INTERNATIONAL COURT OF JUSTICE
QATAR V. UNITED ARAB EMIRATES
HEARING ON QATAR'S REQUEST FOR PROVISIONAL MEASURES

Comments on behalf of the State of Qatar on the Written Reply Submitted by the United Arab Emirates on 3 July 2018

Question 1: Does the local remedies rule have the same rationale in diplomatic protection and in international human rights protection? Does the effectiveness of local remedies have an incidence under the International Convention on the Elimination of All Forms of Racial Discrimination?

1. Qatar wishes to make three comments on the written response to this question submitted by the United Arab Emirates (the "*UAE*").

2. *First*, Qatar maintains that, in international human rights protection, the rationale of the local remedies rule has gone beyond the traditional concern over the State's opportunity to redress a violation by its own means and within the framework of its own domestic system, as reflected in *Interhandel*: it also encompasses the additional element of "actual redress."[1] This is likely why in *Diallo* (a case concerning human rights protection, as the UAE observes[2]), the Court required "the DRC to prove that there were available and *effective* remedies in its domestic legal system,"[3] whereas in *Interhandel* and *ELSI* (both cases not concerning human rights protection), the Court did not make any mention of the "effectiveness" criterion at all.[4]

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1 *See* Response on behalf of the State of Qatar to the Questions posed by Judge Cançado Trindade, 3 July 2018 (hereinafter "Qatar's Response") paras. 3-6.

2 *See* Response of the United Arab Emirates to the questions of Judge Cançado Trindade, Judge Bhandari, and Judge Crawford, 3 July 2018 (hereinafter "UAE's Response"), p. 1.

3 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24 May 2007, I.C.J. Reports 2007)* (hereinafter "*Diallo*"), p. 600, para. 44 (emphasis added).

4 *Interhandel Case (Switzerland v. United States), Preliminary Objections, Judgment of 21 March 1959, I.C.J. Reports 1959*, p. 27; *Elettronica Sicula*

3. *Second*, while the UAE takes the position that "in the context of Articles 11 and 22 of the Convention, the [local remedies] rule applies in the framework of diplomatic protection,"[5] in the present case, Qatar has made its requests "in its own right" and "as *parens patriae* of its citizens."[6] As the Court held in *Avena*, "[t]he duty to exhaust local remedies does not apply to such a request."[7] And, in any case, the Court does not need to address issues of admissibility, such as the exhaustion of local remedies, at this stage of the proceedings.[8]

4. *Third*, Qatar welcomes the UAE's acceptance that "the effectiveness of the available local remedies is a component of the rule requiring exhaustion of local remedies."[9] Qatar furthermore notes the burden of proof in this regard: as the Court held in *Diallo*, "[i]t is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted."[10]

Question 2: Is it necessary to address the plausibility of rights in face of a continuing situation allegedly affecting rights protected under a human rights treaty like the International Convention on the Elimination of All Forms of Racial Discrimination?

5. Qatar welcomes the UAE's acknowledgment that a situation of continuing violations of human rights "is an issue with regard to which one would rightly expect the Court to be sensitive and attentive."[11]

S.p.A. (ELSI) (United States v. Italy), Judgment of 20 July 1989, I.C.J. Reports 1989, p. 46, para. 59.

5 UAE's Response, p. 2.

6 Qatar's Application, p. 65; CR 2018/14, pp. 18-19, paras. 3-4 (Klein); *see also* Qatar's Response, para. 8.

7 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004, I.C.J. Reports 2004*, pp. 35-36, para. 40; *see also* CR 2018/14, pp. 18-19, paras. 3-4 (Klein).

8 *See* CR 2018/14, pp. 17-18, para. 2 (Klein).

9 UAE's Response, p. 2.

10 *Diallo*, p. 600, para. 44.

11 UAE's Response, p. 3.

Qatar otherwise rests on its prior submission in response to Question 2 and will deal with the UAE's comments on the plausibility of rights in its response to Question 3.

Question 3: What are the implications or effects, if any, of the existence of a continuing situation allegedly affecting rights protected under a human rights Convention, for requests of Provisional Measures of Protection?

