Corrigé
Corrected

CR 2018/13

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Thursday 28 June 2018, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar *v.* United Arab Emirates)**

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le jeudi 28 juin 2018, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
	Judges *ad hoc*	Cot
		Daudet
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam, juges
MM. Cot
Daudet, juges *ad hoc*

M. Couvreur, greffier

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Mr. Jassim Al-Kuwari, Ministry of Foreign Affairs,

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comme conseillère.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the first round of oral observations of the United Arab Emirates on the request for the indication of provisional measures submitted by the State of Qatar. I now call on His Excellency Mr. Saeed Ali Alnowais, Agent of the United Arab Emirates. You have the floor, Sir.

INTRODUCTORY STATEMENT

Mr. ALNOWAIS:

1. Mr. President, honourable Members of the Court, it is my honour and privilege to appear before you as the Agent for the Government of the UAE in this hearing. My name is Saeed Ali Alnowais and I serve as the UAE's Ambassador to the Netherlands. I am accompanied today by His Excellency Dr. Abdul Rahim Al Awadhi, Assistant Foreign Minister and by other officials and representatives of my Government. My authorities have asked me to convey the UAE's deepest respect for this Court as the principal judicial organ of the United Nations, and its strong commitment and adherence to international law.

2. We heard yesterday a number of allegations from Qatar. My country was falsely accused of expelling Qatari citizens in a mass campaign under the threat of criminal and civil sanctions. It was falsely accused of mounting a campaign of hatred against the Qatari people. My country was also falsely accused of deliberately separating families. The UAE completely rejects these allegations, all of which are without any merit or basis. Qatar has put forward no credible evidence to substantiate any of these claims. Qatar's only evidence consists of anecdotal and unverified statements reported by organizations that have relied primarily on information from Qatar. None of the organizations cited by Qatar have had the opportunity to learn the true facts of the matter from the UAE.

3. Let me be clear: there has been no mass expulsion of Qataris from the UAE and the UAE certainly has no policy to separate UAE-Qatari mixed families. On the contrary, as we will show the Court using official data and records, the UAE's measures against the Qatari Government are carefully measured to have the least possible impact on ordinary people. I remind the Court of the UAE's statement on 5 June 2017, in which the UAE affirmed "its full respect and appreciation for the brotherly Qatari people on account of the profound, historical, religious, and fraternal ties and

kin relations binding UAE and Qatari peoples"[1]. The UAE makes a clear distinction between the Qatari Government and the people of Qatar. We recognize that the Qatari people have no responsibility for the dangerous policies of their Government.

4. Mr. President, Members of the Court, on 5 June 2017, the UAE ended its relations with Qatar because of its support for terrorism, its interference in the affairs of its neighbours, and its dissemination of hate speech. The UAE did not do this alone[2]. My country was joined by at least ten other countries that either downgraded or ended their relations with Qatar for the same reasons. Our Government have asked Qatar time and again to cease this conduct. Although Qatar repeatedly committed to do so, it failed to live up to its commitments, including under a series of agreements signed by Qatar in 2013 and 2014 known as the Riyadh Agreement***s***. Having exhausted other options, the UAE, along with at least ten other countries, found that the only way remaining to address these grave threats was to end or downgrade relations with Qatar.

5. Qatar today continues to support a number of terrorist groups including Al-Qaida, the Al Nusra Front, Da'esh, the Muslim Brotherhood, Hezbollah and Hamas. It supports dangerous extremist groups in countries such as Libya, Syria and Somalia. In addition, Qatar continues to harbour known terrorists, and has failed to take enforcement actions against them.

6. In April 2017, two months before our break in relations, Qatar paid the extraordinary sum of one billion US dollars to entities affiliated with terrorist organizations such as Al-Qaida, a matter that Egypt has brought to the attention of the United Nations Security Council[3]. These cash payments were illegally flown by Qatar into Iraqi territory, without the permission of the Government of Iraq, and were paid under the guise of a ransom payment[4].

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[1] See Exhibit 1 of the UAE's submission to the Court, dated 25 June 2018.

[2] See Exhibit 1 of the UAE's submission to the Court, dated 25 June 2018.

[3] United Nations Security Council, Threats to International Peace and Security Caused by Terrorist Acts, S/PV.7962 (8 June 2017), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7962. See also Egypt Calls for U.N.; Inquiry into Accusation of Qatar Ransom Payment, Reuters (9 June 2017), https://www.reuters.com/article/us-gulf-qatar-un/egypt-calls-for-u-n-inquiry-into-accusation-of-qatar-ransom-payment-idUSKBN18Z26W.

[4] Iraq Considers Next Move After Intercepting "World's Largest" Ransom for Kidnapped Qataris, *Independent* (26 April 2017), https://www.independent.co.uk/news/world/middle-east/qatari-royals-kidnapped-iraq-ransom-half-billion-shia-militia-syria-saudi-hunters-baghdad-a7703946.html; Hacked Messages Show Qatar Appearing to Pay Hundreds of Millions to Free Hostages, *The Washington Post* (28 April 2017), https://www.washingtonpost.com/world/national-security/hacked-messages-show-qatar-appearing-to-pay-hundreds-of-millions-to-free-hostages/2018/04/27/46759ce2-3f41-11e8-974f-aacd97698cef_story.html?utm_term=.fbf90922d665.

7. Unsurprisingly, Qatar's Application to this Court does not address any of these issues. Qatar would have this Court believe that it was an innocent bystander, targeted for no legitimate reason whatsoever.

8. The reality is that the present crisis was caused by Qatar's own unlawful conduct and the solution is largely within Qatar's hands. Qatar is aware that it must, in accordance with its international obligations, stop harbouring and supporting terrorist groups and individuals. It must no longer interfere in the affairs of its neighbours or seek to undermine their Governments. And, it must also end the dissemination of hate speech through its media networks, which Qatar uses to give a platform to the terrorist groups that it supports.

9. Mr. President, Members of the Court, the actual situation in the UAE is entirely unlike that portrayed by Qatar. The situation for Qataris in the UAE remains much the same today as it was prior to the crisis. Contrary to what Qatar would have this Court believe, there are thousands of Qatari citizens currently residing in and visiting the UAE[5]. All Qataris in the UAE continue to enjoy the full rights granted by law to all residents or visitors of my country. Qatari residents live with their families, attend school, and have access to health care as well as government services. They run businesses and work in government jobs. They freely transfer their capital, including directly to Qatar.

10. Mr. President, Members of the Court, the true facts of this matter are as follows.

11. Although the UAE's announcement on 5 June 2017 detailing the break in diplomatic relations did call upon Qatari citizens to leave its territory for precautionary security reasons, the UAE did not issue any deportation orders, nor did it undertake any action to deport or expel any persons based on their Qatari nationality. Those who decided to leave the UAE did so without compulsion. Many of the persons who left were strongly encouraged to do so by instructions issued by the Embassy of Qatar in the UAE on 5 June 2017[6]. Indeed, recognizing the absence of any efforts by the UAE authorities to take such steps, the majority of Qataris decided not to leave and instead remained in the UAE.

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[5] See Exhibits 11 and 13 of the UAE's submission to the Court, dated 25 June 2018.

[6] Qatar Asks Citizens to Leave UAE Within 14 Days: Embassy, Reuters, 5 June 2017, https://www.reuters.com/article/us-gulf-qatar-citizens-emirates-idUSKBN18W1FT?il=0.

12. What the UAE did was to impose additional requirements on the entry or re-entry into their territory by Qatari nationals. Today, all Qataris who intend to travel to the UAE must obtain a prior permit from the UAE Ministry of the Interior. It is not unusual for one State to impose conditions on the entry of citizens from particular other States.

13. The UAE established facilities to receive applications for such permits almost immediately. Through ***these*** facilities, the UAE has received and granted thousands of applications. Only a very small number of the applications have been rejected for national security or other legitimate concerns[7].

14. Qatari nationals have entered and exited the UAE on over eight thousand occasions since the start of the crisis[8]. The number of Qataris in the UAE today is not substantially different than the number of Qataris who were present on 5 June 2017. Moreover, there are hundreds of Qatari citizens who are presently enrolled in educational programs in my country and continuing their studies[9]. Earlier this year, my Government asked all post-secondary institutions in the UAE to contact Qatari students who discontinued their studies to ensure they understood that they were welcome to return[10].

15. In addition, and contrary to Qatar's assertions, no Qatari citizens have been prevented from seeking legal remedies for any matter. As with any other persons of any nationality, Qatari citizens can seek redress for any legal grievances through counsel of their choosing. The availability of legal remedies applies to claims related to property rights, civil rights and business interests.

16. Furthermore, there has been no interference in the business affairs of Qatari nationals. Qatari citizens continue to operate numerous businesses and maintain investments in the UAE. As evidence of this, hundreds of Qatari companies have received UAE business licenses in the past year, for both new and existing businesses. Notwithstanding the crisis, Qatari citizens continue to

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[7] See Exhibit 3 of the UAE's submission to the Court, dated 25 June 2018.

[8] See Exhibit 14 of the UAE's submission to the Court, dated 25 June 2018.

[9] See Exhibit 12 of the UAE's submission to the Court, dated 25 June 2018.

[10] See Exhibit 8 of the UAE's submission to the Court, dated 25 June 2018.

make new investments in the UAE, including in the real estate sector[11]. Qatari citizens are free to transfer all proceeds of those investments overseas, without any unusual restrictions[12].

17. To facilitate all of these transactions and the personal affairs of Qatari citizens in the UAE, UAE embassies and consulates have continued to provide services to the Qatari people wishing to transact business in the UAE, despite the termination of diplomatic relations. While my Government no longer maintains contact with the Qatari authorities, we have continued to accept documents for authentication from Qataris overseas to ensure that such services remain uninterrupted[13].

18. I would now like to briefly address Qatar's allegations that the UAE is participating in or failing to stop hate speech against Qatari citizens. By making these allegations, Qatar seeks to conflate the UAE's legitimate grievances with the Government of Qatar with opposition to persons of Qatari nationality. The two are not the same. The UAE has no grievance with the Qatari people nor has it engaged in any media campaign against Qataris based on their nationality.

19. In contrast, the Government of Qatar is a major sponsor of hate speech through Al Jazeera's Arabic language network and through its other State-controlled media entities. Qatar complains that the UAE has wrongfully blocked Al Jazeera and its media outlets, but in fact, given Qatar's ownership and control of Al Jazeera, it is Qatar's conduct which should be condemned.

20. Finally, Qatar is simply incorrect that the UAE has criminalized expressions of support for Qataris. Qatar's complaint in this regard stems from the UAE Attorney General's statement from 7 June 2017[14]. The Attorney General's statement does not at all refer to the Qatari people; it refers to the Qatari Government. The Attorney General has rightly warned that any expression of support for Qatar's policy of sponsoring terrorist groups and individuals is punishable under law. The law to which the Attorney General referred is general in nature and contains no specific provisions applicable to Qatar or the Qatari people. That law, which went into effect in December

[11] See Exhibits 5 and 7 of the UAE's submission to the Court, dated 25 June 2018.

[12] See Exhibit 4 of the UAE's submission to the Court, dated 25 June 2018.

[13] See Exhibit 5 of the UAE's submission to the Court, dated 25 June 2018.

[14] Qatar's Request for the indication of provisional measures dated 11 June 2018 (RPMQ), Ann. 3.

2012, is in fact not dissimilar to the cybercrime laws adopted by many other countries, including Qatar's own cybercrime law, which went into effect in September 2014.

21. Mr. President, Members of the Court, as I indicated at the beginning of my speech, the facts that I have summarized will be addressed in further detail before you today and will be proven by the official records that we have provided to the Court.

22. It is implausible that Qatar is not aware of these facts. In view of the record of Qatar in past cases before this Court[15], we urge you to carefully assess the matter before you, and to closely scrutinize the strength of the relative evidence provided by each party.

23. The facts before you today clearly do not meet the basic elements that must be established for the Court to grant provisional relief.

24. I thank you for the opportunity to address you today.

25. I will now ask the Court to call upon our counsel: Professor Alain Pellet will address the issue of preconditions under Article 22 of the Convention. Professor Pellet will then be followed by Professor Tullio Treves, who will deal with the exhaustion of local remedies. After Professor Treves, Mr. Simon Olleson will deal with the existence of a dispute, the requirement for plausibility of rights and the connection with the measures requested. Professor Malcolm Shaw will then conclude our remarks before the Court today. Professor Shaw will address the requirements for irreparable prejudice and urgency. Thank you.

Le PRESIDENT : Je remercie l'agent des Emirats arabes unis. Je donne à présent la parole à M. le professeur Pellet. Vous avez la parole.

M. PELLET : Merci beaucoup, Monsieur le président.

ABSENCE DE COMPÉTENCE *PRIMA FACIE* LES PRÉCONDITIONS DE L'ARTICLE 22

1. Monsieur le président, Mesdames et Messieurs les juges, le Qatar entend fonder la compétence de la Cour sur l'article 22 de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (que j'appellerai pour faire bref «convention CERD»

[15] See e.g. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, ICJ Reports 2001*, p. 47.

conformément à son sigle anglais : c'est plus facile à prononcer...). Selon cette disposition, seul peut être porté devant la Cour un différend «qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite convention».

2. Ces deux éléments — les négociations et les procédures prévues par la convention — sont des critères à l'aune desquels on doit vérifier l'existence ou la non-existence d'un différend «touchant l'interprétation ou l'application de la présente convention». Ils présentent trois caractéristiques essentielles :

i) ce sont «des conditions *préalables* auxquelles il *doit* être satisfait *avant* toute saisine de la Cour»[16], comme vous l'avez dit en 2011 dans l'affaire *Géorgie c. Russie* ;

ii) elles sont cumulatives ; et

iii) elles doivent être remplies successivement.

3. En d'autres termes, la Cour doit vérifier que les négociations puis les procédures expressément prévues par la convention se sont avérées infructueuses, afin d'établir sa compétence et de préserver les principes fondamentaux et indissociables du respect dû aux traités *(pacta sunt servanda)* et du consentement à sa compétence. Comme la Cour l'a rappelé dans son arrêt de 2006 concernant les *Activités armées sur le territoire du Congo*,

> «sa compétence repose sur le consentement des parties, dans la seule mesure reconnue par celles-ci … , et ... , lorsque ce consentement est exprimé dans une clause compromissoire insérée dans un accord international, *les conditions auxquelles il est éventuellement soumis doivent être considérées comme en constituant les limites*»[17].

4. En l'espèce, les Parties ont assorti leur consentement à la compétence de la Cour de deux limites expressément visées à l'article 22, à quoi s'ajoute l'épuisement «de tous les recours internes disponibles», exigé par l'article 11, paragraphe 3, de la convention, et sur laquelle mon collègue et ami Tullio Treves reviendra. Pour ma part, je montrerai, dans un premier temps, que les

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[16] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 128, par. 141 (les italiques sont de nous). Voir aussi *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 125, par. 59.

[17] *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 39, par. 88 (les italiques sont de nous). Voir aussi *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 200, par. 48.

préconditions de l'article 22 ont un caractère cumulatif et successif, avant d'établir que le Qatar ne s'est conformé de toutes manières ni à l'une ni à l'autre.

