INTERNATIONAL COURT OF JUSTICE

INTERPRETATION AND APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(THE STATE OF QATAR *v.* THE UNITED ARAB EMIRATES)

MEMORIAL OF THE STATE OF QATAR

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Annex 102

CERD Committee, *General Recommendation No. 1 concerning States parties' obligations*, contained in document A/87/18 (1972)

Fifth session (1972)*

General recommendation I concerning States parties' obligations (art. 4 of the Convention)

On the basis of the consideration at its fifth session of reports submitted by States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee found that the legislation of a number of States parties did not include the provisions envisaged in article 4 (a) and (b) of the Convention, the implementation of which (with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention) is obligatory under the Convention for all States parties.

The Committee accordingly recommends that the States parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of article 4 (a) and (b) of the Convention.

* Contained in document A/87/18.

Annex 103

CERD Committee, *General Recommendation No. 7 relating to the implementation of article 4*, contained in document A/40/18 (1985)

Thirty-second session (1985)*

General recommendation VII relating to the implementation of article 4

The Committee on the Elimination of Racial Discrimination,

Having considered periodic reports of States parties for a period of 16 years, and in over 100 cases sixth, seventh and eighth periodic reports of States parties,

Recalling and reaffirming its general recommendation I of 24 February 1972 and its decision 3 (VII) of 4 May 1973,

Noting with satisfaction that in a number of reports States parties have provided information on specific cases dealing with the implementation of article 4 of the Convention with regard to acts of racial discrimination,

Noting, however, that in a number of States parties the necessary legislation to implement article 4 of the Convention has not been enacted, and that many States parties have not yet fulfilled all the requirements of article 4 (a) and (b) of the Convention,

Further recalling that, in accordance with the first paragraph of article 4, States parties "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination", with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention,

Bearing in mind the preventive aspects of article 4 to deter racism and racial discrimination as well as activities aimed at their promotion or incitement,

1. *Recommends* that those States parties whose legislation does not satisfy the provisions of article 4 (a) and (b) of the Convention take the necessary steps with a view to satisfying the mandatory requirements of that article;

2. *Requests* that those States parties which have not yet done so inform the Committee more fully in their periodic reports of the manner and extent to which the provisions of article 4 (a) and (b) are effectively implemented and quote the relevant parts of the texts in their reports;

3. *Further requests* those States parties which have not yet done so to endeavour to provide in their periodic reports more information concerning decisions taken by the competent national tribunals and other State institutions regarding acts of racial discrimination and in particular those offences dealt with in article 4 (a) and (b).

* Contained in document A/40/18.

Annex 104

CERD Committee, *General Recommendation No. 11 on non-citizens*, contained in document A/48/18 (1993)

Forty-second session (1993)**

General recommendation XI on non-citizens

1. Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination. Article 1, paragraph 2, excepts from this definition actions by a State party which differentiate between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality.

2. The Committee has noted that article 1, paragraph 2, has on occasion been interpreted as absolving States parties from any obligation to report on matters relating to legislation on foreigners. The Committee therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation.

3. The Committee further affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

** Contained in document A/48/18.

Annex 105

CERD Committee, *General Recommendation No. 14 on article 1, paragraph 1, of the Convention*, contained in document A/48/18 (1993)

Forty-second session (1993)*

General recommendation XIV on article 1, paragraph 1, of the Convention

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights. The Committee wishes to draw the attention of States parties to certain features of the definition of racial discrimination in article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination. It is of the opinion that the words "based on" do not bear any meaning different from "on the grounds of" in preambular paragraph 7. A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.

2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

3. Article 1, paragraph 1, of the Convention also refers to the political, economic, social and cultural fields; the related rights and freedoms are set up in article 5.

* Contained in document A/48/18.

Annex 106

CERD Committee, *General Recommendation No. 15 on article 4 of the Convention*, Forty-second session (1993)

Forty-second session (1993)

General recommendation XV on article 4 of the Convention

1. When the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination. At that time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of article 4 is now of increased importance.

2. The Committee recalls its general recommendation VII in which it explained that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.

3. Article 4 (a) requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.

4. In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

5. Article 4 (a) also penalizes the financing of racist activities, which the Committee takes to include all the activities mentioned in paragraph 3 above, that is to say, activities deriving from ethnic as well as racial differences. The Committee calls upon States parties to investigate whether their national law and its implementation meet this requirement.

6. Some States have maintained that in their legal order it is inappropriate to declare illegal an organization before its members have promoted or incited racial discrimination. The Committee is of the opinion that article 4 (b) places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment. These organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished.

7. Article 4 (c) of the Convention outlines the obligations of public authorities. Public authorities at all administrative levels, including municipalities, are bound by this paragraph. The Committee holds that States parties must ensure that they observe these obligations and report on this.

Annex 107

CERD Committee, *General Recommendation No. 13 on the training of law enforcement officials in the protection of human rights*, Forty-second session (1993)

Forty-second session (1993)*

General recommendation XIII on the training of law enforcement officials in the protection of human rights

1. In accordance with article 2, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination, States parties have undertaken that all public authorities and public institutions, national and local, will not engage in any practice of racial discrimination; further, States parties have undertaken to guarantee the rights listed in article 5 of the Convention to everyone without distinction as to race, colour or national or ethnic origin.

2. The fulfilment of these obligations very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest, and upon whether they are properly informed about the obligations their State has entered into under the Convention. Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.

3. In the implementation of article 7 of the Convention, the Committee calls upon States parties to review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented. They should also include respective information thereupon in their periodic reports.

Annex 108

CERD Committee, *General Recommendation No. 20 on article 5 of the Convention*, contained in document A/51/18 (1996)

Forty-eighth session (1996)[**]

General recommendation XX on article 5 of the Convention

1. Article 5 of the Convention contains the obligation of States parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Note should be taken that the rights and freedoms mentioned in article 5 do not constitute an exhaustive list. At the head of these rights and freedoms are those deriving from the Charter of the United Nations and the Universal Declaration of Human Rights, as recalled in the preamble to the Convention. Most of these rights have been elaborated in the International Covenants on Human Rights. All States parties are therefore obliged to acknowledge and protect the enjoyment of human rights, but the manner in which these obligations are translated into the legal orders of States parties may differ. Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights.

2. Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.

3. Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens.

4. The States parties are recommended to report about the non-discriminatory implementation of each of the rights and freedoms referred to in article 5 of the Convention one by one.

5. The rights and freedoms referred to in article 5 of the Convention and any similar rights shall be protected by a State party. Such protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State party concerned to ensure the effective implementation of the Convention and to report thereon under article 9 of the Convention. To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.

[**] Contained in document A/51/18.