6. Qatar agrees with the UAE that (1) "[p]rotecting rights from infringement is at the core of the Court's work and cannot be ignored at any stage of proceedings before the Court," and (2) "[p]rotecting human rights should . . . be at the forefront of any attempt at engagement in the international legal system."[12] The latter point applies with special force to States in their international relations, and it is the UAE's failure to comply with its Convention obligation to protect all individuals, including Qataris, against racial discrimination that causes Qatar to seek that protection from this Court in the form of provisional measures.

7. Indeed, while the UAE employs the term "balance," it is quick to acknowledge that any balancing is *already* reflected in the standard of plausibility.[13] It follows that when the Court assesses the plausibility of the legal rights a requesting party asserts or the factual claims it makes under a human rights convention, it must take into account the character of the human rights in question and the vulnerability of the affected individuals, in order to give effect to the protective function of human rights conventions.[14]

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[12] *Ibid.*; Qatar's Response, p. 3.

[13] UAE's Response, p. 3 ("As part of ensuring this *balance* between the regard for vulnerable (or claimed vulnerable) individuals and groups on the one hand and adjudication between States in the light of their rights and obligations under international law on the other, the Court has had recourse *inter alia* to the doctrine of plausibility.") (emphasis added).

[14] Qatar's Response, paras. 24-29 ("In short, whether or not the Court puts the requisite showing in terms of 'plausibility of rights' or 'vulnerability of populations' for purposes of a human rights treaty such as the Convention, at a minimum, the rights asserted under the Convention should be subject, in accord with the Court's jurisprudence, to a low threshold showing of both legal and factual plausibility in order to indicate provisional measures.").

8. Likewise, when considering "urgency" in the context of a continuing situation allegedly affecting rights protected under a human rights convention, the criteria of risk and irreparable harm are necessarily met. As Qatar pointed out in its first submission, when confronting a continuing situation, the Court has no need to assess the likelihood of a threatened but future event; the harm is not merely imminent but *presently occurring.*[15] And as the Court has recognized, by their very character, rights protected by human rights conventions may give rise to irreparable harm when prejudiced.[16]

9. Finally, while the UAE "denies there has been any violation of the Convention as alleged" in its Response,[17] it can only do so by ignoring the independent reporting, following comprehensive evaluation, throughout the course of the past year showing violations of the Convention.[18] Even on the UAE's own case, the evidence submitted by the UAE only confirms Qatar's position, as it demonstrates, at the very least, that the continuing situation "ha[s] not yet been resolved in [its] entirety."[19] When the Court interprets and applies the criteria of plausibility and urgency in light of the continuing situation before it, the Court should find that these criteria are more than satisfied.

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[15] CR 2018/14, p. 33-34, paras. 9-13 (Goldsmith). Qatar's Response, para. 37.

[16] Qatar's Response, paras. 32-35.

[17] UAE's Response, p. 5.

[18] CR 2018/12, pp. 54-59, paras. 12-30 (Goldsmith); CR 2018/14, pp. 39-43, paras. 34-54 (Goldsmith); Qatar's Application, para. 7; *see also, e.g.*, Office of the United Nations High Commissioner for Human Rights' Technical Mission to the State of Qatar, 17-24 November 2017, *Report on the Impact of the Gulf Crisis on Human Rights* (December 2017), (Annex 16 to Qatar's Application), paras. 60-64; Amnesty International, *Gulf dispute: Six months on, individuals still bear brunt of political crisis* (14 December 2017), p. 1, https://www.amnesty.org/download/Documents/MDE2276042017ENGLISH.pdf.

[19] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143.

Question 4: In his opening statement yesterday, the Agent of the UAE said, inter alia "[a]lthough the UAE's announcement on 5 June 2017 ... did call upon Qatari citizens to leave its territory for precautionary security reasons ...". My question is: could the UAE please clarify what was meant by "precautionary security reasons" in the announcement of 5 June 2017?

