DISSENTING OPINION OF JUDGE SALAM

[Translation]

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

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

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

(a) The terms "national or ethnic origin" used in the Convention differ in their ordinary meaning to the term nationality.

(b) As regards context, CERD was adopted against a historical background of decolonization and post-decolonization and was part of that effort to eliminate all forms of discrimination and racial segregation. Indeed, its preamble states:

> "Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,
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> . . . . . .
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> Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

. . . . . .

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation."

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

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

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

5. This question of the distinction between "nationality" and "national origin" should not, in my view, admit of any confusion. They are two different notions. An example that clearly illustrates this difference is the

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

well-known case of American citizens of Japanese origin who were incarcerated following the attack on Pearl Harbor during the Second World War. Despite having American nationality, these citizens were subject to racial discrimination based on their "national origin", not their nationality, and were rounded up and held in "War Relocation Camps"[2]. A similar type of discrimination based on "national origin" also affected a large number of individuals of German origin, «regardless of their nationality at that time», in several countries after both the First and Second World Wars.

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

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

8. I would further note that, regardless of the "great weight" that should be ascribed to the work of an "independent body" such as the CERD Committee (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66), the fact remains that the recommendations of that Committee cannot be considered to be an expression of a subsequent practice of the parties to CERD (in the sense of Article 31, paragraph 3 *(b)*, of the 1969 Vienna Convention on the Law of Treaties).

9. In conclusion, although in my opinion the dispute between the Parties does not fall within the scope of CERD, I would note that in the case concerning the *Legality of Use of Force (Yugoslavia* v. *United Kingdom)*, while the Court found that it lacked prima facie jurisdiction to entertain Yugoslavia's Application and "[could not] therefore indicate any provisional measure whatsoever" (*Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 839, para. 37), it nonetheless pointed out that "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law" (*ibid.*, para. 40). With that in mind, it requested that the parties "take care not to aggravate or extend the dispute" (*ibid.*, para. 41). The Court adopted the same approach in the case concerning *Armed Activities on the Territory of the Congo (New*

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

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

Application: 2002) (Democratic Republic of the Congo v. *Rwanda)*: while also finding in this case that it did not have prima facie jurisdiction to indicate provisional measures (*Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 249, para. 89), the Court stressed "the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently" (*ibid.*, p. 250, para. 93).

10. By the same token, and taking account of Qatar's claim that Qataris residing in the United Arab Emirates have been in a vulnerable situation since 5 June 2017, although I believe that the Court should have found that it lacked prima facie jurisdiction to indicate provisional measures, this would not have prevented it from underlining, in its reasoning, the need for the Parties not to aggravate or extend the dispute and to ensure the prevention of any human rights violations.

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

(Signed) Nawaf SALAM.