 1*(a)*, of the Convention, makes its good offices available to the States concerned, with a view to finding an amicable solution "on the basis of respect for this Convention". Furthermore, Article 13, paragraph 1, of the Convention states that a report prepared by an ad hoc conciliation commission must embody its findings "on all questions of fact relevant to the issue between the parties" and contain such recommendations "as it may think proper for the amicable solution of the dispute". The inter-State dispute resolution mechanism provided for by CERD thus has a quasi-judicial character, in so far as it makes findings of fact and law on the basis of respect for the applicable provisions of the Convention. It would be too formalistic to assume that a State Party to a dispute could ignore a recommendation of an ad hoc conciliation commission or the recommendation of the CERD Committee when it contains a conclusion that differs from any decision of the Court.

11. Consequently, I believe that an adaptive approach should be taken to the doctrine of *lis pendens*, so that it may also be applied to issues of concurrency between judicial and quasi-judicial bodies. Such an approach is particularly important when interpreting conventional provisions such as Article 22 of CERD, which provides for multiple methods of dispute settlement, but is rather ambiguous as to how they interrelate. I will address this question in the following section.

B. Lis pendens *and the settlement of CERD-related disputes*

12. Read in light of the doctrine of *lis pendens* considered above, the CERD provisions show that the procedural right not to be forced to defend oneself against the same allegations in parallel proceedings is at

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least plausible (1). It should also be noted that the Court's Order does not preclude this interpretation (2).

1. A plausible interpretation of Article 22

13. At the provisional measures stage, it is not necessary to conclude definitively whether a claimed right exists. The Court can exercise its power to indicate provisional measures if it is satisfied that the rights **[406]** asserted are "at least plausible" (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, ICJ Reports 2018 (II)*, p. 638, para. 53). The present Order does not appear to depart from this jurisprudence (see paragraph 18 of the Order).

14. I believe that one possible interpretation of Article 22 of CERD is that the dispute resolution mechanism provided for by the Convention should be exhausted before the case is brought before the Court. In the *Georgia* v. *Russian Federation* case, the Court interpreted "the terms of Article 22 … [as] establish[ing] preconditions to be fulfilled *before* the seisin of the Court" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 128, para. 141; emphasis added). It follows that the proceedings before the CERD Committee, if pending, must be concluded before the Court is seised. This can be viewed as a conventional test for *lis pendens*. In my opinion, if a treaty provides for several methods of dispute settlement to be followed in a certain order, the parties to a dispute concerning that treaty have the procedural right to expect that order to be respected. Accordingly, under Article 22, the parties to a dispute concerning CERD may legitimately expect that the dispute cannot be pending simultaneously before the Court and the CERD Committee.

2. The Court does not preclude this interpretation of Article 22

15. In my view, the Order that the Court has made today does not preclude that this interpretation of Article 22 is at least plausible. The Court has found that the first measure requested "does not concern a plausible right under CERD", and that this measure "rather concerns the interpretation of the compromissory clause in Article 22 of CERD" (see paragraph 25 of the Order). However, in the case concerning *Pulp Mills on the River Uruguay*, the Court concluded that it did have jurisdiction to entertain the request for the indication of provisional measures with respect to "Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute" (*Pulp Mills on*

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the River Uruguay (Argentina v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, p. 11, para. 29). In other words, the Court found that Article 60 of the 1975 Statute—a compromissory clause enabling the parties to bring a dispute to the Court—confers a procedural right to be able to benefit from the protection of provisional measures. The fact that the rights asserted may relate to the interpretation of a compromissory clause does not, therefore, prevent the Court from concluding that those rights must be protected **[407]** by provisional measures in so far as they are plausible. In my opinion, the question whether the procedural rights asserted exist is intrinsically linked to "the permissibility of proceedings before the CERD Committee when the Court is seised of the same matter" (see paragraph 25 of the Order).

16. Paragraph 25 of the Order also states that the Court has already examined the question of parallel proceedings in its Order of 23 July 2018 and concludes that the Court "does not see any reason to depart from these views at the current stage of the proceedings in this case". However, in its Order of 23 July 2018, the Court found that it was not necessary to decide whether a *lis pendens* exception would be applicable in the present situation, since the procedural preconditions under Article 22 of CERD for its seisin appear to have been complied with (*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*, *ICJ Reports 2018 (II)*, pp. 420-1, paras. 39-40). In my opinion, the Court has never drawn any particular conclusions on whether Article 22 of the Convention comprises the procedural right of States Parties not to be forced to defend themselves in parallel proceedings.

17. I would point out that this is just one possible interpretation of Article 22 and that it does not, therefore, prejudge the final finding of the Court at a later stage of the proceedings. The plausibility of a right deriving from a treaty is sometimes founded on a possible interpretation of the provisions of that treaty (see, for example, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, ICJ Reports 2018 (II)*, p. 643, para. 67). Nevertheless, the presentation of such a plausible interpretation at the provisional measures stage does not prevent the Court from subsequently arriving at a different interpretation following a full examination of the case.

II. The other conditions for the indication of provisional measures

18. In addition to the plausibility of the procedural right asserted, I believe that the other conditions for the indication of provisional

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measures are also met. First, the prima facie jurisdiction of the Court to entertain a request for the indication of provisional measures made by the respondent is examined in light of the merits of the case brought by the applicant (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, p. 10, para. 24), and the Court has already confirmed its prima facie jurisdiction on this basis in its Order of 23 July 2018 (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures,* **[408]***Order of 23 July 2018*, *ICJ Reports 2018 (II)*, p. 421, para. 41). The present Order does not appear to depart from that conclusion (see paragraph 16 of the Order).

19. Second, as regards "the link between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Reports 2007 (I)*, p. 10, para. 27), I am of the view that there is a sufficient link between the procedural right claimed by the UAE and the subject-matter of the proceedings before the Court on the merits of the case, since the right in question is that of the UAE not to be forced to defend itself in the dispute brought by Qatar.

20. Third, I believe that the *lis pendens* situation entails "a risk that irreparable prejudice could be caused" (see *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, ICJ Reports 2018 (II)*, p. 645, para. 77), since an unsatisfactory defence on the part of the UAE, as a result of the parallel proceedings, may irreparably influence the final decisions of the Court or the CERD Committee, or both.

21. Having concluded that all the conditions are met, it is my view that the first request of the UAE for the indication of provisional measures should have been granted. The final question, therefore, is what measure should have been adopted to address the *lis pendens* situation in this case appropriately. In this regard, Qatar suggested that the immediate withdrawal of its Communication to the CERD Committee could cause it disproportionate harm (CR 2019/6, pp. 55-6, paras. 1-5 (Klein)).

22. In my opinion, an immediate withdrawal was not the only way to resolve the *lis pendens* situation. If the measure requested by the UAE risked having a disproportionate effect on Qatar, the Court could have made an order providing for the suspension of the proceedings before the

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CERD Committee, by directing Qatar to take all measures at its disposal to ensure that the proceedings before the Committee are suspended pending the final decision in this case. Alternatively, the Court could have exercised its power under Article 75, paragraph 1, of the Rules of Court to conclude, for example, that it should suspend the present proceedings until the CERD Committee had issued its concluding observations on the Communication submitted by Qatar. There are in fact examples in international practice of proceedings being suspended. The arbitral tribunal in the *MOX Plant* case decided to suspend its own proceedings in a similar situation (Order No 3, suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 24 June 2003, para. 29). In the case concerning *Certain German Interests in Polish Upper Silesia*, the Polish Government requested a suspension rather than the withdrawal of the proceedings before the Permanent Court in the face of **[409]** allegedly parallel proceedings before it and the Germano-Polish Mixed Arbitral Tribunal (*Jurisdiction, Judgment No 6, 1925, PCIJ, Series A, No 6*, p. 19). Moreover, the UAE itself has, in the present case, mentioned the possibility of suspending the proceedings (CR 2019/5, p. 29, para. 6 (Reisman)). I believe that such a suspension, instead of a withdrawal, would not cause disproportionate harm to Qatar.

23. In any event, it is my opinion that the Court should have indicated a provisional measure to resolve the *lis pendens* situation, whether the withdrawal or the suspension of the proceedings. For these reasons, I voted against the operative part of the present Order.

[Report: *ICJ Reports 2019*, p. 361]

[The following is the text of the judgment on preliminary objections:]

[71] JUDGMENT ON PRELIMINARY OBJECTIONS (4 FEBRUARY 2021)

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[77] 1. On 11 June 2018, the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates (hereinafter referred to as the "UAE") 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").

2. In its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

3. On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

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4. The Registrar immediately communicated to the Government of the UAE the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance **[78]** with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request for the indication of provisional measures by Qatar.

5. In addition, by a letter dated 13 June 2018, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application and Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text thereof.

7. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Qatar chose Mr Yves Daudet and the UAE Mr Jean-Pierre Cot.

8. By its Order of 23 July 2018, the Court, having heard the Parties, indicated the following provisional measures:

(1) 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;

(2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. (*ICJ Reports 2018 (II)*, pp. 433-4, para. 79.)

9. Pursuant to Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States Parties to CERD the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notifications provided for in Article 34, paragraph 3, of the Statute.

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10. By an Order dated 25 July 2018, the President of the Court fixed 25 April 2019 and 27 January 2020 as the respective time-limits for the filing in the case of a Memorial by Qatar and a Counter-Memorial by the UAE.

11. On 22 March 2019, the UAE, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, also submitted a Request for the indication of provisional measures, in order to "preserve the UAE's procedural rights" and "prevent Qatar from further aggravating or extending the dispute between the Parties pending a final decision in th[e] case".

12. The Deputy-Registrar immediately communicated a copy of the said Request to the Government of Qatar. He also notified the Secretary-General of the United Nations of the filing of the UAE's Request for the indication of provisional measures.

[79] 13. Qatar filed its Memorial in the case on 25 April 2019, within the time-limit fixed by the President of the Court.

14. On 30 April 2019, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the UAE presented preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 2 May 2019, having noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended, the President of the Court fixed 30 August 2019 as the time-limit within which Qatar could present a written statement of its observations and submissions on the preliminary objections raised by the UAE.

15. By its Order of 14 June 2019, the Court, having heard the Parties, rejected the Request for the indication of provisional measures submitted by the UAE on 22 March 2019.

16. Qatar filed a written statement of its observations and submissions on the preliminary objections raised by the UAE on 30 August 2019, within the time-limit fixed by the President of the Court.

17. By a letter dated 3 September 2019, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of the United Nations copies of the written proceedings filed thus far in the case, and asked whether the Organization intended to present observations in writing under that provision in relation to the preliminary objections raised by the UAE. By a letter dated 27 September 2019, the Under-Secretary-General for Legal Affairs of the United Nations stated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

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18. By a letter dated 19 August 2020, the Agent of the UAE, referring to Article 56 of the Rules of Court and Practice Directions IX and IX*bis*, expressed the wish of her Government to produce three new documents. By a letter dated 24 August 2020, the Agent of Qatar informed the Court that his Government consented to the production of the three new documents by the UAE and expressed the wish of his Government also to produce four new documents under Article 56, paragraph 1, of the Rules of Court. By a letter dated 26 August 2020, the Agent of the UAE informed the Court that her Government had no objection to the production of the four new documents by Qatar. Accordingly, the documents submitted by both Parties were added to the case file.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings, with the exception of Annexes 163, 165-243, 247-63, 265-71 and Exhibit B of Annex 272 of Qatar's Memorial, and Exhibit A of Annex 272-A of Qatar's Written Statement on the Preliminary Objections of the UAE.

20. Public hearings on the preliminary objections raised by the UAE were held by video link from 31 August 2020 to 7 September 2020, at which the Court heard the oral arguments and replies of:

For the UAE: H.E. Ms Hissa Abdullah Ahmed Al-Otaiba,
H.E. Mr Abdalla Hamdan AlNaqbi,
Ms Lubna Qassim Al Bastaki,
Sir Daniel Bethlehem,
[80] Mr Scott Sheeran,
Mr Mathias Forteau.

For Qatar: Mr Mohammed Abdulaziz Al-Khulaifi,
Mr Pierre Klein,
Ms Catherine Amirfar,
Mr Lawrence H. Martin,
Mr Nico Schrijver,
Mr Vaughan Lowe.

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21. In the Application, the following claims were made by Qatar:

65. 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

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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 toward 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 institutions.

66. Accordingly, Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under 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;
[81] *(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;
(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 CERD.

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22. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Qatar in its Memorial:

On the basis of the facts and legal arguments presented in this Memorial, Qatar, in its own right and as *parens patriae* of its citizens, respectfully requests the Court:

1. 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 violations of the CERD, namely Articles 2 (1), 4, 5, 6 and 7, 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
   [82] *(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;

2. To adjudge and declare that the UAE has violated the Court's Order on Provisional Measures of 23 July 2018;
3. And further to adjudge and declare that the UAE is obligated to cease its ongoing violations, make full reparation 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.

4. Accordingly, the Court is respectfully requested 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 Convention as requested in Chapter VII;
   (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

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proceedings; and *(iii)* satisfaction in the forms of a declaration of wrongfulness and an apology to Qatar and the Qatari people, as requested in Chapter VII; and

(c) provide Qatar with assurances and guarantees of non-repetition in written form as requested in Chapter VII.

23. In the preliminary objections, the following submissions were presented on behalf of the Government of the UAE:

239. On the basis of each of the three independent preliminary objections explained above, the United Arab Emirates respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction over Qatar's Application of 11 June 2018 and that the Application is inadmissible.

240. The United Arab Emirates reserves the right to amend and supplement this submission in accordance with the provisions of the Statute and the Rules of Court. The United Arab Emirates also reserves the right to submit further objections to the jurisdiction of the Court and to the admissibility of Qatar's claims if the case were to proceed to any subsequent phase.

24. In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Qatar:

For the reasons described above, Qatar respectfully requests that the Court:

1. Reject the Preliminary Objections presented by the UAE;

[83] 2. Hold that it has jurisdiction to hear the claims presented by Qatar as set out in the Memorial, and that these claims are admissible; and

3. Proceed to hear those claims on the merits.

25. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the UAE,
at the hearing of 4 September 2020:

The United Arab Emirates respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction to address the claims brought by the State of Qatar by its Application dated 11 June 2018.

On behalf of the Government of Qatar,
at the hearing of 7 September 2020:

In accordance with Article 60 of the Rules of Court, for the reasons explained in our Written Statement of 30 August 2019 and during these hearings, Qatar respectfully asks the Court to:

(a) Reject the Preliminary Objections presented by the UAE;

(b) Hold that it has jurisdiction to hear the claims presented by Qatar as set out in its Application and Memorial; and

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(c) Proceed to hear those claims on the merits;
(d) Or, in the alternative, reject the Second Preliminary Objection presented by the UAE and hold, in accordance with the provisions of Article 79*ter*, paragraph 4, of the Rules of Court, that the First Preliminary Objection submitted by the UAE does not possess an exclusively preliminary character.

* * *

I. INTRODUCTION

A. Factual background

26. On 5 June 2017, the UAE issued a statement (hereinafter the "5 June 2017 statement") which provided, in relevant part, that

based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements, it has been decided to take the following measures that are necessary for safeguarding the interests of the [Gulf Cooperation Council] States in general and those of the brotherly Qatari people in particular:

. . .

[84] 2. Preventing Qatari nationals from entering the UAE or crossing its point of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.

The Gulf Cooperation Council (hereinafter the "GCC") is an intergovernmental political and economic union of which Qatar and the UAE were founding members in 1981, along with the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman and the Kingdom of Saudi Arabia.

27. In addition, the 5 June 2017 statement announced the severance of diplomatic relations with Qatar, in support of actions taken by the Kingdom of Bahrain and the Kingdom of Saudi Arabia, giving Qatari diplomats 48 hours to leave the UAE. It also proclaimed the "[c]losure of UAE airspace and seaports for all Qataris in 24 hours and banning [of] all Qatari means of transportation, coming to or leaving the UAE, from crossing, entering or leaving the UAE territories".

28. The 5 June 2017 statement explained:

The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to

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Doha and its Complementary Arrangement in 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its sustained endeavours to promote the ideologies of Daesh and Al Qaeda across its direct and indirect media in addition to Qatar's violation of the statement issued at the US-Islamic Summit in Riyadh on May 21st, 2017 on countering terrorism in the region and considering Iran a state sponsor of terrorism. The UAE measures are taken as well based on Qatari authorities' hosting of terrorist elements and meddling in the affairs of other countries as well as their support of terror groups—policies which are likely to push the region into a stage of unpredictable consequences.

29. According to an announcement posted on the website of the Ministry of Foreign Affairs and International Cooperation of the UAE on 11 June 2017, the President of the UAE had "instructed the authorities concerned to take into consideration the humanitarian circumstances of Emirati-Qatari joint families". The announcement further provided that "the Ministry of the Interior ha[d] set up a telephone line . . . to receive such cases and take appropriate measures to help them". In a statement **[85]** dated 5 July 2018, the Ministry of Foreign Affairs and International Cooperation of the UAE specified that

> [s]ince its announcement on June 5, 2017 . . . the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE [G]overnment.

The statement added that

> Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory. All applications for entry clearance may be made through the telephone hotline announced on June 11, 2017.

30. The UAE took certain additional measures relating to Qatari media and speech in support of Qatar. In this regard, on 6 June 2017, the Attorney General of the UAE issued a statement indicating that expressions of sympathy for the State of Qatar or objections to the measures taken by the UAE against the Qatari Government were considered crimes punishable by imprisonment and a fine. The UAE blocked several websites operated by Qatari companies, including those run by Al Jazeera Media Network. On 6 July 2017, the Abu Dhabi Department of Economic Development issued a circular prohibiting the broadcasting of certain television channels operated by Qatari companies.

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31. On 8 March 2018, Qatar deposited a communication with the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") under Article 11 of the Convention, requesting that the UAE take all necessary steps to end the measures enacted and implemented since 5 June 2017. According to Article 11, paragraph 1, of CERD, "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee". The UAE, through its responses dated 29 November 2018, 14 January 2019 and 19 March 2019, requested "the Committee to dismiss Qatar's Article 11 Communication for lack [of] jurisdiction and/or lack of admissibility".

32. On 11 June 2018, Qatar filed an Application in the Registry of the Court instituting the present proceedings (see paragraph 1 above).

33. In its decision on jurisdiction with regard to Qatar's inter-State communication, dated 27 August 2019, the CERD Committee concluded **[86]** that "it ha[d] jurisdiction to examine the exceptions of inadmissibility raised by the Respondent State" (Decision on the jurisdiction of the Committee over the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/3, para. 60). In its decision on the admissibility of the inter-State communication, also dated 27 August 2019, the CERD Committee concluded as follows:

> 64. In respect of the inter-state communication submitted on 8 March 2018 by Qatar against the United Arab Emirates, the Committee rejects the exceptions raised by the Respondent State concerning the admissibility of the inter-state communication.
>
> 65. The Committee requests its Chairperson to appoint, in accordance with article 12(1) of the Convention, the members of an ad hoc Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of the States parties' compliance with the Convention. (Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/4, paras. 64-5.)

34. By a Note Verbale dated 27 April 2020, addressed by the Permanent Mission of the UAE in Geneva to the Office of the High Commissioner for Human Rights, the Permanent Mission "note[d] with appreciation the [Office's] Note Verbale of 9 April 2020 advising that the ad hoc Conciliation Commission has been appointed by the Chair of the Committee, and has been effective since 1 March 2020".

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B. The jurisdictional basis invoked and the preliminary objections raised

35. Qatar asserts that the Court has jurisdiction over its Application pursuant to Article 22 of CERD, which provides:

> 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.

36. Qatar and the UAE are parties to CERD. Qatar acceded to this Convention on 22 July 1976 without entering any reservation. The UAE did so on 20 June 1974 without entering any reservation relevant to the present proceedings.

37. Qatar contends that there is a dispute between the Parties with respect to the interpretation and application of CERD and that the Parties **[87]** have been unable to settle this dispute despite Qatar's attempts to negotiate with the UAE.

38. At the present stage of these proceedings, the UAE asks the Court to adjudge and declare that the Court lacks jurisdiction to address the claims brought by Qatar on the basis of two preliminary objections. In its first preliminary objection, the UAE maintains that the Court lacks jurisdiction *ratione materiae* over the dispute between the Parties because the alleged acts do not fall within the scope of CERD. In its second preliminary objection, the UAE asserts that Qatar failed to satisfy the procedural preconditions of Article 22 of CERD.

39. The Court notes that, in its written pleadings, the UAE had also included an objection to admissibility on the ground that Qatar's claims constitute an abuse of process. However, during the oral proceedings, counsel for the UAE stated that it was not pursuing an allegation of abuse of process at this stage of the proceedings.

40. Before addressing the preliminary objections of the UAE, the Court will determine the subject-matter of the dispute.

II. SUBJECT-MATTER OF THE DISPUTE

41. Pursuant to Article 40, paragraph 1, of the Statute and Article 38, paragraph 1, of the Rules of Court, an applicant is required to indicate the subject of a dispute in its application. The Rules of Court also require that an application "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based" (Article 38, paragraph 2, of the Rules of Court).

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A Memorial "shall contain a statement of the relevant facts, a statement of law, and the submissions" (Article 49, paragraph 1, of the Rules of Court).

42. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the applicant's claims. In doing so, the Court examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims. The matter is one of substance, not of form (*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, ICJ Reports 2019 (II)*, p. 575, para. 24; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, pp. 308-9, para. 48).