Annex 109

CERD Committee, *General Recommendation No. 30 on discrimination against non-citizens*, Sixty-fifth session (2005)

Sixty-fifth session (2005)

General recommendation XXX on discrimination against non-citizens

The Committee on the Elimination of Racial Discrimination,

Recalling the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, and the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination,

Recalling the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, recognized that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices,

Noting that, based on the International Convention on the Elimination of All Forms of Racial Discrimination and general recommendations XI and XX, it has become evident from the examination of the reports of States parties to the Convention that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory,

Having organized a thematic discussion on the issue of discrimination against non-citizens and received the contributions of members of the Committee and States parties, as well as contributions from experts of other United Nations organs and specialized agencies and from non-governmental organizations,

Recognizing the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens,

Basing its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms,

Affirms that:

I. Responsibilities of States parties to the Convention

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights,

the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin;

Recommends,

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

II. Measures of a general nature

6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination;

7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;

8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them;

9. 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;

10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

III. Protection against hate speech and racial violence

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;

12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

IV. Access to citizenship

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;

14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality;

15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;

16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;

17. Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party;

V. Administration of justice

18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;

19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;

20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law;

21. Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations

providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;

22. Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment;

23. Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny;

24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

VI. Expulsion and deportation of non-citizens

25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;

26. Ensure that non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;

27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;

28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

VII. Economic, social and cultural rights

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;

30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;

31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;

32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;

33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;

34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;

36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;

37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;

38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks;

39. The present general recommendation replaces general recommendation XI (1993).

Annex 110

CERD Committee, *General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, Sixty-fifth session (2005)

Sixty-fifth session (2005)

General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system

The Committee on the Elimination of Racial Discrimination,

Recalling the definition of racial discrimination set out in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Recalling the provisions of article 5 (*a*) of the Convention, under which States parties have an obligation 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 right to equal treatment before the tribunals and all other organs administering justice,

Recalling that article 6 of the Convention requires States parties to assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination,

Referring to paragraph 25 of the declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, which expressed "profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal system and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being overrepresented among persons under detention or imprisoned",

Referring to the work of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights (see E/CN.4/Sub.2/2005/7) concerning discrimination in the criminal justice system,

Bearing in mind the reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,

Referring to the 1951 Convention relating to the Status of Refugees, in particular article 16, which stipulates that "[a] refugee shall have free access to the courts of law on the territory of all Contracting States",

Bearing in mind the observations relating to the functioning of the system of justice made in the Committee's conclusions concerning reports submitted by States parties and in general recommendations XXVII (2000) on discrimination against Roma, XXIX (2002) on discrimination based on descent and XXX (2004) on discrimination against non-citizens,

Convinced that, even though the system of justice may be regarded as impartial and not affected by racism, racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect,

Considering that no country is free from racial discrimination in the administration and functioning of the criminal justice system, regardless of the type of law applied or the judicial system in force, whether accusatorial, inquisitorial or mixed,

Considering that the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries,

Determined to combat all forms of discrimination in the administration and functioning of the criminal justice system which may be suffered, in all countries of the world, by persons belonging to racial or ethnic groups, in particular non-citizens - including immigrants, refugees, asylum-seekers and stateless persons - Roma/Gypsies, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society, paying particular attention to the situation of women and children belonging to the aforementioned groups, who are susceptible to multiple discrimination because of their race and because of their sex or their age,

Formulates the following recommendations addressed to States parties:

I. General steps

A. Steps to be taken in order to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system; the search for indicators attesting to such discrimination

1. Factual indicators

1. States parties should pay the greatest attention to the following possible indicators of racial discrimination:

(a) The number and percentage of persons belonging to the groups referred to in the last paragraph of the preamble who are victims of aggression or other offences, especially when they are committed by police officers or other State officials;

(b) The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country. Such a statistic should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism;

(c) Insufficient or no information on the behaviour of law enforcement personnel vis-à-vis persons belonging to the groups referred to in the last paragraph of the preamble;

(d) The proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society;

(e) The number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports;

(f) The handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups;

(g) The insufficient representation of persons belonging to those groups among the ranks of the police, in the system of justice, including judges and jurors, and in other law enforcement departments.

2. In order for these factual indicators to be well known and used, States parties should embark on regular and public collection of information from police, judicial and prison authorities and immigration services, while respecting standards of confidentiality, anonymity and protection of personal data.

3. In particular, States parties should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia, as well as on compensation awarded to the victims of such acts, whether such compensation is paid by the perpetrators of the offences or under State compensation plans financed from public funds.

2. Legislative indicators

4. The following should be regarded as indicators of potential causes of racial discrimination:

(a) Any gaps in domestic legislation on racial discrimination. In this regard, States parties should fully comply with the requirements of article 4 of the Convention and criminalize all acts of racism as provided by that article, in particular the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, violence or incitement to racial violence, but also racist propaganda activities and participation in racist organizations. States parties are also encouraged to incorporate a provision in their criminal legislation to the effect that committing offences for racial reasons generally constitutes an aggravating circumstance;

(b) The potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities. States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons belonging to the groups referred to in the last paragraph of the preamble.

B. Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system

5. States parties should pursue national strategies the objectives of which include the following:

(a) To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality;

(b) To develop, through appropriate education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensitization to intercultural relations, for law enforcement officials: police personnel, persons working in the system of justice, prison institutions, psychiatric establishments, social and medical services, etc.;

(c) To foster dialogue and cooperation between the police and judicial authorities and the representatives of the various groups referred to in the last paragraph of the preamble, in order to combat prejudice and create a relationship of trust;

(d) To promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice;

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;

(f) To make the necessary changes to the prison regime for prisoners belonging to the groups referred to in the last paragraph of the preamble, so as to take into account their cultural and religious practices;

(g) To institute, in situations of mass population movements, the interim measures and arrangements necessary for the operation of the justice system in order to take account of the particularly vulnerable situation of displaced persons, in particular by setting up decentralized courts at the places where the displaced persons are staying or by organizing mobile courts;

(h) To set up, in post-conflict situations, plans for the reconstruction of the legal system and the re-establishment of the rule of law throughout the territory of the countries concerned, by availing themselves, in particular, of the international technical assistance provided by the relevant United Nations entities;

(i) To implement national strategies or plans of action aimed at the elimination of structural racial discrimination. These long-term strategies should include specific objectives and actions as well as indicators against which progress can be measured. They should include, in particular, guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups;

(j) To entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action and guidelines against racial discrimination, identifying undetected manifestations of racial discrimination and submitting recommendations and proposals for improvement.

II. Steps to be taken to prevent racial discrimination with regard to victims of racism

A. Access to the law and to justice

6. In accordance with article 6 of the Convention, States parties are obliged to guarantee the right of every person within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.

7. In order to facilitate access to justice for the victims of racism, States parties should strive to supply the requisite legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights.

8. In that regard, States parties should promote, in the areas where such persons live, institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation.

9. States parties should also expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organizations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.

B. Reporting of incidents to the authorities competent for receiving complaints

10. States parties should take the necessary steps to ensure that the police services have an adequate and accessible presence in the neighbourhoods, regions, collective facilities, camps or centres where the persons belonging to the groups referred to in the last paragraph of the preamble reside, so that complaints from such persons can be expeditiously received.

11. The competent services should be instructed to receive the victims of acts of racism in police stations in a satisfactory manner, so that complaints are recorded immediately, investigations are pursued without delay and in an effective, independent and impartial manner, and files relating to racist or xenophobic incidents are retained and incorporated into databases.

12. Any refusal by a police official to accept a complaint involving an act of racism should lead to disciplinary or penal sanctions, and those sanctions should be increased if corruption is involved.

13. Conversely, it should be the right and duty of any police official or State employee to refuse to obey orders or instructions that require him or her to commit violations of human rights, particularly those based on racial discrimination. States parties should guarantee the freedom of any official to invoke this right without fear of punishment.

14. In cases of allegations of torture, ill-treatment or executions, investigations should be conducted in accordance with the Principles on the Effective Prevention and Investigation of

Extra-legal, Arbitrary and Summary Executions[i] and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[ii]

C. Initiation of judicial proceedings

15. States parties should remind public prosecutors and members of the prosecution service of the general importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole.

16. In advance of the initiation of proceedings, States parties could also encourage, with a view to respecting the rights of the victims, the use of parajudicial procedures for conflict resolution, including customary procedures compatible with human rights, mediation or conciliation, which can serve as useful options for the victims of acts of racism and to which less stigma may be attached.