I. Les préconditions de l'article 22 sont cumulatives et successives

5. Mesdames et Messieurs les juges, je sais bien qu'à trois reprises la Cour a été invitée à se prononcer sur la question de savoir si les deux conditions préalables à sa saisine posées à l'article 22 de la convention sont alternatives ou cumulatives — je le sais d'autant mieux que, dans deux de ces cas, je me suis employé à montrer devant vous qu'elles doivent être remplies l'une *et* l'autre avant que vous puissiez être appelés à exercer votre compétence. En chacune de ces trois occurrences, la Cour a évité de se prononcer :

1) dans votre ordonnance du 15 octobre 2008, sur la requête en indication de mesures conservatoires de la Géorgie contre la Russie, vous avez, si je puis dire, neutralisé la question en estimant que la rédaction de l'article 22 ne donnait «pas à penser que la tenue de négociations formelles au titre de la convention ou le recours aux procédures visées à l'article 22 constituent des conditions préalables»[18] ; vous n'avez émis cette opinion que *prima facie* et,
2) après plus ample réflexion, en insistant sur le caractère provisoire de cette conclusion initiale[19], vous avez, dans votre arrêt du 1er avril 2011 sur les exceptions préliminaires soulevées par la Russie dans la même affaire, estimé «que, pris dans leur sens ordinaire, les termes de l'article 22, à savoir «[t]out différend … qui n'aura pas été réglé par voie de négociation ou au moyen des procédures expressément prévues par ladite convention», établissent des conditions préalables auxquelles il doit être satisfait avant toute saisine de la Cour»[20] ;
3) la troisième occasion qui vous a été donnée de vous interroger sur la question a été la demande en indication de mesures conservatoires de l'Ukraine contre la Russie, qui a donné lieu à votre ordonnance du 19 avril 2017. Après avoir rappelé que vous aviez «déjà conclu par le passé que

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[18] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008,* p. 388, par. 114.

[19] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* p. 122-123, par. 129.

[20] *Ibid.*, p. 128, par. 141 ; voir aussi, p. 130, par. 148 ou p. 140, par. 183.

l'article 22 de la CIEDR établissait des conditions préalables à [votre] saisine»[21], vous vous êtes déclarés d'avis que vous n'aviez pas à vous prononcer sur la question du caractère alternatif ou cumulatif de ces conditions «[à] ce stade [de la procédure]»[22]. Pour retenir votre compétence, vous vous êtes bornés à constater qu'il ressortait des éléments versés au dossier que les questions relatives à l'application de la CERD n'avaient pas été résolues par voie de négociation au moment du dépôt de la requête[23].

6. On peut ne pas être complètement convaincu par cette position. Quand il soulève des exceptions préliminaires un Etat «a droit à ce qu'il y soit répondu au stade préliminaire de la procédure»[24]. Il me semble qu'il n'y a aucune raison pour qu'il en aille différemment lorsque la compétence *prima facie* de la Cour est contestée à l'occasion d'une requête en indication de mesures conservatoires — dans la mesure au moins où la question qu'il vous appartient de trancher est une question de pur droit et non pas une question de fait, comme c'est le cas en l'espèce. Dans un cas de ce genre, on voit mal pourquoi il faudrait remettre à plus tard l'examen de la question. *Jura novit curia*. Vous devez connaître le droit.

7. Nos contradicteurs se reposent entièrement sur l'ordonnance de 2017 et nous annoncent qu'ils se réservent de s'exprimer sur ce point plus tard — «at the appropriate time»[25]. J'en dirai tout de même quelques mots fût-ce en style un peu télégraphique, car la question se pose de manière différente et plus pressante en la présente affaire que ce n'était le cas dans celle de l'an dernier.

8. Au plan des principes :

1) Il me paraît acquis que les deux éléments mentionnés à l'article 22 sont des «conditions *préalables*» à votre saisine.
2) Je sais bien, Monsieur le président, qu'il y a «ou». Mais, au même titre que «et» qui, comme l'avait remarqué la Cour permanente dans l'affaire de la *Haute-Silésie polonaise*, «dans le

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[21] *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 125, par. 59.

[22] *Ibid.*, p. 125-126, par. 60.

[23] *Ibid.*, p. 125, par. 59.

[24] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 602, par. 51.

[25] CR 2018/12, p. 24, par. 23 (Donovan).

langage ordinaire comme dans le langage juridique, ~~*«et»*~~ **...** peut, selon les circonstances, être aussi bien alternatif que cumulatif»[26], la conjonction «ou» «peut, d'un point de vue linguistique, revêtir un sens soit alternatif soit cumulatif, et doit donc être lue dans le contexte dans lequel elle est utilisée» ainsi que l'a souligné la grande chambre de la Cour de justice des communautés européennes dans un arrêt du 10 juillet 2005[27] — tout est donc affaire de circonstance et de contexte. Or,

3) En l'espèce, «et» eût été parfaitement illogique. Ni en français, ni en anglais il ne serait naturel de dire : «qui n'aura pas été réglé par voie de négociation *et* au moyen de procédures expressément prévues par ladite convention» — «which is not settled by negotiation and by the procedures expressly provided for in this Convention». Dans ce contexte, assimiler «ou» à «et», c'est clairement aller contre «le sens ordinaire à attribuer aux termes du traité»[28] : cela reviendrait à signifier qu'une fois le différend réglé par voie de négociation, il devrait encore l'être à nouveau par les procédures prévues par la convention. Ce serait absurde.
4) Le caractère cumulatif des conditions préalables visées à l'article 22 est confirmé par les travaux préparatoires de la convention CERD. Le texte des déclarations pertinentes est reproduit dans vos dossiers sous l'onglet n° 2.1 et nous avons déposé lundi au Greffe un tableau résumant le déroulement des travaux préparatoires de l'article 22. Vous le trouverez également dans vos dossiers sous l'onglet n° 2.2. Et ***je*** me permets de vous recommander vivement de vous y reporter, Mesdames et Messieurs de la Cour : je le crois fort éclairant. Je me contenterai ici de brèves remarques.

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[26] Voir *Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6*, p. 14 ; voir aussi *Interprétation de l'accord aérien du 6 février 1948 (Etats-Unis c. Italie)*, sentence arbitrale, 17 juillet 1965, *RGDIP*, 1968, p. 478 (pour le texte anglais, voir *RSANU*, vol. XVI, p. 94-95).

[27] CJCE, Grande Chambre, *Commission des Communautés européennes c. République française* (aff. C-304/02), arrêt, 12 juillet 2005, *Recueil*, p. I-06263, par. 83. Voir aussi dans le même sens : Cour suprême des Etats-Unis, *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1866); High Court, Queen's Bench Division, Commercial Court, *Nakanishi Kikai Kogyosho Limited* v. *Intermare Transport GMBH* [2009] EWHC 994 (Comm), par. 12 ; Chambre des Lords, *Federal Steam Navigation* (1974) 1 WLR 505 ; High Court, Queen's Bench Division, *R* v. *Oakes* (1959) 2 QB 350.

[28] Convention de Vienne sur le droit des traités du 23 mai 1969, art. 31, par. 1.

L'article 22 est le résultat d'un compromis réalisé durant la négociation, entre les Etats qui s'opposaient à toute possibilité d'une saisine unilatérale de la Cour[29] et ceux qui y étaient favorables sous certaines conditions. Le texte de cette disposition résulte directement d'une proposition faite par M. Inglès, le membre philippin de la Sous-Commission des droits de l'homme (dont nous n'avons pas trouvé le texte français ni à Paris ni à La Haye). Donc, je le lis en anglais :

> «Under the proposed procedure, States Parties to the convention should first refer complaints of failure to comply with that instrument to the State party concerned ; it is only when they are not satisfied with the explanation of the State Party concerned that they may refer the complaint to the Committee. … The Committee, as its name implied, would ascertain the facts before attempting an amicable solution to the dispute. … If the Committee failed to effect conciliation within the time allotted, either of the Parties may take the dispute to the International Court of Justice,[if the Committee failed to effect conciliation].»[30]

Toutes les déclarations faites à ce propos durant l'élaboration de la convention CERD établissent la volonté des négociateurs de conditionner la compétence de la Cour, en application de l'article 22, à la saisine préalable du CERD en cas d'échec des négociations[31].

5) Je remarque que, dans *Géorgie c. Russie*, la Cour a également relevé que,

> «à l'époque où la CIEDR a été rédigée, l'idée de consentir au règlement obligatoire des différends par la Cour n'était pas facilement acceptable par nombre d'Etats. Il est permis de penser que, bien que les Etats puissent formuler des réserves aux dispositions de la Convention prévoyant le règlement obligatoire des différends, *des limitations supplémentaires au recours au règlement judiciaire furent prévues* — sous la forme de négociations préalables *et* d'autres procédures de règlement des différends non assorties de délais — dans le but de recueillir une plus large adhésion.»[32]

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[29] Voir en particulier M. Dabrowa (Pologne), Nations Unies, *Documents officiels de l'Assemblée générale, vingtième session, Troisième Commission*, compte rendu analytique de la 1358e séance, doc. A/C.3/SR.1358, 29 novembre 1965, p. 426, par. 20-21. Voir aussi M. Lamptey (Ghana), Nations Unies, *Documents officiels de l'Assemblée générale, vingtième session, Troisième Commission*, compte rendu analytique de la 1354e séance, doc. A/C.3/SR.1354, 25 novembre 1965, par. 54.

[30] Conseil économique et social, Commission des droits de l'homme, sous-commission de la lutte contre les mesures discriminatoires et de la protection des minorités, compte rendu analytique de la 427e séance, compte rendu analytique de la 427e séance, Nations Unies, doc. E/CN.4/Sub.2/SR.427, 28 janvier 1964, p. 13 (les italiques sont de nous).

[31] Voir en particulier la déclaration des délégués Philippins à la Commission des droits de l'homme, M. Quiambao (Conseil économique et social, Commission des droits de l'homme, compte rendu analytique de la 810e séance, Nations Unies, doc. E/CN.4/SR.810, 13 mars 1964, p. 7) et à la Troisième Commission, M. Garcia, Nations Unies, *Documents officiels de l'Assemblée générale, vingtième session, Troisième Commission*, compte rendu analytique de la 1344e séance, doc. A/C.3/SR.1344, 16 novembre 1965, p. 338, par. 16 ; M. Mommersteeg (Pays-Bas), *ibid.*, p. 343-344, par. 63 ; M. Cochaux (Belgique), Nations Unies, *Documents officiels de l'Assemblée générale, vingtième session, Troisième Commission*, compte rendu analytique de la 1367e séance, doc. A/C.3/SR.1367, 7 décembre 1965, p. 487, par. 40.

[32] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011*, p. 129-130, par. 147 (les italiques sont de nous).

Ceci aussi plaide bien sûr pour le caractère cumulatif des deux conditions.

6) La convention CERD se différencie des autres traités universels de droits de l'homme en ce qu'elle est la *seule* à établir une procédure de plainte interétatique *obligatoire*. Mais elle se rapproche de certains d'entre eux dont les clauses compromissoires prévoient, elles aussi, une procédure en ~~***deux ou***~~ trois étapes — voire plus[33]. Toutes ces conventions comparables imposent la condition préalable de «négociation». ~~***Et***~~ Là où la convention CERD s'en remet aux procédures qu'elle institue expressément, les traités comparables prévoient le recours à l'arbitrage en cas d'échec des négociations. Et, dans toutes ces conventions, la saisine de la Cour apparaît en fin de parcours, après l'échec des autres moyens, y compris si les parties ne parviennent pas à se mettre d'accord sur l'organisation d'un arbitrage.

   S'agissant de la convention CERD, nul besoin de se mettre d'accord sur la procédure préalable à la saisine de la Cour : elle est prévue (et en assez grands détails) par les articles 11 à 13 de la convention. Mais l'idée est la même : il faut *d'abord* donner sa chance à la conciliation organisée par la convention. Ce n'est *qu'ensuite* que votre haute juridiction peut intervenir. Le Comité s'est vu attribuer le rôle de gardien principal de la convention. Le contournement du mécanisme de conciliation saperait regrettablement son autorité et celle de tous les organes de droit de l'homme comparables.

7) Et enfin, je note que le caractère obligatoire et successif des conditions posées à l'article 22 est confirmé par le *Manuel sur le règlement pacifique des différends entre Etats* publié par les Nations Unies en 1992 :

> «dans beaucoup de traités multilatéraux, les dispositions concernant le règlement des différends prévoient que les différends qu'il est impossible de régler par voie de négociation seront soumis à une autre procédure de règlement pacifique. On trouve dans la pratique divers schémas de *démarches successives* …
>
> *e)* Négociation ; procédures prévues par le traité ; recours à la CIJ (art. 22 de la convention internationale de 1965 sur l'élimination de toutes les formes de discrimination raciale).»[34]

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[33] Voir la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, 10 décembre 1984, article 30 ; la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille, 18 décembre 1990, article 92 ; ou la convention internationale pour la protection de toutes les personnes contre les disparitions forcées, 20 décembre 2006, article 42.

[34] Nations Unies, *Manuel sur le règlement pacifique des différends entre Etats*, 1992, par. 70 (les italiques sont de nous).

Le manuel affirme en outre que «[p]lusieurs conventions internationales disposent que les différends entre Etats parties relatifs à l'interprétation ou à l'application de ces traités seront soumis à la Cour internationale de Justice, à la demande de l'une quelconque des parties au différend, *sauf si celui-ci peut être réglé autrement*»[35] et le manuel de citer en exemple l'article 22 de la convention CERD[36].

9. Tout ceci, n'est qu'un rappel sommaire. Autant, Mesdames et Messieurs les juges, si vous avez des incertitudes sur les faits qui vous sont présentés, il paraît normal que vous vous absteniez de vous prononcer au stade des mesures conservatoires ; autant, ceci me paraît discutable — pour dire le moins — lorsque la question dont dépend votre décision est purement juridique. La Cour, encore une fois, connaît le droit ; elle le connaît, que ce soit *prima* ou *secunda facie*. Les Emirats arabes unis ne doutent pas que vous saisirez cette occasion pour clarifier, enfin, un aspect de l'interprétation de l'article 22 de la convention jusqu'ici laissé dans l'ombre, et que vous direz pour droit que les conditions mises par l'article 22 à votre saisine sont non seulement préalables (ceci vous l'avez déjà constaté) mais aussi cumulatives et successives.

II. Aucune des conditions de l'article 22 n'est remplie

10. Au demeurant, Mesdames et Messieurs de la Cour, si, à nouveau, vous décidiez de ne pas vous prononcer sur cette question, pourtant purement juridique, vous n'en devriez pas moins vous déclarer incompétents *prima facie*, pour une autre raison qui tient aux aspects particuliers de la présente affaire. D'une part en effet, les protestations et la proposition de négociation que le Qatar se targue d'avoir faites au sujet de l'application de la convention CERD sont totalement artificielles. D'autre part, le Qatar a actionné les «procédures expressément prévues par ladite convention», ce qui distingue fondamentalement la présente affaire de celles dont vous avez eu à connaître précédemment au sujet de ce traité ; la Cour se doit de respecter le mécanisme ainsi enclenché.

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[35] Nations Unies, *Manuel sur le règlement pacifique des différends entre Etats*, 1992, par. 423 (les italiques sont de nous).

[36] *Ibid*., note de bas de page 589.

A. L'absence de négociations préalables

11. Monsieur le président, quoique veuille faire croire le Qatar, il résulte clairement du dossier qu'il n'a jamais fait une «véritable tentative de négocier»[37] et ceci avant comme après le 25 avril dernier ou le 1er mai dernier.