* *

[88] 43. According to the Applicant, its "Application concerns a legal dispute between Qatar and the UAE regarding the UAE's deliberate and flagrant violations of the CERD". It claims that "[t]he UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin—measures that remain in effect to this day".

44. Qatar further characterizes the subject-matter of the dispute in the written statement of its observations and submissions on the preliminary objections as follows:

> As Qatar explained in its Application, Memorial, and during the provisional measures phase of the proceedings, Qatar's claims are based on acts and omissions of the UAE that discriminate against Qataris on the basis of national origin and in violation of Articles 2, 4, 5, 6, and 7 of the CERD. These acts and omissions include, in particular, the collective expulsion of Qataris from the UAE pursuant to its 5 June Directive (the "Expulsion Order"); the absolute ban on entry to the UAE by Qataris (the "Absolute Travel Ban"), which was later modified by the imposition of a "hotline" and website procedure that continue to restrict Qataris' entry into the UAE on an arbitrary and discriminatory basis (the "Modified Travel Ban"); and the enactment of measures encouraging anti-Qatari hate propaganda and prejudice, and suppressing Qatari media and speech deemed to support Qatar (including, respectively, the "Anti-Qatari Incitement Campaign", the "Anti-Sympathy Law", and the "Block on Qatari Media").

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45. Qatar states that the measures it describes as the "expulsion order" and the "travel bans", by their express reference to Qatari nationals, discriminate against Qataris on the basis of their current nationality. It points out that the definition of "racial discrimination" contained in Article 1, paragraph 1, of CERD includes discrimination on the basis of national origin. Qatar maintains that "nationality" is encompassed within the phrase "national origin".

46. Qatar also alleges that the UAE directly targeted Qatari media corporations by blocking access to their websites and broadcasts in all or part of the UAE's territory. It maintains that these measures were imposed "on racially discriminatory grounds" and that CERD extends to racial discrimination against "institutions", which it considers to include corporations.

[89] 47. Qatar also points out that CERD applies to measures that are not framed as distinctions on the basis of a protected ground but have in fact the purpose or effect of racial discrimination. It maintains that, regardless of whether the measures imposed by the UAE are explicitly based on Qatari nationality, they have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin, in the sense of their Qatari heritage and culture. It contends that such measures give rise to "indirect discrimination".

48. As one part of its claim of indirect discrimination, Qatar asserts that the measures which discriminate on the basis of current Qatari nationality violate the UAE's obligations under CERD for another independent reason, "because they have an unjustifiable disparate impact on individuals of Qatari origin, in the sense of their heritage and culture".

49. As further support for its claim of indirect discrimination, Qatar maintains that a number of measures imposed by the UAE encourage anti-Qatari propaganda and suppress speech deemed to be in support of Qatar. It refers to the ban on Qatari media corporations as well as a 6 June 2017 announcement of the Attorney General of the UAE which stated that persons "expressing sympathy, bias or affection for" the State of Qatar or "objecting to the . . . measures . . . taken [by the UAE] against the Qatari [G]overnment" are considered to have committed crimes punishable by imprisonment and a fine (see paragraph 30 above). Qatar contends that, although this statement refers to the "Qatari Government", it is "clearly understood as a reference to Qatar *qua* State and Qatar *qua* Qataris". Additionally, Qatar alleges that the UAE has attempted to incite discrimination against Qataris, referring to statements in social and traditional media by persons it identifies as officials of the UAE, which it considers to be attributable to the UAE.

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50. Qatar points out that the UAE's measures are not exclusively addressed to Qataris on the basis of their current nationality and asserts that it has from the beginning framed its case to include a claim of unjustifiable disparate impact. It alleges that the measures imposed by the UAE penalize persons of Qatari national origin based on their identification with Qatari national traditions and culture, their Qatari accent or their Qatari dress. It further alleges that these measures discriminate against persons who are not Qatari citizens on the basis of their cultural identification as "Qataris".

*

[90] 51. The UAE asserts that the subject-matter of the dispute is alleged discrimination on the basis of current Qatari nationality, a term that, in its view, is distinct from "national origin". It contends that claims arising from the measures that Qatar describes as the "expulsion order" and the "travel bans" are founded on differential treatment of persons based on their Qatari nationality.

52. The UAE maintains that Qatar seeks to blur the distinction between the terms "nationality" and "national origin" by using the two terms interchangeably and by referring obliquely to "Qataris" in its written and oral pleadings.

53. The UAE acknowledges that it has imposed restrictions on websites of some Qatari media corporations, stating that it did so on the basis of content restrictions, pursuant to UAE law. It considers that measures that address corporations do not fall within the definition of racial discrimination contained in CERD and thus that Qatar's claims with respect to the measures to restrict transmissions of Qatari media corporations are outside the scope of CERD.

54. The UAE also maintains that the restrictions on Qatari media and the other facts that Qatar invokes in support of its allegations of incitement and suppression of free speech, even if established, are not indicative of a claim of racial discrimination, but rather must be assessed in the context of the UAE's conviction that Qatar supports terrorism, extremism and intervention. It points out that Qatar itself frames its allegation of incitement by accusing the UAE of "media attacks on Qatar" and the dissemination of false reports "accusing Qatar of support for terrorism". It notes that the 6 June 2017 statement of the Attorney General of the UAE relates to persons who express support for the State of Qatar, not to persons of Qatari national origin.

55. The UAE accepts that disguised discrimination against members of a protected group would fall within the scope of CERD. However, it

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contends that, in the present case, the subject-matter of the dispute is limited to alleged direct discrimination on the basis of current nationality and does not extend to "indirect discrimination" because this is not the case that Qatar has pleaded. According to the UAE, Qatar has introduced legal arguments relating to "indirect discrimination" because its claim of direct discrimination on the basis of national origin does not withstand scrutiny.

* *

[91] 56. As can be seen from Qatar's characterization of the subject-matter of the dispute (see paragraph 44 above), Qatar makes three claims of racial discrimination. The first is its claim arising out of the "travel bans" and "expulsion order", which make express reference to Qatari nationals. The second is its claim arising from the restrictions on Qatari media corporations. Qatar's third claim is that the measures taken by the UAE, including the measures on which Qatar bases its first and second claims, result in "indirect discrimination" on the basis of Qatari national origin. In order to determine the subject-matter of the dispute, the Court will consider these three claims in turn.

57. As noted above (see paragraph 45), Qatar states that the "expulsion order" and the "travel bans", by their express reference to Qatari nationals, discriminate against Qataris on the basis of their current nationality. The UAE acknowledges that these measures differentiate between Qataris and other persons on the basis of their current nationality, but does not agree that the measures violate its obligations under CERD. The Parties' characterization of the basis for the challenged measures is consistent with the text of the measures themselves, which refer, *inter alia*, to "Qatari residents and visitors", "Qatari nationals", "Qataris", "Qatari citizens" and "travellers holding Qatari passports".

58. As to Qatar's first claim, taking into account Qatar's characterization of these measures and the facts on which it relies in support of its claim that the measures that it describes as the "expulsion order" and the "travel bans" discriminate against Qataris on the basis of their current nationality, in violation of the UAE's obligations under CERD, as well as the characterization by the Respondent, the Court considers that the Parties hold opposing views over this claim.

59. With regard to Qatar's second claim, the Court has noted that the UAE does not deny that it imposed measures to restrict broadcasting and internet programming by certain Qatari media corporations. The Parties disagree, however, on whether those measures directly targeted these media corporations in a racially discriminatory manner, in violation of the UAE's obligations under CERD.

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60. As to its third claim, as noted above, Qatar maintains that the subject-matter of the dispute encompasses Qatar's assertion that the "expulsion order" and the "travel bans" give rise to "indirect discrimination" against persons of Qatari national origin, independent of the claim of racial discrimination on the basis of current nationality. The UAE, however, **[92]** maintains that this claim of "indirect discrimination" is not part of the case presented in Qatar's Application.

61. The Court observes that the subject-matter of a dispute is not limited by the precise wording that an applicant State uses in its application. The Rules of Court provide an applicant State with some latitude to develop the allegations in its application, so long as it does not "transform the dispute brought before the Court by the application into another dispute which is different in character" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, ICJ Reports 1998*, pp. 318-19, paras. 98 and 99).

62. Qatar's Application did not expressly set out Qatar's contention that the "travel bans" and "expulsion order" give rise to "indirect discrimination" against Qataris on a basis other than nationality. Qatar explains that it developed this argument in its Memorial in response to arguments made by the UAE during the provisional measures phase of the case. In addition, Qatar's Request for the indication of provisional measures, filed on the same day as the Application, requested the Court to order that the UAE cease "all conduct that could result, directly or indirectly, in any form of racial discrimination against Qatari individuals and entities".

63. The Court considers that the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments in response to those made by the UAE, thereby making explicit the contention that the measures that Qatar describes as the "travel bans" and "expulsion order" give rise to "indirect discrimination" against persons of Qatari national origin, in violation of the UAE's obligations under CERD.

64. The Court turns next to Qatar's other allegations of "indirect discrimination" against persons of Qatari national origin. Qatar brings these allegations on the basis of the restrictions on Qatari media corporations and other measures that, in its view, attack freedom of expression, incite anti-Qatari sentiment, and criminalize speech deemed to be in favour of Qatar or critical of the UAE's policies towards Qatar, as well as statements by the UAE or its officials that express or condone anti-Qatari hate speech and propaganda.

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65. The Court notes that Qatar made specific references in its Application to the 6 June 2017 statement by the Attorney General of the UAE, the restrictions on Qatari media corporations, the UAE's "media defamation" campaign against Qatar and alleged statements by UAE officials fostering anti-Qatari sentiment.

[93] 66. The Parties address these contentions in their written and oral pleadings. Although Qatar acknowledges that the statement by the Attorney General of the UAE refers to criminal penalties for supporting the Qatari Government, not Qataris, it asserts that the risk of criminal penalties has a chilling effect and potentially alienates Qataris from their Emirati friends and family. It introduces several witness statements to substantiate its claims. In support of its contention that the UAE has fostered anti-Qatari sentiment, Qatar attaches to its Memorial a number of social media posts from persons it describes as UAE officials in which the authors criticize Qatar. Qatar claims that these statements formed part of a wider media campaign directed against it. It asserts that this criticism of Qatar has resulted in hate messages directed towards persons of Qatari national origin. Qatar also claims that the restrictions on Qatari media corporations have interfered with the free expression of Qatari ideas and culture in a broader sense and have contributed to the climate of fear which persons of Qatari national origin are said to have experienced as a result of the other measures that the UAE has taken.

67. The UAE does not dispute that its Attorney General made the statement to which Qatar objects. It acknowledges that it has made "adverse comments directed towards the State of Qatar and its behaviour" and that "others within its territory may have made similar comments against the State of Qatar". It does not accept, however, that such comments about another State can give rise to a claim of racial discrimination under CERD. The UAE also refutes Qatar's allegations of certain instances in which individuals claim to have been arrested, mistreated or to have suffered other negative consequences in the UAE for expressing sympathy with Qatar and adds that in any case the persons concerned are not of Qatari nationality or alleged to be of Qatari national origin. The UAE also argues that, by invoking the restrictions on Qatari media corporations in support of its claim of "indirect discrimination", Qatar has presented a new argument that does not form part of the case pleaded in its Application.

68. In its Application, Qatar alleges that the restrictions imposed on Qatari media corporations violate the freedom of expression of Qataris (see paragraphs 64-5 above). As the Court previously noted (see paragraph 63 above), the Rules of Court do not preclude Qatar from

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refining the legal arguments presented in its Application or advancing new arguments.

[94] 69. Taking into account the Application and the written and oral pleadings, as well as the facts asserted by Qatar, the Court considers that the Parties hold opposing views over Qatar's claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin, in violation of its obligations under CERD.

70. In view of the preceding analysis, the Court concludes that the Parties disagree in respect of Qatar's three claims that the UAE has violated its obligations under CERD: first, the claim that the measures that Qatar describes as the "expulsion order" and the "travel bans", by their express references to Qatari nationals, discriminate against Qataris on the basis of their current nationality; secondly, the claim that the UAE imposed racially discriminatory measures on certain Qatari media corporations; and thirdly, the claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin by taking these measures and other measures summarized in paragraph 64. The Parties' disagreements in respect of these claims form the subject-matter of the dispute.

III. FIRST PRELIMINARY OBJECTION: JURISDICTION *RATIONE MATERIAE*

71. The Court will now consider whether it has jurisdiction *ratione materiae* over the dispute under Article 22 of CERD.

72. In order to determine whether the dispute is one with respect to the interpretation or application of CERD, under its Article 22, the Court will examine whether each of the above claims falls within the scope of CERD (*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, ICJ Reports 2019 (II)*, p. 595, paras. 94-5). The Court will address Qatar's claims in the order mentioned above (see paragraph 70).

73. The Court observes that, as far as the first claim of Qatar is concerned, the Parties disagree on whether the term "national origin" in Article 1, paragraph 1, of the Convention encompasses current nationality. In respect of the second claim of Qatar, the Parties disagree on whether the scope of the Convention extends to Qatari media corporations. Finally, in respect of the third claim, the Parties disagree on whether the measures of which Qatar complains give rise to

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"indirect discrimination" against Qataris on the basis of their national origin. The Court will examine each of these questions with a view to ascertaining whether it has jurisdiction *ratione materiae* in the present case.

[95] *A. The question whether the term "national origin" encompasses current nationality*

74. Qatar is of the view that the term "national origin", in the definition of racial discrimination in Article 1, paragraph 1, of the Convention, encompasses current nationality and that the measures of which Qatar complains thus fall within the scope of CERD. The UAE argues that the term "national origin" does not include current nationality and that the Convention does not prohibit differentiation based on the current nationality of Qatari citizens, as complained of by Qatar in this case. Thus, the Parties hold opposing views on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention, which reads:

> In this Convention, the term 'racial discrimination' shall 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.

* *

75. In order to determine its jurisdiction *ratione materiae* in this case, the Court will interpret CERD and specifically the term "national origin" in Article 1, paragraph 1, thereof by applying the rules on treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"). Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as CERD, it is well established that Articles 31 and 32 of the Vienna Convention reflect rules of customary international law (*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, ICJ Reports 2019 (II)*, p. 598, para. 106; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, pp. 320-1, para. 91; *Question of the*

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Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. *Colombia), Preliminary Objections, Judgment, ICJ Reports 2016 (I)*, p. 116, para. 33).

76. The Court will interpret the term "national origin" by reference, first, to the elements set out in Article 31 of the Vienna Convention, **[96]** which states the general rule of treaty interpretation. Only then will the Court turn to the supplementary means of interpretation provided for in Article 32 in order to confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, p. 321, para. 91; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, ICJ Reports 2007 (I)*, pp. 109-10, para. 160).

77. The Court will also examine the practice of the CERD Committee and of regional human rights courts. In their pleadings, the Parties expressed different opinions on that practice in relation to the interpretation of the term "national origin" in Article 1, paragraph 1, of the Convention. The Court recalls that, in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, ICJ Reports 2012 (I)*, p. 331, para. 13; pp. 334-5, para. 24; p. 337, para. 33, and pp. 339-40, para. 40; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, ICJ Reports 2012 (II)*, pp. 457-8, para. 101; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, pp. 663-4, para. 66; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, p. 179, para. 109, and pp. 192-3, para. 136).

1. The term "national origin" in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of CERD

78. The Court recalls that Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The

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Court's interpretation must take account of all these elements considered as a whole (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, ICJ Reports 2017*, p. 29, para. 64).

* *

79. According to the UAE, the ordinary meaning of the term "national origin" does not encompass current nationality, because the latter concept refers to a legal relationship with a State in the sense of citizenship, whereas national origin denotes "an association with a nation of people, not a State". In the Respondent's view, the five authentic texts of the **[97]** Convention confirm that the drafters drew a distinction between the term "national origin", as used in Article 1, paragraph 1, and Article 5 of the Convention, and "nationality", as used in Article 1, paragraph 3, of the Convention. In its view, the definition of racial discrimination in the Convention refers only to characteristics that are inherent and immutable, namely race, colour, descent, or national or ethnic origin. Nationality, on the other hand, is a legal bond that can change over time. Lastly, the Respondent considers that the Convention's title and Preamble confirm that it does not prohibit differentiation on the basis of an individual's current nationality, since it concerns racial discrimination. According to the Respondent, the Preamble reaffirms the overall aim of bringing racial discrimination to an end and makes no mention of discrimination based on current nationality. It thus argues that the term "national origin" as used in Article 1, paragraph 1, of CERD is "an individual's permanent association with a particular nation of people" and does not include nationality in the sense of citizenship.

80. In Qatar's view, discrimination based on a person's current nationality falls within the prohibition of racial discrimination provided for in Article 1, paragraph 1, of the Convention. According to the Applicant, the term "national origin" refers to a person belonging to a nation by birth, or to the country from which he or she originates, as well as a person's current nationality or national affiliation. It contends that this term, as reproduced in the different languages of the Convention, does not refer only to the immutable characteristics of a person. Qatar further contends that paragraphs 2 and 3 of Article 1, which exclude from the scope of the Convention any differentiation between citizens and non-citizens and at the same time prohibit discrimination against any particular nationality, would be deprived of any *effet utile* if current nationality were not covered by the term "national origin". Relying on the Preamble, the Applicant argues that it

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was the drafters' intention that the Convention would not remain static but would form a comprehensive network of protections which would apply to racial discrimination, however it manifests, across different countries, contexts and time periods. According to the Applicant, excluding current nationality from the definition of racial discrimination would permit States to put in place any discriminatory policy targeting individuals or groups with the characteristics expressly mentioned in Article 1, paragraph 1, of the Convention. The adoption of such policies could be justified officially by sole reference to current nationality rather than to the characteristics in question. The Applicant thus concludes that the exclusion of nationality-based discrimination from the scope of the Convention would lead to absurd results wholly at odds with its purpose.

* *

[98] 81. As the Court has recalled on many occasions, "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994*, p. 22, para. 41). The Court observes that the definition of racial discrimination in the Convention includes "national or ethnic origin". These references to "origin" denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime (*Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, ICJ Reports 1955*, pp. 20 and 23). The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.

82. The Court will next turn to the context in which the term "national origin" is used in the Convention, in particular paragraphs 2 and 3 of Article 1, which provide that:

> 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> 3. 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.

83. The Court considers that these provisions support the interpretation of the ordinary meaning of the term "national origin" as not

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encompassing current nationality. While according to paragraph 3, the Convention in no way affects legislation concerning nationality, citizenship or naturalization, on the condition that such legislation does not discriminate against any particular nationality, paragraph 2 provides that any "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens do not fall within the scope of the Convention. In the Court's view, such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States Parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there—rights that are in dispute in this case—on the basis of their current nationality.

84. The Court will now examine the object and purpose of the Convention. The Court has frequently referred to the preamble of a convention to determine its object and purpose (*Certain Iranian Assets (Islamic* **[99]** *Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, ICJ Reports 2019 (I)*, p. 28, para. 57, and p. 38, para. 91; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, ICJ Reports 2014*, p. 251, para. 56; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, ICJ Reports 2012 (II)*, p. 449, para. 68).

85. It is recalled in the Preamble of CERD that

> the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end.

86. The Court notes that CERD was drafted against the backdrop of the 1960s decolonization movement, for which the adoption of resolution 1514 (XV) of 14 December 1960 was a defining moment (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019 (I)*, p. 132 para. 150). By underlining that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere", the Preamble to the Convention clearly sets out its object and purpose, which is to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics or to impose a system of racial discrimination or segregation. The aim of the

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Convention is thus to eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth.

87. CERD, whose universal character is confirmed by the fact that 182 States are parties to it, thus condemns any attempt to legitimize racial discrimination by invoking the superiority of one social group over another. Therefore, it was clearly not intended to cover every instance of differentiation between persons based on their nationality. Differentiation on the basis of nationality is common and is reflected in the legislation of most States Parties.

88. Consequently, the term "national origin" in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality.

[100] *2. The term "national origin" in the light of the* travaux préparatoires *as a supplementary means of interpretation*

89. In light of the conclusion above, the Court need not resort to supplementary means of interpretation. However, the Court notes that both Parties have carried out a detailed analysis of the *travaux préparatoires* of the Convention in support of their respective positions on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention. Considering this fact and the Court's practice of confirming, when it deems it appropriate, its interpretation of the relevant texts by reference to the *travaux préparatoires* (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 128, para. 142, and pp. 129-30, para. 147), the Court will examine the *travaux préparatoires* of CERD in the present case.

* *

90. According to the UAE, the various drafts of the definition of racial discrimination considered by the negotiators of the Convention did not refer to nationality in the political-legal sense of the term. The Respondent recalls that the amendment jointly proposed by the United States of America and France in the course of the work of the Third Committee of the United Nations General Assembly (hereinafter the "Third Committee"), according to which "the expression 'national origin' does not mean 'nationality' or 'citizenship'", was withdrawn in

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favour of an amendment adopted as the final text of Article 1. The Respondent adds that this withdrawal was justified by the insertion of paragraphs 2 and 3 into the text of Article 1, which the two countries considered "entirely acceptable".

91. Qatar, for its part, asserts that the drafters of the Convention sought a broad and comprehensive definition of racial discrimination, which would leave no vulnerable group without protection, and they did not intend to exclude nationality-based discrimination from its scope. According to the Applicant, the fact that the proposed amendments seeking to exclude nationality from the scope of the term "national origin" in the definition of racial discrimination were not adopted confirms that this term encompasses current nationality. As regards the joint amendment of the United States of America and France, which was withdrawn in favour of the current wording of Article 1, Qatar considers that it was in any event limited in scope, since it sought to prevent non-citizens from availing themselves of certain rights reserved for citizens and in no way sought to exclude differentiation based on current nationality from the scope of the Convention. Thus, in Qatar's view, the *travaux préparatoires* confirm that the scope of the Convention extends to discrimination based on current **[101]** nationality, in particular where, as in the present case, a State singles out an entire group of non-citizens for discriminatory treatment.