17. In order to make it easier for the victims of acts of racism to bring actions in the courts, the steps to be taken should include the following:

(a) Offering procedural status for the victims of racism and xenophobia and associations for the protection of the rights of such victims, such as an opportunity to associate themselves with the criminal proceedings, or other similar procedures that might enable them to assert their rights in the criminal proceedings, at no cost to themselves;

(b) Granting victims effective judicial cooperation and legal aid, including the assistance of counsel and an interpreter free of charge;

(c) Ensuring that victims have information about the progress of the proceedings;

(d) Guaranteeing protection for the victim or the victim's family against any form of intimidation or reprisals;

(e) Providing for the possibility of suspending the functions, for the duration of the investigation, of the agents of the State against whom the complaints were made.

18. In countries where there are assistance and compensation plans for victims, States parties should ensure that such plans are available to all victims without discrimination and regardless of their nationality or residential status.

D. Functioning of the system of justice

19. States parties should ensure that the system of justice:

(a) Grants a proper place to victims and their families, as well as witnesses, throughout the proceedings, by enabling complainants to be heard by the judges during the examination proceedings and the court hearing, to have access to information, to confront hostile witnesses, to challenge evidence and to be informed of the progress of proceedings;

(b) Treats the victims of racial discrimination without discrimination or prejudice, while respecting their dignity, through ensuring in particular that hearings, questioning or confrontations are carried out with the necessary sensitivity as far as racism is concerned;

(c) Guarantees the victim a court judgement within a reasonable period;

(d) Guarantees victims just and adequate reparation for the material and moral harm suffered as a result of racial discrimination.

III. Steps to be taken to prevent racial discrimination in regard to accused persons who are subject to judicial proceedings

A. Questioning, interrogation and arrest

20. States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.

21. States parties should prevent and most severely punish violence, acts of torture, cruel, inhuman or degrading treatment and all violations of human rights affecting persons belonging to the groups referred to in the last paragraph of the preamble which are committed by State officials, particularly police and army personnel, customs authorities, and persons working in airports, penal institutions and social, medical and psychiatric services.

22. States parties should ensure the observance of the general principle of proportionality and strict necessity in recourse to force against persons belonging to the groups referred to in the last paragraph of the preamble, in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[iii]

23. States parties should also guarantee to all arrested persons, whatever the racial, national or ethnic group to which they belong, enjoyment of the fundamental rights of the defence enshrined in the relevant international human rights instruments (especially the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights), in particular the right not to be arbitrarily arrested or detained, the right to be informed of the reasons for their arrest, the right to the assistance of an interpreter, the right to the assistance of counsel, the right to be brought promptly before a judge or an authority empowered by the law to perform judicial functions, the right to consular protection guaranteed by article 36 of the Vienna Convention on Consular Relations and, in the case of refugees, the right to contact the Office of the United Nations High Commissioner for Refugees.

24. As regards persons placed in administrative holding centres or in holding areas in airports, States parties should ensure that they enjoy sufficiently decent living conditions.

25. Lastly, as regards the questioning or arrest of persons belonging to the groups referred to in the last paragraph of the preamble, States parties should bear in mind the special precautions to be taken when dealing with women or minors, because of their particular vulnerability.

B. Pretrial detention

26. Bearing in mind statistics which show that persons held awaiting trial include an excessively high number of non-nationals and persons belonging to the groups referred to in the last paragraph of the preamble, States parties should ensure:

(a) That the mere fact of belonging to a racial or ethnic group or one of the aforementioned groups is not a sufficient reason, de jure or de facto, to place a person in pretrial detention. Such pretrial detention can be justified only on objective grounds stipulated in the law, such as the risk of flight, the risk that the person might destroy evidence or influence witnesses, or the risk of a serious disturbance of public order;

(b) That the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons belonging to such groups, who are often in straitened economic circumstances, so as to prevent this requirement from leading to discrimination against such persons;

(c) That the guarantees often required of accused persons as a condition of their remaining at liberty pending trial (fixed address, declared employment, stable family ties) are weighed in the light of the insecure situation which may result from their membership of such groups, particularly in the case of women and minors;

(d) That persons belonging to such groups who are held pending trial enjoy all the rights to which prisoners are entitled under the relevant international norms, and particularly the rights specially adapted to their circumstances: the right to respect for their traditions as regards religion, culture and food, the right to relations with their families, the right to the assistance of an interpreter and, where appropriate, the right to consular assistance.

C. The trial and the court judgement

27. Prior to the trial, States parties may, where appropriate, give preference to non-judicial or parajudicial procedures for dealing with the offence, taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples.

28. In general, States parties must ensure that persons belonging to the groups referred to in the last paragraph of the preamble, like all other persons, enjoy all the guarantees of a fair trial and equality before the law, as enshrined in the relevant international human rights instruments, and specifically.

1. The right to the presumption of innocence

29. This right implies that the police authorities, the judicial authorities and other public authorities must be forbidden to express their opinions publicly concerning the guilt of the accused before the court reaches a decision, much less to cast suspicion in advance on the members of a specific racial or ethnic group. These authorities have an obligation to ensure that the mass media do not disseminate information which might stigmatize certain categories of persons, particularly those belonging to the groups referred to in the last paragraph of the preamble.

2. The right to the assistance of counsel and the right to an interpreter

30. Effectively guaranteeing these rights implies that States parties must set up a system under which counsel and interpreters will be assigned free of charge, together with legal help or advice and interpretation services for persons belonging to the groups referred to in the last paragraph of the preamble.

3. The right to an independent and impartial tribunal

31. States parties should strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel.

32. They should prevent all direct influence by pressure groups, ideologies, religions and churches on the functioning of the system of justice and on the decisions of judges, which may have a discriminatory effect on certain groups.

33. States parties may, in this regard, take into account the Bangalore Principles of Judicial Conduct adopted in 2002 (E/CN.4/2003/65, annex), which recommend in particular that:

- Judges should be aware of the diversity of society and differences linked with background, in particular racial origins;
- They should not, by words or conduct, manifest any bias towards persons or groups on the grounds of their racial or other origin;
- They should carry out their duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
- They should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

D. Guarantee of fair punishment

34. In this regard, States should ensure that the courts do not apply harsher punishments solely because of an accused person's membership of a specific racial or ethnic group.

35. Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences and to capital punishment in countries which have not abolished it, bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.

36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

37. Punishments targeted exclusively at non-nationals that are additional to punishments under ordinary law, such as deportation, expulsion or banning from the country concerned, should be imposed only in exceptional circumstances and in a proportionate manner, for serious reasons related to public order which are stipulated in the law, and should take into account the need to respect the private family life of those concerned and the international protection to which they are entitled.

E. Execution of sentences

38. When persons belonging to the groups referred to in the last paragraph of the preamble are serving prison terms, the States parties should:

(a) Guarantee such persons the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation: the right to respect for their religious and cultural practices, the right to respect for their customs as regards food, the right to relations with their families, the right to the assistance of an interpreter, the right to basic welfare benefits and, where appropriate, the right to consular assistance. The medical, psychological or social services offered to prisoners should take their cultural background into account;

(b) Guarantee to all prisoners whose rights have been violated the right to an effective remedy before an independent and impartial authority;

(c) Comply, in this regard, with the United Nations norms in this field, and particularly the Standard Minimum Rules for the Treatment of Prisoners,[iv] the Basic Principles for the Treatment of Prisoners[v] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;[vi]

(d) Allow such persons to benefit, where appropriate, from the provisions of domestic legislation and international or bilateral conventions relating to the transfer of foreign prisoners, offering them an opportunity to serve the prison term in their countries of origin.