12. Au paragraphe 13 de sa requête auquel renvoie la note de bas de page 18 de sa demande en indications de mesures conservatoires, le Qatar fait état de quelques discours prononcés par ses hautes autorités qui prouveraient que «Qatar repeatedly has raised the specific human rights violations resulting from the UAE's unlawful discrimination since June 2017 and thereafter»[38]. En elle-même, cette formulation, passablement emberlificotée, atteste de l'embarras du Qatar : les quelques annexes censées illustrer cette affirmation portent très généralement sur des allégations rituelles de violations des droits de l'homme et lorsque, en passant, ces documents mentionnent la convention CERD, cette mention n'est assortie d'aucune espèce de proposition de négocier. Me Donovan s'est borné hier à se référer, à une exception près, aux mêmes déclarations[39] sans y trouver davantage de proposition de négocier[40]. La seule nouvelle déclaration qu'il a citée est toute aussi générale que les autres ; le seul passage vaguement pertinent se lit ainsi : «We are ready for dialogue and for reaching settlements on all contentious issues in this context»[41]. Même si vous n'êtes pas formalistes, Mesdames et Messieurs les juges, ceci peut difficilement passer pour une offre de négociation ayant pour objet de résoudre le différend allégué par Qatar, que ce soit au titre de l'article 22 de la convention CERD ou même, plus généralement, au sujet de prétendues mesures discriminatoires.

13. Je me bornerai à rappeler à ce sujet ce que vous avez dit dans votre arrêt de 2011 et répété dans votre ordonnance de 2017 :

> «[P]our que soit remplie la condition préalable de négociation prévue par cette clause, ladite négociation doit porter sur l'objet de l'instrument qui la renferme. En

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[37] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011,* p. 133, par. 159.

[38] Requête introductive d'instance déposée par l'Etat du Qatar, par. 13.

[39] CR 2018/12, p. 26, par. 31, note de bas de page 38 (Donovan).

[40] CR 2018/12, p. 22, par. 17-18 (Donovan).

[41] Emir Speech in Full Text : Qatar Ready for Dialogue but won't Compromise on Sovereignty, Peninsula Qatar, 22 July 2017, https://thepeninsulaqatar.com/article/22/07/2017/Emir-speech-in-full-text-Qatar-ready-for-dialogue-but-won%E2%80%99t-compromise-on-sovereignty.

> d'autres termes, elle doit concerner l'objet du différend, qui doit lui-même se rapporter aux obligations de fond prévues par l'instrument en question.»[42]

Ces quelques déclarations invoquées par le Qatar ne répondent en aucune manière à cette condition.

14. Il en va, apparemment, différemment d'une lettre datée du 25 avril dernier, mais dont nos contradicteurs avaient semblé admettre expressément qu'elle n'a été reçue par le défendeur que le 1er mai (en tout cas, ils l'admettaient dans la requête[43] car, pour sa part, Me Donovan en tient — de manière un petit peu... trompeuse — pour le 25 avril[44]). En tout cas, le décalage est étrange… Cette lettre que le ministre des affaires étrangères du Qatar a adressée à son homologue émirati pourrait, à première vue, *sembler* constituer une offre de négociation en vertu de la convention. Je note cependant son titre[45], qui, à nouveau, concerne les violations alléguées des droits de l'homme *en général* que le Qatar impute aux Emirats ainsi que l'absence de toute mention de l'article 22.

15. Quoiqu'il en soit, voici la conclusion de cette lettre, envoyée donc — en tout cas reçue — le 1er mai :

> «In conclusion, in the event that these violations are not eliminated and given Qatar's concern to protect the interests of Qatari nationals and defend their rights, it is necessary to enter into negotiations in order to resolve these violations and the effects thereof within no more than two weeks from the date of receiving this letter, in accordance with the principles of international law and the principles governing relationships between countries».

16. Cette «offre» en forme d'ultimatum — envoyée à peu près un an après le début de la crise — n'a été ni acceptée ni refusée par les Emirats : moins d'une semaine après l'avoir reçue, ils ont appris, par une note du Secrétaire général des Nations Unies datée du 7 mai, qui figure dans le dossier des juges sous l'onglet no 2.3 que le Qatar avait adressé, le 8 mars précédent, une communication («interstate complaint») au Comité pour l'élimination de la discrimination raciale

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[42] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 133, par. 161 ; *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 120-121, par. 43.

[43] Voir requête introductive d'instance déposée par l'Etat du Qatar, note de bas de page 26 : «Annex 21, Request for Negotiation, His Excellency Sultan Ben Saed Al-Marikhi, Qatar Minister of State for Foreign Affairs, to His Excellency Anwar Gargash, UAE Minister of State for Foreign Affairs, dated 25 April 2018, received via fax and registered mail on 1 May 2018».

[44] CR 2018/12, p. 30, par. 41 (Donovan).

[45] Requête introductive d'instance déposée par l'Etat du Qatar, annexe 21, «An invitation to negotiate with respect to the human rights violations arising from the actions taken by the Government of the State of the United Arab Emirates against the State of Qatar and its citizens on June 5, 2017».

en vertu de l'article 11 de la convention. Pourtant, sans attendre le résultat de la procédure qu'il a lui-même entamée, le Qatar a introduit, le 11 juin dernier, sa requête introductive d'instance en même temps qu'il vous demandait d'indiquer les mesures conservatoires dont nous discutons aujourd'hui. Dans ces conditions, les Emirats n'ont pu que constater que la proposition n'était pas faite de bonne foi.

17. Du reste, cette chronologie interpelle pour une autre raison :

— le Comité CERD se réunit le 23 avril 2018 ;

— alors qu'il est en session (celle-ci ne se terminera que le 11 mai), le Qatar ou ses conseils envisagent, apparemment le 25 avril, de court-circuiter le Comité ; et

— il envoie sa pseudo-offre de négociation le 1er mai (toujours pendant la session du Comité).

Cette précipitation est d'autant plus incompréhensible, et pour tout dire inacceptable, que le Comité a institué, depuis 1993, une procédure d'urgence et d'alerte rapide (modifiée en 2007), lui permettant de faire face, en situation d'urgence, à des violations graves de la convention[46] ; le Qatar pouvait donc poursuivre dans la voie qu'il avait choisie initialement même si, comme il le prétend, il y avait eu une urgence véritable.

18. Alors, certes, Monsieur le président, le différend dont le Qatar allègue l'existence n'a pas été réglé par voie de négociation mais il n'y a eu aucune «véritable tentative» («genuine attempt») et ceci est le résultat du comportement unilatéral et incohérent du Qatar lui-même — *nemo auditur propriam turpitudinem allegans*. Conformément à votre jurisprudence bien établie, «la notion de «négociations» ... implique, à tout le moins, que l'une des parties tente *vraiment* d'ouvrir le débat avec l'autre partie en vue de régler le différend»[47]. Tel n'a pas été le cas.

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[46] Nations Unies, *Documents officiels de l'Assemblée générale, soixante-deuxième session*, Rapport du Comité pour l'élimination de la discrimination raciale, doc. A/62/18, 2007, annexe III, Directives applicables aux procédures d'alerte rapide et d'intervention d'urgence.

[47] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 132, par. 157 (les italiques sont de nous). Voir aussi : *ibid*., p. 133, par. 159 ; *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 445-446, par. 57 ; *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017, C.I.J. Recueil 2017*, p. 120, par. 43.

B. Le non-épuisement des «procédures expressément prévues par [la] convention»

19. Mesdames et Messieurs de la Cour, faute d'avoir véritablement proposé une négociation en vue de régler le différend qu'il vous a soumis le 11 juin, le Qatar a eu recours aux «procédures expressément prévues par la convention». Voici au moins un point qui n'est pas discuté entre les Parties. Ce qui les oppose à cet égard, ce sont les conclusions qu'il convient de tirer de cette saisine. Encore que ce qui a été frappant dans la plaidoirie de M[e] Donovan hier, c'est plutôt l'absence totale de conclusions que la Partie quatarie veut en tirer... «While Qatar did make recourse to the procedure under Article 11 of the Convention in March of this year by submitting a Communication to the CERD Committee, it does not rely on this Communication for the purposes of showing prima facie jurisdiction here»[48]. Je comprends la discrétion de M[e] Donovan, Monsieur le président ! Mais elle ne saurait abuser la Cour qui ne peut s'en tenir à cette esquive. La Cour doit, au contraire, tirer les conclusions du comportement du Qatar à cet égard.

20. Et cette conclusion est simple. Dès lors que le Qatar a adressé une communication au Comité pour l'élimination de la discrimination raciale, il ne peut pas simultanément saisir la Cour et court-circuiter l'organe que les auteurs de la convention ont institué gardien de celle-ci. Certes, le Comité ne peut pas prendre de décisions obligatoires et c'est précisément pour cela que, *in fine*, ultime filet de sécurité, l'article 22 prévoit la possibilité soit de saisir la Cour de céans, soit d'un accord des Parties sur un autre mode de règlement du différend.

21. Nous tenons, Monsieur le président, que la saisine du Comité est obligatoire dans tous les cas. Mais, même si tel n'était pas le cas, il paraît tout à fait évident que, lorsqu'il est saisi celui-ci doit pouvoir s'acquitter de sa mission.

22. Il a été saisi le 8 mars par le Qatar. Conformément aux dispositions de l'article 11, paragraphe 1, de la convention, les Emirats arabes unis ont été invités à soumettre «des explications ou déclarations écrites éclaircissant la question et indiquant, le cas échéant, les mesures qui peuvent avoir été prises … pour remédier à la situation». Ceci suppose, bien sûr, que cette procédure puisse se poursuivre et se dérouler comme le prévoit la convention.

[48] CR 2018/12, p. 25, par. 25 (Donovan).

23. La façon de procéder du Qatar est incompatible tant avec le principe *electa una via*[49] qu'avec l'exception de litispendance[50] puisque la même réclamation a été soumise successivement à deux instances par un même demandeur contre un même défendeur. Je relève d'ailleurs que la requête du Qatar devant la Cour s'inspire de manière extrêmement claire de sa communication du 8 mars au Comité. A cet égard, peu importe que les deux conditions préalables posées à l'article 22 soient alternatives ou cumulatives (même s'il ne me paraît pas douteux qu'elles sont *cumulatives* — mais ça, je crois que vous l'aurez compris), de toute manière, elles ne peuvent pas être simultanées. Ceci n'aurait aucun sens et priverait d'effet utile la mention des «procédures expressément prévues par [la] Convention» : on ne peut évidemment pas déterminer que le différend «n'aura pas été réglé ... au moyen» de ces procédures si la Cour se prononce avant même que le différend ait été examiné dans le cadre de ces procédures.

24. On peut peut-être considérer que le Qatar est *estopped* à saisir votre haute juridiction dès lors que, conformément aux dispositions de l'article 22, il a déclenché la procédure prévue aux articles 11 à 13 de la convention. Je l'ai dit souvent à cette barre, Monsieur le président, je ne suis pas convaincu que l'*estoppel*, dans le sens technique qu'il a dans le *common law*, ait sa place en droit international public. En revanche, il m'apparaît que la saisine simultanée de deux modes de règlement des différends ayant le même objet, envisagés dans un même traité, est difficilement compatible avec le principe fondamental de la bonne foi.

25. Si vous voulez bien lui donner la parole, Monsieur le président, le professeur Tullio Treves va maintenant montrer qu'il y a une autre condition, également prévue par la convention, que le Qatar n'a pas respectée : l'utilisation préalable et l'épuisement «de tous les recours internes disponibles». Pour ma part, Mesdames et Messieurs les juges, je vous remercie très vivement de votre attention.

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[49] CIRDI, *Pantechniki S.A. Contractors & Engineers c. Albanie*, ARB/07/21, sentence, 30 juillet 2009, par. 64 ; CIRDI, *Getma International et al. c. République de Guinée*, ARB/11/29, décision sur la compétence, 29 décembre 2012, par. 129 et 134 ; CIRDI, *Quiborax S.A. et Non Metallic Minerals S.A. c. Bolivie*, ARB/06/2, sentence, 16 septembre 2015, par. 158.

[50] *Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6*, p. 20 ; Comité des droits de l'homme, décision sur l'admissibilité, 17 juillet 1985, *VO c. Norvège*, Communication 168/1984, par. 4.2-4.4 ; CIRDI, *Pantechniki SA Contractors and Engineers c. Albanie*, sentence, 30 juillet 2009, par. 67 ; CPA, *Chevron Corp c. Equateur*, troisième décision sur la compétence et l'admissibilité, 25 janvier 2012, par. 4.74, 4.76, 4.77.

The PRESIDENT: I thank Professor Pellet and I now give the floor to Professor Treves. You have the floor.

Mr. TREVES:

EXHAUSTION OF LOCAL REMEDIES

1. Mr. President, Members of the Court, it is an honour to plead again before you and to do so on behalf of the United Arab Emirates.

My task today is to explain that Qatar's Request for the indication of provisional measures is prima facie inadmissible because the Applicant has not shown and cannot show that domestic remedies were exhausted prior to the institution of proceedings.

Exhaustion of local remedies

2. In the present case Qatar specifies that it acts "in order to prevent irreparable prejudice to the rights of Qatar and Qataris under the CERD . . . in its own right and as *parens patriae* of its citizens"[51]. All of the nine provisional measures requested under paragraph 19 *(a)* of the Request require that "the UAE shall immediately cease and desist from violations of the human rights of Qataris under the CERD"[52].

3. This corresponds to the description of diplomatic protection under general international law and to the definition given in the International Law Commission's Articles on Diplomatic Protection ("ILC Articles"). Article 1 of these Articles, which you can read on the screen, states that

> "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility"[53].

4. Under the international law rules on diplomatic protection, as confirmed by Article 14 (1) of the ILC Articles, which you can also see on the screen, "[a] State may not present an

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[51] Request for the Indication of Provisional Measures of Qatar (RPMQ), para. 19 repeating para. 65 of the Application Instituting Proceedings of Qatar (AQ).

[52] RPMQ, para. 19 *(a)*.

[53] International Law Commission, Draft Articles on Diplomatic Protection, *Official Records of the General Assembly*, Sixty-first Session, Supplement No. 10 (A/61/10) (2006) ("ILC Articles").

international claim in respect to an injury to a national . . . before the injured person has, subject to draft article 15 [dealing with exceptions], exhausted all local remedies"[54]. This Court in the case concerning *Elettronica Sicula* has referred to the local remedies rule as "an important principle of customary international law"[55].

5. The CERD, the very convention that is the alleged basis for the jurisdiction of the Court in the present case and describes and delimits the obligations whose alleged violations the Court is called to consider, confirms what already applies under general international law, namely that consideration of a claim raised by a State party against another State party, in which non-compliance with the Convention is alleged, requires the previous exhaustion of local remedies.

6. In fact, Article 11 (3) of the CERD, describing one of the procedures for such consideration, namely, the procedure before the Committee on the Elimination of Racial Discrimination, specifies that the Committee, before dealing with a matter referred to it, must have "ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged". The preparatory work of the Convention shows that, in accordance with generally recognized principles of international law, there was an overall consensus that domestic remedies should be exhausted before a case is taken to the international level, especially with respect to the treatment of individuals or groups of individuals such as in the present case. A proposal by the Tanzanian delegation to do away with this requirement[56] was emphatically opposed and voted against[57]. This part of the preparatory works has been included in the judges' folder at tab 3.1.

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[54] ILC Articles, Art. 14.

[55] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989,* p. 42, para. 50.

[56] GA Third Committee, A/C.3/SR.1353, para. 25 (Tanzania), explaining that "it would be an escape clause for any signatory which did not wish to apply the Convention in good faith"; judges' folder, tab 3.1.