* *

92. The Court recalls that the Convention was drafted in three stages: first, as part of the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter the "Sub-Commission"), then within the Commission on Human Rights (hereinafter the "Commission") and, finally, within the Third Committee.

93. In the view of the Court, the definition of racial discrimination contained in the various drafts demonstrates that the drafters did in fact have in mind the differences between national origin and nationality. The Sub-Commission discussed at length the question whether the definition should refer solely to national origin or should also include nationality. Although some members were in favour of including the term "nationality" in the first draft definition of racial discrimination, this was only for specific cases of States composed of different nationalities. Indeed, several members of the Sub-Commission were of the opinion that the Convention should not seek to eliminate all differentiation based on nationality in the political-legal sense of the term, since

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in all countries a distinction was made between nationals and aliens. As a result, the draft presented by the Sub-Commission to the Commission did not refer to current nationality as a basis of racial discrimination:

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin (and in the case of States composed of different nationalities discrimination based on such difference) 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 political, economic, social, cultural or any other field of public life set forth *inter alia* in the Universal Declaration of Human Rights. ("Draft International Convention on the Elimination of All Forms of Racial Discrimination", annexed to the *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, 13-31 January 1964, UN doc. E/CN.4/873, E/CN.4/Sub.2/241, 11 February 1964, p. 46.)

94. The Court notes that the question of the scope of the term "national origin" arose again during the work of the Commission. The Court **[102]** observes that it is clear from the Commission's discussions that the expression "national origin" refers not to nationality but to country of origin (United Nations, *Commission on Human Rights, Report on the Twentieth Session, 17 February-18 March 1964*, doc. E/3878, E/CN.4/874, pp. 24-5, para. 85). Accordingly, the draft Convention presented by the Commission to the Third Committee contained the following definition of racial discrimination, which sought to exclude nationality from the scope of the term "national origin":

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, [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]. [In this paragraph the expression "national origin" does not cover the status of any person as a citizen of a given State.] (*Ibid.*, p. 111; see also United Nations, *Commission on Human Rights, Twentieth Session, Summary Record of the 810th Meeting*, 13 March 1964, doc. E/CN.4/SR.810, 15 May 1964, p. 5.)

95. It emerges from the discussions within the Third Committee that, although it was ultimately decided to retain the term "national origin" in the text of the Convention, this decision was made only in so

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far as the term refers to persons of foreign origin who are subject to racial discrimination in their country of residence on the grounds of that origin. Several delegations noted that national origin differs from current nationality.

96. In the Court's view, the fact that the amendment of the United States of America and France was not retained (see paragraph 90 above) cannot support the Applicant's position that the term "national origin" encompasses current nationality (see United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, "Draft International Convention on the Elimination of All Forms of Racial Discrimination", doc. A/6181, 18 December 1965, pp. 12-14, paras. 30-7). Although the amendment was withdrawn, this was done in order to arrive at a compromise formula that would enable the text of the Convention to be finalized, by adding paragraphs 2 and 3 to Article 1 (see the compromise amendment presented by Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland and Senegal, UN doc. A/C.3/L.1238). As the Court has noted (see paragraphs 82-3 above), paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States' legislation on nationality, thus fully addressing the concerns expressed by certain delegations, including those of the United States of America and France, regarding the scope of the term "national origin" (see the explanations **[103]** provided by Lebanon in presenting the compromise amendment, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, Summary Record of the 1307th Meeting, held on 18 October 1965*, doc. A/C.3/SR.1307, p. 95, para. 1 (Lebanon)).

97. The Court concludes that the *travaux préparatoires* as a whole confirm that the term "national origin" in Article 1, paragraph 1, of the Convention does not include current nationality.

3. The practice of the CERD Committee

98. With regard to the practice of the CERD Committee, the UAE argues that the Committee's opinions and general recommendations do not constitute subsequent practice or agreement of States Parties to CERD regarding the interpretation of the Convention. In particular, the Respondent considers that General Recommendation XXX concerning discrimination against non-citizens, adopted by the CERD Committee in 2004, does not constitute an interpretation based on the practice of States Parties and that, in any event, it is not intended as a general prohibition of all differential treatment based on nationality.

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The Respondent further considers that, according to that text, any differential treatment between different groups of non-citizens must be assessed "in the light of the objectives and purposes of the Convention". Finally, as regards the decisions on jurisdiction and admissibility delivered by the CERD Committee in respect of the communication submitted by Qatar, the Respondent contends that these decisions are in no way binding on the Court and their reasoning with regard to the interpretation of the term "national origin" is insufficient. It adds that these decisions, whereby the Committee held that measures based on the current nationality of Qatari citizens fell within the scope of the Convention, are based on a single criterion, i.e. the Committee's "constant practice", which is inconsistent with the rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention.

99. Qatar, for its part, requests that the Court ascribe great weight to the CERD Committee's interpretations of the Convention, in keeping with its jurisprudence relating to committees established under other human rights conventions. The Applicant asserts that the CERD Committee, as the guardian of the Convention, has developed a constant practice whereby differentiation based on nationality is capable of constituting racial discrimination within the meaning of the Convention. It notes, in particular, that the CERD Committee found that it was competent to entertain Qatar's communication concerning the same measures of which it complains in the present case, considering that they were capable of falling within the scope *ratione materiae* of the Convention. Thus, according **[104]** to Qatar, differentiation based on nationality can constitute racial discrimination within the meaning of the Convention, in so far as it does not pursue a legitimate aim and is not proportional to the achievement of that aim.

* *

100. The CERD Committee, in its General Recommendation XXX, considered that

> differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

The Committee, a body of independent experts established specifically to supervise the application of CERD, relied on this General Recommendation when it found that it was competent to examine Qatar's communication against the UAE and that this communication

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was admissible (Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/4, paras. 53-63).

101. The Court recalls that, in its Judgment on the merits in the *Diallo* case, to which reference is made in paragraph 77 above, it indicated that it should "ascribe great weight" to the interpretation of the International Covenant on Civil and Political Rights—which it was called upon to apply in that case—adopted by the Human Rights Committee (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, p. 664, para. 66). In this regard, it also affirmed, however, that it was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee" (*ibid.*). In the present case concerning the interpretation of CERD, the Court has carefully considered the position taken by the CERD Committee, which is specified in paragraph 100 above, on the issue of discrimination based on nationality. By applying, as it is required to do (see paragraph 75 above), the relevant customary rules on treaty interpretation, it came to the conclusion indicated in paragraph 88 above, on the basis of the reasons set out above.

4. The jurisprudence of regional human rights courts

102. Lastly, both Parties referred in their written and oral pleadings to the jurisprudence of regional human rights courts in their arguments on the meaning and scope of the term "national origin". In this respect, Qatar invokes the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission **[105]** on Human and Peoples' Rights, which, it contends, have interpreted the term national origin as including nationality. Moreover, the Applicant refers to this jurisprudence to reiterate that discrimination consists in a difference in treatment without legitimate justification and without a reasonable relationship of proportionality with the aim to be achieved, which in its view is true of the measures at issue in this case. The Applicant adds that the elements of the definition of discrimination adopted by the CERD Committee are exactly the same as those applied in regional human rights instruments and in general international law, and entail an examination of the legitimacy and proportionality of the measures.

103. The UAE disputes the relevance of the jurisprudence of regional human rights courts for the purpose of interpreting the Convention. In its view, the concept of discrimination that has prevailed in general international human rights law has no bearing on the

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interpretation of CERD, which is concerned solely with racial discrimination.

* *

104. It is for the Court, in the present case, to determine the scope of CERD, which exclusively concerns the prohibition of racial discrimination on the basis of race, colour, descent, or national or ethnic origin. The Court notes that the regional human rights instruments on which the jurisprudence of the regional courts is based concern respect for human rights without distinction of any kind among their beneficiaries. The relevant provisions of these conventions are modelled on Article 2 of the Universal Declaration of Human Rights of 10 December 1948, according to which

> [e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (see also Article 14 of the European Convention on Human Rights, entitled "Prohibition of discrimination"; Article 1 of the American Convention on Human Rights; and Article 2 of the African Charter on Human and Peoples' Rights).

While these legal instruments all refer to "national origin", their purpose is to ensure a wide scope of protection of human rights and fundamental freedoms. The jurisprudence of regional human rights courts based on those legal instruments is therefore of little help for the interpretation of the term "national origin" in CERD.

[106] *5. Conclusion on the interpretation of the term "national origin"*

105. In light of the above, the Court finds that the term "national origin" in Article 1, paragraph 1, of the Convention does not encompass current nationality. Consequently, the measures complained of by Qatar in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD.

B. The question whether the measures imposed by the UAE on certain Qatari media corporations come within the scope of the Convention

106. In its second claim, Qatar complains that the measures imposed on certain media corporations in the UAE have infringed the right to freedom of opinion and expression of Qataris. According

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to the Applicant, the UAE has blocked access to news websites and television stations operated by Qatari corporations, including Al Jazeera. In particular, Qatar submits that the effect of closing down Qatari media channels has been to silence sources of independent information that might have mitigated the racially discriminatory messages disseminated as part of anti-Qatari hate speech and propaganda. The Applicant submits that the block on Qatari media has not only directly targeted Qatari corporations, but has also infringed the freedom of expression of Qatari ideas and culture and contributed to the climate of fear experienced by Qataris as a result of their Qatari identity being targeted.

107. The UAE considers that the Applicant's claims in respect of Qatari media corporations do not fall within the scope of the Convention. It submits that corporations are not covered by the Convention, which applies only to natural persons. The UAE further submits that while corporations may have a nationality, they do not have a national origin. In respect of the allegations made by Qatar, the UAE argues that it has a regulatory framework for media activities, which provides for certain content restrictions that allow the authorities to block the websites of media corporations. It is pursuant to this regulatory framework, which applies to all media corporations operating in the UAE, that the Respondent has blocked certain websites of Qatari media corporations.

* *

108. For the present purposes, the Court will examine only whether the measures concerning certain Qatari media corporations, which according to Qatar have been imposed in a racially discriminatory manner, fall **[107]** within the scope of the Convention. As to the alleged "indirect discrimination" resulting from the effect of the media block on persons of Qatari national origin, the Court will examine that aspect in its analysis of Qatar's third claim. The Court notes that the Convention concerns only individuals or groups of individuals. This is clear from the various substantive provisions of CERD, which refer to "certain racial or ethnic groups or individuals" (Article 1, paragraph 4), "race or group of persons" (Article 4*(a)*), or "individuals or groups of individuals" (Article 14, paragraph 1), as well as its Preamble which refers to racial "discrimination between human beings". While under Article 2, paragraph 1*(a)*, of the Convention, "[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions", the Court considers

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that this reference to "institutions" does not include media corporations such as those in the present case. Read in its context and in the light of the object and purpose of the Convention, the term "institutions" refers to collective bodies or associations, which represent individuals or groups of individuals. Thus, the Court concludes that Qatar's second claim relating to Qatari media corporations does not fall within the scope of the Convention.

C. The question whether the measures that Qatar characterizes as "indirect discrimination" against persons of Qatari national origin fall within the scope of the Convention

109. Qatar submits that the "expulsion order" and "travel bans", as well as other measures taken by the UAE, have had the purpose and effect of discriminating "indirectly" against persons of Qatari national origin in the historical-cultural sense, namely persons of Qatari birth and heritage, including their spouses, their children and persons otherwise linked to Qatar. According to Qatar, a measure may be considered as "based on" one of the grounds listed in Article 1 if, by its effect, it implicates a protected group. It adds that the Convention prohibits both direct discrimination, where a measure expressly distinguishes on the basis of one of the grounds of racial discrimination, and "indirect discrimination", where a measure results in such a distinction by its effect. As part of the latter claim, Qatar complains of official statements critical of Qatar, including the 6 June 2017 statement of the Attorney General of the UAE, which mentioned criminal penalties for any expression of sympathy towards Qatar. Qatar adds that the UAE has failed to comply with CERD by encouraging and failing to supress anti-Qatari hate speech and propaganda. The Applicant emphasizes that its complaints are based not on a minimal difference in the treatment of Qatari citizens in the area of immigration controls, but on comprehensive, serious and co-ordinated **[108]** discriminatory acts resulting in discrimination against persons of Qatari national origin in the historical-cultural sense, in particular on the basis of their traditions, culture, accent or dress.

110. According to the UAE, there is no question of "indirect" racial discrimination in the present case. It adds that this is not how Qatar presented its complaints in its Application instituting proceedings or in its offer to negotiate dated 25 April 2018, which concerned allegedly discriminatory policies directed at Qatari citizens and companies on the sole basis of their Qatari nationality in violation of CERD. It further states that the notion of "indirect discrimination", in the context of the

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present Convention, is more specific than in other human rights treaties, since it refers solely to measures which are not discriminatory at face value but are discriminatory in fact and effect. The UAE observes that the 6 June 2017 statement by its Attorney General was made in the context of existing legislation, i.e. Federal Decree-Law No 5 on Combating Cybercrimes dated 13 August 2012, and that there was no criminalizing of sympathy for Qatar. The UAE submits that the various allegations relating to its failure to suppress statements critical of Qatar or the actions of its Government, even if they were true, do not fall within the scope *ratione materiae* of the Convention since it does not constitute racial discrimination on the grounds of race, colour, descent, or national or ethnic origin.

* *

111. The Court recalls that it has already found that the "expulsion order" and "travel bans" of which Qatar complains as part of its first claim do not fall within the scope of CERD, since these measures are based on the current nationality of Qatari citizens, and that such differentiation is not covered by the term "national origin" in Article 1, paragraph 1, of the Convention (see paragraph 105 above). The Court will now turn to the question whether these and any other measures as alleged by Qatar are capable of falling within the scope of the Convention, if, by their purpose or effect, they result in racial discrimination against certain persons on the basis of their Qatari national origin.

112. The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may constitute **[109]** racial discrimination if it "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". Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin.

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The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its "indirect discrimination" claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.

113. It follows from the above that the Court does not have jurisdiction *ratione materiae* to entertain Qatar's third claim, since the measures complained of therein by that State do not entail, either by their purpose or by their effect, racial discrimination within the meaning of Article 1, paragraph 1, of the Convention.

D. General conclusion

114. In light of the above, the Court concludes that the first preliminary objection raised by the UAE must be upheld. Having found that it does not have jurisdiction *ratione materiae* in the present case under Article 22 of the Convention, the Court does not consider it necessary to examine the second preliminary objection raised by the UAE. In accordance with its jurisprudence, when its jurisdiction is challenged on diverse grounds, the Court is "free to base its decision on the ground which in its judgment is more direct and conclusive" (*Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, ICJ Reports 2000*, p. 24, para. 26; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, ICJ Reports 1978*, p. 17, para. 40; *Certain Norwegian Loans (France* v. *Norway), Judgment, ICJ Reports 1957*, p. 25).

* * *

[110] 115. For these reasons,
THE COURT,

(1) By eleven votes to six,
Upholds the first preliminary objection raised by the United Arab Emirates;

IN FAVOUR: *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; *Judges ad hoc* Cot, Daudet;

AGAINST: *President* Yusuf; *Judges* Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa;

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(2) By eleven votes to six,

Finds that it has no jurisdiction to entertain the Application filed by the State of Qatar on 11 June 2018.

IN FAVOUR: *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; *Judges ad hoc* Cot, Daudet;

AGAINST: *President* Yusuf; *Judges* Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa.

President YUSUF appends a declaration to the Judgment of the Court; Judges SEBUTINDE, BHANDARI and ROBINSON append dissenting opinions to the Judgment of the Court; Judge IWASAWA appends a separate opinion to the Judgment of the Court; Judge ad hoc DAUDET appends a declaration to the Judgment of the Court.

[111] DECLARATION OF PRESIDENT YUSUF

I. Introduction

1. I disagree with the conclusions of the Court and the reasoning of the majority on two interrelated issues dealt with in the Judgment: *(a)* the determination of the subject-matter of the dispute; and *(b)* the jurisdiction *ratione materiae* of the Court with regard to what is referred to as "indirect discrimination".

2. On the first issue, the entire reasoning of the Judgment turns on the concept of "nationality", without taking adequately into consideration Qatar's claims regarding racial discrimination on the basis of "national origin". By focusing almost exclusively on the question of nationality, the formulation of the object of the claim chosen by the Applicant is ignored, leading to the mischaracterization of the subject-matter of the dispute. As discussed below, this approach is inconsistent with the jurisprudence of the Court on the determination of the subject-matter of the dispute.

3. Secondly, apart from the fact that the above mischaracterization results in an erroneous conclusion on the jurisdiction of the Court, the majority also finds that some of the measures complained of by Qatar, which are referred to as "indirect discrimination" in the Judgment, do not fall within the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD" or the "Convention"), even if they have the purpose or effect

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of nullifying or impairing the rights and freedoms of persons of Qatari national origin. There is, however, no meaningful analysis in the Judgment to support such a statement.

[112] *II. The subject-matter of the dispute*

4. Qatar has consistently claimed that the measures adopted on 5 June 2017 by the United Arab Emirates (hereinafter the "UAE") against Qataris amount to a "distinction, exclusion, restriction or preference based on ... national ... origin" both in purpose and in effect within the meaning of Article 1, paragraph 1, of CERD. In its Application (AQ), Qatar argued that "[t]he UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin" (AQ, para. 3; see also paras. 34, 44, 54, 58, 62-3, 65*(a)* and 66*(a)*); that the "blanket expulsion of Qataris from the UAE and the ban on entry by Qataris into the UAE discriminate against Qataris on the basis of national origin" (*ibid.*, para. 59); that "[t]he UAE has also enacted various measures interfering with rights to property based on Qatari national origin" (*ibid.*, para. 44; see also para. 63); and that "[t]he UAE has ... unlawfully targeted Qataris on the basis of their national origin" (*ibid.*, para. 54).

5. Similar statements are made by the Applicant in its Memorial (MQ) and in its Written Statement (WSQ), clarifying that its claims were predicated on "national origin" both in purpose and in effect (MQ, paras. 1.2, 1.8, 1.11-1.13, 1.15, 1.23, 1.25, 3.5, 3.21, 3.24 and 3.86 to 3.113), and alleging that the measures adopted by the UAE were "discriminatory in both purpose and effect, by intentionally targeting and having a disproportionately negative impact on persons of Qatari 'national origin' in the historical-cultural sense, irrespective of their present nationality" (WSQ, para. 1.18). Moreover, during the oral proceedings, Qatar explained that it "has from the beginning framed its case as one of discrimination 'based on' national origin, including in the sense of intentional targeting and of disparate impact" (CR 2020/7, p. 45, para. 40 (Amirfar)).

6. Instead of paying particular attention to the above formulation of the dispute by the Applicant, as the Court has always done in determining the subject-matter of the dispute, the majority frames the subject-matter of the dispute in a manner totally disconnected from the Applicant's written and oral pleadings. For example, after quoting paragraph 2.6 of Qatar's Written Statement, which refers to acts and omissions of the UAE that "discriminate against Qataris on the basis of

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national origin" (paragraph 44 of the Judgment), the Judgment surprisingly states that "[a]s can be seen from Qatar's characterization of the subject-matter of the dispute (see paragraph 44 above), Qatar makes three claims of racial discrimination" (paragraph 56 of the Judgment). The Judgment then proceeds to make an artificial classification of Qatar's claims, the first category of which is purportedly a "claim arising out of the 'travel bans' and 'expulsion order', which make express reference to Qatari nationals" (*ibid.*). However, the text of Qatar's Written Statement, quoted in paragraph **[113]** 44 of the Judgment, and to which reference is made in paragraph 56, does not mention even once the word "nationality", while it clearly explains that the alleged acts and omissions of the UAE discriminate against Qataris "on the basis of national origin". Nor does this text provide a basis for the classification of Qatar's claims into the three categories indicated in the Judgment.

7. It is true that Qatar argued in its pleadings that the concept of "national origin" in Article 1, paragraph 1, of CERD encompasses discrimination based on nationality. Qatar based such interpretation on General Recommendation XXX of the CERD Committee, which reads as follows:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. (CERD Committee, General Recommendation XXX on Discrimination against Non-Citizens, UN doc. CERD/C/64/Misc.11/rev.3 (2004), para. 4.)

8. In General Recommendation XXX, the CERD Committee seems to suggest that a measure that seeks to differentiate between individuals on the basis of their current nationality might, deliberately or inadvertently, have a disproportionately adverse impact on a group of people having a common "national or ethnic origin", taking into account the objective underlying that measure and the criteria chosen for differentiation, or may not be applied pursuant to a legitimate aim, in which case it would constitute discrimination under CERD.

9. The Court may endorse such interpretation or may decide, as the majority appears to favour in the present Judgment, that the term "national origin" cannot encompass measures predicated on current nationality. In either case, it cannot be held, on the basis of the written and oral pleadings of the Applicant, that the claims of Qatar mostly relate to racial discrimination on grounds of current nationality, and

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that consequently they fall outside the scope of the Convention as such. The content of those pleadings clearly indicates otherwise.