39. Further, the independent authorities in the States parties that are responsible for supervising prison institutions should include members who have expertise in the field of racial discrimination and sound knowledge of the problems of racial and ethnic groups and the other vulnerable groups referred to in the last paragraph of the preamble; when necessary, such supervisory authorities should have an effective visit and complaint mechanism.

40. When non-nationals are sentenced to deportation, expulsion or banning from their territory, States parties should comply fully with the obligation of non-refoulement arising out of the international norms concerning refugees and human rights, and ensure that such persons will not be sent back to a country or territory where they would run the risk of serious violations of their human rights.

41. Lastly, with regard to women and children belonging to the groups referred to in the last paragraph of the preamble, States parties should pay the greatest attention possible with a view to ensuring that such persons benefit from the special regime to which they are entitled in relation to the execution of sentences, bearing in mind the particular difficulties faced by mothers of families and women belonging to certain communities, particularly indigenous communities.

Notes

[i] Recommended by the Economic and Social Council in its resolution 1989/65 of 24 May 1989.

[ii] Recommended by the General Assembly in its resolution 55/89 of 4 December 2000.

[iii] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990.

[iv] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[v] Adopted and proclaimed by the General Assembly in its resolution 45/111 of 14 December 1990.

[vi] Adopted by the General Assembly in its resolution 43/173 of 9 December 1988.

Annex 111

CERD Committee, *Reports Submitted by States Parties in Accordance with Article 9 of the Convention: United Arab Emirates*, document CERD/C/ARE/12-17 (27 March 2009)

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

REPORTS SUBMITTED BY STATES PARTIES IN ACCORDANCE WITH ARTICLE 9 OF THE CONVENTION

Seventeenth periodic report of States parties due in 2007*

UNITED ARAB EMIRATES**

[Original: Arabic]
[29 February 2008]

* This document contains the 12th, 13th, 14th, 15th, 16th and 17th periodic reports of the United Arab Emirates, due on 20 July 1997, 1999, 2001, 2003, 2005 and 2007, respectively. For the 7th to 11th periodic reports of the United Arab Emirates (consolidated document) and the summary records of the meetings at which the Committee considered those reports, see documents CERD/C/279/Add.1 and CERD/C/SR.1113.

** In accordance with the information transmitted to the States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services.

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CONTENTS

Introduction

1. Ever since its inception, the United Arab Emirates has striven to observe and protect human rights and ensure that they are safeguarded under its Constitution and legislation. As accession to the international instruments in which these rights are enshrined is one of its key foreign policy goals, the State acceded to the International Convention on the Elimination of All Forms of Racial Discrimination in 1974, has scrupulously adhered to its provisions and makes constant appeals, in international and regional forums, for the prohibition of racial discrimination and the right of all to a life free from discrimination on grounds of race, sex or colour.

2. The United Arab Emirates has submitted its periodic reports under article 9 of the Convention, which requires States parties to submit to the Committee on the Elimination of Racial Discrimination, for consideration and evaluation, reports on the legislative, judicial, administrative or other measures which they have taken to give effect to the Convention. The United Arab Emirates submitted its twelfth periodic report to the Committee on 23 February 1995. The present report contains its thirteenth to seventeenth periodic reports on the achievements in the social, economic, legislative and regulatory domains which the State has scored in furtherance of the general rights and freedoms exercised in the United Arab Emirates.

3. The present report was prepared under the supervision of the Ministry of Foreign Affairs and with input from all relevant federal and local institutions, in order to ensure consistency with the guidelines on reports adopted by the Committee on the Elimination of Racial Discrimination.

I. BASIC INFORMATION: GENERAL FRAMEWORK FOR STATE MEASURES TO ELIMINATE RACIAL DISCRIMINATION

A. Basic information

4. The United Arab Emirates was established in 1971 as a federation of seven States - Abu Dhabi, Dubai, Sharjah, Ras al-Khaimah, Ajman, Umm al-Qaiwain and Fujairah - with Abu Dhabi as its capital. The State, which is in Asia, occupies the eastern part of the Arabian Peninsula between 22°50' and 26°N and 51° and 56°25'E. It is bounded by Qatar and the Kingdom of Saudi Arabia in the north of the Peninsula and the west of the State, by the Sultanate of Oman and the Kingdom of Saudi Arabia in the south and by the Gulf of Oman in the east.

Area

5. The total area of the State is 83,600 square kilometres. This includes a number of islands with a total area of approximately 5,900 square kilometres.

6. The coastline stretches for 644 kilometres along the southern shore of the Peninsula, from the base of the Peninsula, Qatar, in the west, to Ras Musandam in the east. The eastern shore extends for 90 kilometres along the Gulf of Oman.

Topography

7. Most of the land, particularly in the west, consists of desert interspersed with several well-known oases, such as Al-Ain and Liwa, in addition to fertile pastureland around Al-Zafrah, where groundwater is plentiful. To the south of these areas lie the sand dunes that form the boundary of Al-Ruba' al-Khalil (the Empty Quarter).

8. Jabal Hafit marks the southern boundary of the Buraimi Oasis, where the city of Al-Ain is found, and is approximately 1,220 metres high. In addition, the Hajar mountain range, which is 80 kilometres long from north to south and approximately 32 kilometres wide, cuts across the Musandam Peninsula, then enters the Sultanate of Oman and runs down to the eastern tip of the Arabian Peninsula. The city of Ras al-Khaimah stands at the foot of the northern flanks of this range, which reach an altitude of around 2,438 metres at their highest point. On the western flanks are a number of large valleys and ridges, some of which are used for agriculture.

9. Most of the coastline is sandy, except in the north, in Ras al-Khaimah, at the headland of the Hajar mountain range.

10. The territorial waters tend to be shallow, with an average depth of 35 metres and a maximum depth of 90 metres, except in the Straits of Hormuz, where the water is up to 145 metres deep. The State's territorial waters contain many coral reefs studded with pearl oysters and teeming with fish.

Climate

11. The United Arab Emirates is in the tropical dry zone that stretches across Asia and North Africa, and is also affected by local environmental factors, because of its position on the shores of the Arabian Gulf and of the Gulf of Oman, which is linked to the Red Sea through the Mandeb Straits.

12. High summer temperatures are associated with high humidity rates, and there are marked differences in climate between the coastal, inner desert and mountainous zones which together make up the topography of the State. The State is buffeted by seasonal and non-seasonal winds of two different kinds, which pick up strength in the spring and late summer. It receives little rainfall, and in variable quantities, between November and April.

Population

13. According to the latest figures, the estimated population of the State was around 4,229,000 in 2006. Approximately 3.5 million persons live in urban areas and 700,000 in remote parts of the State. United Arab Emirates nationals account for around 21 per cent of the population. According to the census results, 2.5 million men and women over the age of 15 in the State are economically active.

Table 1

Geographical distribution of the population of the Emirates, 2006

Emirate	No.	Percentage
Abu Dhabi	1 430 000	33.81
Dubai	1 372 000	32.44
Sharjah	821 000	19.42
Ajman	212 000	5.01
Umm al-Qaiwain	50 000	1.18
Ras al-Khaimah	214 000	5.06
Fujairah	130 000	3.08
Total	4 229 000	100.00

Source: *The Emirates in Figures, 2007*, Ministry of the Economy.