[57] See GA Third Committee, A/C.3/SR.1353, para. 57, indicating that "[t]he Tanzanian proposal to delete paragraph 3 was rejected by 70 votes to 2, with 12 abstentions". See also *ibid*., para. 28 (Italy), stating, with respect to the exhaustion of local remedies: "States should be left as free as possible to deal with a case through domestic procedures, for it was a recognized international principle that all domestic remedies should be exhausted before a matter was referred to an international body."; *ibid*., para. 48 (Senegal), indicating that the requirement to exhaust local remedies would "prevent a proliferation of complaints at the international level"; judges' folder, tab 3.1.

The role of exhaustion of local remedies in proceedings for the indication of provisional measures

7. In the preliminary objections Judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court has expressly recognized that failure to exhaust local remedies is normally considered as a question relating to the admissibility of the claim[58]. In order to proceed to consider the merits of the present case, the Court will thus have to determine that domestic remedies have been exhausted. There is no need to recall that a party may request that questions of admissibility be treated before any further proceeding on the merits pursuant to Article 79 of the Rules of the Court.

8. This applies to proceedings on the merits of the case. In our view, however, exhaustion of local remedies has also a role to play in proceedings for the indication of provisional measures. This point has to be made in light of the jurisprudence of the Court concerning provisional measures.

9. As is well known, Article 41 of the Statute is extremely laconic in describing the requirement for the granting of provisional measures. The law as it now stands is based on the work of your Court. The Court has elaborated a rather detailed ***regime*** for provisional measures. In particular and among others, the jurisprudence of the Court has established two conditions that need to be verified in order to grant provisional measures: that the Court has prima facie *jurisdiction* and that the rights claimed are at least plausible. The first of these two requirements has a long history. It was introduced in 1951 in the *Anglo-Iranian Oil* case and refined and repeated in all subsequent provisional measures orders. The history of the second is much shorter. After being foreshadowed in a separate opinion of Judge Abraham in 2006 (*Pulp Mills* case)[59], the plausibility of rights requirement was introduced by the Court in 2009 in the Order on provisional

[58] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 456, para. 120. See also J. R. Crawford and T. D. Grant, "Exhaustion of Local Remedies" in *Max Planck Encyclopedia of Public International Law* (Oxford online edition, last updated Jan. 2007), para. 5.

[59] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*; separate opinion of Judge Abraham, pp. 139-140, para. 8.

measures in the *Belgium* v. *Senegal* case on the *Obligation to Prosecute or Extradite*[60], and repeated in all orders on provisional measures since then[61].

10. So, the Court must determine that prima facie it has jurisdiction and that the rights claimed are at least plausible. In other words, it must inquire and make a determination prima facie on jurisdiction and on the merits. It follows as a logical consequence that it must also make a prima facie determination on the admissibility of the claims. Before assessing whether the rights alleged are plausible the Court must consider whether admissibility is plausible or, in other words, whether the case is prima facie admissible. Not considering this aspect would risk that the Court might make a determination on the plausibility of rights that are the object of a prima facie inadmissible claim.

11. Your Court has not yet settled a jurisprudence on this point comparable to that concerning prima facie jurisdiction and plausibility of rights. The Court has not, however, ignored it. In its 1996 provisional measures Order in the case on the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court stated, as you can read on the screen:

> "Whereas without ruling on the question whether, faced with a request for the indication of provisional measures, the Court must, before deciding whether or not to indicate such measures, ensure that the Application of which it is seised is admissible prima facie, it considers that, in this case, the consolidated Application of Cameroon does not appear prima facie to be inadmissible in the light of the preliminary objections raised by Nigeria"[62].

12. Without formally taking a stand, the Court thus identified the notion of prima facie inadmissibility and its possible relevance in provisional measures proceedings. Moreover, in the case before it, the Court in fact took a decision based on this requirement.

13. Also in the present case, the Court should consider not only whether prima facie it has jurisdiction and whether the rights claimed are plausible, points on which my colleagues have given and will give the UAE's view, but also whether the Application is prima facie admissible.

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[60] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

[61] See as an example the most recent *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, ICJ Reports 2017*, p. 276, para. 35.

[62] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 21, para. 33.

This requires considering, prima facie, compliance with the admissibility requirement of exhaustion of domestic remedies.

Qatar has failed to satisfy its burden with respect to the invocation and exhaustion of local remedies

14. In the present case, the burden to submit sufficient evidence that domestic remedies have been "invoked or exhausted" falls on Qatar, the Applicant. In the materials Qatar has submitted to the Court remedies are mentioned, but there is nothing showing, prima facie, that they have been invoked, even less exhausted. Qatar simply states at paragraph 64 of the Application that "even if avenues for redress are ostensibly available to Qataris under UAE law, these avenues have been rendered completely ineffective because Qataris are unable to use them", either because "the entry ban prevents Qataris from appearing in UAE courts" or because of the "criminalization of statements of 'sympathy' for Qatar and the general atmosphere of hostility towards Qatar and Qataris" (AQ, para. 64).

15. Further, in the Request for provisional measures, Qatar's position seems to be that there is no need to give evidence of Qatari citizens invoking and exhausting domestic remedies, because there are no such remedies available to challenge the measures. Looking at the "measures requested" in paragraph 19 of the Request — the provisional measures requested —, at letter *(a)* (ix), one gets an idea of what kind of remedies Qatar has in mind. This paragraph requests the Court to indicate, as a provisional measure

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

16. The remedies envisaged may concern "equal treatment before tribunals and other judicial organs of the UAE" and "mechanisms to challenge any discriminatory measures".

17. As explained by the Agent of the UAE**,** this morning, the picture painted by Qatar with respect to what it refers to as the collective expulsion and entry ban is completely misleading. This has a direct bearing on the availability of local remedies and on the lack of exhaustion of local remedies by Qatari nationals.

18. Although on 5 June 2017 the Ministry of Foreign Affairs announced that "for precautionary security reasons" Qatari nationals were to leave the UAE within 14 days and that

they would be prevented from entry, only a small proportion of Qataris left the UAE voluntarily within that period[63]. There was a much larger number of Qataris that remained in the UAE. There were in fact no steps taken by the UAE Government to deport Qatari nationals who remained after the 14-day period. The only restrictions were imposed on Qataris that wanted to enter the UAE, for which there was need to seek prior permission. As the Agent explained in his presentation, that prior permission was almost always granted. The total number of Qataris in the UAE as of 5 June 2017 was only a few hundred more than the number of Qataris currently present in the UAE. Moreover, a number of the Qatari nationals that have left the UAE have re-entered the UAE upon obtaining prior permission from the UAE. Tab 3.2 of the UAE's judges' folder contains a series of documents from the UAE Government evidencing these facts[64].

19. As a result of the above:

20. First, there was no need to resort to any domestic remedies with respect to the alleged expulsions because the UAE Government took no steps to compel Qatari nationals to leave the UAE on the ground of their Qatari nationality.

21. Second, if Qataris who left the UAE or reside abroad want to come into the UAE to defend their rights, they can ask permission to come to the UAE and permission is almost always granted.

22. Third, if Qataris that did leave the UAE needed to resort to avenues for redress, without coming to the UAE, they could grant a power of attorney to a lawyer practising in the UAE. This remains possible, and can be done through the Kuwaiti Embassy in Qatar, which sends the document for authentication to the UAE Embassy in Kuwait. The documents are then sent back to the Kuwaiti Embassy in Qatar to be returned to the Qatari citizen granting the power of attorney. Tab 3.3 of the UAE's judges' folder contains a few examples of the powers of attorney granted by Qatari companies to individuals or law firms in the UAE to manage the Qatari's company's

[63] Statement of Support for Blockade and Cessation of Ties by the UAE Ministry of Foreign Affairs, dated 5 June 2017 (QA; Ann. 2).

[64] Cover letter and list from the United Arab Emirates Federal Authority for Identity and Citizenship, 20 June 2018 (Documents 11 and 13 deposited by the UAE on 25 June 2018: excerpts); judges' folder, tab 3.2.

business in the UAE and to represent the company before the UAE courts and any UAE public authority[65].

23. With respect to specific "mechanisms to challenge any discriminatory measures", the Agent of the UAE has explained that facilities were put in motion through a telephone line to deal with any requests by Qataris for permission to enter the UAE. These facilities have been and continue to be highly effective to address applications by Qatari nationals. In 2018 alone — just half a year — there have been at least 1,390 applications; 1,378 of those applications were accepted; 12, a mere 12, were rejected. A document evidencing this information has been included in tab 3.4 of the UAE's judges' folder[66]. Against this, Qatar's counsel, yesterday morning, referred to a vague remark by the High Commissioner for Human Rights made on 14 June 2017 — just three days after the hotline mechanism was set up — stating that the mechanism was not "sufficiently effective to address all cases"[67]. The UAE Agent has also explained that normal avenues for redress continue to be available to Qatari nationals to deal with any issues related to real estate, business and property owned by them. Documents showing this have also been included in the judges' folder in tab 3.5[68].

24. Therefore, not only has Qatar not satisfied its burden of showing that local remedies have been invoked but there is also no basis to say, in the words of the ILC Articles on Diplomatic Protection, that "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress" or "there is undue delay in the remedial process" (Article 15, ILC Articles on Diplomatic Protection).

25. Mr. President, Members of the Court, the Applicant has failed to submit any evidence that domestic remedies were exhausted prior to the institution of proceedings. The request for provisional measures is therefore prima facie inadmissible.

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[65] Powers of Attorney from Qatar Chemical and Petrochemical Marketing and Distribution Company and from Qatar Engineering and Construction Company (Documents 5 and 6 deposited by the UAE on 25 June 2018: excerpts); judges' folder, tab 3.3.

[66] Report of Abu Dhabi police summarizing hotline usage and numbers of humanitarian applications, 20 June 2018 (Document 3 deposited by the UAE on 25 June 2018: excerpts); judges' folder, tab 3.4.

[67] CR 2018/12, p. 39 (citing OHCHR, *Qatar diplomatic crisis: Comment by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on impact on human rights,* 14 June 2017, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21739&LangID=E*)*.

[68] Report of Abu Dhabi police showing real estate, business and property owned by Qataris within the UAE (Document 3 deposited by the UAE on 25 June 2018: excerpts); judges' folder**,** tab 3.5.

26. This concludes my intervention. I thank you for your kind attention and patience. I should be grateful if you would now give the floor to Simon Olleson in order to address the questions of existence of a dispute and the requirement for plausibility of rights.

The PRESIDENT: I thank Professor Treves. Before I invite the next speaker, the Court will observe a coffee break for 15 minutes. The hearing is suspended.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

The PRESIDENT: The sitting is resumed and I will now give the floor to Mr. Olleson. You have the floor, Sir.

Mr. OLLESON: Thank you, Mr. President.

EXISTENCE OF A DISPUTE, PLAUSIBILITY OF RIGHTS AND CONNECTION WITH THE MEASURES REQUESTED

1. Mr. President, Members of the Court, it is a great honour for me to appear before you on behalf of the United Arab Emirates.

2. In my intervention**,** I will first explain why the dispute submitted to the Court by Qatar is not one falling within the scope of the Convention, and thus within the jurisdiction of the Court.

3. Thereafter, I will deal with two of the requisite elements for the indication of provisional measures which Qatar has not fulfilled, namely the plausibility of the rights relied upon and the necessary link between the measures sought and those rights.

A. Existence of a dispute falling within the scope of the Convention

4. Mr. President, I start with the absence of a dispute falling within the scope of the Convention.

1. Introduction

5. As mentioned by Mr. Donovan yesterday[69], in your recent practice you have consistently made clear that, whilst not required to satisfy yourselves in a definitive manner that jurisdiction

[69] CR 2018/12, p. 20, para. 7 (Donovan).

exists prior to doing so, nevertheless 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"[70].

6. [Slide 2] The sole basis relied upon by Qatar in order to found the jurisdiction of the Court is Article 22 of the Convention for the Elimination of All Forms of Discrimination (which I shall refer to simply as "the Convention"). As Mr. Donovan said, there is no dispute that both Qatar and the UAE are party to the Convention, without any relevant reservations, including as regards Article 22[71].

7. Professors Pellet and Treves have addressed you in relation to Qatar's failure to comply with the applicable preconditions to seisin of the Court under the Convention. These constitute further reasons, additional to those I will outline, why the Court does not have competence, even prima facie, over the present dispute.

8. Even assuming that those preconditions are fulfilled, however, Article 22 in a very familiar fashion confers subject-matter jurisdiction on the Court only in relation to disputes relating to the "interpretation and application" of the Convention.

9. Two basic, if not elementary, points flow from this:

10. *First*, given that the Court's jurisdiction is so limited, the Court is without jurisdiction, and manifestly so, in so far as Qatar claims the violation of obligations deriving from any source outside the Convention, for instance, under customary international law or under any other international instruments[72]. Whilst yesterday there were a number of suggestions of violation of obligations under international human rights law more generally, including under the Universal

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[70] *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Report 2017*, p. 267, para. 15; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Report 2017*, pp. 146-147, para. 17; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1159, para. 47; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 151, para. 18; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 402, para. 12; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 17, para. 49; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40.

[71] CR 2018/12, p. 21, para. 10 (Donovan).

[72] Cf. AQ, para. 58.

Declaration[73], the focus in the present case must necessarily ***(***and can only***)*** be exclusively on the obligations contained in the Convention.

11. *Second*, and conversely, the Court has jurisdiction and thus is competent to indicate provisional measures only to the extent that the dispute submitted to you is in fact one which is capable of falling — at least prima facie at this stage of the proceedings — within the four corners of the Convention. [Slide 3 — logo]

12. In addressing you yesterday as to whether the present claim falls within the scope of the Convention *ratione materiae*, Mr. Donovan referred to both the classic *Mavrommatis* definition of a dispute[74], and the alternative, more practical definition, deriving from *Interpretation of Peace Treaties*[75], as recently deployed in the *Ukraine* v. *Russia* case[76]. In addition, he had earlier suggested, referring to the Court's 1995 provisional measures order in *Legality of the Use of Force (Yugoslavia* v. *United States of America)*, that it was "only if the Court 'manifestly lacks jurisdiction' to entertain the Applicant State's application, that the Court will decline to indicate provisional measures"[77].

13. This is**,** of course, not entirely accurate. First, in the *NATO* case against the United States, the Court did not state that it was *only* if a lack of jurisdiction was "manifest" that it would decline to indicate provisional measures; rather, that was the Court's finding in respect of the particular jurisdictional bases relied upon by the applicant[78]. Such finding resulted in the case being removed from the List[79].

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[73] CR 2018/12, p. 32, para. 6; p. 38, para. 23; p. 40, para. 29 (Amirfar).

[74] CR 2018/12, p. 21, para. 14 (Donovan), referring to *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11 ("a disagreement on a point of law or fact, a conflict of legal views or of interests".

[75] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[76] CR 2018/12, p. 21, para. 14 (Donovan), quoting *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Report 2017*, p. 115, para. 22: "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 also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 26, para. 50.

[77] CR 2018/12, p. 20, para. 7 (Donovan), quoting *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 925, para. 29.

[78] *Legality of Use of Force (*v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 924, para. 25;

[79] *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 925, para. 29; and the *dispositif*, *ibid.*, p. 926, para. 34 (2).