10. The insistence of the majority on characterizing the subject-matter of the dispute in a manner which does not take into consideration the actual formulation put forward by the Applicant in its written and oral pleadings departs from a long-standing jurisprudence of the Court referred to in paragraph 42 of the Judgment itself. According to this jurisprudence, it is for the Court to determine on an objective basis the subject-matter of the dispute between the Parties, "while giving particular attention to the formulation of the dispute chosen by the applicant" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, ICJ Reports 2015 (II)*, p. 602, para. 26; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, ICJ Reports* **[114]** *2007 (II)*, p. 848, para. 38; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998*, p. 448, para. 30).

11. Had the majority applied this jurisprudence to the present case, it would have come to the conclusion that the subject-matter of the dispute relates to "the interpretation or application" of CERD, and that Qatar's claims fall squarely within the scope of Article 1, paragraph 1, of the Convention, since those claims concern alleged measures of racial discrimination on grounds of "national origin".

III. The jurisdiction of the Court with regard to "indirect discrimination"

12. According to the artificial classification of Qatar's claims mentioned above (para. 6), the only claim that is described as relating to discrimination on grounds of national origin is the so-called claim of "indirect discrimination", as opposed to "direct" discrimination on the basis of nationality; a distinction which has no basis in the text of the Convention. However, even in the case of this claim, the majority concludes that,

> In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State

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or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its "indirect discrimination" claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention. (Paragraph 112 of the Judgment.)

The reasons of my disagreement with this sweeping statement are set out below.

13. First, it is rather odd to find in a judgment on preliminary objections an attempt at a factual assessment of whether the measures complained of actually constitute racial discrimination under CERD. In a very recent judgment of the Court dealing also with jurisdiction *ratione materiae* under CERD, it was clearly stated as follows:

> In order to determine whether it has jurisdiction *ratione materiae* under CERD, the Court does not need to satisfy itself that the measures **[115]** of which Ukraine complains actually constitute "racial discrimination" within the meaning of Article 1, paragraph 1, of CERD. Nor does the Court need to establish whether, and, if so, to what extent, certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. Both determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged by Ukraine, and are thus properly a matter for the merits, should the case proceed to that stage. (*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, ICJ Reports 2019 (II)*, p. 595, para. 94.)

In the present case, however, issues of fact, which are normally a matter for the merits, appear to be summarily dismissed in a single paragraph at the jurisdictional stage of the proceedings.

14. Secondly, the majority offers no meaningful analysis to support the above-mentioned statement. The question whether or not the term "Qatari" is to be understood solely as synonymous to "current nationality" or as indicating "national origin", or both, and whether as a consequence measures targeting "Qataris" come within the ambit of Article 1 of CERD, is a question of fact that should be addressed at the merits stage. In this connection, it is to be noted that the majority does not even acknowledge—let alone examine—the Expert Report adduced by the Applicant to establish that "Qataris" form, apart from a legal nationality, a socio-cultural national group distinct from the Emiratis (cf. MQ, paras. 3.94-3.112; MQ, Vol. VI, Ann. 162, Expert Report of Dr J. E. Peterson dated 9 April 2019, paras. 28-30; WSQ, para. 2.121).

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15. Thirdly, the "Court's view" cannot simply be asserted. It needs to be based on legal and factual analysis. This is not the case here. The fact that Article 1, paragraph 1, of CERD distinguishes between "purpose" and "effect" suggests that, under CERD, discrimination may also derive from the collateral effects of the measure on a particular group, without having to establish a discriminatory purpose or intent. As the CERD Committee observed in its General Recommendation XIV,

> particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin. (CERD Committee, General Recommendation XIV on Article 1, Paragraph 1, of the Convention, UN doc. A/48/18 (1993), p. 115, para. 2.)

[116] 16. Thus, a measure may amount to *de facto* racial discrimination when it has a disproportionate effect on a group of people having a common "national or ethnic origin", regardless of whether that measure was intended to target a particular "nationality". This is essentially a question of fact and may only be established after having heard both Parties in the merits phase. It cannot be used at this stage of the proceedings to justify a finding that the measures complained of by Qatar fall outside of the scope of the jurisdiction of the Court, particularly when they are alleged to have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin.

17. The determination of the jurisdiction of the Court *ratione materiae* does not require the Court to satisfy itself at this preliminary stage that the measures complained of by the Applicant constitute racial discrimination within the meaning of Article 1, paragraph 1, of the Convention. What matters is whether the measures complained of by Qatar "are capable of having an adverse effect on the enjoyment of certain rights protected under CERD" (*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, ICJ Reports 2019 (II)*, p. 595, para. 96; see also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, ICJ Reports 1996 (II)*, p. 820, para. 51).

18. It is my view that the measures complained of by Qatar were capable of having such an adverse effect on persons of Qatari national origin, and that the Court should have left the examination of the actual effect of these measures for the merits stage.

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[117] DISSENTING OPINION OF JUDGE SEBUTINDE

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 79*ter*, 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.)

[118] 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 dissenting 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

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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 **[119]** 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 institutions.[1]

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;

[1] Application of Qatar, pp. 58 and 60, para. 65.

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(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;
(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 CERD.[2]

[120] 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.

[2] *Ibid.*, p. 60, para. 66.

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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;

[121] *(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.

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 CERD;[4] 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 inadmissible.[5]

[3] Preliminary Objections of the United Arab Emirates, Part III.
[4] *Ibid.*, Part IV.
[5] *Ibid.*, Part V.

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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, **[122]** 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.

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 claim.[7] The Court does this by examining the dispute as formulated in the application, including

[6] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, ICJ 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, ICJ Reports 2019 (II)*, p. 575, para. 24.

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

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the basis that the applicant identifies as the basis of jurisdiction, as well as the written and oral pleadings of the parties.[8]

[123] 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 5 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 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 jurisdiction.[11]

[8] See *ibid.*, pp. 602-3, 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, ICJ Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, ICJ Reports 1974*, p. 467, para. 31; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, ICJ 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, ICJ Reports 1996 (II)*, pp. 809-10, para. 16.

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

[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, ICJ Reports 2019 (II)*, p. 584, paras. 57-8.

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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 **[124]** 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.

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, **[125]** citizenship or

[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, ICJ Reports 2018 (II)*, p. 417, paras. 27-8.

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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 Convention.[13]

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 rebutted.[14] 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

[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, ICJ Reports 2019 (II)*, p. 595, paras. 94-5.

[14] Memorial of Qatar, Vol. I, pp. 131-4, 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".

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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 **[126]** 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 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) **[127]** and therefore outside the scope *ratione materiae* of the CERD, I am of the considered view that this objection does not

[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, ICJ Reports 2018 (II)*, p. 427, para. 54.

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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 cumulative.[16] The Court in that case stated as follows:

> 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 **[128]** 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

[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, ICJ Reports 2019 (II)*, pp. 599-600, paras. 110-13.

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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 **[129]** on 8 March 2018[17] pursuant to Article 11. Regarding the precondition of bilateral negotiations, the Court has in

[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).

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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.

[130] *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

[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, ICJ Reports 2018 (II)*, p. 420, paras. 37-8.

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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 "to determine whether or not the Conciliation Commission procedures had resulted in a settlement of the dispute" before pursuing judicial settlement.[21]

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 **[131]** effect to the provisions of this Convention", the matter may be brought to the attention of

[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".

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

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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, ICJ Reports 2017*, pp. 125-6, 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.

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 **[132]** pointing to such abuse. Qatar's claims are admissible and the third preliminary objection should have been rejected.

[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, ICJ Reports 2018 (II)*, pp. 420-1, paras. 39-40.

[23] Oral argument by Sir Daniel Bethlehem.

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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.

[133] DISSENTING OPINION OF JUDGE BHANDARI

1. Regrettably I disagree with the finding in the Judgment which upholds the first preliminary objection raised by the United Arab Emirates (hereinafter "UAE") and finds that the Court has no jurisdiction to entertain the Application filed by the State of Qatar (hereinafter "Qatar"). In my view, the discriminatory measures allegedly promulgated by the UAE against Qatar and Qatari nationals are capable of falling within the scope of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention"). With great respect to the views expressed in the Judgment, I endeavour to explain the reasoning behind my decision not to concur with the majority.

A. Subject-matter of the dispute between Qatar and the UAE

2. The case of Qatar is based on a series of measures taken by the UAE against Qatar, Qatari nationals and individuals of Qatari national origin on 5 June 2017 and the days that followed.[1] These measures, which were accompanied by the severing of diplomatic relations with Qatar, fell within the following categories:

(a) requirement that all Qatari residents and visitors leave the UAE in 14 days, as well as a ban on Qatari nationals from entering the UAE. This was subsequently modified to a requirement of permission for entry of Qatari nationals into the UAE;

[134] *(b)* closure of land borders, airspace and seaports of the UAE to all Qatari nationals and Qatari means of transportation; and

[1] Application of Qatar, p. 6, para. 3.

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(c) suppression of Qatari media outlets and speech deemed to support Qatar, and the enactment of measures "perpetuating, condoning, and encouraging anti-Qatari hate propaganda".[2]

3. It is recalled that the Court is to objectively determine the subject-matter of the dispute while giving particular attention to the formulation of the dispute chosen by the Applicant, identifying the object of those claims, and taking into consideration the written and oral pleadings of the Parties.[3] Accordingly, the disagreements between Qatar and the UAE, with respect to the UAE's alleged violation of obligations under CERD fall under three heads of claims which form the subject-matter of the dispute as follows:

(a) the first is the claim by Qatar that the "travel bans" and "expulsion order" by their express reference to Qatari nationals and Qatari residents and visitors discriminate against Qataris on the basis of their national origin;
(b) the second is the claim by Qatar arising out of the restrictions on Qatari media corporations; and
(c) the third is the claim by Qatar that, through these measures, the UAE has engaged in "indirect discrimination" against persons of Qatari national origin.

4. The jurisdiction of the Court in the present case is based on Article 22 of CERD. As per the test for jurisdiction *ratione materiae* laid down by the Court in its previous cases, the Court needs to determine whether it can be established that the "alleged violations . . . are capable of falling within the provisions of the [CERD] and whether, as a consequence . . . the dispute is one which the Court has jurisdiction to entertain".[4] In order to invoke the Court's jurisdiction under Article 22 of CERD, the discriminatory measures allegedly promulgated by the UAE must fall within one of the prohibited categories of "racial discrimination", **[135]** as defined under Article 1, paragraph 1, of CERD, which provides:

[2] Memorial of Qatar (MQ), Vol. I, para. 1.7.

[3] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, ICJ Reports 2015 (II)*, p. 602, para. 26; *Nuclear Tests (Australia* v. *France), Judgment, ICJ Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, ICJ Reports 1974*, p. 467, para. 31; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998*, p. 449, para. 31, and pp. 449-50, para. 33.

[4] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, ICJ Reports 2018 (I)*, p. 308, para. 46, and p. 324, para. 106; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, ICJ Reports 1996 (II)*, pp. 809-10, para. 16.

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In this Convention, the term 'racial discrimination' shall 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.

5. Qatar has consistently claimed that the alleged acts of the UAE amount to a "distinction, exclusion, restriction or preference based on . . . national . . . origin" within the meaning of Article 1, paragraph 1, of CERD[5] and thus within the compromissory clause contained in Article 22 of CERD. The UAE, on the other hand, argues there is a crucial jurisdictional flaw in the case, that these measures differentiate between individuals on the basis of their current nationality, which is not included within the scope of the term "national origin" in Article 1, paragraph 1, of CERD.[6] In its first preliminary objection to the jurisdiction of the Court, the UAE argues that the dispute falls outside of the scope *ratione materiae* of CERD.

6. Accordingly, at this preliminary stage, the Court is called upon to interpret whether the term "national origin", as contained in Article 1, paragraph 1, of CERD, encompasses current nationality.

B. The term "national origin" under Article 1, paragraph 1, of CERD in accordance with its ordinary meaning

7. The customary international law on the rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties (hereinafter the "VCLT") is applicable to the interpretation of the terms of CERD. Article 31, paragraph 1, of the VCLT stipulates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[7]

8. The majority takes the following position regarding the ordinary meaning of the term "national origin" in paragraph 81 of the Judgment:

the definition of racial discrimination in the Convention includes "national or ethnic origin". These references to "origin" denote, respectively, **[136]** a person's bond to a national or ethnic group at birth, whereas nationality is a

[5] CR 2020/7, p. 33, para. 36 (Klein); CR 2020/7, p. 40, para. 26 (Amirfar).
[6] CR 2020/6, p. 52, para. 56 (Sheeran).
[7] United Nations, *Treaty Series*, Vol. 1155, p. 340.

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legal attribute which is within the discretionary power of the State and can change during a person's lifetime . . . The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.

9. In its attempt to distinguish between "nationality" and "national origin", the majority highlights the immutable nature of the meaning of "national origin" and frames it in opposition to the transient nature of the meaning of "nationality". In doing so, the majority attempts to allude that the two terms are fundamentally disparate. As a result of this approach, the Judgment insufficiently delineates the ordinary meaning of the term "national origin" and thereby reaches no real consensus on its meaning for the reasons set out below.

10. The term "national origin" presents an amalgamation of the words "national" and "origin". The ordinary meaning attributable to these two words, read conjunctively, would have led to a more harmonious interpretation of its meaning as Article 31, paragraph 1, of the VCLT stipulates. When the ordinary meaning of the words "national" and "origin" are analysed to determine the meaning of the term "national origin", it is evident that the term is capable of being construed in both of the ways argued by the Parties. It can either carry the meaning attributed to it by Qatar, that is of nationality and of "relat[ing] to the country or nation where a person is from",[8] or that argued by the UAE, that is of an "association with a nation of people, not a State", which is distinct from nationality.[9] As a general proposition, in my view, the definitions of the two words indicate that "national origin" refers to a person's belonging to a country or nation. Belonging in this sense may be long standing or historical, and defined by ancestry or descent, or it may be confirmed by the legal status of nationality or national affiliation. Thus, current nationality, even if considered in a purely legal sense to be within the discretion of the State and subject to change over a person's lifetime, is in any event encompassed within the broader term "national origin". Since there is no doubt that these terms coincide, it is difficult to simply distinguish one from the other solely on the basis relied upon in paragraph 81 of the Judgment.

11. Furthermore, the Judgment's attempt to distinguish between "nationality" and "national origin" becomes more complex and difficult to differentiate on the basis of immutability in the context of countries

[8] MQ, Vol. I, para. 3.30.
[9] Preliminary Objections of the United Arab Emirates, para. 76.

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[137] where nationality is based on *jus sanguinis*. Where nationality follows a *jus sanguinis* model, as is the case in many Gulf States, nationality coincides with national origin. Under the *jus sanguinis* model, in Qatar, "nationality is conferred by parentage—and naturalization is rare . . . the vast majority of Qatari nationals, including those affected by the measures, were born Qatari nationals and are Qatari in the sense of heritage—in other words, of Qatari 'national origin'".[10] Nationality in this context is as immutable as "national origin" and is a characteristic that is inherent at birth contrary to the Court's assertion in paragraph 81. When the UAE adopted measures targeting "Qatari residents and visitors" and "Qatari nationals", they inevitably also affected persons of Qatari national origin since Qatari nationals are primarily persons of Qatari heritage.

C. The context of Article 1, paragraph 1, of CERD

12. The ordinary meaning of a term in a treaty is to be determined in light of its context and not in the abstract.[11] Under Article 31, paragraph 2, of the VCLT, the context for interpretation purposes includes, the text of the treaty, its preamble and annexes. In its contextual reading of the term "national origin", in light of the object and purpose of CERD, in paragraph 83 of the Judgment, the Court begins its reasoning by acknowledging that any legislation concerning nationality, citizenship or naturalization by States Parties would not be affected by the provisions of CERD provided that they do not discriminate against any particular nationality (Article 1, paragraph 3, of CERD). However, in its conclusion on this point, the Judgment seems to rely solely on the broader terminology found in Article 1, paragraph 2, of CERD which expressly excludes "from the scope of the Convention . . . differentiation between citizens and non-citizens". Consequently, to the exclusion of the prohibition of discrimination "against any particular nationality" in Article 1, paragraph 3, of CERD, the Judgment concludes that

> such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States parties from adopting measures that restrict the right of

[10] MQ, Vol. I, para. 1.25.
[11] VCLT, Art. 31, para. 1, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221.

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non-citizens to enter a State and their right to reside there—rights that are in dispute in this case—on the basis of their current nationality (para. 83).

[138] 13. I find it difficult to concur with a contextual reading that allows differentiation between citizens and non-citizens, as well as particular groups of non-citizens on the basis of their current nationality. If one is to pay close attention to Article 1, paragraphs 2 and 3, of CERD—the provisions which form the context of Article 1, paragraph 1, of CERD—they do not seem to envisage broad and unqualified distinctions to be drawn between citizens and non-citizens.

14. Article 1, paragraph 1, of CERD provides a broad definition of racial discrimination which includes discrimination based on "national origin". The plain text of CERD makes it clear that this definition is to protect against "all forms" of racial discrimination. Article 1, paragraph 2, in functional terms, establishes an exception to the broader principle contained in Article 1, paragraph 1, of CERD, by permitting a distinction to be drawn between citizens and non-citizens. However, this exception is limited by the object and purpose of the Convention, as made clear in its preamble and operative provisions, to eliminate racial discrimination in all its forms and manifestations. This object and purpose cannot be furthered if States are permitted to draw broad and unqualified distinctions as have been drawn by the UAE through its measures vis-à-vis Qataris, Qatari nationals, residents and visitors. Second, Article 1, paragraph 3, establishes a further exception to Article 1, paragraph 1. Article 1, paragraph 3, while implicating the treatment of non-citizens, clarifies that a State can dictate how, in particular, non-citizens acquire or lose its nationality; however, it reinforces the aforesaid reading of the Convention through the explicit indication in its proviso that "such provisions [should] not discriminate against any particular nationality".

15. Therefore, the context makes it clear that—even though nationality-based distinctions are specifically permitted by paragraphs 2 and 3 of Article 1 which permit distinctions between citizens and non-citizens—it cautions that even in making such permitted distinctions, "such provisions [should] not discriminate against any particular nationality" when considering non-citizens *inter se*. In my view, only such an interpretation would be consistent with the object and purpose of CERD to "eliminat[e] racial discrimination throughout the world in all its forms and manifestations". To interpret "national origin" as entirely excluding nationality-based discrimination would, on the other hand, lead to absurd results.

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D. The travaux préparatoires *of CERD*

16. When interpretation under Article 31 of the VCLT leaves the meaning ambiguous or obscure, or leads to manifestly absurd or unreasonable results, Article 32 of the VCLT provides that "[r]ecourse may be had to **[139]** supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". The Judgment, in paragraph 96, in reference to the amendment submitted by France and the United States of America and the subsequent withdrawal of the amendment, states that this

> was done in order to arrive at a compromise formula that would enable the text of the Convention to be finalized, by adding paragraphs 2 and 3 to Article 1 . . . As the Court has noted . . . paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States' legislation on nationality, thus fully addressing the concerns expressed by certain delegations, including those of the United States of America and France, regarding the scope of the term "national origin".

17. The *travaux préparatoires* makes it clear that the term "national origin" should have a wider application than that envisaged by the majority in paragraph 96. The Judgment does not touch upon the fact that the nine-power compromise proposal, highlighted in this paragraph, was the result of the deliberate exclusion of certain proposed amendments which had the effect of excluding nationality from the purview of "national origin". The debate on the term "national origin" indicates that the drafters of the Convention leaned towards rejecting the approach of excluding differential treatment on the basis of nationality from the purview of Article 1, paragraph 1, of CERD. The delegate of the United States of America for instance stated that "[n]ational origin differed from nationality in that national origin related to the past—the previous nationality or geographical region of the individual or his ancestors—while nationality related to the present status".[12] The delegate of France explained the specific meaning attributed to the word "nationality" in French legal terminology; that it was strictly understood to "cover all that concerned the rules governing the acquisition or loss of nationality and the rights derived therefrom".[13] In the Third Committee of the United Nations

[12] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, Summary Record of the 1304th session* (14 October 1965), doc. A/C.3/SR.1304, p. 85, para. 23.

[13] *Ibid., Summary Record of the 1299th session* (11 October 1965), doc. A/C.3/SR.1299, p. 60, para. 37.

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General Assembly, the delegate of France, along with the United States of America, suggested an amendment which excluded the word nationality from the purview of the term "national origin". If that joint amendment had been adopted, Article 1, paragraph 2, would have read as follows:

> [i]n this Convention the expression "national origin" does not mean, "nationality" or "citizenship", and the Convention shall therefore not **[140]** be applicable to distinctions, exclusions, restrictions, or preferences based on differences of nationality of citizenship.[14]

The amendments proposed were all withdrawn subsequently in favour of a compromise which formed the final text of paragraphs 1, 2, and 3 of Article 1 of CERD.

18. Certain arguments during the debates of the Commission on Human Rights highlights the compromise that the meaning of "national origin" represents. The delegate of Lebanon argued that "[t]he convention should apply to nationals, non-nationals, and all ethnic groups, but it should not bind States Parties to afford the same political rights to non-nationals as they normally granted to nationals".[15] The delegate of India proposed the deletion of the words "the right of everyone" in Article V, instead of altering the definition of "national origin". This was for the purpose of leaving it for the States to decide for themselves whether the same guarantees were to be afforded to aliens and nationals.[16]

19. The drafter's rejection of the approach that excluded nationality-based discrimination in Article 1, paragraph 1, indicates that CERD's inclusion of "national origin" protects against discrimination on the basis of current nationality. The rejection of the amendment proposed by France and the United States of America, which narrowed the definition of racial discrimination in Article 1, paragraph 1, indicates that the drafters adopted an approach whereby citizens and non-citizens were to be guaranteed the same rights, notwithstanding certain exceptions outlined in Article 1, paragraph 2, and Article 1, paragraph 3. It is particularly telling that this compromise was accepted

[14] *Op. cit.* note 12 *supra*, Annexes, Report of the Third Committee—Draft International Convention on the Elimination of All Forms of Racial Discrimination, doc. A/6181, 18 December 1965, p. 12, para. 32.