Table 2

Population by nationality and sex (2005 census)

Nationals			Non-nationals			Total		
Male	Female	Total	Male	Female	Total	Male	Female	Total
417 917	407 578	825 495	2 388 224	892 708	3 280 932	2 806 141	1 300 286	4 106 427

Source: *The Emirates in Figures, 2007*, Ministry of the Economy.

B. Political system

14. The United Arab Emirates is a federal State with a federal political system. The Constitution defines the basic features, aims and values of the Federation and the matters entrusted to the Federation in the exercise of its sovereignty throughout the territory and territorial waters inside the international borders of the member Emirates. The member Emirates exercise sovereignty throughout the territory and territorial waters over all matters which are not entrusted to the Federation under the Constitution. The people of the Federation are one people and are part of the Arab nation. Islam is the official religion of the Federation and the sharia is the main source of legislation. The official language of the Federation is Arabic. The federal authorities established by the Constitution are the following.

1. Supreme Council of the Federation

15. This is the highest authority in the State and consists of the rulers of all the Emirates in the Federation or, in the event of their absence or inability to attend, their representatives. Each Emirate has one vote in Council proceedings.

16. The Supreme Council formulates the State's general policy on all matters for which the Federation has competence under the Constitution, and considers all questions pertaining to the furtherance of the Federation's goals and the common interests of the member Emirates. It also ratifies federal laws and decrees and international treaties, approves the appointment of the Prime Minister and accepts his resignation or release from his functions upon the

recommendation of the President of the Federation. It likewise approves the appointment of the president and justices of the Federal Supreme Court and accepts their resignation or dismissal under the conditions laid down in the Constitution. The Council also has supreme oversight functions with regard to the general affairs of the Federation. Article 47 of the Constitution provides that the Supreme Council of the Federation shall carry out the following tasks:

- Formulate general policy on all matters for which the Federation has competence under the Constitution, and consider all questions pertaining to the furtherance of the Federation's goals and the common interests of the member Emirates
- Ratify federal laws prior to their promulgation, including the Federation's annual general budget laws and final accounts
- Ratify decrees on matters subject to the Constitution
- Ratify or approve Supreme Council decrees prior to their issuance by the President of the Federation
- Ratify international treaties and conventions by decree
- Approve the appointment of the Prime Minister and accept his resignation or his release from his functions upon the recommendation of the President of the Federation
- Approve, by decree, the appointment of the president and justices of the Federal Supreme Court and accept their resignation or dismissal under the conditions laid down in the Constitution
- Ensure supreme oversight of the general affairs of the Federation
- Perform any other tasks stipulated in the Constitution or in federal laws

17. Article 49 of the Constitution states: "Supreme Council decisions on substantive matters are taken by a majority of five members, provided that majority includes the votes of the Emirates of Abu Dhabi and Dubai. The minority shall abide by the majority's decision."

18. Council decisions on procedural matters are adopted by majority vote. These matters are defined in the Council's rules of procedure.

2. President and Vice-President of the Federation

19. The Supreme Council of the Federation elects the President and Vice-President from among its members. The Vice-President performs all the duties of the President when the latter is absent for any reason. The President and Vice-President serve a five-year term and can be re-elected. Article 51 of the Constitution provides as follows:

> "The Supreme Council of the Federation elects from among its members the President and the Vice-President of the Federation. The Vice-President of the Federation performs all the duties of the President when the latter is absent for any reason."

20. Article 54 of the Constitution states that the President of the Federation performs the following duties:

(a) Presiding over the Supreme Council and guiding its deliberations;

(b) Convening and ending meetings of the Supreme Council in accordance with the Council's rules of procedure; a meeting of the Council must be convened whenever a member requests one;

(c) Convening joint meetings of the Supreme Council and Federal Cabinet as and when required;

(d) Signing and issuing federal laws, decrees and decisions ratified by the Supreme Council;

(e) Appointing the Prime Minister of the Federation, accepting his resignation and releasing him from his functions, subject to the approval of the Supreme Council; appointing the Deputy Prime Minister of the Federation and ministers, accepting their resignation and releasing them from their duties on the recommendation of the Prime Minister of the Federation;

(f) Appointing diplomatic representatives of the Federation to foreign States, as well as other senior civilian and military federal officials, excluding the president and justices of the Supreme Court, and accepting their resignation and dismissal subject to the approval of the Federal Cabinet. Decisions to appoint, accept the resignation of, or dismiss these persons are taken by decree and in accordance with federal law;

(g) Signing the credentials of diplomatic representatives to the Federation from foreign States and entities; accepting the accreditation of foreign diplomatic and consular representatives to the Federation and receiving their credentials; signing representatives' letters of appointment and credentials;

(h) Overseeing the implementation of federal laws, decrees and decisions by the Federal Cabinet and ministers;

(i) Representing the Federation at home and abroad and in all international relations;

(j) Exercising the right to grant a pardon and commute sentences, and endorsing death sentences in accordance with the Constitution and federal law;

(k) Bestowing military and civilian medals and honours in accordance with the relevant laws;

(l) Performing any other functions vested in him by the Supreme Council or pursuant to the present Constitution or federal law.

3. Federal Cabinet

21. As stated in article 55 of the Constitution, the Federal Cabinet consists of the Prime Minister, the Deputy Prime Minister and a number of ministers. Article 56 states: "Ministers

shall be selected from among citizens of the Federation who are well-known for their skills and experience." Article 60 states: "The Cabinet, in its capacity as the executive body of the Federation, subject to oversight by the President of the Federation and the Supreme Council, shall deal with all aspects of domestic and foreign affairs for which the Federation has competence under the present Constitution and federal law."

22. In particular, the Cabinet carries out the following functions:

(a) Following up on the implementation of the general domestic and foreign policy of the Federal Government;

(b) Proposing draft federal laws and transmitting them to the Federal National Council before they are submitted to the President of the Federation to lay before the Supreme Council for ratification;

(c) Preparing the Federation's draft general annual budget and final accounts;

(d) Preparing draft decrees and decisions of different kinds;

(e) Formulating regulations on the implementation of federal laws without introducing any amendments, invalidating provisions or derogations, and formulating disciplinary regulations and regulations on the structure of public administration and institutions, in accordance with the present Constitution and federal laws. The competent federal minister or any other administrative body may be empowered, by means of a special legal provision or by the Cabinet, to issue certain of these regulations;

(f) Overseeing the implementation by all the competent authorities in the Federation or the Emirates of federal laws, decrees, regulations and decisions;

(g) Overseeing the enforcement of federal court judgements and international treaties ratified by the Federation;

(h) Appointing and dismissing, in accordance with the law, federal officials whose appointment or dismissal does not need to be effected by decree;

(i) Monitoring the performance of the federal administration and public institutions and the general conduct and discipline of federal employees;

(j) Any other particular functions vested in it pursuant to the law or by the Supreme Council under the present Constitution.

4. Federal National Council

23. The Federal National Council comprises 40 seats which are allocated among the member Emirates as follows: Abu Dhabi: 8 seats; Dubai: 8 seats; Sharjah: 6 seats; Ras al-Khaimah: 6 seats; Ajman: 4 seats; Umm al-Qaiwain: 4 seats; and Fujairah: 4 seats.

Article 69 of the Constitution states: “Every Emirate shall be left to determine the method for selecting its representatives in the Federal National Council.” Article 70 defines the conditions for membership as follows:

> “Members of the Federal National Council must satisfy the following criteria:
>
> “(a) They must be citizens of one of the Emirates in the Federation and reside permanently in the Emirate that they represent in the Council.
>
> “(b) At the time of selection, they must not be below 25 years of age.
>
> “(c) They must have civil capacity, a record of exemplary conduct, a good reputation and no previous convictions for dishonourable offences, unless they have been rehabilitated in accordance with the law.
>
> “(d) They must be completely literate.”