14. Second, it ignores and takes no account of the development of the Court's recent case law. As you have made clear in recent decisions, at the very preliminary stage of a request for the indication of provisional measures, before jurisdiction has been established,

> "in order to determine, even prima facie, whether a dispute within the meaning of [the relevant jurisdictional provision] exists, the Court cannot limit itself to noting that one of the Parties maintains that the [relevant treaty] applies, while the other denies it. It 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 . . ."[80]

15. That is not the case as regards the present dispute; first, 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 dispute thus clearly falls outside the scope *ratione materiae* of the Convention, such that the Court is without jurisdiction.

16. In addition, it is also the case as regards certain specific parts of Qatar's claims; Qatar's factual allegations in respect of certain alleged breaches of the Convention on their face disclose no conduct which is capable of being held to be contrary to the Convention.

2. The Convention does not apply to differences of treatment based on nationality, and the dispute accordingly falls outside the scope *ratione materiae* of the Convention

17. I turn to the general absence of any dispute capable of falling even prima facie within the scope *ratione materiae* of the Convention.

18. In the present case, the crucial, initial, threshold question is whether the Convention applies at all to the measures complained of by Qatar. On Qatar's own assertion, those measures are either directed principally against Qatar itself, or**,** to the extent that they are directed at, or affect Qatari individuals, such impact is based purely on the fact of their current Qatari nationality or citizenship.

19. Notably, Qatar does not suggest that the relevant measures are of any application to UAE or foreign nationals of Qatari heritage (for instance where one of their parents was Qatari), nor

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[80] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1159, para. 47; see also *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*, para. 22.

even to those who were previously Qatari nationals but who have subsequently acquired a different nationality through marriage.

The PRESIDENT: Mr. Olleson, could you please speak a bit slower so that the interpreters can follow you. Thank you.

Mr. OLLESON: I do apologise, Mr. President. I will attempt to do so.

20. In previous cases brought before the Court under the Convention, the allegations have been of ethnic cleansing, or prejudicial differences of treatment of minority groups based on ethnicity. As such no issue arose on that basis as regards the prima facie applicability of the Convention *ratione materiae* to the facts in issue.

21. In the present case, the foundation of Qatar's case as to the applicability of the Convention is the proposition that, as a matter of law, the notion of "national . . . origin" contained in the definition of racial discrimination in Article 1 (1) of the Convention extends to measures applied solely on the basis of an individual's present nationality.

22. You were told repeatedly yesterday that the measures in question constituted prohibited racial discrimination against Qataris on the basis of "national origin"[81], or less frequently on the basis of their Qatari nationality[82].

23. Qatar does not make any allegation of discrimination on the basis of race; given the geographical proximity, the common cultural and social background and the close ties and interconnectedness of the populations of Qatar and the UAE, matters which were emphasized yesterday by the Qatari Agent[83], any such allegation would have been unsustainable.

24. Nor is there any allegation of discrimination on the basis of the other remaining criteria listed in Article 1 (1) of the Convention (i.e., colour, descent or ethnic origin).

25. As I will explain, Qatar's argument that the term "national . . . origin" in the definition of racial discrimination encompasses present nationality is flawed. The result is that, in the circumstances of the present case, the alleged acts complained of are not capable, even prima facie,

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[81] CR 2018/12, p. 15, para. 2; p. 16, para. 4 (Al-Khulaifi); p. 19, para. 5 (Donovan), p. 34, para. 12; p. 38, paras. 23 and 24; p. 44, para. 44 (Amirfar); p. 57 para. 24 (Goldsmith).

[82] CR 2018/12, p. 15, para. 2 (Al-Khulaifi).

[83] CR 2018/12, p. 15, para. 2 (Al-Khulaifi).

of falling within the scope of the Convention and therefore within the jurisdiction of the Court under Article 22.

26. That is apparent based on the ordinary meaning of Article 1 (1), when read in its context and in the light of the object and purpose of the Convention and to the extent there could be any doubt in this regard, it is unequivocally confirmed by the *travaux préparatoires*.

(a) ***The ordinary meaning of "national origin" in Article 1 (1), read in its context and in light of the object and purpose of the Convention, does not encompass differences of treatment based on present nationality***

27. The Convention is at tab 1-1 of your folders. [Slide 4] Turning to the text of Article 1, paragraph 1, of the Convention, the definition of "racial discrimination" contained therein refers to "any distinction, exclusion, restriction or preference based on race, colour, descent, or *national* or ethnic origin" having the specified effects.

28. The reference to "national . . . origin" immediately follows the other grounds of "race, colour, descent"; further it is twinned with the concept of "ethnic origin". Its ordinary meaning is necessarily informed by that placing and its linkage with the concept of "ethnic origin".

29. A further and crucial point to underline is that the Convention contains no express reference to nationality as a prohibited ground of discrimination. That omission is in itself significant. The term "national origin" is different in scope and has a different meaning than "nationality". Prohibitions of discrimination on the ground of nationality are not uncommon in international law, and were very far from being unknown in 1965. Yet the drafters of the Convention chose instead to include only the term "national origin". As I will explain, the omission of the word "nationality" was conscious and deliberate.

30. As a consequence, whilst the UAE does not deny that Article 1 (1) refers to "national . . . origin" as a prohibited ground of discrimination, those words cannot be read as simply being the equivalent of, or even encompassing "nationality". It is evident that those words were intended to carry a narrower meaning.

31. [Slide 5] That is clear from Article 1, paragraph 2, which forms part of the immediate context for paragraph 1. It expressly qualifies and informs the definition in paragraph 1, and indeed, limits the scope of the Convention as a whole. Article 1, paragraph 2, expressly recognizes,

and carves out from the scope of application of the Convention, the right of States to make distinctions between "citizens and non-citizens", and therefore to accord differential treatment on the basis of present nationality.

32. Qatar clearly recognizes the issue in this regard; in an attempt to limit the clear meaning of Article 1, paragraph 2, Qatar in its Application sought to rely on paragraph 4 of the CERD Committee's General Recommendation No. XXX, and suggested that the Committee has expressed the view that Article 1, paragraph 2, of the Convention does not permit States parties "to distinguish between different groups of non-nationals"[84]. Ms Amirfar made a similar argument yesterday in the context of collective expulsion[85].

33. However, Qatar misunderstands the meaning and effect of the relevant passage. General Recommendation No. XXX is at tab 4.8 of your judges' folders.

(a) [Slide 6] First, it should be noted that the Committee had explicitly recognized at paragraph 1 of the Recommendation that "Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens"[86].

(b) Second, and contrary to the impression Qatar attempts to portray, as you can see moving down the second page [Slide 7], the comments of the Committee at paragraph 4 were not expressly linked to or specifically directed at Article 1, paragraph 2, of the Convention, but instead were of a more general nature.

(c) Third, contrary to what Qatar suggests, and as you can see, the Committee did not refer to non-nationals, or discrimination between different groups of non-nationals; instead it referred to "differential treatment based on citizenship or immigration status".

(d) Fourth, Qatar selectively quotes and only inaccurately summarizes the relevant passage; what the Committee in fact said was that

> "[u]nder 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

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[84] AQ, para. 56.

[85] CR 2018/12, pp. 37-38, paras. 22-23 (Amirfar).

[86] CERD General Recommendation XXX: Discrimination against non-citizens" (2004); UN doc. CERD/C/64/Misc.11/rev.3 (emphasis added); judges' folder, tab 4.8, para. 1.

> pursuant to a legitimate aim, and are not proportional to the achievement of this aim"[87].

34. That passage needs to be read with care. The Committee was clearly not purporting to suggest that *all* differential treatment based on citizenship (or immigration status) is impermissible under the Convention; any such approach would have been inconsistent not only with the clear terms of Article 1, paragraph 2, but with widespread State practice, for instance, in denying or restricting entry of the citizens or nationals of specific States.

35. The Committee's focus was instead, and unambiguously so, on the "criteria for such differentiation, judged in the light of the objectives and purposes of the Convention". The Committee's aim was thus no more than to make clear that differential treatment on the basis of citizenship or immigration status is prohibited in so far as, "judged in light of the objectives and purpose of the Convention", the criteria used are a vehicle for disguised racial discrimination.

36. As such, General Recommendation XXX is of no assistance to Qatar in diluting or diminishing the ordinary meaning of Article 1, paragraph 2.

37. [Slide 8] The conclusion that present nationality does not fall within the scope of "national origin" in Article 1, paragraph 1, is also confirmed by the fact that Article 5, paragraph *(c)*, prohibits racial discrimination in respect of political rights, including those which are normally reserved for the citizens or nationals of a State. If "national origin" were to be read as encompassing present nationality, that provision would entail far-reaching obligations to enable foreign nationals to vote, stand in elections, and so on.

38. Further, that conclusion is consistent with the predominant object and purpose of the Convention, which is the elimination of discrimination on the basis of race.

39. Turning back to the Convention at tab 1-1 [Slide 9], it is useful to begin at the beginning, with the Convention's title: the "International Convention on the Elimination of All Forms of *Racial* Discrimination". That both forms the general context for Article 1 (1), as well as neatly encapsulating the overall object and purpose of the Convention.

40. The object and purpose of the Convention also results clearly from its Preamble, which includes, amongst other things:

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[87] CERD General Recommendation XXX: Discrimination against non-citizens" (2004); UN doc. CERD/C/64/Misc.11/rev.3 (emphasis added); judges' folder, tab 4.8, para. 4; emphasis added.

(a) First, in the fifth paragraph, on the first page of tab 1-1, the rejection of "any doctrine of superiority based on racial differentiation"**,** to which Lord Goldsmith referred you yesterday[88].

(b) Second, moving down the page, the reaffirmation in the next paragraph [Slide 10] that

> "discrimination between human beings *on the grounds of race, colour or ethnic origin* is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State".

In this regard, I note that any reference to discrimination on the basis of *national* origin is significantly absent.

(c) Third, in the *next* paragraph, the affirmation that "the existence of *racial* barriers is repugnant to the ideals of any human society".

(d) Fourth, in the next paragraph again [Slide 11], the condemnation of "governmental policies based on racial superiority or hatred, such as **policies** of apartheid, segregation or separation".

41. Similarly, and notwithstanding the almost inevitable element of circularity involved in seeking to ascertain the scope of the notion of "racial discrimination" from provisions which themselves use that term, the overarching object and purpose of the Convention also results clearly from its substantive provisions, notably:

(a) [Slide 12] Article 2, paragraph 1, with its obligation to pursue a "policy of eliminating racial discrimination in all its forms and *promoting understanding among all races*";

(b) the carve-out for measures of affirmative action contained in Article 2, paragraph 2, which is in turn expressly qualified by the stipulation that such 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". Similar language is contained in ***Article 1, paragraph 4*** of the Convention;

(c) [Slide 13] Article 3 with its specific condemnation of, and obligation to prevent, prohibit, and eradicate "racial segregation and apartheid";

(d) [Slide 14] Article 4, with its condemnation of**,** and obligation to eradicate "all propaganda and all organizations which are based on ideas or theories of *superiority of one race or group of*

[88] CR 2018/12, p. 59, para. 32.

persons of one colour or ethnic origin" — once again, no mention here of national origin — "or which attempt to justify or promote racial hatred and discrimination in any form".

42. [Slide 15 — logo] All of these provisions disclose a particular concern with race as a ground of discrimination, which necessarily informs the interpretation of the definition of racial discrimination in Article 1 (1). Conversely, there is no indication of any intention to outlaw discrimination on the basis of present nationality — in fact quite the contrary.

43. In conclusion, on this point, the ordinary meaning of the term "national . . . origin" in the definition of racial discrimination in Article 1 (1), when interpreted in its context — in particular the express exclusion of difference of treatment between citizens and non-citizens in Article 1 (2) — patently cannot be interpreted as applying to differences of treatment based on current nationality. That conclusion is reinforced by the object and purpose of the Convention as a whole.

(b) ***The ordinary meaning of Article 1 (1) is confirmed by the*** **travaux préparatoires**

44. Should there be doubt**,** or thought to be any ambiguity in this regard, the conclusion that the inclusion of "national . . . origin" does not extend the notion of racial discrimination to differences of treatment based solely on current nationality is fully, and very clearly, supported by the *travaux préparatoires* of the Convention.

45. This is not an appropriate juncture to go in detail into the debates at the various stages of genesis of the Convention within the Sub-Commission on Prevention of Discrimination and Protection of Minorities, then subsequently the Commission on Human Rights, and, finally, the Third Committee of the General Assembly. What follows is necessarily a brief overview; you have the key documents from the *travaux* to which I will refer in your folders at tabs 4.1-4.7.

46. [Slide 16] An initial indication of the limited role which it was envisaged that nationality and "national origin" should play within the definition of racial discrimination was the proposal in the Sub-Commission by Abram, which is at tab 4.1 of your folders. The proposed Article I, which is at p. 2, and now on the screen referred to

> "any distinction, exclusion or preference made on the basis of race, colour, or ethnic origin, and in the case of States composed of different nationalities or persons of different national origin, discrimination based on such differences"[89].

Notably, this did not link "national" and "ethnic origin", and limited the role of the concept of discrimination to differential treatment of persons of different "national origin" who were nationals of a State party.

47. [Slide 17 — Logo] During the discussion in the Sub-Committee, extracts of which are at tab 4.3 of your folders, there were significant divergences of opinion as to whether to make reference to "national origin" or "nationality" (which were clearly regarded as meaning different things), or to neither; only a small minority was in favour of use of the term "nationality"[90].

48. [Slide 18] In the draft which emerged from the working group of the Sub-Commission, which is at tab 4.2 of your folders, the limited role for the notion of national origin as contained in the Abram draft survived in modified form, with the definition of racial discrimination referring to any distinction, etc. "based on race, colour, national or ethnic origin (and *in the case of States composed of different nationalities* discrimination based on such difference . . .)"[91].

49. In this formulation, where "national origin" is already twinned with "ethnic origin", it is to be noted that the reference to "nationalities" in the bracketed clause evidently does not refer to the fact of present nationality of a foreign State, but rather is a far more diffuse concept.

50. During the subsequent consideration within the Commission on Human Rights, as documented in the Report of the Commission which is at tab 4.4 of your folders, deletion of the subclause in brackets in the Sub-Commission's draft was agreed upon on the basis that it was liable to cause confusion, whilst the reference to the notion of "national . . . origin" was initially retained[92].

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[89] "Mr. Abram: Suggested Draft for United Nations Convention on the Elimination of Racial Discrimination"; Record of the Commission on Human Rights — Sub-Commission on Prevention of Discrimination and Protection of Minorities, 16th session, UN doc. E/CN.4/Sub.2/L.308, 13 Jan. 1964; judges' folders, tab 4.1.

[90] "Summary Record of the 411th Meeting, 16 Jan. 1964", Record of the Commission on Human Rights — Sub-Commission on Prevention of Discrimination and Protection of Minorities, 16th session, UN doc. E/CN.4/Sub.2/SR.411, 5 Feb. 1964; judges' folders, tab 4.3, pp. 5-6 (Capotorti); pp. 9-10 (Cuevas Cancino, Calvocoressi, and Santa Cruz), p. 12 (Saario); see also p. 4 (Krishnaswami).

[91] "Draft International Convention on the Elimination of All Forms of Racial Discrimination", Record of the Commission on Human Rights — Sub-Commission on Prevention of Discrimination and Protection of Minorities, 16th session, UN doc. E/CN.4/Sub.2/L.319, 17 Jan. 1964; judges' folders, tab 4.2; emphasis added.