[15] United Nations, *Official Records of the Economic and Social Council, Commission on Human Rights, Twentieth Session, Summary Record of the 809th Session* (13 March 1964), doc. E/CN.4/SR.809, 14 May 1964, p. 5.

[16] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, Summary Record of the 1299th Session* (11 October 1965), doc. A/C.3/SR.1299, p. 59, para. 30.

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by France and the United States of America as "entirely acceptable". Such acceptance coupled with a reading of the *travaux préparatoires* as a whole makes it clear that the compromise does not indicate that nationality was to be left out of the scope of "national origin"; in fact, it only seems to allow States to reserve certain rights to their citizens.

20. In light of the foregoing, in my view, the ordinary meaning of the term "national origin" encompasses one's nationality, including current nationality. The ordinary meaning in its context in light of CERD's object **[141]** and purpose to eliminate "all forms" of racial discrimination converges to confirm that the term "national origin" encompasses current nationality. An interpretation that categorically excludes current nationality would undermine this object and purpose. Considering the fundamental ambiguity resulting from the approach adopted by the majority to determine the ordinary meaning, the *travaux préparatoires* reinforces the conclusion that CERD's definition of racial discrimination should have a wide application. The *travaux préparatoires* thus confirms the ordinary meaning of "national origin" as encompassing current nationality.

E. The CERD Committee and its General Recommendation XXX, paragraph 4

21. In relation to the CERD Committee and its General Recommendation XXX, paragraph 4, the majority cites the Court's observation in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, p. 664, para. 66 (hereinafter "*Diallo*") that it is "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee" and does not take into account the observation that it "should ascribe great weight" to interpretations by the independent body established for the purpose of supervising the application of the treaty concerned. The Judgment provides no compelling reason as to why it has chosen to depart from the reasoning in *Diallo* in this dispute, despite the fact that the CERD Committee remains "the guardian of the Convention"—an assertion that both Parties appear to agree on. The functions carried out by the CERD Committee and the manner in which they are carried, as well as the composition of the Committee and its members offer insights as to why the majority should have taken account of General Recommendation XXX, paragraph 4.

22. The CERD Committee's primary function is to analyse and comment on reports submitted to it by States Parties pursuant to

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Article 9, paragraph 1, of CERD. In reporting under Article 9, paragraph 1, of CERD, each State Party undertakes to submit a report on the legislative, judicial, administrative or other measures which it has adopted in relation to its obligations under CERD. Each dialogue with a State Party is followed by a set of concluding observations by the Committee which may contain statements of concern and recommendations for further action. This framework allows the CERD Committee to establish certain rules in dialogue, which include the establishment of the CERD's rules of procedure, and the translation of general principles and rights enshrined in the Convention into rules applicable to problems faced in implementation. Under Article 14 of CERD, once a State declares that it recognizes the competence of the CERD Committee, it may receive and consider communications from individuals or groups of individuals within the jurisdiction **[142]** of that State claiming to be victims of a violation by that State of rights set forth in the Convention. The State is thereby obliged to revise its law or practice in light of the Committee's findings. Through this framework of consistent dialogue with States, the CERD Committee is engaged in the development of consistent interpretations of CERD. Moreover, in the performance of its tasks, the CERD Committee has sought to act judicially since its very first meeting in 1970.[17] Furthermore, as per Article 8, paragraph 1, of CERD, the CERD Committee comprises of 18 experts, who are individuals of "high moral standing and acknowledged impartiality" and "who shall serve in their personal capacity". These individuals fall into the category of the "most highly qualified publicists" in this field. General Recommendation XXX, paragraph 4, of the CERD Committee therefore offers a consistent interpretation of CERD by the most highly qualified publicists because of which it should have been ascribed great weight in the Court's Judgment.

23. The Judgment further insufficiently addresses the jurisprudence of the Court which indicates the Court's willingness to take into account the work of United Nations supervisory bodies of human rights treaties in its judgments in the past. While reference to external precedents is not a common feature of the Court's case law, there is evidence of a change.[18] The clearest endorsement of such a supervisory

[17] M. Banton, "Decision-taking in the Committee on the Elimination of Racial Discrimination", *The Future of UN Human Rights Treaty Monitoring*, P. Alston, J. Crawford (eds.), Cambridge University Press, 2000, pp. 55-7.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, ICJ Reports 2007 (I)*, p. 43; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*,

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body in the jurisprudence of the Court is contained in its 2010 merits Judgment in *Diallo*, p. 692, para. 165, subparas. 2 and 3. In *Diallo*, while finding that the Democratic Republic of the Congo had violated provisions of the International Covenant on Civil and Political Rights, 1966 (hereinafter the "ICCPR") and the African Charter on Human and Peoples' Rights, 1981 (hereinafter the "ACHPR"), the Court specifically pointed out that its interpretation of the provisions of the ICCPR and the ACHPR was "fully corroborated by the jurisprudence of the Human Rights Committee established by the [ICCPR] to ensure compliance with that instrument by the States parties".[19] Subsequently, in the same Judgment, the Court noted that,

> [a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight **[143]** to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[20]

24. I am therefore obliged to conclude that, since the Court ascribed great weight to the interpretations of the ICCPR by the Human Rights Committee, the body of independent experts that monitors the implementation of the ICCPR by its States Parties; there is no compelling reason for the Court not to have attached "great weight" to General Recommendation XXX, paragraph 4, of the CERD Committee, the independent body of experts established specifically to supervise the application of CERD. The necessity to consider General Recommendation XXX, paragraph 4, of the CERD Committee is reinforced by the observation in *Diallo* that "[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[21]

25. Furthermore, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, pp. 179-80, paras. 109-12—(hereinafter *"Construction of a Wall"*)—while quoting from Human Rights Committee General

p. 179, para. 109; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports 2005*, p. 244, para. 219; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, p. 663, para. 66.

[19] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010 (II)*, p. 663, para. 66.

[20] See note 19 *supra*.

[21] *Ibid.*

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Comment 27, paragraph 14, the Court stated that, the restrictions to the freedom of movement in Article 12, paragraph 3, of the ICCPR, "[a]s the Human Rights Committee put it", "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result".[22] The Court thereby acknowledged that the derogatory measure in question had to be proportionate to the achievement of a legitimate aim. The principle of proportionality is found in all global and regional human rights instruments.[23] It is also enshrined in the national constitutions of numerous States. It is generally couched in terms of requiring a justification from States for derogation from a fundamental human right or freedom. Such derogation ought to serve a legitimate aim and should be proportional to the achievement of that aim. General Recommendation XXX, paragraph 4, reflects this widely accepted principle. Considering its widespread acceptance, including in the Court's own jurisprudence in *Construction of a Wall*, there appears to be no reason to disregard its application in the present case.

[144] 26. I will proceed to make some observations on the relevance of General Recommendation XXX, paragraph 4, to the claims made by Qatar and the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

27. The CERD Committee adopted General Recommendation XXX on 1 October 2002. General Recommendation XXX, paragraph 4, provides that differential treatment will "constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim". Therefore, even if nationality-based discrimination were to be interpreted as falling within the meaning of "national origin", the beneficial treatment of some categories of non-nationals by a State would not necessarily violate Article 1, paragraph 1, of CERD, provided these beneficial rights were granted to some nationalities pursuant to the legitimate aim of regional integration or friendly relations and were proportionate to the achievement of that aim. Such differential treatment would be unlikely to fall afoul of the restriction against

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, p. 193, para. 136.

[23] European Convention on Human Rights, Arts. 8(2) and 15; ICCPR, Arts. 12, 19(2)*(b)*, 21 and 22; International Covenant on Economic, Social and Cultural Rights, Article 8(1)*(a)* and *(c)*; Inter-American Convention on Human Rights, Arts. 13(2)*(b)*, 15, 16, 22; African Charter on Human and Peoples' Rights, Arts. 11, 12(2) and 29.

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nationality-based discrimination. To interpret "national origin" so that it entirely excludes nationality-based discrimination would, on the other hand, lead to incongruent results.

28. The UAE announced a series of measures with specific application to Qataris on the basis of their nationality and with the specific purpose of using such measures to "induc[e] Qatar to comply with its obligations under international law". Accordingly, if nationality is determined to be a prohibited basis of discrimination under Article 1, paragraph 1, of CERD, distinctions on this basis are capable of falling within the provisions of CERD, when they do not fulfil "a legitimate aim, and are not proportional to the achievement of this aim". The stated purpose of using such measures to induce compliance with unrelated treaty obligations appears neither legitimate nor proportionate, given the fundamental human rights claimed to have been affected. The alleged acts by the UAE thus disproportionately affect Qatari nationals and satisfy the conditions for exercise of the Court's jurisdiction *ratione materiae* under Article 22 of CERD.

29. In light of the foregoing, in my considered opinion, CERD encompasses discrimination against a particular group of non-nationals on the basis of their current nationality, within the prohibition on discrimination based on "national origin" in Article 1, paragraph 1. As such, the measures adopted by the UAE which disproportionately affected individuals of Qatari nationality by explicitly discriminating against "Qatari nationals" and "Qatari residents and visitors"—in particular through the "expulsion order" and the "travel bans", which form the first claim of Qatar, are capable of falling within the scope of CERD. Furthermore, the majority fails to identify that the 5 June 2017 statement affects "all Qatari residents and visitors". Leaving aside "visitors", "residents" is broad **[145]** enough to include not only Qatari nationals but also people of Qatari national origin. If the measures were to only affect Qatari nationals, the measures would have mentioned so explicitly. However, such terminology is not to be found. Thus, even from this perspective the measures are capable of falling within the protective scope of CERD.

30. Article 1, paragraph 1, of CERD defines "racial discrimination" as distinctions with either the "purpose or effect" of impairing the enjoyment of human rights. It is noted that the majority of Qatari nationals are defined by their Qatari heritage, ancestry or descent. The Qataris, in the sense of constituting a historical-cultural community undoubtedly fall within the scope of "national origin" as contained in Article 1, paragraph 1, of CERD. The ordinary meaning, in its context and in light of the object and purpose of CERD, and the *travaux*

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préparatoires of CERD also support this finding. As such, the discriminatory effect of the measures which forms the third claim of indirect discrimination, are capable of falling within the provisions of CERD. This is particularly so in relation to the adverse media coverage and the anti-Qatari propaganda that Qatar alleges. The effect of such broadcasts against Qatari nationals impair the enjoyment of rights by individuals of Qatari national origin. The attempt to limit these measures to nationality alone is untenable.

31. While a full assessment of these claims would appear more appropriate at the merits stage of the proceedings, at the jurisdictional stage, there is a sufficient basis to reject the first preliminary objection of the UAE.

Conclusion

32. In my view, Qatar's submission that the term "national origin" encompasses differential treatment on the basis of current nationality is correct and, as a consequence, the dispute concerns the interpretation or application of CERD; the UAE's case, which is grounded on its objections to the jurisdiction *ratione materiae* of the Court, on the basis that the contested measures do not fall within the scope of application of CERD, should therefore fail. Consequently, the Court has jurisdiction to entertain the Application filed by Qatar, on 11 June 2018, pursuant to the compromissory clause contained in Article 22 of CERD. The majority ought to have rejected the first preliminary objection of the UAE.

[146] DISSENTING OPINION OF JUDGE ROBINSON

1. I disagree with the finding in paragraph 115 of the Judgment upholding the first preliminary objection of the United Arab Emirates ("UAE") and the finding that the Court has no jurisdiction to entertain the Application filed by Qatar.

2. It is settled that for the Court to have jurisdiction to entertain the Application, the violations of which Qatar complains must fall within the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the "Convention" or "CERD").[1]

[1] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, ICJ Reports 1996 (II)*, p. 810, para. 16.

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First preliminary objection

3. In paragraph 56 of the Judgment the Court refers to Qatar's characterization of the dispute as follows:

> [t]he first is its claim arising out of the "travel bans" and "expulsion order", which make express reference to Qatari nationals. The second is its claim arising from the restrictions on Qatari media corporations. Qatar's third claim is that the measures taken by the UAE, including the measures on which Qatar bases its first and second claims, result in "indirect discrimination" on the basis of Qatari national origin.

4. The majority has wrongly concluded that the claims arising from the first and third measures do not fall within the provisions of the Convention.

A. The first claim

5. Article 1 of CERD reads as follows:

> 1. In this Convention, the term 'racial discrimination' shall 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 **[147]** in the political, economic, social, cultural or any other field of public life.
> 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
> 3. 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.

The meaning of the term "national origin" in Article 1(1) of the Convention

6. The dispute between the Parties concerns the question whether the term "national origin" in the definition of racial discrimination in Article 1(1) of CERD excludes or encompasses differences of treatment based on nationality. Qatar is correct in its argument that the term "national origin" encompasses differences of treatment based on nationality.

7. By virtue of customary international law, the provisions of Article 1 of the Convention must be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the Convention. According to the ordinary meaning of

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the words "national" and "origin", the term "national origin" refers to a person's historical relationship with a country where the people to which that person belongs are living. This relationship may extend for a short period or for a relatively long period. In some cases, the person may, while living in another country and having the citizenship of that country, retain citizenship of the country with which he also has a historical relationship. In other cases, he may not. There is nothing in the ordinary meaning of the term "national origin" that would render it inapplicable to a person's current nationality. The majority has argued as a general proposition that, while nationality is changeable, national origin is a characteristic acquired at birth and for that reason is immutable. As a general proposition, the validity of this statement is questionable. It is too stark in its presentation of the difference between nationality and national origin and does not reflect the nuances distinguishing one from the other.

8. National origin refers not only to the place from which one's forebears came; it may also refer to the place where one was born. For that reason, it is clear that national origin can encompass nationality because the place where one was born can give rise to both one's nationality as well as one's national origin. The directive of 5 June 2017 referred not only to Qatari nationals but also to Qatari residents and visitors in the UAE and the Qatari people, the latter categories clearly referring to **[148]** national origin. As a matter of fact, the vast majority of persons who acquire nationality on the basis of *jus sanguinis* will spend the rest of their lives holding that nationality. In Qatar and the UAE, nationality is acquired on the basis of *jus sanguinis*. Therefore, a person who acquires nationality on the basis of *jus sanguinis* will, more likely than not, retain that nationality along with his national origin. In that sense, that person's nationality would seem to be just as unchangeable as his national origin.

9. The majority has relied on the Court's Judgment in *Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, ICJ Reports 1955*, p. 20, to support its reasoning that nationality is subject to the discretion of the State. However, that case, decided in 1955, reflects a substantially State-centred approach to international law that has been affected by subsequent developments in human rights law. For example, it is now generally accepted that a State is not entirely free to deprive a person of his nationality where this act would render the person stateless.

10. The ordinary meaning of the term "national origin" must be read in its context and in light of the Convention's object and purpose.

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11. As far as context is concerned, the exceptional régime in Article 1(2) providing for distinctions between citizens and non-citizens is only intelligible on the basis that the definition of racial discrimination in Article 1(1) also covers such distinctions; if those distinctions were not part of the definition that includes discrimination on the basis of national origin, there would be no need to provide for the exception in this paragraph. There is no merit in the UAE's submission that the paragraph was inserted "for the avoidance of doubt"; the drafters inserted the paragraph because they considered it necessary, since nationality was encompassed by national origin. Article 1(2) therefore must be seen as carving out from Article 1(1) an exceptional régime relating to distinctions that a Contracting Party may make between citizens and non-citizens; in effect, Article 1(2) allows States Parties to derogate from the prohibition of discrimination in Article 1(1) by measures that distinguish between citizens and non-citizens. While Article 1(3) allows States to adopt legal provisions that distinguish between nationals and non-nationals, importantly it requires that those provisions must not discriminate against a particular nationality. In that regard, it is noteworthy that Qatar alleges that the UAE's measures discriminate against persons of the specific nationality of Qatar. As far as the aim of the Convention is concerned, its Preamble and operative provisions make clear that its purpose is to eliminate racial discrimination in *all* its forms, an objective that would not be achieved if States were left entirely free to discriminate between citizens and non-citizens. Interpreting "national origin" in the Convention as encompassing nationality is therefore consistent with the Convention's object and purpose. Consequently, the ordinary meaning of the term "national origin" when read in its context and in light of the Convention's **[149]** object and purpose encompasses differences of treatment based on nationality.

The travaux préparatoires

12. Recourse may be had to the *travaux préparatoires* to confirm the ordinary meaning of the term "national origin" set out above. The *travaux préparatoires* show that during the discussion in the United Nations Third Committee of what ultimately became Article 1(1), some members understood the term "national origin" to include nationality or understood it as equated with the word "nationality". On the other hand, some delegations argued that the inclusion of the term "national origin" might oblige States to give to non-citizens in their territory rights that would normally be reserved for their own

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citizens. To take account of the latter concern, France and the United States proposed an amendment, the effect of which was to exclude "nationality" from the definition of "national origin". However, this proposal met with strong opposition and was withdrawn. A nine-power compromise proposal was made and accepted, resulting in the addition to Article 1 of paragraphs 2 and 3. France and the United States indicated that the compromise proposal was "entirely acceptable". The acceptance of the compromise proposal indubitably indicated the rejection of the exclusion of nationality from the concept of national origin. The majority attempts to make much of the fact that the proposal was a compromise. Of course, the text of paragraph 2 is a compromise, but its meaning is clear. It reflects the agreement reached between the position of those States, such as France and the United States, that the Convention should not prevent States Parties from distinguishing between citizens and non-citizens, and the position of those States who were concerned that the term "national origin" should not be construed narrowly and restrictively. The entire Committee therefore accepted the compromise that the term "national origin" would encompass current nationality, but would leave States with the ability to reserve certain rights to their citizens. The *travaux préparatoires* therefore confirm the interpretation resulting from the ordinary meaning of the term "national origin".

The work of the CERD Committee and General Recommendation XXX

13. On 1 October 2002, 32 years after its establishment, the CERD Committee adopted General Recommendation XXX, paragraph 4 of which provides that

> **[150]** differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim.

This recommendation replaced General Recommendation XI of 1993. Qatar embraces General Recommendation XXX, paragraph 4, because, in its view, the UAE's measures had a disproportionate impact on Qataris. The UAE on the other hand argues that this recommendation does not reflect the law and should not be followed by the Court. The matter is of some importance because the Court has in the past taken account of the work of the United Nations supervisory bodies of human rights treaties. While the Court is not bound by the recommendations of such bodies, in *Ahmadou Sadio Diallo*, it indicated that

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it would attach "great weight" to the interpretations of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") by the Human Rights Committee.[2] The contribution, made by the CERD Committee to the protection of human rights by its monitoring of the implementation of the Convention, cannot be questioned. There is no reason why the Court should not attach great weight to the recommendations of the CERD Committee (which is properly seen as the guardian of the Convention), if they are not in conflict with international human rights law or general international law. This approach will promote the achievement of the clarity, consistency and legal security which the Court referred to in *Ahmadou Sadio Diallo*.[3] It is regrettable that, in this case, the Court did not follow the CERD Committee's recommendation. Notably, the majority did not offer any explanation for not following it.

14. Paragraph 4 of Recommendation XXX reflects the tug between State power and the stress placed in international law after World War II on the fundamental rights of the individual. The paragraph seeks to strike a balance between measures taken by a State in the exercise of its sovereign powers and the extent to which those measures may properly derogate from a fundamental human right. The principle of proportionality is applied in the implementation of all the major global and regional human rights instruments; it is also applied by the multitude of States, which have, in their national constitutions and laws, provisions relating to the protection of fundamental rights and freedoms that have been influenced by the Universal Declaration of Human Rights and the European Convention on Human Rights. The principle of proportionality is applied by all regional human rights courts. My own view is that the principle may very well reflect a rule of customary international law. It is a principle **[151]** that is applied in the interpretation and application of human rights instruments even though the word "proportionality" may not be found in those instruments. The principle requires States to justify a derogation from a fundamental human right by showing that the derogatory measure serves a legitimate aim and is proportional to the achievement of that aim. As the Court itself held in its Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* in its interpretation of Article 12(3) of the ICCPR, the derogation must be

[2] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Merits, Judgment, ICJ Reports 2010 (II)*, pp. 663-4, para. 66.
[3] *Ibid.*

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the least restrictive measure needed to achieve that aim.[4] Once the Court is satisfied that measures taken by a State in the implementation of Articles 1(2) and 1(3) are properly seen as raising a question of derogation from the prohibition of racial discrimination under Article 1, it must, if it is to be consistent with the development of the *corpus* of international human rights law since 1945, apply the principle of proportionality in order to determine whether that question arises. Such a question, if it arises, falls within the provisions of the Convention and would be an important aspect of the dispute relating to its interpretation or application.

15. If the Convention is interpreted as not requiring the application of the principle of proportionality set out in paragraph 4 of General Recommendation XXX, it would be an outlier among the number of human rights treaties that have been adopted since World War II. Moreover, the Committee's recommendation is wholly consistent with the purpose of the Convention to eliminate all forms of racial discrimination, since it confirms that States are not free to adopt measures that disproportionately discriminate against persons on the basis of their nationality. The effect of the recommendation is not to prevent States from adopting measures that differentiate between citizens and non-citizens. It only prohibits measures that cannot be justified on the basis that they serve a legitimate aim and are proportional to the achievement of that aim.

