DISSENTING OPINION OF JUDGE BHANDARI

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

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

> "UAE affirms its complete commitment and support to the Gulf Cooperation Council and to the security and stability of the GCC States. Within this framework, and based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements, it has been decided to take the following measures that are necessary for safeguarding the interests of the GCC States in general and those of the brotherly Qatari people in particular:
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> (1) In support of the statements issued by the sisterly Kingdom of Bahrain and sisterly Kingdom of Saudi Arabia, the United Arab Emirates severs all relations with the State of Qatar, including breaking off diplomatic relations, and gives Qatari diplomats 48 hours to leave UAE.
> (2) Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.
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> (3) Closure of UAE airspace and seaports for all Qataris in 24 hours and banning all Qatari means of transportation, coming to or leaving the UAE, from crossing, entering or leaving the UAE territories, and taking all legal measures in collaboration with friendly countries and international companies with regards to Qataris using the UAE airspace and territorial waters, from and to Qatar, for national security considerations.
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> The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to Doha and its Complementary Arrangement in

> 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its sustained endeavours to promote the ideologies of Daesh and Al Qaeda across its direct and indirect media."[1]

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

> "[s]ince its announcement on June 5, 2017, pursuant to which the United Arab Emirates (UAE) took certain measures against Qatar for national security reasons, the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE Government.
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> The UAE Ministry of Foreign Affairs and International Cooperation wishes to confirm that Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory."

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

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[1] Qatar's Application instituting proceedings, p. 22, para. 22.

[2] CR 2018/13, p. 63, para. 25 (Shaw); *ibid.*, p. 64, para. 26 (Shaw); CR 2018/15, p. 39, para. 12 (Shaw).

[3] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43.

[4] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46.

[5] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 34, para. 78.

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

The Court held that, "taking note of the assurances given by Senegal . . . the risk of irreparable prejudice to the rights claimed by Belgium is not apparent on the date of this Order"[7]. In *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the Attorney General of Australia made a written undertaking, under which the documents seized from Timor-Leste's legal counsel would "not be used by any part of the Australian Government for any purpose other than national security purposes"[8]. The Court held that, "[g]iven that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material . . . there remains a risk of disclosure of this potentially highly prejudicial information"[9].

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

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

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[6] *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. 154, para. 68.

[7] *Ibid.*, p. 155, para. 72.

[8] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 156, para. 38.

[9] *Ibid.*, p. 158, para. 46.

[10] United Nations, *Treaty Series (UNTS)*, Vol. 1833, p. 3.

[11] *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 24, para. 85.

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

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

8. In the present case, the unqualified undertaking included in the statement of the UAE's Ministry of Foreign Affairs of 5 July 2018 does not seem to have been qualified by any exceptions. In this sense, it is similar to the undertaking in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, and different from the undertakings in *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)* and *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*. Qataris already residing in the UAE "need not apply for permission to continue residence in the UAE", while only being encouraged to "obtain prior permission for re-entry into UAE territory". Based on this wording, it would appear that Qataris residing in the UAE, but currently located outside the UAE, can re-enter the UAE without hindrance. Qataris residing overseas are required "to obtain prior permission for entry into the UAE". The granting of right to entry and right of abode to any foreign citizen is a prerogative falling within the reserved domain of the UAE. Consequently, that "permission may be granted . . . at the discretion of the UAE Government" could not be seen as an exception to the undertaking that residing Qataris may continue legally to reside in the UAE, and that non-residing Qataris need to obtain permission to enter the UAE. In the light of this undertaking, it is my view that there is no irreparable prejudice in the circumstances of this case.

9. The existence of urgency in a request for provisional measures is fundamentally fact-dependent. The unqualified undertaking by the UAE,

[12] *ITLOS Reports 2003*, p. 25, para. 88.
[13] *Ibid.*, pp. 26-28, para. 106.

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

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

(Signed) Dalveer BHANDARI.

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[14] *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. 152, para. 62; *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. 21, para. 64; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 154, para. 32; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1168, para. 83; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 136, para. 89; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 243, para. 50.