[92] Commission on Human Rights, Report on the Twentieth Session — Economic and Social Council, Official Record of the 37th session: Supplement No. 8, UN doc. E/CN.4/874, 17 Feb. 1964- 18 Mar. 1964 (extracts); judges' folders, tab 4.4, para. 85.

51. [Slide 19] Subsequently, upon a proposal by Denmark resulting in the formulation you can now see on your screens, which is at page 111 of the Report, the Commission agreed without objection to place the word "national" within square brackets and to place at the end of the definition, also within square brackets, the specification that "in this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State"[93].

52. At this stage, it was clear that "national origin" did not encompass citizenship (and by extension, did not encompass nationality).

53. That view was carried over into the consideration in the Third Committee. Whilst there were again mixed views in that regard, at the 1304th meeting, [slide 20] the summary record of which is at tab 4.5 of your folders, the representative of Poland defended retention of the term "national origin" on the basis that (at paragraph 4) "in many languages and cultural systems 'national origin' meant something different from 'ethnic origin' and that distinction might serve as a basis for discrimination"[94].

54. Moving down to the next paragraph, [slide 21] he further made clear that the particular concern justifying retention of the term was

> "situations in which a politically organized nation was included within a different State and continued to exist as a nation in the social and cultural senses even though it had no government of its own. The members of such a nation within a State might be discriminated against, not as members of a particular race or as individuals, but as members of a nation which existed in its former political form."[95]

Again, both observations indicate that the concern with retention of the reference to "national origin" was not one relating to discrimination on the basis of present nationality.

55. In addition, amongst other proposals, [slide 22] it should be noted that an amendment was proposed by France and the United States — this is at paragraph 32 on page 12 of the Report of the Third Committee which is at tab 4.7 of your folders, and you can see it on the screens. This was to add a new paragraph 2 stating explicitly that the phrase "national origin" did not "mean

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[93] Commission on Human Rights, Report on the Twentieth Session — Economic and Social Council, Official Record of the 37th session: Supplement No. 8, UN doc. E/CN.4/874, 17 Feb. 1964-18 Mar. 1964 (extracts); judges' folders, tab 4.4, para. 101.

[94] Official Records of the UN General Assembly, Twentieth Session — Third Committee, 1304th meeting, UN doc. A/C.3/SR.1304, 14 Oct. 1965; judges' folders, tab 4.5, para. 4

[95] Official Records of the UN General Assembly, Twentieth Session — Third Committee, 1304th meeting, UN doc. A/C.3/SR.1304, 14 Oct. 1965; judges' folders, tab 4.5, para. 5

'nationality' or 'citizenship', and the Convention shall therefore not be applicable to distinctions, exclusions, restrictions or preferences based on differences of nationality or citizenship"[96].

56. The United States, in explaining that proposal, [slide 23] made explicit that the notion of "national origin" was not to be equated with "nationality", and that the purpose of inclusion of the term was so as to preclude discrimination on the basis of historic national origin, rather than present nationality:

> "National origin differed from nationality in that national origin related to the past — the previous nationality or geographical region of the individual or of his ancestors — while nationality related to present status."[97]

57. The United States–French proposal was never put to a vote; it was withdrawn[98] [slide 24] as were other proposed amendments to Article 1[99] in favour of an amendment sponsored by nine States (which include Poland)[100], which was adopted unanimously, resulting in the actual text of Article 1, paragraphs 1 to 3 of the Convention[101]. In withdrawing the joint proposal, the French delegate made clear that the nine-Power proposal was "entirely acceptable" to his delegation and that of the United States[102].

58. [Slide 25 — Logo] This sequence of events demonstrates unequivocally that Article 1, paragraphs 1 to 3 as finally adopted were understood to have fully dealt with the concerns raised by the United States–French proposal as to applicability of the Convention to treatment based on nationality and/or citizenship.

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[96] Amendment proposed by the US and France: doc. A/C.3/L.1212; reproduced in Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the UN General Assembly, Twentieth Session, UN doc. A/6181, 18 Dec. 1965; judges' folders, tab 4.7, p. 12, para. 32.

[97] Official Records of the United Nations General Assembly (UNGA), Twentieth Session, Third Committee, 1304th meeting, UN doc. A/C.3/SR.1304, 14 Oct. 1965; judges' folders, tab 4.5, para. 23

[98] Official Records of the UNGA, Twentieth Session, Third Committee, 1307th meeting, UN doc. A/C.3/SR.1307, 18 Oct. 1965; judges' folders, tab 4.6, para. 8.

[99] Official Records of the UNGA, Twentieth Session, Third Committee, 1307th meeting, UN doc. A/C.3/SR.1307, 18 Oct. 1965; judges' folders, tab 4.6, paras. 10-12; for the other proposals, see Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the UNGA, Twentieth Session, UN doc. A/6181, 18 Dec. 1965; judges' folders, tab 4.7, pp. 12-13, paras. 30-31 and 33-36.

[100] Amendment proposed by Ghana, India, Kuwait, Lebanon, Mauritius, Morocco, Nigeria, Poland and Senegal (UN doc. A/C.3/L.1238); reproduced in Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee; Official Records of the UNGA, Twentieth Session, doc. A/6181, 18 Dec. 1965, judges' folders, tab 4.7, pp. 13-14, para. 37)

[101] Official Records of the UNGA, Twentieth Session, Third Committee, 1307th meeting, doc. A/C.3/SR.1307, 18 Oct. 1965, judges' folders, tab 4.6, para. 17.

[102] Official Records of the UNGA, Twentieth Session, Third Committee, 1307th meeting, doc. A/C.3/SR.1307, 18 Oct. 1965, judges' folders, tab 4.6, para. 8

59. The discussions in the Third Committee thus confirm the ordinary meaning of the text of Article 1, paragraphs 1 and 2, namely that the term "national origin" in Article 1 (1) is not to be read as encompassing present "nationality", and that the Convention as a whole was not intended to encompass treatment on the basis of an individual's present nationality.

(c) ***Conclusion***

60. By way of conclusion on this point, the definition of "racial discrimination" does not extend to differences of treatment based on present nationality. Qatar's claim in the present case, in so far as they relate to alleged differences of treatment of Qatari nationals based solely on the basis of their current nationality, therefore falls outside the scope *ratione materiae* of the Convention. It follows that there is no dispute over which the Court has jurisdiction, even prima facie, and as a consequence, there is no basis on which the provisional measures sought by Qatar may be ordered by the Court.

3. There is no dispute falling prima facie within the scope of the Convention as regards the alleged interferences with freedom of expression

61. Quite apart from the fact that the measures adopted do not fall even prima facie within the scope of the Convention, since they have nothing to do with *racial* discrimination, two specific issues require further attention.

62. The first concerns Qatar's invocation of the right to freedom from racial discrimination in respect of the freedom of opinion and expression**,** contained in Article 5, paragraph *(d)* (viii)~~,~~ of the Convention, which is relied upon as constituting the basis for the provisional measure relating to suspension of the closure and blocking of transmissions by Qatari media within the UAE[103].

63. Even taking Qatar's factual allegations as pleaded at face value, however, they do not reveal even a prima facie case of violation of that provision, nor of a dispute falling within the scope of the Convention in that regard.

64. Qatar's allegations are limited to alleged interference with the exercise of freedom of expression by Qatari entities. Those entities are located outside of the UAE in Qatar, whilst the

[103] RPMQ, para. 19 *(a)* (iv).

effects of blocking of transmissions are felt only within the UAE. Further, the relevant entities are corporations, not individuals, and so cannot themselves be subjected to racial discrimination.

65. Conversely, in so far as the blocking of transmissions might be argued to interfere with the rights of individuals within the UAE, this necessarily affects *all* individuals within the UAE who might otherwise have wished to listen to or watch those transmissions. They thus cannot be characterized as discriminatory, whether on the basis of "national origin", or otherwise.

66. There is thus no sustainable allegation that the blocking of Qatari media outlets within the UAE interferes with the exercise of the freedom of expression of Qatari nationals or of any other individual in an impermissibly discriminatory manner falling within the scope of the Convention. There is no dispute, and certainly not prima facie, in this regard, as to violation of the Convention.

67. Similarly, to the extent that the right to be free of discrimination as regards freedom of opinion and expression is relied upon as the basis for the provisional measure seeking suspension of application of the UAE Federal Decree-Law On Combatting Cybercrimes, even taking Qatar's allegations as pleaded at face value, there is no plausible allegation of prohibited racial discrimination (or indeed any discrimination) capable of giving rise to a dispute under the Convention.

68. First, the announcement by the Attorney General of the UAE relates only to expressions of sympathy for Qatar (and not Qataris). Second, it applies generally, to any individual, whatever their nationality. The Convention is simply not engaged and there is no dispute in this regard, even prima facie.

B. Plausibility of rights relied upon

69. Mr. President, Members of the Court, I turn to my second topic, the plausibility of the rights relied upon by Qatar.

1. Introduction

70. As I have just explained, the claims submitted to the Court do not give rise to a dispute which is capable of falling, even prima facie, within the jurisdiction of the Court under Article 22

of the Convention, as the measures in question do not fall within the Convention's scope *ratione materiae*.

71. But even if the Court were to take the view *(quod non)* that it does have jurisdiction at least prima facie over the dispute submitted by Qatar, a number of the rights relied upon by Qatar in order to found its request are manifestly not "plausible", and thus cannot serve as the basis for the indication of the provisional measures sought.

72. Starting with your decision in *Obligation to Extradite and Prosecute*, and as repeatedly reiterated in your orders in the years since**,** in what is now a consolidated jurisprudence, you have taken the view that the Court can exercise the power to indicate provisional measures "*only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible*"[104].

73. The explanation for this requirement, as you stated most recently in the *Jadhav Case*, is that the Court's power to indicate provisional measures under Article 41 of the Statute

> "has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the 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."[105]

74. The emphasis is on the rights which "may subsequently be adjudged to belong to either party". To the extent that a right relied upon and claimed in the main proceedings does not, when

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[104] *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017*, para. 35; *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*, para. 63; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1165, para. 71*; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 402, para. 15; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57; see previously *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*; separate opinion of Judge Abraham, p. 140, para. 9.

[105] *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017*, para. 35; *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*, para. 63; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1165, para. 71*; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 22; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 402, para. 15; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 57.

assessed at the preliminary stage of the proceedings, appear capable of being adjudged to belong to the party relying upon it, and therefore does not attain at least the level of plausibility, it cannot form the basis for the indication of a provisional measure.

75. You reached precisely such a conclusion in relation to the rights claimed by Ukraine under Article 18 of the International Convention on the Suppression of the Financing of Terrorism to found its request for provisional measures. That conclusion was reached in light of the failure by Ukraine at that stage of the proceedings to provide elements necessary to show the plausible existence, as a matter of fact, of the commission of predicate offences under Article 2[106].

76. The same logic necessarily applies to the extent that the existence of an asserted right is not plausible because it is not sustainable, even prima facie, as a matter of law.

2. The rights relied upon by Qatar are not plausible

77. In making its claim, and attempting to provide a basis for the measures requested, Qatar seeks to give impermissibly broad interpretations to a number of the obligations enumerated in Article 5 of the Convention. As a consequence, the rights on which it seeks to rely are not "plausible"**, *in*** so far as the requisite *fumus boni juris* is lacking, they cannot form a basis for the indication of provisional measures.

78. As to the plausibility of the rights invoked by Qatar, issues arise in particular in relation to Qatar's reliance on a number of the rights under Article 5 of the Convention, which I deal with in turn.

79. [Slide 26] As an introductory observation, it bears emphasis that, pursuant to Article 5, the Parties thereby undertake: "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights".

[106] *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*, para. 75.

80. Thus, as has been recognized by the CERD Committee, the obligation under Article 5 is to prohibit and eliminate racial discrimination in the enjoyment of the rights enumerated in the sub-paragraphs which follow[107].

81. [Slide 27] First, Qatar relies upon alleged violations of the "right to marriage and choice of spouse", contained in Article 5, paragraph *(d)* (iv), of the Convention. This right forms the basis for the provisional measure that the UAE should cease and desist "from measures that, directly or indirectly, result in the separation of families that include a Qatari", and requiring the UAE "to take all necessary steps to ensure that families separated by the Discriminatory Measures are reunited"[108]. Further, it appears to be relied upon as underpinning the first general measure sought, requiring suspension of the alleged expulsion of Qatari nationals, and the supposed "ban of entry" of Qatari nationals into the UAE.

82. Qatar treats Article 5, paragraph *(d)* (iv), as if it embodied a general right to family life. What is more, its argument requires it to treat that provision as if it included a right of individuals to gain entry into a State party of which they are not a national in order to fulfil that right[109].

83. However, the specific obligation is of far more limited scope; its clear aim is evidently the outlawing of anti-miscegenation laws, and more generally the outlawing of discrimination in respect of the right to marry, in particular by ensuring all individuals are free to marry whomsoever they choose.

84. Qatar's implicit and impermissibly broad interpretation of Article 5, paragraph *(d)* (iv), is not plausible, and that provision cannot form the basis for the indication of any provisional measure.

85. [Slide 28] Second, Qatar relies on the right "to public health and medical care" contained in Article 5, paragraph *(e)* (iv) — that provision forms the basis for the measure sought in relation to suspension of measures that "result in Qataris being unable to seek medical care in the UAE"[110].

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[107] Committee on the Elimination of Racial Discrimination, "General Recommendation XX on Article 5 of the Convention", UN doc. A/51/18, para. 1.

[108] QR, para. 19 *(a)* (v).

[109] Cf. CR 2018/12, pp. 40-41, paras. 29-30 (Amirfar).

[110] QR, para. 19 *(a)* (vi).

In addition, it also appears to be relied upon as underpinning the general measure relating to suspension of alleged expulsions, and the supposed ban on entry of Qatari nationals.

86. Once again, on the ordinary meaning of the terms used, the relevant obligation is to outlaw racial discrimination and ensure equal treatment in the provision of public health and medical care; the corresponding right is one not to be discriminated against in this regard.

87. Qatar by contrast, is forced to treat that provision as if it entailed an absolute right to receive medical care, and**,** what is more, as entailing a right to enter a State of which an individual is not a national for that purpose[111], and even an obligation upon the UAE to allow export to Qatar of medicines originating in the UAE[112].

88. Again, such a reading of the provision is not plausible, and Article 5, paragraph *(e)* (iv), is thus incapable of providing a basis for the measures sought.

89. [Slide 29] Third, a similar point may be made as regards Qatar's reliance on Article 5, paragraph *(e)* (v), concerning the right to education and training. Again, the obligation undertaken by States parties is to outlaw racial discrimination and ensure equal treatment in the availability and provision of education and training**,** the corresponding right of individuals is a right not to be discriminated against in that regard.

90. Qatar however, would have you read that provision more broadly, as if it entailed both a general right to receive an education, and a right of entry to a State in order to pursue an education before institutions located there. Again, the right relied upon fails to get over the threshold even of plausibility.

91. Finally, similar points may be made as regards Qatar's reliance on the right to work, and the right to own property, as contained in Article 5, paragraph *(e)* (i), and *(d)* (v), of the Convention, respectively. To the extent that these rights are relied upon as justifying both the measures in relation to access to property and the more general measure in relation to restrictions on travel, neither provision can plausibly be read as entailing a right to enter a particular State.

[Slide 30]

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[111] Cf. CR 2018/12, p. 42, para. 35 (Amirfar).

[112] Cf. CR 2018/12, p. 42, para. 36 (Amirfar).