16. In the circumstances of this case and in the context of Article 1(2) and (3) of the Convention, it was open to the UAE to adopt measures distinguishing between United Arab Emirates' citizens and the citizens of other States, including those of Qatar. However, in adopting those measures, the UAE was obliged to ensure that the measures served a legitimate aim and were proportionate to the achievement of that aim. Qatar has argued that Qataris were disproportionately targeted by the measures. Moreover, although Article 1(3) allows a State to adopt measures providing for distinctions on the basis of nationality, it specifically **[152]** provides that such measures must not discriminate against a particular nationality.

17. Paragraph 4 of General Recommendation XXX becomes relevant in light of Qatar's claim that the measures disproportionately targeted persons of Qatari citizenship. As noted before, the principle of proportionality becomes applicable once a treaty or national law provides for what is in effect a derogation from a fundamental human right. In the particular context of this case therefore, Qatar's claim that

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 (I)*, pp. 192-3, para. 136.

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the measures disproportionately affected Qataris on the basis of their nationality, which is encompassed by the term "national origin", falls within the provisions of the Convention.

18. In light of the foregoing, Qatar's first claim falls within the provisions of CERD.

B. The Second Claim

19. I am in agreement with the finding of the majority that Qatar's claim relating to discrimination against media corporations does not fall within the provisions of the Convention.

C. The Third Claim

20. According to the Convention, the term "racial discrimination" refers to a restrictive measure that is based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of impairing the enjoyment, on an equal footing, of fundamental human rights. However, as Judge Crawford stated in his declaration in *Ukraine* v. *Russian Federation*,

> [t]he definition of "racial discrimination" in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds.[5]

Qatar relies on this analysis by Judge Crawford in order to distinguish between a restrictive measure that is based expressly on one of the protected grounds (direct discrimination) and one that, although not based expressly on one of those grounds, nonetheless directly implicates a group on one of the protected grounds. Translated to the circumstances of this **[153]** case, Qatar's submission is that although the UAE's measures do not on their face refer to persons of Qatari national origin, as a matter of fact by their effect they directly implicate persons of Qatari national origin. Qatar describes this as indirect discrimination. Although Qatar has framed this part of its case as one of indirect discrimination, in my view, since labels such as "indirect

[5] *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, ICJ Reports 2017*, declaration of Judge Crawford, p. 215, para. 7.

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discrimination" are very often misleading, it is better to concentrate on the essence of Qatar's claim.

21. Some comments on indirect discrimination are appropriate. First, the label "indirect discrimination" may be misleading because, for the so-called indirect discrimination to occur, the measures in question must by their effect directly implicate persons in the protected group. In this case, the measures directly implicate persons of Qatari national origin. There is nothing that is indirect in the way the measures by their effect implicate persons of Qatari national origin. Second, the kind of treatment described by Qatar as indirect discrimination occurs frequently in the practice of States. Third, another drawback with the label "indirect discrimination" is that it would seem to suggest or imply that indirect discrimination is inferior to what is called direct discrimination, and for that reason, there may be a tendency to undervalue indirect discrimination. This tendency is evident in paragraph 112 of the Judgment where the majority speaks of "collateral or secondary effects" of the measures. Fourth, the kind of restriction that gives rise to indirect discrimination is frequently disguised discrimination; the discrimination may be difficult to detect because, on its face, the restrictive measure is not based expressly on racial or other grounds.

22. For all these reasons, it is regrettable that the majority did not address Qatar's third claim in a satisfactory manner.

23. The substance of Qatar's third claim is that while the travel ban, the expulsion order and the restrictions on media corporations do not, on their face, purport to discriminate against Qataris on the basis of their national origin—that is, are not based expressly on national origin—by their effect, they constitute discrimination on that basis.

24. It must be emphasized that Qatar's third claim operates independently of its claim that the measures discriminated against Qataris by reason of their nationality; Qatar argues that by reason of their effect the measures also discriminate against Qataris because of their cultural links with Qatar and, therefore, by reason of their Qatari national origin. The examples given by Qatar of how Qataris have been impacted by the measures are a classical illustration of discrimination based on national origin; they show precisely how Qataris were impacted by the measures by reason of their cultural ties with Qatar as a nation. It follows, therefore, that Qatar's third claim, based as it is on the effect of the measures on Qataris as persons of Qataris national origin, is not affected by the majority's finding in paragraph 105 that "the measures complained of by Qatar **[154]** in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD". Qatar's third claim

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is that the measures that are based on national origin, a protected ground in the Convention, fall within the provisions of the Convention.

25. Qatar's examples of how the UAE's measures as a matter of fact directly implicated persons of Qatari national origin on the basis of identification with Qatari national traditions and culture, their dress and accent include the following:

(i) As a general matter, Qatar argues that the measures target and discriminate against "Qataris" as a historical-cultural community and not merely as holders of a Qatari passport. In this regard, Qatar cites the statement of a person, not a Qatari national who had lived in Qatar for over 60 years and who was denied entry into the UAE because, as he stated, "the immigration officer saw me as Qatari because of the way I was dressed"; on the other hand, his travel companions who were not wearing traditional Qatari dress were allowed to enter. That person stresses that prior to the measures he had travelled to and from the UAE on many occasions without experiencing any problem at the border.
(ii) Another person who identifies completely as Qatari, but is not a Qatari citizen relates that he was subjected to interrogation by the UAE's officials merely because his passport showed that he was born in Qatar.

There is merit in Qatar's argument that the treatment to which these persons were subjected at the border on the basis of their national origin resulted from the travel ban which targeted Qataris. Consequently, the obligation under the Convention not to discriminate against persons on the basis of their national origin was engaged and the treatment falls within the provisions of the Convention.

26. Despite these clear examples of how the measures discriminate by their effect on persons of Qatari national origin, the majority concluded that they do not constitute racial discrimination within the meaning of the Convention. In paragraph 112 of the Judgment the majority makes a statement of questionable validity. It states that

> [i]n the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari **[155]** citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention.

This finding is questionable because in this part of its case Qatar is not complaining about the measures that are based on current Qatari nationality. As the majority itself noted in paragraph 60 of the Judgment: in setting out Qatar's complaint, Qatar's case in relation to what it describes as indirect discrimination is independent of its

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complaint about the measures on the basis of nationality; Qatar has made it clear that this part of its case is based on national origin, which is one of the protected grounds in the definition of racial discrimination. The second comment that may be made on this finding relates to the regrettable reference to the "collateral or secondary effects" of the measures. The finding is regrettable because it suggests that what Qatar describes as indirect discrimination is equivalent to what the majority describes as the collateral or secondary effects of the measures. As noted before, the essence of Qatar's third claim is that these measures directly implicate Qataris on the basis of their national origin. There is nothing collateral or secondary about the impact of the measures on Qataris on the basis of their national origin. Moreover, in this statement the majority seems to be referring to the collateral or secondary effects of the measures on persons of Qatari national origin; however, this is not at all clear from its reference to those effects on "persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE", since that categorization of persons could also refer to persons of Qatari nationality.

27. The majority does not seek to substantiate its finding by way of reason; it proceeds by way of assertion by simply stating that "the various measures of which Qatar complains do not, either by their purpose or their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin" (paragraph 112 of the Judgment). It is not clear what the majority means by racial discrimination against Qataris as a "distinct social group". It certainly could not mean that the majority does not accept that Qataris constitute a distinct social group, since uncontradicted evidence was given by Qatar through its expert, Mr John Peterson, that Qataris constitute such a group. If the majority accepts that Qataris constitute a distinct social group, then certainly cogent evidence has been provided to illustrate the discriminatory effect of the measures on Qataris as such a group, and therefore, on the basis of their national origin. For what could be more illustrative of the distinctiveness of the social group to which a person belongs than his dress and speech and, if this cultural linkage is exploited for discriminatory reasons as a result of the travel ban, why is that treatment not capable of constituting racial discrimination on the basis of national origin? The majority is silent as to a reason but strong in its oracular declaration **[156]** that "the measures of which Qatar complains ... are not capable of constituting racial discrimination within the meaning of the Convention". In its reasoning, the majority does not even pause to identify and examine the factual circumstances cited by Qatar as giving rise to discrimination by effect on the basis of national origin. If there is an inherent element

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in these measures that renders them incapable of resulting in discrimination by effect on the basis of national origin, the majority has not identified it.

28. In sum, Qatar's claim that the measures by their effect discriminated against Qataris on the basis of their national origin falls within the provisions of the Convention.

Conclusion

29. In light of the foregoing, the first preliminary objection should have been rejected as the dispute between the Parties concerns the interpretation or application of the Convention, and the Court should have found that it has jurisdiction *ratione materiae* under Article 22 of CERD in respect of the Qatar's first and third claims in its first preliminary objection.

[157] SEPARATE OPINION OF JUDGE IWASAWA

1. The Court finds that the term "national origin" in Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD" or the "Convention") does not encompass current nationality (Judgment, para. 105). The Court also examines whether the measures taken by the UAE discriminate indirectly against Qataris on the basis of their "national origin", and holds that "even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention" (*ibid.*, para. 112). Accordingly, the Court concludes that the first preliminary objection raised by the UAE, that the dispute falls outside the scope *ratione materiae* of CERD, must be upheld (*ibid.*, para. 114).

2. I agree that the term "national origin" in Article 1, paragraph 1, of CERD does not encompass current nationality. However, I do not agree with the Court's analysis and its conclusion regarding Qatar's claim of indirect discrimination. The UAE's objection, inasmuch as it relates to Qatar's claim of indirect discrimination, raises issues that require a detailed examination by the Court at the merits stage. The Court therefore should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

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3. This opinion is structured as follows. I shall first review the position of non-citizens under international law. I will explain that since human **[158]** rights are inalienable rights of everyone, non-citizens are also entitled to human rights under international law. In the second section, I will first show that, because the jurisdiction of the Court in the present case is limited to the interpretation or application of CERD, in order for the Court to have jurisdiction, the measures taken by the UAE must be capable of constituting "racial discrimination" under CERD. Secondly, I shall explain the reasoning for my view that current nationality is not encompassed within the term "national origin" in Article 1, paragraph 1, of CERD. Thirdly, I shall discuss the notion of indirect discrimination and describe how differentiation of treatment based on current nationality can have the "purpose or effect" of discriminating on the basis of a prohibited ground listed in Article 1, paragraph 1, of CERD. Finally, I shall explain the reasons why the Court should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

I. Human rights of non-citizens under international law

4. The protection of the rights of non-citizens has a long history in international law, which pre-dates the protections accorded to States' own nationals. In the nineteenth and early twentieth centuries, an international minimum standard of treatment of aliens developed in international law. By contrast, international law at that time contained few rules regulating States' treatment of their own nationals, which was traditionally considered to be part of the internal affairs of States.

5. At the Paris Peace Conference held in 1919-1920, proposals were made to include in the Covenant of the League of Nations clauses on freedom of religion and racial equality. These proposals were ultimately defeated, and the Covenant failed to stipulate even minimum rules concerning human rights. Instead, a number of mostly Central and Eastern European States concluded treaties or made declarations committing themselves to protect minorities within their territories. In addition, the International Labour Organization, which was established in 1919, began adopting conventions on the rights of workers. Thus, while some efforts were made in the interwar period to protect human rights under international law, this protection was extended only to certain rights or covered only a limited number of States.

6. In 1945, this situation changed dramatically with the adoption of the Charter of the United Nations. The Charter was revolutionary in

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that it **[159]** not only included the promotion and encouragement of respect for human rights as one of the purposes of the Organization, but also declared that human rights were guaranteed for "all without distinction" (Art. 1, para. 3, and Art. 55*(c)*). The adoption of the Charter marked the beginning of a process of continual expansion of international human rights law.

7. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (hereinafter the "UDHR"), which set out a catalogue of human rights to be protected by States under the Charter. Influenced by the idea of natural rights, it provided that "*[a]ll human beings* are born free and equal in dignity and rights" (Art. 1; emphasis added) and that "*[e]veryone* is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind, such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*" (Art. 2; emphasis added). From the phrase "such as", it is clear that the list of prohibited grounds of discrimination in Article 2 of the UDHR is illustrative, and not exhaustive. Moreover, the list includes the catch-all term "other status". Thus, even though nationality is not expressly mentioned in the list of prohibited grounds, it may be concluded that discrimination based on nationality is prohibited by the UDHR and that non-citizens are also entitled to the human rights enshrined therein.

8. In 1966, the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (hereinafter the "ICESCR") and the International Covenant on Civil and Political Rights (hereinafter the "ICCPR"). The ICCPR provides in Article 2, paragraph 1, that

> [e]ach State Party . . . undertakes to respect and to ensure to *all individuals* . . . the rights recognized in the present Covenant, *without distinction of any kind, such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status.* (Emphasis added.)

Article 26 of the ICCPR, a self-standing non-discrimination clause, contains comparable language. As with the UDHR, it may be concluded that, in principle, non-citizens are entitled to the human rights provided for in the ICCPR, and that the States Parties are prohibited from discriminating on the basis of nationality.

9. The wording used by the ICESCR is slightly different. Article 2, paragraph 2, provides that the States Parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind *as to* race, colour, sex, language,

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religion, **[160]** political or other opinion, national or social origin, property, birth or *other status*" (emphasis added). The words "as to" are more restrictive than the words "such as" used in the UDHR and the ICCPR. Nevertheless, because the list of prohibited grounds of discrimination, like those in the UDHR and the ICCPR, contains the catch-all term "other status", it may be concluded that this list is also illustrative, and not exhaustive. Moreover, Article 2, paragraph 3, provides that "[d]eveloping countries . . . may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals". Interpreting this clause *a contrario*, it may be concluded that the human rights provided for in the ICESCR are also guaranteed in principle to non-nationals.

10. Regional conventions on human rights likewise contain non-discrimination clauses, such as Article 14 of the European Convention on Human Rights and Articles 1 and 24 of the American Convention on Human Rights. The lists of prohibited grounds of discrimination in these clauses also contain catch-all terms: "other status" in Article 14 of the European Convention and "other social condition" in Article 1 of the American Convention. Thus, these lists of prohibited grounds are equally considered to be illustrative, and not exhaustive. Accordingly, like the international conventions discussed above, regional conventions are understood to protect the rights of non-citizens.

11. The international human rights bodies and courts established by these treaties to monitor their implementation by States have confirmed that non-citizens are entitled to the human rights provided for therein and that discrimination based on nationality is prohibited.

12. With regard to the ICCPR, in 1986 the Human Rights Committee adopted General Comment No 15 on *the position of aliens under the Covenant*, in which it affirmed that "[i]n general, the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality", and that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens".[1]

13. Subsequently, in a number of individual communication cases, the Human Rights Committee has held that discrimination based on nationality is prohibited by Article 26 of the ICCPR. In *Gueye et al.* v. *France*, **[161]** retired soldiers of Senegalese nationality who had served in the French Army prior to the independence of Senegal claimed that France was in breach of Article 26 because the pensions

[1] Human Rights Committee, General Comment No 15 on the position of aliens under the Covenant, 22 July 1986, paras. 1-2.

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they received were inferior to those enjoyed by retired soldiers of French nationality. The Committee considered that this practice constituted discrimination based on nationality in violation of Article 26.[2] The Committee also found violations of Article 26 in a number of cases brought against the Czech Republic. These cases concerned Czech nationals who had fled Czechoslovakia under communist pressure and had their property confiscated under the legislation then applicable. The Czech Restitution Act of 1991 provided for restitution of property or compensation, but only if a person was a citizen of the Czech and Slovak Republic and was a permanent resident in its territory. Persons who lost Czech citizenship after leaving the country submitted communications to the Committee, claiming that they had been discriminated against because of their lack of citizenship. The Committee found the condition of citizenship unreasonable and discriminatory, in violation of Article 26 of the ICCPR.[3]

14. The Committee on Economic, Social and Cultural Rights (hereinafter the "CESCR") has similarly confirmed that the ICESCR applies to non-citizens. In General Comment No 20 of 2009, the CESCR declared that "[t]he ground of nationality should not bar access to Covenant rights", while noting that this was "without prejudice to the application of art. 2, para. 3, of the Covenant". It confirmed that "[t]he Covenant rights apply to everyone including non-nationals".[4]

15. The monitoring bodies established by regional conventions on human rights have taken the same position. The European Court of Human Rights (hereinafter the "ECtHR") has held that discrimination based on nationality is prohibited by the European Convention on **[162]** Human Rights.[5] So has the Inter-American Court of Human

[2] Human Rights Committee, *Gueye et al.* v. *France*, 3 April 1989, Communication No 196/1985, para. 9.4.

[3] E.g. Human Rights Committee, *Simunek et al.* v. *Czech Republic*, 19 July 1995, Communication No 516/1992, para. 11.6; *Adam* v. *Czech Republic*, 23 July 1996, Communication No 586/1994, para. 12.6; *Blazek et al.* v. *Czech Republic*, 12 July 2001, Communication No 857/1999, para. 5.8; *Des Fours Walderode* v. *Czech Republic*, 30 October 2001, Communication No 747/1997, para. 8.4. See also Human Rights Committee, *Karakurt* v. *Austria*, 4 April 2002, Communication No 965/2000, para. 8.4 (finding a distinction between aliens made solely on the basis of their different nationalities concerning their capacity to stand for election to a works council to be discrimination in violation of Article 26).

[4] CESCR, General Comment No 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 18 May 2009, para. 30.

[5] E.g. ECtHR, *Andrejeva* v. *Latvia*, Grand Chamber, judgment of 18 February 2009, No 55707/00, para. 87; *Biao* v. *Denmark*, Grand Chamber, judgment of 24 May 2016, No 38590/10, para. 93.

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Rights (hereinafter the "IACtHR") with regard to the American Convention on Human Rights.[6]

16. Furthermore, the General Assembly of the United Nations adopted in 1985 the Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in which They Live (resolution 40/144), which lists rights applicable to individuals present in States of which they are not nationals. A substantial number of the rights mentioned therein replicate provisions contained in the International Bill of Human Rights (the UDHR, the ICESCR and the ICCPR), emphasizing their applicability to non-citizens, albeit using somewhat different wording. This declaration provides further evidence that non-citizens are entitled to most of the human rights contained in these instruments.

17. While it is clear that non-citizens are entitled to human rights under international law, international law does allow States to draw distinctions between citizens and non-citizens in respect of certain rights, such as political rights and the right to enter a country. For example, Article 25 of the ICCPR provides that "[e]very citizen" shall have the right to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service; and Article 12, paragraph 4, states that no one shall be arbitrarily deprived of the right to enter "his own country". In General Comment No 15 of 1986, the Human Rights Committee acknowledged that "some of the rights recognized in the Covenant are expressly applicable only to citizens".[7]

18. In addition, international law allows States to draw distinctions between citizens and non-citizens in time of public emergency. Article 4, paragraph 1, of the ICCPR permits States, in time of public emergency, to take measures derogating from their obligations under the Covenant, provided such measures do not involve discrimination on the ground of "race, colour, sex, language, religion or social origin". Neither "nationality" nor "other status" is included in this list. Since Article 4, paragraph 2, makes certain rights non-derogable even in time of public emergency, no one, including non-citizens, can be deprived of these non-derogable rights. With regard to the other rights, however, States are not prohibited from **[163]** introducing restrictions that apply only to non-citizens in time of public emergency.

[6] E.g. IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, advisory opinion of 17 September 2003, OC-18/03, para. 118; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, advisory opinion of 19 August 2014, OC-21/14, para. 53.

[7] Human Rights Committee, General Comment No 15, *supra* note 1, para. 2.

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19. Furthermore, even in respect of the rights to which non-citizens are entitled under international law, States are not prohibited from making certain distinctions based on nationality. The monitoring bodies established by the international and regional human rights treaties use similar frameworks to determine whether a distinction constitutes discrimination. A differentiation of treatment is considered to constitute discrimination, unless the criteria for such a differentiation are reasonable and objective; in other words, unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[8] This general framework also applies to the question of whether particular distinctions based on nationality constitute discrimination. Thus, for instance, preferential treatment given to certain groups of non-citizens by virtue of international agreements may be considered reasonable and objective and therefore would not constitute discrimination.[9]

20. The Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee"), in its General Recommendation XXX on *discrimination against non-citizens*, took note of the aforementioned protections that international law provides to non-citizens.[10] Article 1, paragraph 2, of CERD provides that "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens". In the General Recommendation, the Committee stressed that "Article 1, paragraph 2 . . . should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in [the UDHR, the ICESCR and the ICCPR]".[11] Similarly, the Committee noted:

Although some of [the rights listed in Article 5 of CERD], such as the right to participate in elections, to vote and to stand for election, **[164]** may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between

[8] E.g. Human Rights Committee, General Comment No 18 on non-discrimination, 9 November 1989, para. 13; ECtHR, *Biao* v. *Denmark*, *supra* note 5, para. 90; IACtHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, advisory opinion of 19 January 1984, OC-4/84, para. 57.

[9] E.g. Human Rights Committee, *van Oord* v. *Netherlands*, 23 July 1997, Communication No 658/1995, para. 8.5; ECtHR, *C.* v. *Belgium*, judgment of 7 August 1996, No 21794/93, para. 38.

[10] CERD Committee, General Recommendation XXX on discrimination against non-citizens, 5 August 2004.

[11] *Ibid.*, para. 2. This paragraph essentially repeats what the Committee had already affirmed in 1993. CERD Committee, General Recommendation XI on non-citizens, 9 March 1993, para. 3.