24. Article 71 of the Constitution states: “Membership of the Federal National Council may not be combined with any other public office in the Federation, including ministerial office.” With regard to the term of membership, article 72 of the Constitution states: “Membership of the Council shall be for two years, beginning on the date of the Council’s first meeting. Thereafter, the Council shall define the period remaining until the end of the transition phase referred to in article 144 of the present Constitution. Members may be re-elected when their mandate comes to an end.”

25. Article 89 of the Constitution refers to the Council’s law-making functions. It states: “Without prejudice to article 110, federal bills, including finance bills, shall be referred to the Federal National Council prior to submission to the President of the Federation for consideration and ratification by the Supreme Council. These bills shall be debated by the Federal National Council, which may approve, amend or reject them.”

26. As for international treaties, article 91 of the Constitution states: “The Government shall notify the Federal Council of the international treaties and conventions which it concludes with other States and international organizations and shall provide it with relevant background information.”

27. Federal Supreme Council Decision No. 4 of 2006, concerning the method for selecting representatives of the Emirates to the Federal National Council, was a constitutional turning point in the consolidation of the democratic process on which the State has embarked, a process based on political participation by all members of society and the empowerment of the people of the Emirates to elect the members of the Council according to a procedure which combines elections with appointments in the initial stage. Article 1 of the Federal Supreme Council decision states: “Half the members shall be elected by an electoral college consisting of a minimum of multiples of one hundred times the number of representatives of each Emirate.” Article 2 states: “The other half shall be chosen by the ruler from among the members of each Emirate.”

5. The federal court system

28. Article 94 of the Constitution states: “Justice is the foundation of government. Judges are independent and in the performance of the duties are subject to no authority other than the law and their own conscience.” The court system in the United Arab Emirates consists of the Federal Supreme Court, which sits in the federal capital, and appeals courts and courts of first instance in various cities. The Federal Supreme Court is composed of the president and up to five justices. They are appointed by a decree of the President of the Federation, subject to the approval of the Supreme Council. Local judicial bodies in each Emirate deal with legal matters that do not come under the purview of the federal courts.

29. Article 99 of the Constitution defines the functions of the Federal Supreme Court as follows:

> The Federal Supreme Court shall issue rulings on the following matters:
>
> (a) Disputes between member Emirates of the Federation or between one or more Emirates and the Federal Government which are referred to the Court at the request of any of the parties concerned;
>
> (b) Verification of federal laws which one or more Emirates challenge on grounds of unconstitutionality, and verification of any law adopted by an Emirate which is challenged by a federal authority on the grounds of unconstitutionality or incompatibility with federal law;
>
> (c) Verification of the constitutionality of laws, legislation and regulations in general, upon the request of any domestic court hearing a case. The court concerned must abide by the Federal Supreme Court’s ruling on the matter;
>
> (d) Interpreting the Constitution, at the request of a federal authority or the Government of an Emirate; such interpretations shall be binding on all;
>
> (e) Trying ministers and senior federal officials appointed by decree for offences committed during the course of their official duties, at the request of the Supreme Council and in accordance with the relevant law;
>
> (f) Trying offences that directly harm the interests of the Federation, such as offences against internal or external security, the forging of official documents and the seals of any federal authority and counterfeiting;
>
> (g) Adjudicating disputes over jurisdiction between the federal courts and local federal bodies in the Emirates;
>
> (h) Adjudicating disputes between federal institutions in different Emirates over jurisdiction and applicable federal regulations;
>
> (i) Any other functions entrusted to it under the present Constitution or that may be entrusted to it pursuant to a federal law.

C. Economic and social development

30. The development policy which the United Arab Emirates has adopted has succeeded in bringing about high rates of growth in all economic and social sectors. Gross domestic product (GDP) rose from 321 billion dirhams (Dh) in 2003 to Dh 599.23 billion in 2006. The contribution of the non-petroleum sectors amounted to Dh 375.809 billion, accounting for 62.7 per cent of total GDP and 223.4 billion dirhams, while income from the oil and gas sector accounted for 37.3 per cent of GDP. Income per capita rose from Dh 91,500 in 2003 to Dh 147,100 in 2006.

31. Since its inception, the United Arab Emirates has experienced rapid economic and social growth such as is rarely achieved in developing, or even advanced, societies. It has used growing revenue from oil sales to supply the basic needs of society. The State is one of those countries that has made a good impression on the international community, because of its generous donations of aid and assistance to Arab States and other developing countries across the world. The following are some of the State's most important domestic achievements:

(a) The establishment of a majority of existing infrastructure projects;

(b) The establishment of educational and health institutions and the delivery of educational, health, social and cultural services;

(c) The procurement of production and investment materials and equipment for the creation of different types of industries;

(d) The enactment of laws and regulations and the creation of a modern structure for the administration of the State;

(e) The enactment of flexible laws to facilitate recruitment of foreign labour and supply the necessary manpower to meet the requirements of different development projects;

(f) The use of modern technologies tailored to the real needs of the State;

(g) The encouragement of women's participation in the workforce and in development efforts;

(h) The creation of channels for economic, commercial, political and cultural cooperation with the outside world in furtherance of the mutual interests of the State and of friendly and fraternal States and peoples.

32. The United Arab Emirates pursues a liberal economic policy which is based on free trade, commercial exchanges and the free flow of capital and services. The policy is geared towards the development of the national economy and the diversification of sources of income. The Emirates also seeks to achieve balanced economic and social development for the State as a whole and in each member Emirate of the Federation, endeavouring to strike a balance between social development and economic growth when formulating its policies and future plans. As a result of its development policies, the United Arab Emirates has managed to place itself among the leading countries of the world. The 2005 Human Development Report published by the

United Nations Development Programme (UNDP) gave the State a positive ranking, placing it in forty-first position out of the 177 States covered by the report and second in the Arab world.

33. The report shows that the State has achieved real progress when measured against the development indicators of gender and gender equality. This is the result of quantitative and qualitative changes in the areas of education and health.

34. The report also shows that the State enjoys a high standard of living in general and that the incidence of poverty and deprivation has fallen to a record low, while adult literacy rates have risen. The advances made in regard to health services delivery are clearly reflected in all the health indicators, pointing, for example, to a fall in the infant and under-5 mortality rates, in the percentage of babies with low birthweight and in the maternal mortality rate. The number of children over the age of 1 who have been fully vaccinated against tuberculosis and measles has risen, and the number of doctors per 1,000 of the population has likewise risen. The report points to an increase in the proportion of GDP spent on health services in the Emirates.

35. With regard to education and modern technology, the 2005 Human Development Report shows that the Emirates has made considerable endeavours and spent increasing amounts of money on education, raising the rate of enrolment in primary education and increasing the proportion of girls in different stages of education compared to boys.

36. There have also been major changes and a huge qualitative shift in the fixed and mobile telephones sector and in Internet use, as a result of the growing development and expansion of services.

37. By way of confirmation of the findings of the Human Development Report, the World Development Indicators 2007 report issued by the World Bank also shows that the Emirates has a high ranking when measured against the world development indicators, recording one of the strongest performances globally in education, health, the environment and the promotion of inward investment. At the same time, the sixth annual report of the World Economic Forum, on information technology in 2006-2007, which contains an indicator on network readiness as a measure of progress in the information technology and communications sector, shows that the Emirates occupies a leading position in the Arab and Islamic world, ranking twenty-ninth globally.