C. Connection of measures requested with rights relied upon and the UAE's rights at issue

92. Mr. President, Members of the Court, my final topic, on which I can be relatively brief, relates to the necessary connection of the measures requested with the rights relied upon, and the extent to which the measures sought by Qatar would, if granted, necessarily involve the Court disregarding the UAE's rights which are at issue in the present case.

93. As to the first point as Professor Klein explained, in light of the underlying objective of provisional measures under Article 41 of the Statue, your constant jurisprudence makes clear that: "there must be a link between the measures which are requested and the rights which are claimed to be at risk of irreparable prejudice"[113].

94. Professor Klein's short intervention on this topic, however, amounted to no more than a bare assertion that the measures in question "clearly have a direct link" with the rights asserted under the Convention[114].

95. I shall deal only with the issue of the link between the measures sought and the rights claimed. Professor Shaw will then address you on the absence of any risk of irreparable prejudice.

96. Now, as to the second point, as I have already mentioned, you have made clear that the objective of provisional measures is the preservation of "the respective rights claimed by the parties . . . pending [the] decision on the merits . . ."[115]. Linked to this, the Court has frequently

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[113] *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017*, para. 36; *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*, paras. 64, 86; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1166, para. 72*; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 152, para. 23; see also *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 403, para. 16; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 18, para. 54; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 151, para. 56.

[114] CR 2018/12, p. 50, para. 12 (Klein).

[115] See e.g. *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 240, para. 35.

stated that a decision in relation to the indication of provisional measures can in no way prejudge the merits of the dispute[116].

97. As resulted from the interventions of Qatar's Agent[117] and Ms Amirfar yesterday[118], the clear principal aim, or the centre of gravity**,** of the provisional measures requested is the overturning of the supposed ban on entry of Qatari nationals. That is the underlying aim of the general measure sought in paragraph 19 *(a)* (i) of the request, as well as underlying the measures sought in relation to separation of families, medical care, education, and property and related rights to work in sub-paragraphs *(a)* (iv) to (viii).

98. As the UAE's Agent has made clear, there is no substance to Qatar's factual allegations in this regard: no Qatari nationals were in fact expelled, and whist a pre-authorization procedure has been put in place, the vast majority of Qatari nationals who have applied have been granted authorizations and are able to travel to and from the UAE.

99. But in any case, the measures sought in relation to the supposed ban on entry are insufficiently linked to the rights which Qatar asserts are at issue, whilst also disregarding the UAE's rights.

100. I have already made the point that the right under Article 5 is one not to be discriminated against in respect of the relevant rights, and those provisions cannot be read as entailing a right of entry. As a corollary of this, the individual measures sought in this regard, and *a fortiori*, the general measure, are insufficiently linked to the rights relied upon by Qatar.

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[116] See e.g. *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017*, para. 60; *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*, para. 105; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1171, para. 98*; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 160, para. 54; see also *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 408, para. 38; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 85; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, para. 74; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 148.

[117] CR 2018/12, p. 17, paras. 8-10 (Al-Khulaifi).

[118] CR 2018/12, pp. 33-34, paras. 8-10 (Amirfar).

101. Quite apart from this, on its face, the general measure is impermissibly broad. It would require the UAE to permit entry of *all* Qatari nationals, whether or not they had previously been resident or otherwise present in the UAE, and without reference to whether or not there was some other specific prior circumstances (family, medical, education, etc.) motivating travel to the UAE. Again, there is an insufficient link between the measure sought and the rights asserted.

102. As to the preservation of the respective rights of the parties, the general measure, as well as the other more specific measures implicating the supposed ban on entry take no account of the UAE's indisputable sovereign right to regulate the entry and exit of foreign nationals to its territory. As a consequence, the indication of such a measure would not take due account of, and preserve, the *respective* rights of *both* parties pending the Court's decision on the merits.

103. In a similar fashion,

(a) the measure requested as to the suspension of the UAE's penal laws fails to take account of the UAE's right to enforce its laws within its own territory,

(b) the measure requested in relation to the blocking of transmissions by Qatari media outlets directly implicates (and disregards) the UAE's right to regulate such matters within its own territory.

104. The measures sought by Qatar in this regard would thus fail to preserve the UAE's rights which are at issue in the present case.

105. Mr. President, Members of the Court, I am grateful for your careful attention; I would ask you now to call upon Professor Shaw ~~***in***~~ ***to*** conclude the UAE's presentations this morning and to address the questions of irreparable prejudice and urgency.

The PRESIDENT: I thank Mr. Olleson and I now give the floor to Professor Shaw. You have the floor.

Mr. SHAW:

URGENT AND IRREPARABLE PREJUDICE

1. Mr. President, Members of the Court, it is an honour to appear before you again and to appear on behalf of the Government of the UAE.

2. It is my responsibility today to tackle particular and critical components of provisional measures. It will be shown that the requirements that need to be established before the Court is able to grant an order of provisional measures are rigorous and not lightly to be assumed or accepted. Such requirements include the propositions, first, that the applicant for such measures must prove and not just assert on the basis of a few anecdotes that irreparable prejudice to rights will be caused if provisional measures are not granted and, secondly, that as the Court has noted on a number of occasions, such measures are only justified if there is urgency — real urgency. It does not suffice to declare, as did Lord Goldsmith yesterday, that, for example, the question of imminence was "beyond doubt"[119]. It is far from that.

3. Faced with these significant requirements, our argument is that an examination of the relevant facts demonstrates that the applicant has failed to satisfy them. The grant of provisional measures by the Court is not a right, it is subject to conditions.

4. It is, of course, for the State seeking provisional measures to prove that the circumstances as they are provide the Court with the appropriate reasons to exercise its competence to award such measures in the light of the relevant rules.

A. The Legal Framework

1. The Essential Requirements for a Grant of Provisional Measures

5. In the Order of 18 May 2017 in the *Jadhav Case*, the Court reaffirmed that

> "The Court, pursuant to Article 41 of [the] 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, *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*, para. 88)",

and the Court continued:

> "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

[119] CR 2018/12, p. 53, para. 9 (Goldsmith).

> its final decision (*ibid.*, para. 89). The Court must therefore consider whether such a risk exists at this stage of the proceedings"[120].

This essentially reflects earlier case law[121]. I turn to consider first the requirement of irreparable prejudice.

2. Irreparable Prejudice

6. Irreparable prejudice means that the rights in question or alleged might be damaged or seriously impaired in a manner which cannot be rectified or remedied. It is a stringent test. It is linked, of course, to the need to preserve the rights at issue. And the provisional measures sought and to be granted must be restricted by the necessity to avoid such irreparable prejudice[122]. The case law demonstrates that this requirement is composed of a number of separate elements. First, that damage or prejudice might be caused should the provisional measures not be adopted. Second, that such prejudice must be irreparable, that is, it clearly and definitely could not be relieved, remedied or resolved now or in the future. What is to be prevented is the irretrievable or irreparable destruction of the rights in question or the subject-matter of the dispute[123]. No more, no less. Third, that the provisional measures sought must actually be necessary in order to avoid such prejudice, that is, they must be constrained and limited by this requirement.

7. There are certain areas where by their very nature, the conditions for the grant of provisional measures are deemed to have been fulfilled. For example, in cases involving the death penalty, it is obvious that, by not preventing the execution of the person concerned, the rights in question would have been rendered without purpose[124]. Further examples here would include the

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[120] *Jadhav Case (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 243, paras. 49 and 50. See also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016 (II),* p.1168, para. 82 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I),* pp. 21-22.

[121] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, pp. 73-74 and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility Judgment, I.C.J. Reports 1984*, p. 437.

[122] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 27.

[123] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 263: declaration of Judge Koroma.

[124] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9; *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248 and *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 77.

use of armed force[125] and genocide[126]. These may be seen as self-evident. Beyond this, it is less certain. There are two relevant factors.

8. First, can the prejudice in question be repaired or remedied by traditional remedial devices, such as financial compensation or restitution?

9. In the *Sino-Belgian Treaty* case, the Permanent Court noted that there would be irreparable prejudice "in the event of an infraction . . . of certain of the rights [in question] . . . [where] such infraction could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form"[127]. In the *Aegean Sea Continental Shelf* case, the Court reaffirmed that "the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of the continental shelf, if it were established, is one that might be capable of reparation by appropriate means"[128]. Accordingly, the prejudice was not irreparable and an order for provisional measures was not made.

10. Secondly, can the prejudice be remedied at the merits stage? If so, a grant of provisional measures will not lie.

11. For example, the Court noted, in *Pulp Mills*, that it was not convinced that, if it could be shown that Uruguay breached the relevant treaty provision, such violations were not capable of being remedied at the merits stage of the proceedings or could otherwise be protected[129]. Similarly, in a further request for the indication of provisional measures in that case, the Court declared that it was not convinced that the blockades in question actually risked prejudicing irreparably the rights which Uruguay claimed[130].

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[125] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 111; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6 and *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, p. 537.

[126] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3.

[127] *Denunciation of the Treaty of 2 November 1865 between China and Belgium, Orders of 8 January, 15 February and 18 June 1927, PCIJ, Series A, No. 8*, p. 7.

[128] *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, pp. 3, 11.

[129] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 131 and 132.

[130] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 13.

12. One writer has concluded that the case law reveals that "provisional measures are granted when an obvious and flagrant violation of the rights claimed on the merits cannot be tolerated until the delivery of the final judgment"[131]. Lord Goldsmith himself quoted this[132]. Obvious and flagrant violation. The key elements of irreparable prejudice are thus clear: prejudice or damage to the asserted or alleged rights in question; the high bar of irreparability; the absence of viable alternative means of addressing that prejudice; and the impossibility of addressing the issue at the merits stage.

13. Lord Goldsmith has argued that "irreparable prejudice is the natural consequence of violations of the rights before the Court in this case"[133] or the "natural consequence of compromising such rights"[134]. But the case law he cites[135] goes no more, no further, than stating that rights under the Convention are "capable" of irreparable prejudice and that the rights are "of such a nature that prejudice to them could be irreparable"[136]. There is no natural consequence here. It has to be proved. Automaticity does not exist.

14. With that, Mr. President, I turn to consider the second requirement, that of urgency.

3. Urgency

15. In short, urgency means urgency, the imminence of the danger of irreparable prejudice to the rights in question, real or asserted. It does not mean it would be useful or helpful or of some advantage or of some benefit to be granted the provisional measures. It does mean that the risk of irreparable prejudice is not merely high but overwhelming and about to happen. The death penalty and armed conflict cases are good examples of the urgency in question.

16. The Court addressed this issue in the *Timor-Leste* case, where it was noted that: "The power of the Court to indicate provisional measures will be exercised only if there is urgency, in

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[131] Karin Oellers-Frahm, "Article 41", *The Statute of the International Court of Justice* (eds. Zimmermann et al), 2nd ed, 2013, Oxford, pp. 1026, 1047.

[132] CR 2018/12, p. 54, para. 13 (Goldsmith).

[133] CR 2018/12, p. 53, para. 8 (Goldsmith).

[134] CR 2018/12, p. 61, para. 37 (Goldsmith).

[135] CR 2018/12, p. 60, paras. 34-35 (Goldsmith).

[136] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 392 and *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*, para. 96.

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."[137] Further, the time for consideration whether such a risk exists is at this stage of the proceedings[138]. This approach has been reaffirmed on a number of occasions, such as the *Costa Rica* v. *Nicaragua* case, where the Court talked in terms of urgency "in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision"[139], and in *Georgia* v. *Russia*[140], the additional request for provisional measures in *Pulp Mills*[141], and in *Ukraine* v. *Russia*[142]. Indeed, in the first *Pulp Mills* application, the Court referred in terms to the "imminent threat of irreparable damage"[143].

17. There are, therefore, three legs to the urgency concept. First, that there is a risk of irreparable prejudice. If there is no risk, there is no urgency. Second, that the risk be real. In other words, the danger has to be manifest, obvious and palpable in an objective sense and not concocted or politically generated or rhetorical — but it must be a *real* risk. It means that the chances of the irreparable prejudice happening are tangible and appreciable. Third, and perhaps most important for present purposes, the risk has to be imminent. In other words, the peril of irreparable prejudice is about to happen; it is fast approaching; it is looming large.

18. Lord Goldsmith sought to argue yesterday that: "The condition of imminence is plainly made out."[144] Not, we suggest on the basis of a few anecdotal and unverified examples mainly

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[137] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32; emphasis added.

[138] *Ibid*.

[139] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, pp. 6, 21

[140] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 353, 392.

[141] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 113, 132.

[142] *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*, p. 136, para. 89 and p. 138, para. 98.

[143] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, pp. 3, 13.

[144] CR 2018/12, p. 63, para. 47 (Goldsmith).

taken from Qatari sources. Lord Goldsmith is right, however, in saying essentially that the identification of imminence is context-driven. It depends upon the facts of the situation[145].

19. Each of these requirements (irreparable prejudice and urgency) is context-driven, objectively verifiable and totally dependent on the situation at hand. The legal test is clear, but the facts, the actual facts**,** must match the conditions set and reaffirmed. In assessing the situation as to whether an order for provisional measures be granted, a restrictive interpretation is called for, since the Court is dealing to a certain extent with substantive issues as to legal entitlements as well as procedural questions as to jurisdiction before such matters have been argued by the parties. If urgency is not demonstrated, then the need to address such issues cannot exist. It would indeed be presumptuous.

20. Mr. President, at this point I shall now turn to look at the fact of the situation itself which constitutes the flesh to the legal skeleton just outlined briefly. I will do this by taking the Court through the relevant provisional measures requested by the Applicant looking at them through the prism of the essential requirements of irreparable damage and urgency as appropriate.

B. The factual situation

21. There is one initial critical point, bearing in mind what has been said about irreparable prejudice and urgency. The key event in terms of the violations of rights under CERD alleged by the Applicant is the statement of the UAE Foreign Ministry on 5 June 2017, taken together with the purported deadline of 19 June 2017. This is the asserted starting-point of the measures complained against. But the Application to the Court was made only on 11 June 2018, one year later. One year later. As the Court emphasized in *LaGrand:* "the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time"[146]. But "good time" in the context of the essential requirements concerning irreparable prejudice and urgency can hardly be 12 months. Especially when something as egregious as collective expulsion is alleged. Even taking into account, as one must, the conditions laid down in Article 22 of the CERD, one year has to be seen as puzzling. There is a further point.

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[145] CR 2018/12, p. 61, para. 39 (Goldsmith).

[146] *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 14, para. 19.

If one assumed that the allegations made were correct — which, of course, is denied — and the claimed collective expulsion had taken place within the 14 days, then where is the urgency? If the Qataris had all been deported last year, where is the urgency this year, for suspension?

22. I turn to the specific measures requested by the Applicant.

23. The first provisional measure requested calls for the UAE to immediately cease and desist from "violations of the human rights of Qataris under the CERD", including suspending the operations of the collective expulsion of all Qataris from, and ban on entry into, the UAE on the basis of national origin[147]. This is dramatic. It is, of course, predicated on the existence of the "collective expulsion of all Qataris" from the UAE. But was that true? According to Qatar it was. The Agent stated so clearly. Twice[148]. Ms Amirfar discussed collective expulsion at some length and on a number of occasions in her pleading[149]. Not to be outdone, Professor Klein[150] and Lord Goldsmith[151] also referred to the claimed collective expulsion of Qataris. If assertion and repetition were to suffice, the case would be made.