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citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.[12]

21. As I will explain in more detail below, the present dispute concerns solely "the interpretation and application of [CERD]" and not other rules of international law. The Court has no jurisdiction to make determinations as to whether the measures taken by the UAE comply with other rules of international law.

II. "Racial discrimination" under the International Convention on the Elimination of All Forms of Racial Discrimination

1. The Court has jurisdiction with respect to the interpretation or application of the International Convention on the Elimination of All Forms of Racial Discrimination

22. The present dispute has been brought to the Court pursuant to Article 22 of CERD. According to this clause, the Court's jurisdiction is limited to disputes "with respect to the interpretation or application of this Convention". In order to determine whether the present dispute is one with respect to the interpretation or application of CERD, the Court needs to examine whether Qatar's claims fall within the scope of CERD (Judgment, para. 72). For Qatar's claims to fall within the scope of CERD, the measures of which it complains must be capable of constituting "racial discrimination" within the meaning of CERD. Accordingly, whether the measures at issue are capable of constituting racial discrimination under CERD is critically important in the present case. If they are not, the Court has no jurisdiction, irrespective of whether the same measures could constitute discrimination based on nationality under other rules of international law.

23. Just as it has done before this Court, the UAE raised before the CERD Committee the objection that its dispute with Qatar falls outside the scope *ratione materiae* of CERD. In accordance with Rule 91 of its Rules of Procedure, the Committee dealt with the preliminary issue of its competence *ratione materiae* as a question of admissibility.[13] For this Court, however, this objection raises an issue of jurisdiction. If the measures taken by the UAE are not capable of constituting racial

[12] CERD Committee, General Recommendation XXX, *supra* note 10, para. 3.
[13] CERD Committee, Decision on the jurisdiction of the inter-State communication submitted by Qatar against the United Arab Emirates, dated 27 August 2019, UN doc. CERD/C/99/3, para. 57.

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discrimination **[165]** under CERD, the dispute falls outside the jurisdiction *ratione materiae* of the Court.

24. Article 1, paragraph 1, of CERD defines "racial discrimination" as follows:

> In this Convention, the term "racial discrimination" shall 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.

25. The definition of "racial discrimination" under this provision has two elements. First, the measures must constitute a distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights. In other words, they must entail differential treatment. Secondly, the differential treatment must be based on one of the prohibited grounds, namely, "race, colour, descent, or national or ethnic origin".

26. As noted by the Court, it is not disputed that the "expulsion order" and the "travel bans", as well as the "measures to restrict broadcasting and internet programming by certain Qatari media corporations", constitute differential treatment (Judgment, paras. 57 and 59). It is, however, disputed whether these measures are "based on" one of the grounds listed in Article 1, paragraph 1, of CERD and are thus capable of constituting racial discrimination.

27. In its first preliminary objection, the UAE maintains that the Court lacks jurisdiction *ratione materiae* over the present dispute because the alleged acts differentiate on the basis of "current nationality" and do not fall within the scope of CERD. Article 1, paragraph 1, of CERD, unlike the non-discrimination provisions of the other human rights instruments discussed above, contains neither a phrase like "such as" before the list of prohibited grounds, nor a catch-all term like "other status". The wording of Article 1, paragraph 1, therefore clearly indicates that the list of prohibited grounds is exhaustive, and not illustrative. In order for differential treatment to constitute "racial discrimination", it must be based on one of the specified prohibited grounds: "race, colour, descent, or national or ethnic origin". "Nationality" is not included in the list. Nonetheless, Qatar argues that the term "national origin" encompasses nationality, including present nationality, while the UAE disagrees. The Court examines this issue in detail and concludes that "national origin" does not encompass

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current nationality (Judgment, paras. 74-105). I agree with **[166]** this conclusion of the Court. The next section of this opinion will explain my reasoning, including additional reasons to those provided by the Court.

2. "Nationality" and "national origin"

28. The prohibited grounds listed in Article 1, paragraph 1—"race, colour, descent, or national or ethnic origin"—are inherent, immutable and permanent characteristics of individuals. "National origin" is not listed independently, but together with "ethnic origin" as "national or ethnic origin". Thus, the text indicates a close relationship between the terms "national origin" and "ethnic origin". Read in its ordinary meaning in this context, "national origin" can be understood as referring to the country or cultural group (nation) from which a person originates.

29. "Nationality", on the other hand, is a legal bond a State creates with certain persons whom it accepts as its nationals. It is a person's legal status as a citizen of a State. Nationality is an alterable condition and is fundamentally different in nature from the characteristics of individuals listed in Article 1, paragraph 1, which are inherent, immutable and permanent. This crucial difference suggests that nationality is not encompassed within any of the prohibited grounds listed in Article 1, paragraph 1, including "national origin".

30. Article 1, paragraph 1, must also be read in the context of the Convention's other provisions. Paragraph 2 of Article 1 provides that "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens", and paragraph 3 provides that "[n]othing 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*" (emphasis added). It is reasonable to consider that this proviso was inserted in paragraph 3 because CERD does not otherwise prohibit discrimination based on nationality. Furthermore, in Article 5, States Parties undertake to guarantee the right of everyone to equality before the law in the enjoyment of the listed rights, which include rights that are typically reserved for citizens, such as political rights.

[167] 31. Qatar argues that since paragraphs 2 and 3 of Article 1 are exceptions to the definition established in paragraph 1, they imply that

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nationality is a prohibited ground under the definition in paragraph 1. However, paragraphs 2 and 3 rather convey the drafters' intent to exclude differential treatment based on nationality from the scope of the Convention and to make sure that the Convention does not prevent States Parties from regulating questions of nationality. They are not exceptions to paragraph 1, but instead clarify that the definition of racial discrimination in paragraph 1 should not be read to encompass distinctions based on nationality.

32. Interpreting "national origin" as not encompassing nationality is also consistent with CERD's object and purpose of eliminating racial discrimination "in all its forms and manifestations" (Preamble; see also Arts. 2 and 5). Although nationality is not encompassed within "national origin", Article 1, paragraph 1, still prohibits differential treatment based on nationality when it has the "purpose or effect" of discriminating on the basis of "national origin" (see Section II (3) below).

33. The *travaux préparatoires* of CERD confirm that the drafters did not intend nationality to constitute a ground of racial discrimination. The Court analyses the *travaux préparatoires* in detail (Judgment, paras. 89-97). I would draw attention to the following two points in particular. First, the definition of racial discrimination prepared by the Commission on Human Rights and presented to the Third Committee of the General Assembly in 1964 contained the following sentence: "[In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]" (See Judgment, para. 94.) Secondly, in the course of the work of the Third Committee, France and the United States of America proposed an amendment that would have provided that "the expression 'national origin' does not mean 'nationality' or 'citizenship'" and that the Convention was not applicable to distinctions "based on differences of nationality or citizenship".[14] In withdrawing this proposal, the French delegate stated that the alternative text, which was eventually adopted as Article 1, was "entirely acceptable" to both France and the United States (see *ibid.*, paras. 90 and 96). The CERD Committee has also accepted that "the *travaux préparatoires* of the Convention show that in the different stages of the elaboration of the Convention . . . the ground 'national origin' was understood as not covering 'nationality' or 'citizenship'".[15]

[14] United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, "Draft International Convention on the Elimination of All Forms of Racial Discrimination", UN doc. A/6181, 18 December 1965, p. 12, para. 32.

[15] CERD Committee, Decision on the admissibility of the inter-State communication submitted by Qatar against Saudi Arabia, dated 27 August 2019, UN doc. CERD/C/99/6, para. 12.

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[168] 34. An additional reason to distinguish "national origin" from "nationality" relates to the different levels of scrutiny that are required in reviewing the lawfulness of differential treatment under each ground. Racial discrimination is one of the most invidious forms of discrimination. Differentiation of treatment based on a prohibited ground listed in Article 1, paragraph 1, of CERD is inherently suspect and must meet the most rigorous scrutiny. For example, the ECtHR has held that "[w]here the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible".[16] The ECtHR has gone so far as to affirm that "[n]o difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society".[17] In this way, if the difference in treatment is based on "race, colour, descent, or national or ethnic origin", States bear a very heavy burden in demonstrating that the difference pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The scrutiny must be most rigorous and the threshold must be very high.

35. When the difference in treatment is based on nationality, the level of scrutiny required is different. Since non-citizens normally have no right to vote or be elected, and thus are unable to protect their interests through the political process, rigorous scrutiny is warranted for distinctions based on nationality. However, because States are entitled to make distinctions between citizens and non-citizens in respect of some rights or in certain circumstances, the level of scrutiny required need not be as rigorous as in cases of distinctions based on "race, colour, descent, or national or ethnic origin". The ECtHR has declared that "very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".[18] While that threshold remains high, the scrutiny required by the ECtHR is not as rigorous and the threshold is not as high as for cases of distinctions based on "race, colour, descent, or national or ethnic origin".[19]

[16] ECtHR, *D. H. and Others* v. *Czech Republic*, Grand Chamber, judgment of 13 November 2007, No 57325/00, para. 196.

[17] ECtHR, *Biao* v. *Denmark*, *supra* note 5, para. 94.

[18] ECtHR, *Andrejeva* v. *Latvia*, *supra* note 5, para. 87; *Biao* v. *Denmark*, *supra* note 5, para. 93.

[19] See also ECtHR, *Biao* v. *Denmark*, *supra* note 5, joint dissenting opinion of Judges Villiger, Mahoney and Kjølbro, para. 30 ("a wide margin of appreciation is afforded to Member States in relation to differences in treatment on the basis of 'other status' [in this case, length of nationality], as opposed to 'national' or 'ethnic' origin").

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[169] 36. As noted in the Judgment, the Court has taken into account in its jurisprudence the practice of bodies and courts established by international and regional human rights conventions, in so far as it is relevant for the purposes of interpretation (Judgment, para. 77). In the present case, however, the Court considers the jurisprudence of regional human rights courts to be "of little help for the interpretation of the term 'national origin' in CERD", because the purpose of the regional instruments "is to ensure a wide scope of protection of human rights and fundamental freedoms" (*ibid.*, para. 104). CERD prohibits *racial* discrimination and certainly differs from general human rights conventions, which prohibit many kinds of discrimination. Nevertheless, the general prohibition of discrimination includes the prohibition of *racial* discrimination and the other human rights conventions also list "national origin" among the prohibited grounds of discrimination. Therefore, the practice of bodies and courts established by international and regional human rights conventions is relevant to the interpretation of Article 1 of CERD.

37. Interpreting the term "national origin" in Article 1, paragraph 1, of CERD as not encompassing nationality is consistent with the interpretation of similar language in other human rights conventions by these bodies and courts. As noted above (see Section I), international human rights conventions usually contain non-discrimination provisions with a list of prohibited grounds of discrimination that includes "national origin" but not "nationality". In interpreting these provisions, these bodies and courts typically distinguish "nationality" from "national origin" and do not consider the former to be encompassed by the latter.

38. Non-discrimination provisions of the core human rights treaties adopted by the United Nations do not contain nationality among the prohibited grounds of discrimination, except for the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, which lists "nationality" separately from and in addition to "national origin" as a prohibited ground (Arts. 1 and 7). In interpreting that Convention, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has explicitly treated "national origin" and "citizenship status" as two distinct grounds of discrimination.[20]

[20] E.g. Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, para. 3.

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[170] 39. Similarly, the Human Rights Committee does not view the term "national origin", as used in the ICCPR, as encompassing nationality. Rather, it has taken the position that nationality falls within the term "other status", which is listed along with "national origin" among the prohibited grounds of discrimination in Article 26 of the ICCPR. In *Gueye et al.* v. *France*, the case concerning the pensions of retired French soldiers of Senegalese nationality (see paragraph 13 above), the Committee held that there was discrimination based on nationality, while finding "no evidence to support the allegation that the State party has engaged in *racially* discriminatory practices *vis-à-vis* the authors". In doing so, the Committee expressly stated that a differentiation by reference to nationality "falls within the reference to 'other status' in . . . article 26".[21]

40. *Karakurt* v. *Austria*, another case before the Human Rights Committee, is even more illuminating. The case involved a claim by a Turkish national that a labour law of Austria which barred non-Austrian nationals from holding positions on works councils violated his rights under Article 26 of the ICCPR. Upon its ratification of the ICCPR, Austria entered a reservation that "Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of [CERD]". The Committee considered that it was precluded by this reservation from examining the claim of the author of the communication in so far as it related to the distinction between Austrian nationals and non-nationals, but that it was not precluded from examining the author's claim relating to the distinction made by Austria between nationals of the European Economic Area (EEA) and non-EEA nationals. Two members disagreed with the first conclusion of the Committee. They maintained that Austria's intention was to harmonize its obligations under the ICCPR with those under CERD. Hence, in their view, "the Committee [was] precluded from assessing whether a distinction made between Austrian nationals and aliens amounts to such discrimination on grounds of 'race, colour, descent or national or ethnic origin'". They contended, however, that nationality was not a ground of racial discrimination under CERD and, therefore, that the Committee was not barred by the Austrian reservation from examining the author's claim on the distinction between Austrian nationals and non-nationals. For them, "Article 1, paragraph 2, of [CERD] makes it clear that citizenship is not covered by the notion of 'national origin'". By contrast, "distinctions based on citizenship fall under the notion of

[21] Human Rights Committee, *Gueye et al.* v. *France*, *supra* note 2, para. 9.4; emphasis added.

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'other status' in article 26 and not under any of the grounds of discrimination covered by article 1, paragraph 1, of [CERD]". They concluded **[171]** that "the Austrian reservation to article 26 does not affect the Committee's competence to examine whether a distinction made between citizens and aliens amounts to prohibited discrimination under article 26 of the Covenant on other grounds than those covered also by [CERD]".[22]

41. The CESCR, like the Human Rights Committee, has taken the view that "national origin", which is listed among the prohibited grounds of discrimination in Article 2, paragraph 2, of the ICESCR, "refers to a person's State, nation, or place of origin",[23] and that nationality falls within "other status".[24]

42. As previously noted, regional conventions on human rights also contain non-discrimination provisions with lists of prohibited grounds of discrimination, which are recognized to be illustrative, and the monitoring courts and bodies established by these conventions have confirmed that the human rights provided for therein also apply to non-citizens (see paragraphs 10 and 15 above). These courts and bodies usually do not consider nationality as falling within "national origin". For example, in *Luczak* v. *Poland*, the ECtHR stated that "a difference in treatment on the basis of nationality ... falls within the non-exhaustive list of prohibited grounds of discrimination in Article 14".[25]

43. The CERD Committee has confirmed in its jurisprudence that differentiation of treatment based on nationality does not per se constitute "racial discrimination" under CERD. In *Diop* v. *France*, a Senegalese citizen claimed that France was in violation of CERD because his application for membership of the Bar of Nice had been rejected for the reason that he was not a French national. The Committee found no violation, stating that "the refusal to admit [the author] to the Bar was based on the **[172]** fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1".[26] Similarly, in *Quereshi* v. *Denmark*, the CERD

[22] Human Rights Committee, *Karakurt* v. *Austria*, *supra* note 3, individual opinion by Committee Members Sir Nigel Rodley and Mr Martin Scheinin (partly dissenting).

[23] CESCR, General Comment No 20, *supra* note 4, para. 24.

[24] *Ibid.*, paras. 15 and 30.

[25] ECtHR, *Luczak* v. *Poland*, Fourth Section, judgment of 27 November 2007, No 77782/01, para. 46. See also ECtHR, *Andrejeva* v. *Latvia*, *supra* note 5, paras. 87-92 (examining under Article 14 of the European Convention a distinction based on the "sole criterion" of nationality without any reference to national origin). For the IACtHR, see e.g. *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 6, para. 101 (listing "nationality" separately from "national ... origin").

[26] CERD Committee, *Diop* v. *France*, 18 March 1991, Communication No 2/1989, para. 6.6.

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Committee held that it could not conclude that the Danish authorities had reached an inappropriate conclusion in determining that offensive statements made at a party about "foreigners" did not amount to an act of racial discrimination, because "a general reference to foreigners does not at present single out a group of persons . . . on the basis of a specific race, ethnicity, colour, descent or national or ethnic origin".[27]

44. For the reasons given by the Court (Judgment, paras. 74-105) and the reasons set out above, I am of the view that current nationality is not encompassed within "national origin" under Article 1, paragraph 1, of CERD and, therefore, that differentiation of treatment based on current nationality does not per se constitute "racial discrimination" within the meaning of CERD.

45. In accordance with Article 22 of CERD, the Court has jurisdiction only if the challenged measures are capable of constituting "racial discrimination" within the meaning of CERD. The next section turns to examine whether differential treatment based on nationality, although it does not per se constitute racial discrimination under CERD, can nonetheless have the purpose or effect of discrimination on the basis of one of the prohibited grounds listed in Article 1, paragraph 1, of CERD and thus constitute racial discrimination indirectly.

3. Distinctions based on "nationality" can have the purpose or effect of discrimination based on "national origin"

46. With regard to Qatar's claim of indirect discrimination, the majority of the Court considers that "even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination" (Judgment, para. 112), and concludes that the first preliminary objection of the UAE must therefore be upheld (*ibid.*, para. 114). I respectfully disagree. Qatar's claim of indirect discrimination requires a detailed examination at the merits stage. The Court should have declared that the first preliminary objection of the UAE does not possess an exclusively preliminary character.

[173] 47. I shall start by examining the notion of indirect discrimination as embraced and developed by international human rights courts and bodies and the role it plays under CERD. Then, in the next

[27] CERD Committee, *Quereshi* v. *Denmark*, 9 March 2005, Communication No 33/2003, para. 7.3. See also CERD Committee, *P. S. N.* v. *Denmark*, 8 August 2007, Communication No 36/2006, para. 6.4.

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section, I will explain why Qatar's claim of indirect discrimination should have been examined in detail at the merits stage.

48. The definition of racial discrimination in Article 1, paragraph 1, of CERD sets out two conditions. First, there must be a distinction, exclusion, restriction or preference "based on race, colour, descent, or national or ethnic origin". Secondly, the differential treatment must have 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.

49. If differentiation of treatment based on nationality has the "purpose or effect" of discrimination based on one of the prohibited grounds listed in Article 1, paragraph 1, it is capable of constituting "racial discrimination" within the meaning of the Convention. The object and purpose of CERD is to eliminate racial discrimination "in all its forms and manifestations" (Preamble; see also Arts. 2 and 5). Ensuring that differentiation of treatment based on nationality does not have the "purpose or effect" of discriminating based on any of the prohibited grounds in Article 1, paragraph 1, is consistent with, and indeed required by, the object and purpose of the Convention.

50. Judge Crawford has acknowledged that "[a restriction] may constitute racial discrimination if it has the 'effect' of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD".[28] Likewise, Judges Tomka, Gaja and Gevorgian observed in their joint declaration appended to the Court's first provisional measures Order in the present case that "[d]ifferences of treatment of persons of a specific nationality may target persons who also have a certain ethnic origin and therefore would come under the purview of CERD".[29]

51. International human rights courts and bodies, including the CERD Committee, have embraced and developed the notion of indirect discrimination. If a rule, measure or policy that is apparently neutral has an unjustifiable disproportionate prejudicial impact on a certain protected **[174]** group, it constitutes discrimination notwithstanding that it is not specifically aimed at that group. The analysis of

[28] *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, ICJ Reports 2017*, declaration of Judge Crawford, p. 215, para. 7.

[29] *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, ICJ Reports 2018 (II)*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6.

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disproportionate impact requires a comparison between different groups. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measure amounts to discrimination.

52. The CERD Committee has recognized in its practice the need to address not only direct but also indirect discrimination. In its 1993 General Recommendation XIV on *article 1, paragraph 1, of the Convention*, the Committee stated that "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin".[30] In *L. R. et al.* v. *Slovakia*, it recalled that

> the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.[31]

53. The other human rights treaty bodies have likewise embraced the notion of indirect discrimination. The Human Rights Committee has recalled that

> article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons.[32]

The CESCR has declared that "[b]oth direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph **[175]** 2, of the Covenant", defining indirect discrimination as "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as

[30] CERD Committee, General Recommendation XIV on article 1, paragraph 1, of the Convention, 17 March 1993, para. 2.

[31] CERD Committee, *L. R. et al.* v. *Slovakia*, 7 March 2005, Communication No 31/2003, para. 10.4. See also CERD Committee, General Recommendation XXXII on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, August 2009, para. 7.

[32] Human Rights Committee, *Derksen* v. *Netherlands*, 1 April 2004, Communication No 976/2001, para. 9.3. See also Human Rights Committee, *Althammer et al.* v. *Austria*, 8 August 2003, Communication No 998/2001, para. 10.2.

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distinguished by prohibited grounds of discrimination".[33] Similarly, the Committee on the Elimination of Discrimination against Women has declared that "States parties shall ensure that there is neither direct nor indirect discrimination against women", and explained when indirect discrimination occurs.[34]

54. Regional human rights courts have accepted the notion of indirect discrimination as well. For example, the ECtHR has stated that "a policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, regardless of whether the policy or measure is specifically aimed at that group".[35] Similarly, the IACtHR has considered that

> a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups.[36]

55. The CERD Committee has applied the notion of indirect discrimination in the context of the treatment of non-citizens. In *B. M. S.* v. *Australia*, the Committee examined a quota system introduced by Australia that limited the number of doctors trained abroad who were permitted to pass the first stage of the medical examination process to be registered as a doctor in that country. The Committee held that it could not reach the conclusion that "the system works to the detriment of persons of a particular race or national origin" and therefore found that the facts as submitted did not disclose a violation of CERD. It nonetheless recommended to Australia to take measures and improve the transparency of the medical registration procedure to ensure that "the system is in no way discriminatory towards foreign candidates irrespective of their race **[176]** or national or ethnic origin".[37] In addition, the Committee has consistently asked States Parties to report on the status of non-citizens, particularly migrants and refugees, who often belong to a single ethnic group and are susceptible

[33] CESCR, General Comment No 20, *supra* note 4, para. 10.