38. In view of the high standard of living and economic and social prosperity which the Emirates enjoys, the Mercer Human Resources Consulting company ranked Abu Dhabi and Dubai top among the cities in the Middle East and the Arab world in terms of quality of life. They shared fifty-eighth place out of a total of 215 cities across the world, which were ranked according to the health and medical services available and quality of life.

39. The delegation from the International Monetary Fund which visited the State recently praised the excellent economic performance resulting from the State's policy of: relying on market mechanisms; strengthening economic policy; ensuring that investments of oil revenue are properly managed; according an important role in development to the private sector; and successfully turning the economy into an integrated economy where the State plays a stronger role as a regional centre for the export of services, so as to promote social development and individual prosperity.

40. The delegation also welcomed the Federal Government's achievements in regard to financial reforms, including draft budget programmes and the performance and implementation of the global Government's financial statistics system and consolidated accounts.

41. The State has furthermore made efforts to restructure activities and devolve services provision to the private sector. The Government has introduced efficiency standards, directed additional expenditure towards the health and education sectors and subsidized housing for citizens on low incomes. The Government has also made efforts to involve the private sector more fully in infrastructure development and the delivery of services such as electricity and water, reducing the number of government-supplied services, devolving their provision to the private sector and cutting down on the number of persons in the Government's employ.

42. The most recent statistics produced by the Ministry of the Economy show that GDP per capita has increased as a result of the State's economic policy, as illustrated in table 3.

Table 3

Indicator		2006
Average GDP per capita	(In Emirates dirhams)	141.7
Total (in thousands)	(United States dollars)	38.6
Workforce (in thousands)	Males	2 288
	Females	359
	Total	2 647
Workforce as a percentage of the total population; crude activity (participation) rate	Males	79.0
	Females	26.9
	Total	62.6
The unemployed as a percentage of the total workforce (unemployment rate)	Males	2.58
	Females	6.96
	Total	3.17
Total allowances:		25.5
Old age allowance		1.1
Child allowance		24.4
Population density per square kilometre		54
Rural population as a percentage of the total population		17.5
Gender ratio (number of males per 100 females)		217
Crude birth rate (per 1,000 population)		14.9
Total fertility rate		1.96
Crude mortality rate (per 1,000 population)		1.55
Life expectancy at birth	Males	76.5
	Females	78.5
	Total	77.4
Infant mortality rate (per 1,000 live births)		7.3
Illiteracy rate*	Males	10.0
	Females	7.6
	Total	9.3

Source: *Emirates in figures, 2007*, Ministry of the Economy.

* Data for 2005.

43. The United Arab Emirates uses oil wealth for social development, in keeping with the fundamental principles on which the federal State was founded and the general aims of development, namely, that the human person in the Emirates must be the beneficiary of development and social services. As a result of this policy, the State has succeeded in helping its people to escape the cycle of poverty, illiteracy and disease, and has improved their economic and social welfare, providing them with free services inter alia in the areas of education, health, housing, culture, sanitation and infrastructure.

44. In a 2005 report, the World Health Organization confirmed that the State of the Emirates has been highly successful in reducing the under-five mortality rate, which is approximately 8 per 1,000 live births. The report indicates that the vaccination rate among newborns and children under 2 has reached 98 per cent and that the Emirates are free from infant poliomyelitis and malaria.

45. As a result of various developments, family life in the Emirates has changed significantly over the past few years, with the shift from Bedouin and nomadic life to a more sedentary existence and from extended families to nuclear families. The roles played by men and women in society have continued to evolve on the basis of complementarity of roles and responsibilities, since men and women have different responsibilities and duties towards the family and society.

46. The Millennium Development Goals report prepared in 2006 by the Ministry of the Economy, in conjunction with the United Nations Development Programme, confirmed that the Emirates has succeeded in meeting many of the Goals, particularly those on education and health, before the May 2015 deadline, and that the relevant indicators are close to those in advanced countries.

47. The State's development strategies are geared towards the promotion of the private sector's role, the diversification of sources of income, the development of human resources and technology transfers and meeting all the requirements for entry into the global economy.

D. Policies and procedures for the elimination of racial discrimination

1. Status of the Convention on the Elimination of All Forms of Racial Discrimination under the State's domestic law

48. Article 46 of the Constitution provides: "The Supreme Council of the Federation is the supreme federal authority and comprises the rulers of all the Emirates that make up the Federation, or, in the event of their absence or inability to attend, their representatives in the respective Emirates. Each Emirate has one vote in Council proceedings."

49. Article 47 of the Constitution, concerning the functions of the Supreme Council, contains a paragraph stating that the Council shall ratify international treaties and conventions by decree. Article 60 of the Constitution, concerning the functions of the Cabinet, contains a paragraph stating that one of the Cabinet's functions is to oversee the enforcement of federal court judgements and international treaties entered into by the Federation.

50. The Constitution makes it clear that a treaty which has been ratified pursuant to a federal decree and published in the Official Gazette carries the force of law and has the status of a State law, if the decree on accession, or ratification, provides that the treaty shall enter into force on the date of publication in the Official Gazette. In this way, the treaty becomes a State law which the Cabinet and relevant minister are bound to enforce. With regard to the link between human rights principles, the prohibition of racial discrimination as provided for under the Convention and the principles set out in the Constitution of the State, all these principles enjoy twofold protection under State law, because they are enshrined in the Constitution and because the Convention has the status of a domestic law, so that no provisions may be enacted that conflict with it.

2. General legal framework for the protection of human rights and prohibition of racial discrimination

51. Since its inception in 1971, the United Arab Emirates has created a legal and legislative system to regulate all relations between persons and institutions in the State. The Constitution is the fundamental reference point for legislation and laws on many different issues.

52. The constitutional guarantees of human rights in the United Arab Emirates are found in the core articles of the Constitution on public rights and freedoms, the provisions of which take precedence over ordinary legislation and laws, are endowed with a binding force and have indisputable legal value. In dealing with public rights and freedoms, the authors of the Constitution of the United Arab Emirates, were guided by the rights, freedoms and guarantees recognized in the Universal Declaration of Human Rights and international human rights treaties. Thus, the Constitution includes most of the rights set forth in those international instruments.

53. Chapter III of the Constitution deals with public rights, freedoms and duties, as provided for in the following articles:

> Article 25: “All persons are equal before the law, and there shall be no discrimination among citizens of the Federation on grounds of origin, ethnicity, religious belief or social status.”
>
> Article 26: “Personal freedom is guaranteed to all citizens, and no one may be arrested, searched or detained other than in accordance with the law. No one may be subjected to torture or degrading treatment.”
>
> Article 29: “Freedom of movement and residence is guaranteed to citizens, subject to the limits laid down by law.”
>
> Article 30: “Freedom of opinion and of oral, written and other forms of expression is guaranteed, subject to the limits laid down by law.”
>
> Article 31: “The freedom and confidentiality of postal and telegram correspondence and other means of communication are guaranteed by law.”
>
> Article 32: “The freedom to perform religious observances in accordance with established traditions is safeguarded, without prejudice to public order or public morals.”

Article 33: “Freedom of assembly and of association is guaranteed, subject to the limits laid down by law.”

Article 34: “Every citizen is free to choose his own occupation, profession or trade, subject to the limits laid down by law and having due regard for the legislation regulating certain professions and trades. No person may be subjected to forced labour other than in the exceptional circumstances provided for by law and in return for compensation. No person may be enslaved.”

Article 35: “Equal access to public employment is afforded to all in accordance with the law. Public employment is national service entrusted to the holders of public positions, who must carry out their official duties solely in the public interest.”