24. However, one is immediately struck by something significant. The dog did not bark. Where, in an age of robust 24 hour TV and media news and comment, does one see the image of hundreds or thousands of Qataris fleeing or leaving the UAE? Where does one see pictures or news reports of the rounding-up of detainees, or detention or organization of such "collective expulsion"? Where are the reports of the UAE police or security personnel arresting Qataris and transporting them to the border? Where indeed? Collective expulsion cannot be done secretly, especially not in the midst of a high-profile political crisis in a very sensitive part of the world. Where is the evidence of mass expulsion or deportation?

25. Truth can be stated simply. There has been no collective expulsion. Our Agent has underlined this earlier on. The statement of the Foreign Ministry of 5 June 2017 focused on the break in diplomatic relations with Qatar and various countermeasures to be taken against that State as a result of its failure to respect the Riyadh Agreement and its support for terrorism. That

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[147] Request for the Indication of Provisional Measures, 11 June 2018, para. 19 *(a)* (i).

[148] CR 2018/12, p. 16, para. 4 and p. 17, para. 8 (Al-Khulaifi).

[149] CR 2018/12, pp. 37-40, paras. 20-25; p. 42, para. 35, and p. 43, para. 41 (Amirfar).

[150] CR 2018/12, p. 48, para. 7 (Klein).

[151] CR 2018/12, p. 53, para.10 (Goldsmith).

statement also referred to Qatari residents and visitors in the UAE having 14 days in which to leave "for precautionary security reasons". But the real question for us is twofold. Was this political statement followed by the necessary legal and administrative orders and regulations in order to render the policy binding or indeed any relevant order or regulation? No, it was not. The Agent has affirmed that there were no legal instruments adopted requiring the expulsion of Qatari nationals. None.

26. More importantly, was the 5 June statement followed either within the asserted 14 days or later, or at any time within the following year, by the practical implementation of the claimed "collective expulsion"? No, it was not. There were no lines of refugees fleeing the UAE, because there was no flight.

27. On the contrary, the facts show clearly that Qataris were not expelled or deported from the UAE either during June 2017 or later. The vast majority of Qataris present on 5 June 2017 are still present in the UAE. Some Qataris did leave voluntarily, but only a relatively small number. The statistics we have obtained show that the number of Qataris in the UAE as of mid-June this year is 2,194 — that is at tab 5.1 of the judges' folder.

28. Some collective expulsion. Some urgency.

29. Qatar has not even put forward any evidence of individual expulsions. The only concrete example of alleged expulsion referred to yesterday was that of "Ahmed", who Ms Amirfar said was "expelled from the UAE, *just* because he is Qatari"[152]. The source given is the Human Rights Watch report dated 12 July 2017 which is Annex 10 to the Application. However, when one follows up the reference, it is clear that the individual in question was not expelled, but was instead denied entry around the time that the travel restrictions were imposed. No evidence has been provided as to whether "Ahmed" remains excluded from the UAE, and if so, on what grounds.

30. It is true that Qataris wishing to enter the UAE require prior permission, but this is something which is not unusual for States to do. However, entry and exit records for Qatari nationals since the start of the crisis reveals 8,442 movements. This document is 164 pages long and is lodged with the Registry[153].

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[152] CR/2018/12, p. 41, para. 30 (Amirfar).

[153] Reference document 11 on Immigration, Entry and Exit Records.

31. Thus, in so far as this requested provisional measure is concerned, the suspension of the claimed "collective expulsion", since it did not and does not exist, the request should be rejected.

32. The second request is that the UAE be ordered to take all necessary steps to ensure that Qataris or persons with links to Qatar are not subjected to racial hatred or discrimination[154]. That Qataris are subjected to such discrimination is denied. It is accepted that political relations between the two States are tense at the moment and that this has involved criticism of Qatar for reasons given already. But this is criticism of the State and not hatred directed against its citizens. The UAE denies engaging in racially motivated hate speech directed at Qataris, as alleged by Qatar[155]. Indeed, may I draw the Court's attention to Article 7 of UAE Federal Decree Law No. 2 of 2015 entitled "On Combatting Discrimination and Hatred", which provides that any person who commits any act involving hate speech by any means of expression or by any other means, shall be liable to punishment (judges' folder, tab ***5.2***).

33. Of course, political opposition to Qatar or any other State is a different matter. This is not prohibited by the CERD in any event and thus cannot be the subject of recourse to this Court.

34. So, one asks, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

35. The third request is directly linked with the second and calls for the suspension of the application of 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[156]. The cross-reference for this appears in footnote 14 of the Request for provisional measures, which refers to a press report of a speech given by the UAE Attorney General. But both the legislation in question and the statement of the Attorney General are general in intent, expression and operation. They do not refer to Qataris in particular and cannot thus be taken to be discriminatory against Qataris at all. There is no CERD right here which can be said to be violated. The legislation is directed at all and Qatar is not mentioned. The legislation predates the crisis. The statement of the Attorney General is just that. No more. It is not a law.

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[154] RPMQ, 11 June 2018, para. 19 *(a)* (ii).

[155] RPMQ, 11 June 2018, para. 8.

[156] *Ibid.*, para. 19 *(a)* (iii).

36. So, where one asks, is the irreparable prejudice and where is the urgency, the real and imminent risk?

37. The fourth request calls for the taking of 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[157]. Mr. Olleson has addressed this. What is involved are measures against Qatar for reasons given and not against individual Qataris. In any event, there is an issue of principle here. CERD applies to individuals and not to corporations. Article 5 provides that States parties to the convention undertake to prohibit and eliminate racial discrimination and "guarantee to everyone without distinction as to race, colour or national or ethnic origin" equality before the law in the enjoyment of a specified range of rights. While Article 2 (1) *(d)* does provide that each State party is to prohibit racial discrimination *by* any persons, group or organization, corporations as such are not beneficiaries of rights under this convention. In addition, and critically, one looks in vain for conformity with the necessary requirements.

38. So, I ask again, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

39. After all, and as a matter of necessary context, the reason for the banning flows from the pro-terrorist output of such media enterprises as Al-Jazeera (Arabic).

40. Qatar has argued that there have been "numerous cases of forced separation of Qatari families, which continues to this day"[158]. This issue is reflected in the fifth request, requiring the UAE to cease and desist from measures that result in the separation of families that include a Qatari and to take all necessary steps to ensure reunification[159].

41. The problem of mixed Qatari-Emirati families in general has arisen because, as is common in Gulf States, a child takes the nationality of the father. To deal with this perceived problem, a Presidential Directive was issued on 6 June 2017 which instructed the authorities to take into account the humanitarian circumstances of such mixed families and in implementation a special telephone line was established to receive such cases and take appropriate action (tab 5.3).

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[157] RPMQ, 11 June 2018, para. 19 *(a)* (iv).

[158] *Ibid.*, para. 7.

[159] *Ibid.*, para. 19 *(a)* (v).

42. Thus, the statement in the Qatari Request for provisional measures that "[t]o this day, Qatari-Emirati families remain apart or fear separation if they travel to the UAE"[160] is simply tendentious. Again the two examples provided come from Qatar's NHRC and we have no independent verification of these, nor indeed of the asserted number of 82 such separations[161].

43. The underlying problem of the nationality of children of mixed marriages in Gulf States remains but is under consideration. Indeed, Qatar itself has faced criticism from the Committee on the Elimination of All Forms of Racial Discrimination on this question in its Concluding Observations of 13 April 2012 on Qatar's report[162].

44. So, one asks, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

45. The sixth request made by the Applicant is to cease and desist 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. The Request for provisional measures refers to "disrupted" medical care[163] and claims that the "collective expulsion order" resulted in interrupted treatment and some individuals being denied access to necessary medical care[164]. Two sources are given for this.

46. First, the Office of the United Nations High Commissioner for Human Rights (OHCHR) Technical Mission to the State of Qatar[165] report — a report which has been criticized by States, including the UAE, and which relied considerably upon Qatari sources, actually states only that the Qatar Ministry of Health had received as of 23 November 2017, 130 individuals reporting medical issues related to the crisis. No mention of what those issues were, or who the individuals were, or where they came from. An example of one person is given, a person who had been previously treated in Saudi Arabia and returned to Qatar. He then had to travel to Germany to receive treatment as his means of payments from Saudi Arabia were blocked in Qatar. Second example, two patients from Qatar who resided in Saudi Arabia were transferred to Turkey and Kuwait for

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[160] RPMQ, 11 June 2018, para. 10.

[161] CR 2018/12, p. 41, paras. 30-31 (Amirfar).

[162] CERD/C/QAT/CO/13-16, para. 16.

[163] RPMQ, para. 2.

[164] RPMQ, para. 8.

[165] OHCHR Technical Mission Report, Dec. 2017, Ann. 16, paras. 43-44.

surgery as "they were reportedly unable to pursue their medical treatment" in Saudi Arabia. That's it. Hardly a ringing criticism of the UAE.

47. The second source is a report of Qatar's National Human Rights Committee[166]. This refers to four "violations of the right to health" by the UAE. However, it only provides the anonymous testimony of one Qatari woman, who wanted to travel abroad for medical treatment but was unable to travel to the UAE due to the expiration of travel documents on 1 June 2018. She is receiving treatment at Hamad General Hospital in Qatar. In this context, we should note that the OHCHR report, so heavily relied upon by the other side, states explicitly that

> "[m]edical services in Qatar are known to be of high quality. Since September 2017, the Ministry of Health recorded 388,000 visits to public health services by patients, including by 260,000 patients from the KSA, UAE, Bahrain and Egypt whose residents in Qatar *[sic]*. The Qatar authorities stated [continued the report] they will continue to provide treatment to patients from these countries without discrimination."[167]

While Ms Amirfar mentioned the claimed health problems noted by the NHRC's fifth report, almost in passing[168], she did not address these comments by the report.

48. Finally here, it should be noted that there are a significant number of Qataris covered by the UAE health insurance provider, Daman in the UAE (judges' folder, tab 5. 4).

49. So, one asks, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

50. The seventh request is for the UAE to cease and desist 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 student records. In support of their contentions, the Applicant has referred to the OHCHR report[169]. This report refers to 157 students in the UAE being affected, but without any further detail. The information of course is from Qatari sources[170]. The report also states that the NHRC followed up some of these cases and the students concerned themselves declared that they had been in fact offered a choice by Qatar

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[166] NHRC, Fifth General Report, June 2018, Ann. 22, p.51.

[167] OHCHR Technical Mission Report, Dec. 2017, Ann. 16, para. 45.

[168] CR 2018/12, p. 42, paras. 34-35 (Amirfar).

[169] RPMQ, 11 June 2018, para. 8.

[170] AQ, Ann. 16, Dec. 2017 OHCHR report, paras. 50-53.

University, either to be integrated into that institution or to be placed in a university abroad, for instance in Jordan or Malaysia[171]. We note that the Fifth General Report of the NHRC of June 2018 asserts there were 148 education violations by the UAE, but only provides the anonymous testimony of one Qatari man who studied law at Al Jazira University in the UAE[172].

51. Ms Amirfar yesterday went so far as to assert that "the UAE is barring Qataris who previously studied in the country from continuing their education there"[173]. However, as of 20 June 2018, there are 694 Qatari students currently studying in the UAE (judges' folder, tab 5.1). And, as our Agent has stated this morning, instructions have gone out from the Office of the Undersecretary of Higher Education to the Directors of Higher Education Institutions declaring that "[b]y following up the information of the university students, it was noted that a number of students from the State of Qatar dropped out of university studies in the United Arab Emirates for non-academic reasons. Kindly communicate with the dropped out students immediately and check the reasons, stressing that studies are available to all students who meet the required conditions. Kindly provide a report about the results of communication and immediately send it to us . . ." (Exhibit 8).

52. Well, Mr. President, again one asks, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

53. The eighth request calls for the UAE to cease and desist from measures that directly or indirectly prevent Qataris from accessing or otherwise using their property in the UAE[174]. Again, the Applicant refers to the OHCHR report, which states that Qataris were forced to abandon businesses and personal property in the UAE[175]. However, the report also notes that the Qatari Chamber of Commerce and the Government of Qatar have been helping such businessmen in a variety of ways, ranging from sourcing supplies from other countries to assisting with business contacts and establishing a hotline[176]. Further, there has been the claim that financial transactions between Qatar and the UAE have been suspended, blocking the payment of salaries and preventing

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[171] AQ, Ann. 16, Dec. 2017 OHCHR report, para. 51.

[172] AQ, Ann. 22, pp. 18-20.

[173] CR 2018/12, p. 43, para. 38 (Amirfar).

[174] RPMQ, para. 19 *(a)* (viii).

[175] RPMQ, para. 8.

[176] AQ, Ann. 16, Dec. 2017, paras. 40-41.

the paying of bills and support for relatives[177]. However, we can say, first, that the Central Bank did not issue any circular or decision with regards to dealing with or closing Qatari banks or banning dealing with Qatari currency (judges' folder, tab 5.5) and, secondly, that there has been an extensive range of transfers and remittances between the two States covering billions of UAE dirham. For example, we have a document showing bank transfers between the Central Bank of the UAE and Qatar banks from June 2017 to April 2018 amounting to a total of 42,210,763,000 UAE dirham (about 11 and a half billion dollars) in outward and inward remittances between the Central Bank and Qatar (judges' folder, tab 5.5). No suspension of financial transactions here.

54. So, one asks once again, where is the irreparable prejudice and where is the urgency, the real and imminent risk?

55. The ninth request is a very general and vague call that the UAE take all necessary steps to ensure that Qataris are granted equal treatment before tribunals. This was not particularized in the Request for the indication of provisional measures and hardly mentioned in the oral pleadings. May I just point to Article 6 of the UAE Federal Decree Law No. 2 of 2015 entitled "On Combatting Discrimination and Hatred", which provides that any person who commits any act of discrimination of any form is liable to punishment (judges' folder, tab 5.2).

56. It is thus, incorrect to conclude, as Lord Goldsmith did yesterday[178], that on the evidence before it "irreparable prejudice is not only a real risk: it is the ongoing reality". As to the evidence before the Court presented by Qatar, let me note that Lord Goldsmith quoted from the report of the six United Nations Special Rapporteurs, but the paragraph he quoted begins as follows: "While we do not wish to prejudge the accuracy of these allegations . . .". Well, indeed.

57. Mr. President, Members of the Court, I have briefly in the time available taken a look at the measures requested in the light of the core requirements for an indication of provisional measures, namely that such measures are essential in order to avoid irreparable prejudice and are urgent. None of these measures comply with these necessary conditions. The alleged collective expulsion simply did not happen. Other measures requested cover situations that, if proven, can be adequately compensated for in financial or other material restitutionary ways or otherwise

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[177] RPMQ, para. 8 and AQ, Ann. 16, Dec. 2017, para. 40.

[178] CR 2018/12, p. 55, para. 15 (Goldsmith).

remedied at the merits stage. None of the measures requested reach the high standard required of provisional measures, that they are necessary to avoid irreparable prejudice and are urgent in the sense of real and imminent risk of such damage.

58. Mr. President, Members of the Court, this concludes the first round oral pleading of the UAE and I thank you very much for your kind attention.

The PRESIDENT: I thank Professor Shaw. As he has just indicated, his statement brings to an end the first round of oral observations of the United Arab Emirates. The Court will meet again tomorrow morning, at 10 a.m., to hear the second round of oral observations of Qatar, followed by the second round of oral observations of the United Arab Emirates in the afternoon at 4.30 p.m. The sitting is adjourned.

The Court rose at 1 p.m.

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