10. In its Response, the UAE does not address Judge Bhandari's actual question: namely, what it meant by "precautionary security measures" in calling upon Qataris to leave its territory in the 5 June 2017 announcement. Instead, the UAE explains only that it terminated relations with *Qatar* "due to national security concerns seriously felt at that time," and that "[o]ne aspect of the UAE's 5 June 2017 announcement was a call for citizens of Qatar to leave the UAE and UAE citizens to leave Qatar and return home for precautionary security reasons."[20] However, nothing in the UAE's Response indicates that its supposed "national security concerns" related—at all—to actions of individual *Qataris*, against whom the measures in the 5 June 2017 announcement were clearly directed. Nor could the UAE make that connection; that is the unjustified and unjustifiable nature of measures imposed on a collective basis against an entire group of people.[21]

11. Ironically, the UAE's Response, echoing its oral submissions, makes quite clear that its measures were not intended to address any perceived "precautionary security reasons" related to the residence, entry or transit of individual Qataris in the UAE, but rather, were intended as a punitive measure against the State of Qatar through the punishment of Qataris.[22]

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[20] UAE's Response, p. 5-6.

[21] *See, e.g.*, CR 2018/12, pp. 38-39, paras. 23-24 (Amirfar); CR 2018/14, p. 30, para. 22 (Amirfar).

[22] *E.g.*, CR 2018/15, pp. 38, 41-42, paras. 10, 12, 27-28 (Shaw) ("Such actions by Qatar could not remain without consequences, as it had been informed. This is what generated the difficulties in the region. . . . [The problems faced by Qatari-Emirati families] flow from Qatar's behavior and the responsibility for the circumstances as they are now must be placed firmly at the door of the Applicant. . . . [I]t must be said that the resolution for the current political crisis and its consequences lies squarely in the hands of Qatar. They started it with their violation of the Riyadh Agreements and support for terrorism."). Indeed, the invocation of

12. In any event, while the UAE has indulged in numerous political statements during the course of the proceedings,[23] it has not attempted to claim that its ostensible "national security" concerns—which again Qatar unequivocally denies—justify its actions as a legal matter—nor could it.[24]

13. Finally, in its Response, the UAE again attempts to re-characterize its broad discriminatory measures as mere "immigration restrictions."[25] As previously noted, the discriminatory measures set in place by the UAE cannot be reduced to a question of "entry requirements."[26] Further, the UAE once again contorts the meaning of Article 1(2) of the Convention in its attempt to justify its measures on that basis.[27] As Qatar has demonstrated in its submissions, Article 1(2) cannot be construed in a manner that undermines the basic prohibition on discrimination as contained in the Convention.[28] Article 1(2) is not a

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"precautionary security reasons" in the 5 June 2017 announcement made clear that the order to leave was not precatory or casual. *See, e.g.*, CR 2018/14, p. 35, paras. 18-19 (Goldsmith).

[23] *See, e.g.*, CR 2018/13, p. 11, paras. 4-6 (Alnowais), pp. 63-64, para. 25 (Shaw); CR 2018/15, p. 38, para. 10 (Shaw), p. 42, paras. 5-6 (Alnowais).

[24] Unlike other human rights instruments, the Convention provides no basis for derogation, including for national security reasons, and, indeed, the Committee has made clear that "measures taken in the fight against terrorism" must still comply with the Convention's obligations. *See* CERD Committee General Recommendation XXX, para 10.

[25] UAE's Response, p. 6.

[26] CR 2018/14, pp. 29-30, paras. 19-22 (Amirfar) ("Qatar does not contend that the UAE has no right to regulate its borders. Qatar does contend, however, that the expulsion of Qataris and ban on re-entry of those Qataris on the discriminatory basis set forth in the 5 June 2017 directive has had the *effect* of infringing on the fundamental human rights contained in Article 5 and incorporated human rights instruments."); CR 2018/12, pp. 33-35, paras. 8-11, 16 (Amirfar).

[27] UAE's Response, p. 6.