[34] Committee on the Elimination of Discrimination against Women, General Recommendation No 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, para. 16.

[35] ECtHR, First Section, *J.D. and A* v. *United Kingdom*, judgment of 24 October 2019, Nos 32949/17 and 34614/17, para. 85.

[36] IACtHR, *Nadege Dorzema et al.* v. *Dominican Republic*, judgment of 24 October 2012, para. 235.

[37] CERD Committee, *B. M. S.* v. *Australia*, 12 March 1999, Communication No 8/1996, paras. 9.2, 10 and 11.1.

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to racial discrimination based on one of the prohibited grounds listed in Article 1, paragraph 1, of CERD. It has rejected an interpretation of Article 1, paragraph 2, that would "absolv[e] States parties from any obligation to report on matters relating to legislation on foreigners", affirming that "States parties are under an obligation to report fully upon legislation on foreigners and its implementation".[38] After considering reports submitted by States Parties, the Committee regularly adopts concluding observations that include recommendations on the treatment of non-citizens. These practices of the CERD Committee can be explained by the notion of indirect discrimination. While differentiation of treatment based on nationality does not per se constitute racial discrimination within the meaning of CERD, it constitutes racial discrimination if it has the "purpose or effect" of discrimination based on one of the prohibited grounds in Article 1, paragraph 1.

56. In September 2001, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, adopted a Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance (hereinafter the "Durban Declaration"). The Durban Declaration stated that "racism, racial discrimination, *xenophobia* and related intolerance *occur on the grounds of race, colour, descent or national or ethnic origin*" (Durban Declaration, para. 2; emphasis added), and that

> xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and . . . human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices (*ibid.*, para. 16).

The drafters of the Durban Declaration considered that xenophobia against non-nationals "constitutes one of the main sources of contemporary racism", presumably because it often has the purpose or effect of discrimination based on "race, colour, descent or national or ethnic origin". Thus, the concern expressed by the Durban Declaration about xenophobia against non-nationals may also be explained by the notion of indirect discrimination.

[177] 57. In 2004, influenced by the Durban Declaration, the CERD Committee adopted General Recommendation XXX on *discrimination against non-citizens*.[39] In its paragraph 4, the Committee proclaimed:

[38] CERD Committee, General Recommendation XI, *supra* note 11, para. 2.
[39] CERD Committee, General Recommendation XXX, *supra* note 10.

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Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[40]

The phrase "judged in the light of the objectives and purposes of the Convention" in this context may be understood as referring to situations where differential treatment based on citizenship has the purpose or effect of discriminating on the basis of a prohibited ground listed in Article 1, paragraph 1, of CERD, that is, indirect discrimination.

58. Finally, the notion of indirect discrimination presumably underlies the CERD Committee's decision on the admissibility of the inter-State communication brought by Qatar against the UAE pursuant to Article 11 of CERD. The Committee concluded that the allegations submitted by Qatar "do not fall outside the scope of competence *ratione materiae* of the Convention", relying primarily on its previous practice, in particular paragraph 4 of General Recommendation XXX.[41] As noted above, paragraph 4 can be explained by the notion of indirect discrimination. The Committee may have come to the above conclusion precisely because differentiation based on current nationality is capable of constituting racial discrimination indirectly.

4. The objection of the UAE does not possess an exclusively preliminary character

59. In accordance with the notion of indirect discrimination explained in the previous section, if differentiation of treatment based on current nationality has an unjustifiable disproportionate prejudicial impact on an identifiable group distinguished by "race, colour, descent, or national or ethnic origin", it constitutes racial discrimination within the meaning of Article 1, paragraph 1, of CERD.

60. In the present case, Qatar has explicitly acknowledged that "it is on **[178]** 'national origin' that [it] bases its claims".[42] It claims that the UAE has engaged in indirect discrimination against persons of Qatari

[40] *Ibid.*, para. 4. The Committee thus employed the framework it had used for discrimination under Article 1, paragraph 1, to examine differential treatment based on citizenship. See CERD Committee, General Recommendation XIV, *supra* note 30, para. 2.

[41] CERD Committee, Decision on the admissibility of the inter-State communication submitted by Qatar against the United Arab Emirates, dated 27 August 2019, UN doc. CERD/C/99/4, paras. 57-63.

[42] CR 2020/9, p. 17, para. 19 (Amirfar).

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national origin. It does not claim that the measures taken by the UAE were discriminatory on the basis of another protected ground—"race, colour, descent, or ethnic origin". The UAE for its part contends that the measures complained of by Qatar do not constitute indirect discrimination on the basis of national origin. It maintains that no measure was taken, in terms of either purpose or effect, against any person other than those belonging to the group defined by Qatari nationality.

61. The task of the Court, therefore, is to determine whether the measures taken by the UAE on the basis of current nationality have an unjustifiable disproportionate prejudicial effect on an identifiable group distinguished by national origin. In order to make this determination, it is first necessary to identify a group that is distinguished by "national origin" and entitled to protection under CERD. Subsequently, it must be assessed whether the measures have an unjustifiable disproportionate prejudicial impact on that protected group compared to other groups.

62. With regard to the first issue, Qatar contends that Qataris can be distinguished by their "national origin" in the historical-cultural sense, defined by their heritage or descent, family or tribal affiliations, national traditions and culture, and geographic ties to the peninsula of Qatar. It argues that several factors, including dialect or accent, traditional dress and family affiliations, distinguish Qataris from other national communities in the Gulf region. Qatar relies mainly on an expert report in support of this contention.[43] The UAE for its part argues that Qatari and Emirati people share geographical ties, as well as a common ancestry, language, heritage, traditions and culture, to such an extent that they are the same people, albeit with different nationalities. However, it submits no evidence in support of this contention. The UAE accepts that "[d]isguised discrimination would come within the scope of . . . CERD", but maintains that "there is no discrimination, whether open or disguised, direct or indirect, *against a CERD protected group*".[44] Thus, the very existence of a protected group under CERD is contested by the Parties. Based on the pleadings of the Parties and the evidence submitted, the Court is not in a position to establish whether a CERD protected group can be distinguished by national origin. The materials before the Court do not provide it with all the facts needed to resolve the first issue.

[43] Memorial of Qatar (MQ), Vol. VI, Ann. 162, Expert Report of Dr J. E. Peterson, 9 April 2019.

[44] CR 2020/8, p. 14, para. 10 (Bethlehem); emphasis in the original.

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[179] 63. The second issue is whether the challenged measures have an unjustifiable disproportionate prejudicial impact on the protected group compared to other groups. Qatar claims that the measures have a "disproportionate impact" on the rights of Qataris.[45] The UAE for its part contends that the measures are addressed to Qatari nationals, and not persons of Qatari national origin. It maintains that persons of Qatari national origin but not possessing Qatari nationality were neither addressed nor affected by the measures, and that persons of Qatari nationality but possessing some other national origin were nonetheless addressed and affected by the measures.

64. In order for the measures challenged here to constitute indirect discrimination, they must have an unjustifiable disproportionate prejudicial impact on the identified protected group in comparison with other groups. Qatar bears the burden of establishing such a disproportionate impact. On the other hand, the UAE has the burden of demonstrating that the measures were based exclusively on nationality. The context and circumstances in which the differentiation was introduced must be taken into account in determining whether the measures amount to discrimination. The examination of these questions requires extensive factual analysis. In the same way as for the first issue addressed above, the materials before the Court do not provide it with all the facts necessary to address the second issue. Moreover, these issues constitute the very subject-matter of the dispute on the merits, and as such their determination should be left to the merits stage. The Court should rule on them only after the Parties have presented their arguments and evidence at that stage.

65. The majority of the Court considers that "[w]hile in the present case the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention", because they "do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin". In its view, "even if the measures of which Qatar complains in support of its 'indirect discrimination' claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention" (Judgment, para. 112). Accordingly, it concludes that

[45] MQ, para. 3.109; Written Statement of Qatar on the Preliminary Objections of the United Arab Emirates (WSQ), para. 2.111.

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the Court "does not have jurisdiction *ratione materiae* to entertain Qatar's [claim of indirect discrimination]" (*ibid*., para. 113).

66. I disagree with the majority's analysis and its conclusion on Qatar's claim of indirect discrimination. If it were proven on the facts that the measures have an unjustifiable disproportionate prejudicial impact on an **[180]** identifiable group distinguished by national origin and that they were not based exclusively on nationality, the measures would constitute racial discrimination within the meaning of the Convention, in accordance with the notion of indirect discrimination. The majority provides little analysis in support of its conclusion that while the measures based on current Qatari nationality may have "collateral or secondary effects" on Qataris, they do not, "either by their purpose or by their effect", give rise to racial discrimination against Qataris "as a distinct social group on the basis of their national origin". By drawing that conclusion, the majority has in effect determined the dispute on the merits at the preliminary objections stage.

67. In the case concerning the *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*), the Court pointed out that, at the preliminary objections stage, it only needs to ascertain whether the challenged measures are capable of affecting the rights protected by CERD, and that it does not need to satisfy itself that the measures actually constitute racial discrimination within the meaning of Article 1, paragraph 1, of CERD, or to what extent certain acts may be covered by Article 1, paragraphs 2 and 3, of CERD. The Court explained that "[both of these] determinations concern issues of fact, largely depending on evidence regarding the purpose or effect of the measures alleged . . . and are thus properly a matter for the merits".[46] The same is true for Qatar's claim of indirect discrimination in the present case.

68. It is also a relevant consideration that Qatar developed its claim of indirect discrimination significantly during the preliminary objections stage. In the Court's first provisional measures Order in the present case, five judges took the view that nationality was not encompassed within the term "national origin".[47] Judges Tomka, Gaja and

[46] *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, ICJ Reports 2019 (II)*, p. 595, para. 94; emphasis added.

[47] *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, ICJ*

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Gevorgian observed in addition that "[the] possibility [of indirect discrimination] has not been suggested by Qatar".[48] During the oral proceedings on the preliminary objections in the present case, the UAE contended that "nowhere is [the] indirect discrimination claim referred to in Qatar's Application" and that **[181]** "to try and patch a leaky argument, Qatar's counsel asserted ... that Qatar's is an indirect discrimination claim".[49] It should be noted, however, that in its Application, Qatar did refer to discrimination "*de jure* or *de facto*" on the basis of national origin and that in its Request for the indication of provisional measures, it requested that the Court order the UAE to cease and desist from any and all conduct that could result, "directly or indirectly", in any form of racial discrimination against Qatari individuals and entities.[50] In its Memorial, Qatar also contended that the UAE's measures had a discriminatory "effect" on Qataris.[51] Nevertheless, it is true that the Applicant significantly developed its arguments on indirect discrimination at the preliminary objections stage, in its Written Statement[52] and in particular in its oral pleadings. The Court properly points out in this regard that "the subject-matter of a dispute is not limited by the precise wording that an applicant State uses in its application" (Judgment, para. 61), and that "the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments" (*ibid*., paras. 63 and 68).

69. It is nonetheless important to keep in mind that in preliminary objection proceedings, the parties have only one chance to exchange written submissions. After Qatar submitted its Written Statement in response to the UAE's Preliminary Objections, the UAE had no further opportunity to refute in writing the arguments made by the Applicant therein, including those pertaining to the claim of indirect discrimination. During the oral proceedings, the Parties did exchange arguments on indirect discrimination, but only to a limited extent and not thoroughly. Qatar's claim of indirect discrimination should have been examined in detail by the Court at the merits stage, after being fully apprised of the relevant facts, evidence and arguments of the Parties.

Reports 2018 (II), joint declaration of Judges Tomka, Gaja and Gevorgian, p. 436, paras. 4-5; dissenting opinion of Judge Crawford, p. 475, para. 1; dissenting opinion of Judge Salam, pp. 481-3, paras. 2-7.

[48] *Ibid.*, joint declaration of Judges Tomka, Gaja and Gevorgian, p. 437, para. 6.

[49] CR 2020/8, p. 28, para. 25 (Sheeran).

[50] Application of Qatar, p. 60, para. 66; Request for the indication of provisional measures of Qatar, para. 19.

[51] MQ, Chap. III, Sec. I.B.2.

[52] WSQ, Chap. II, Sec. III.

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70. Under Article 79*ter*, paragraph 4, of the Rules of Court, when it is called upon to rule on a preliminary objection, the Court shall uphold or reject it, or "declare that, in the circumstances of the case, [it] does not possess an exclusively preliminary character".

71. The Court has previously expressed its view on the resolution of preliminary objections as follows:

> In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings **[182]** *unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits*.[53]

In the present case, the Court does not have before it all facts necessary to decide the two issues raised in relation to Qatar's claim of indirect discrimination. They are precisely the issues that should be examined in detail by the Court at the merits stage. Furthermore, while the UAE's objection contains "both preliminary aspects and other aspects relating to the merits", it is "inextricably interwoven with the merits".[54] Thus, the present case fulfils the criteria laid down by the Court for finding that a preliminary objection does not possess an exclusively preliminary character.

72. For the reasons set out above, the Court should have declared that, in the circumstances of the present case, the first preliminary objection of the UAE does not have an exclusively preliminary character.

73. This conclusion is in line with the final submissions that the Applicant made at the end of the oral pleadings. It asked the Court to "*(a)* Reject the Preliminary Objections presented by the UAE; . . . *(d)* Or, in the alternative, reject the Second Preliminary Objection . . . and hold . . . that the First Preliminary Objection . . . does not possess an exclusively preliminary character".[55] Qatar's claim of indirect discrimination should have been examined in detail by the Court at the merits stage, on the basis of facts and evidence submitted by the Parties. The conclusion drawn in paragraph 72 above should not be interpreted as prejudging in any way the potential findings of the Court on the merits.

[53] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, ICJ Reports 2007 (II)*, p. 852, para. 51; emphasis added.

[54] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, ICJ Reports 1998*, pp. 133-4, para. 49; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1998*, pp. 28-9, para. 50.

[55] CR 2020/9, p. 45, para. 9 (Al-Khulaifi).

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[183] DECLARATION OF JUDGE AD HOC DAUDET

1. The Court has already had occasion to review the factual background of the present case (see Judgment, paras. 26 *et seq*.), not only at the time of its Order on the provisional measures requested by Qatar (*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, ICJ Reports 2018 (II)*, p. 406), but also in connection with its Judgments of 14 July 2020 in the cases concerning *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar)* and *Appeal relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates* v. *Qatar)* (*ICJ Reports 2020*, pp. 93-5 and 184-6, paras. 21-6). It is clear that Qatar has been committed to finding a peaceful and judicial settlement to its dispute with its Gulf neighbours, a dispute with particularly serious repercussions for it, which arose as a result of its neighbours' alleged violations of the 2013 and 2014 Riyadh Agreements, to the detriment of Qatar, and of Qatar's purported support for international terrorism.

2. It was not possible to seise the Court by way of special agreement, which had evidently been ruled out by the Parties; and none of the Parties had made the declaration provided for under Article 36, paragraph 2, of the Court's Statute. That left the option of a compromissory clause included in a treaty. Since Article 22 of CERD contained such a clause, the Convention emerged as the only possible title of jurisdiction that could serve as a basis for Qatar's Application. However, its implementation was not self-evident in this instance and the UAE did not err in filing preliminary objections to the Court's jurisdiction.

3. The two preliminary objections presented by the UAE (which had originally raised three) were independent of each other. In keeping with the jurisprudence of the Court recalled in paragraph 114 of its Judgment, having upheld the first objection, the Court did not consider it necessary **[184]** to examine the second one, relating to the procedure under Article 22 of CERD.

4. If the Court had addressed that objection, I would have voted in favour of its dismissal. Indeed, in light of the evidence in the case file, I am of the view that Qatar had pursued the prior negotiations required to seise the International Court of Justice to a point where their continuation appeared futile and headed towards "deadlock[]"

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(*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, ICJ Reports 2018 (II)*, p. 419, para. 36; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, ICJ Reports 2011 (I)*, p. 130, para. 150). The fulfilment of this precondition alone was sufficient to establish the Court's jurisdiction, since the other precondition contained in Article 22, i.e. recourse to the procedures provided for in Articles 11 to 13 of CERD, is not cumulative but an alternative to the first, as recently determined by the Court (*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, ICJ Reports 2019 (II)*, p. 600, para. 113).

5. Qatar did, however, have recourse to the second procedure under Article 22, which led to a conciliation process. It did so even before it seised the Court, and independently of that seisin, for which such recourse was not a prerequisite, the precondition for seising the Court having already been satisfied by the failure of negotiations; this resulted in two sets of proceedings—one before the Court and one before the CERD bodies—taking place in parallel. The UAE, which during the hearings withdrew its third preliminary objection that Qatar's "abuse of process" should cause its "claims [to be] inadmissible" (Preliminary Objections of the United Arab Emirates, Vol. I, para. 238), nonetheless argued that Qatar should have refrained from seising the Court until the conciliation process under CERD had ended.

6. The disputes brought before the Court are never minor, and this one, which began on 5 June 2017, is certainly no exception. There is no doubt that both Parties wish it to come to an end, but it is understandable that Qatar in particular should want to do so as soon as possible. I thus regard its pursuit of parallel proceedings as a way of facilitating this, and I see nothing problematic, much less irregular, in this situation, since the proceedings are taking place before two different bodies and have different effects. On the one hand, there is the Court, the "principal judicial organ of the United Nations", which today rendered a *res judicata* judgment; on the other, there is a conciliation body which may, on the basis of international law, offer a solution to the dispute which the Parties are free to accept. While the Court found today that it lacks jurisdiction, the CERD Committee

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determined on 27 August 2019 that Qatar's claim based on **[185]** Article 11 of the Convention is admissible and decided to form a Conciliation Commission as provided for by Article 12. The Commission took up its functions on 1 May 2020, and may now, therefore, find a solution bearing in mind the Court's decision.

7. The Court found that it lacks jurisdiction by upholding the UAE's first preliminary objection. I deeply regret that it is therefore unable to settle this dispute and perhaps enable Qatar to recover the rights of which I myself believe it has been deprived by the UAE.

8. Nevertheless, I voted in favour of the finding that the Court lacks jurisdiction, because I fully agree with the reasoning set out in the Judgment. This includes, in particular, the position expressed by the Court in its interpretation of Article 1, paragraph 1, of CERD, whereby it considered that "national origin", which appears in the Convention, is different from "nationality", which does not; that national origin does not encompass nationality; and that the two notions are not equivalent or interchangeable, neither in letter nor in spirit. I supported this position because I believed, in good conscience, that it was the correct legal interpretation of Article 1, paragraph 1, and that this consideration took precedence over any other.

9. I would nonetheless recall that, by its 2018 Order (*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, ICJ Reports 2018 (II)*, p. 433, para. 79), which I supported, the Court indicated the most important of the provisional measures requested by Qatar. Since the Court's landmark ruling in *LaGrand* (*(Germany* v. *United States of America), Judgment, ICJ Reports 2001*, p. 506, para. 109), subsequently well established in its jurisprudence (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports 2005*, p. 258, para. 263; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, ICJ Reports 2011 (I)*, pp. 26-7, para. 84; *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, ICJ Reports 2018 (II)*, p. 433, para. 77), the Court's orders on provisional measures have had binding effect. This situation has therefore enabled Qatar to recover many of its rights, subject to the proper implementation of the Order by the UAE.

10. I also carefully considered the question whether the interpretation of Article 1, paragraph 1, possessed an exclusively preliminary character. It is often possible to find links of varying strength between

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jurisdiction and the merits. Interpreting what determines jurisdiction frequently entails analysing facts or evidence pertaining to the merits, in which event the question raised does not have an exclusively preliminary character. **[186]** That does not seem to be the case here. Nationality is a well-known concept in international law, and defining it in relation to national origin for the purposes of determining whether the inclusion of one term and not the other in Article 1, paragraph 1, of CERD should be understood as incorporating both, is a purely legal and abstract question which can be answered without any examination on the merits. I thus considered that it would be artificial to regard the question as not having an exclusively preliminary character.

11. In conclusion, therefore, the Court's decision is, in my view, perfectly well founded in law. Strict though it may seem, it is quite simply the only possible application of international law. Needless to say, I do not see in it a justification for the UAE's actions against Qatar, many of which constitute human rights violations under several international conventions. In the present case, however, it was CERD which, without any reservations from either State, contained a compromissory clause allowing for the Court to be seised. It was thus CERD alone that could be invoked, as I mentioned above (para. 2). It might subsequently have been for the Conciliation Commission to propose a solution following the delivery of the Court's Judgment.

12. Indeed, that possibility had been agreed to by the UAE, whose Ambassador stated at the close of the hearings: "We will engage in good faith with the Conciliation Commission even if you find in our favour on the issue of nationality" (CR 2020/8, p. 42, para. 8 (AlNaqbi)).

13. However, a few weeks later, a reconciliation process was initiated between the Gulf countries. We can take heart that all their disagreements are thus expected to be resolved peacefully even as the Court is delivering its Judgment, which, it should be recalled, addresses only its jurisdiction, without examining the merits of a dispute which the States themselves declare, in an atmosphere of new-found serenity, will soon be over.

[Report: *ICJ Reports 2021*, p. 7]

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