[28] CR 2018/12, pp. 37-38, paras. 22-23 (Amirfar); CR 2018/14, pp. 24-27, paras. 9, 12-13 (Amirfar).

license to discriminate freely against non-citizens;[29] instead, "judged in light of the objectives and purposes of the Convention," any distinctions between citizens and non-citizens must be "applied pursuant to a legitimate aim" and "proportional to the achievement of this aim."[30] This applies both to the distinctions at issue that impact fundamental human rights protected by Article 5 of the Convention, as asserted by Qatar in its Application, as well as the unspecified and unsupported "entry requirements" the UAE would have the Court believe are its only action taken (contrary to the evidence presented), imposed on Qataris collectively after the 5 June 2017 announcement of expulsion without any basis or criteria beyond Qatari nationality.[31]

14. Likewise, Article 1(3), which was introduced at the same time as Article 1(2) as part of the "compromise amendment," cannot be used to justify distinctions in immigration policy that discriminate based on nationality.[32] Indeed, under the Convention, States parties should "[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin."[33]

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[29] CR 2018/12, pp. 37-38, paras. 22-23 (Amirfar); CR 2018/14, pp. 24-26, paras. 9, 12 (Amirfar); *see* Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016), p. 146 ("[T]he restriction of rights in 1(2) and 1(3) is exceptional and should be construed narrowly.").

[30] CERD Committee, *General Recommendation XXX on Discrimination Against Non Citizens* (2002), para. 4.

[31] *See ibid.* paras. 4, 9.

[32] CR 2018/14, pp. 22-24, paras. 5, 9 (Amirfar).

[33] CERD Committee, *General Recommendation XXX on Discrimination Against Non Citizens* (2002), para. 9; *see also* CERD Committee, *Concluding observations on the United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CERD/C/GBR/CO/18-20 (2011), para. 16 (noting Committee's concern at "a Ministerial authorization . . . which would allow the UK Border Agency (UKBA) to discriminate among nationalities in granting visas" and recommending that "the State party remove the exceptions . . . as well as the discretionary powers granted to the UK Border Agency (UKBA) to discriminate at border posts among those entering the territory of the State party."); CERD Committee, *Concluding observations on Australia*, U.N. Doc. CERD/C/AUS/CO/15-

Question 5: My question is this. Is the announcement of 5 June 2017, and in particular its paragraph 2, still in effect? Has the UAE made any further announcement clarifying that Qataris resident in the UAE may elect to stay, notwithstanding paragraph 2 of the announcement?

15. Although the UAE's Response to Judge Crawford's question tries hard not to answer it, there can be no dispute that the UAE's Ministry of Foreign Affairs, an organ of the State that is authoritative, issued a statement on 5 June 2017 "[p]reventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country." The UAE has now had more than a year to forthrightly and definitively disavow and withdraw this statement. The final paragraph of the UAE's Response to Judge Crawford—in which it states the UAE is "*actively contemplating*" "clarifying the entry and residence requirements applicable to Qatari[s]"[34]—effectively confesses that, even now, no organ or official of the UAE has so clarified, or otherwise prevented that 5 June 2017 statement and the UAE policy it reflects from having a continuing detrimental effect on Qataris.

16. As detailed in Qatar's submissions, and as confirmed by independent human rights bodies, the UAE's measures had and continue to have a detrimental impact on Qataris.[35] In the words of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the measures have "a potentially durable effect on the enjoyment of the human rights and fundamental freedoms of those affected."[36] So the

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17 (2010), para. 24 (noting Committee's concern at the suspension on processing visa applications "for applicants from certain countries" and "[r]ecalling its general recommendation No. 30 . . . reiterates its view that States parties ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin.").

[34] UAE's Response, p. 7 (emphasis added).

[35] CR 2018/14, pp. 40-43, paras. 36-53 (Goldsmith).

[36] Office of the United Nations High Commissioner for Human Rights' Technical Mission to the State of Qatar, 17-24 November 2017, *Report on the Impact of the Gulf Crisis on Human Rights* (December 2017), p. 14, para. 60 (Annex 16 to Qatar's Application).

UAE's "contemplation" of potential clarification only confirms the conclusions of the OHCHR and other third parties that the continuing situation "has not yet been resolved in [its] entirety," necessitating the indication of provisional measures.[37]

17. The UAE's extended discussion of the status of the Ministry of Foreign Affairs' statement as a matter of UAE law does not detract from this conclusion. The UAE cannot deny the effects that its measures have had on Qataris. Even by its own account, the UAE has established certain measures, including the so-called "hotline," to mitigate the harmful effects of the measures on Qataris. There would of course be no need for mitigation if these measures had actually *not* been "in effect,"[38] as the UAE falsely contends.

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[37] *See supra* paras. 6-9.

[38] UAE's Response, p. 7.