Article 36: “Homes are inviolable and may only be entered without the permission of the owners in accordance with the law and the conditions laid down therein.”

Article 37: “Citizens may not be expelled from, or denied entry to, the Federation.”

Article 38: “The extradition of all citizens and political refugees is prohibited.”

Article 39: “The expropriation of public property is prohibited, and the penalty of expropriation of private property may only be imposed pursuant to a court order and under the conditions defined by law.”

Article 40: “Foreigners in the Federation enjoy the rights and freedoms recognized in the applicable international covenants, treaties and conventions to which the Federation is a party and incur the corresponding obligations.”

Article 41: “Any person may submit a complaint to the competent authorities, including judicial bodies, about violations of the rights and freedoms set out in the present chapter.”

3. Regulations on participation in camel racing

54. Act No. 15 of 2005 regulates participation in camel racing. Article 1 prohibits any form of participation by persons of either sex below the age of 18. The article also renders null and void all procedures for the recruitment of persons in this category. Article 2 prescribes a penalty of up to three years in prison and/or a fine of up to Dh 5,000 for any breach of the Act. The penalty is doubled in cases of recidivism.

55. On 5 August 2005, the United Arab Emirates signed a cooperation agreement with the United Nations Children’s Fund (UNICEF) providing for the identification and registration of [child] camel jockeys and their return to their home countries, local reintegration and social and psychological rehabilitation. The authorities concerned took the necessary action by allocating close to $2.7 million to rehabilitate children involved in this work and provide for their return to their home country. The Government took steps to assist UNICEF by establishing a number of shelters for child camel jockeys who had been rescued. A total of 1,070 children were repatriated after being identified by the competent authorities as victims of trafficking. The State provided assistance to facilitate their reintegration in their home countries.

56. The Emirates has acceded to the United Nations Convention on the Rights of the Child and International Labour Organization Conventions Nos. 29, 138 and 182, which all prohibit the smuggling of children for the purposes of their employment in camel racing or hazardous work.

4. Combating human trafficking

57. In keeping with its determination to combat human trafficking offences and all forms of exploitation, particularly of women and children, the State issued Federal Act No. 51 of 2006 on combating human trafficking. Article 1 of the Act defines human trafficking as the recruitment, transfer, removal or receiving of persons by means of the threat or use of force or any other form of coercion, abduction, deception, deceit, abuse of authority, exploitation of a situation of vulnerability or the giving or receiving of sums of money or favours in order to obtain the consent of another person, for the purposes of exploitation. The subsequent articles enumerate the different forms of human trafficking as follows: "Exploitation includes all forms of sexual exploitation; exploitation of the prostitution of others; bonded labour; forced labour; slavery or practices similar to slavery; servitude or the removal of human organs."

58. One of the most important aims of criminal policy is to ensure that domestic laws are drafted in such a way that penalties reflect the gravity of crimes. Given the gravity of human trafficking offences, because of the terrible physical and psychological harm that they do to the victims, the fact that they offend against the human values on which the sharia, the main source of domestic law, is based, and the fact that these offences are incompatible with the values of Emirates society, the legislature of the Emirates has introduced severe penalties for human trafficking, namely, a fixed term of not less than five years' imprisonment. The penalty is increased to life imprisonment if the offence is attended by aggravating circumstances.

59. Article 12 of the Act on human trafficking provides for the establishment of a committee - the National Committee on Human Trafficking - consisting of representatives of a number of government departments such as the Ministry of the Interior, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Labour, the Ministry of Social Affairs and the Ministry of Health, as well as the security services and the Red Crescent Society. The Committee's tasks include:

- Studying and updating legislation on trafficking in order to provide victims with appropriate protection in keeping with international standards
- Preparing, in conjunction with relevant State entities, reports on the measures taken by the State to combat human trafficking
- Studying reports on human trafficking and taking the necessary follow-up action
- Coordinating efforts to combat human trafficking with the relevant State authorities, including ministries, government agencies, institutions and other bodies, through conferences, seminars, publications and training and other events aimed at realizing the Committee's goals

- Participating, with relevant State authorities, in international conferences and forums on human trafficking, and representing the views of the State in these forums

- Carrying out any other activities entrusted to the Committee in this connection

5. Grace period for persons in breach of the Residence Act

60. On 3 June 2007 the Cabinet adopted Decision No. 331/1, granting a grace period to persons who had breached the Residence and Employment Act in order to allow them to leave the State or to resolve their situation within three months of the date of issuance of the Decision. The Decision lays down the following general principles and rules:

1. The Decision does not apply to persons arriving in the State after it enters into force because the grace period will be in effect during a number of annual events, such as the Dubai Trade Fair and Ramadan, which attract large numbers of visitors.

2. The person leaving the State must not be an investor or an employer; such persons act as sponsors for others and must resolve their situation before leaving.

3. All persons who have breached the Act must be fingerprinted, and checks must be done before they leave to ensure that they are not subject to any security restrictions.

4. Inspections will be suspended during the grace period in order to intensify efforts to complete the procedures for those in breach of the Act.

5. Agreements shall be made with embassies and foreign consular offices present in the State to facilitate the departure of persons who cannot afford to pay for a ticket home.

6. An amount of money shall be set aside for emergencies and contingencies.

7. Lists of figures containing full information on departing offenders shall be drawn up.

- Operations rooms working around the clock shall be set up by the investigating judge to facilitate the exit process; a shift system will be in effect during the grace period.

- Steps will be taken to ensure that airline companies do not exploit the situation but facilitate the departure of the persons concerned. The following groups will benefit from the present Decision:

(a) Passport holders who have overstayed their visas, whether they have work, residence or tourist visas of any kind;

(b) Persons who have lost their passports;

(c) Investors and persons who have sponsors.

61. The Cabinet Decision allowed persons wishing to change their status in the State to do so, on condition that they had not entered the country illegally, by making it possible to renew their residence cards and work permits using the name of the existing sponsor, without them incurring any fines or allowing for the transfer of sponsorship to another person or enterprise. If the person concerned had run away from his or her sponsor, the sponsor's agreement would be needed for the transfer of sponsorship.

6. Establishment of women's and children's refuges in the United Arab Emirates

62. The President of the United Arab Emirates Red Crescent Society issued Decision No. 1 of 2008 providing for the establishment in the State of women's and children's refuges with legal personality, financial and administrative autonomy and a humanitarian mission of protecting women and children, whether nationals or foreigners, who are victims of human trafficking and sexual exploitation. The refuges provide the women and children in their care with suitable accommodation, guarantee respect for their human dignity, alleviate their suffering and offer them all kinds of social, legal, psychological, medical, educational and vocational support. They will also help victims during police investigations and in court, ensuring their right to a defence and helping them to return safely to their country.

7. Social welfare

63. The United Arab Emirates pursues several social action strategies which were all established, in cooperation with United Nations experts, to ensure social justice and social security, provide a decent life for nationals and foreign residents, foster social development and progress, provide for families, protect children, ensure the welfare and rehabilitation of persons with disabilities and assist older persons, widows and persons with limited financial resources by paying them regular monthly allowances that are sufficient for a decent life.

64. The Ministry of Social Affairs implements Federal Act No. 6 of 2001, concerning social security, and a series of comprehensive social programmes designed to provide all social groups with a decent life.

65. Social development centres in the different Emirates play a vital role in social development, organizing activities, including seminars, talks, field visits and training courses, and creating literacy centres and traditional crafts centres in order to train groups, particularly women, for participation in the overall development process.

66. In August 2006, the Ministry of Social Affairs began implementing a Cabinet decision providing for the creation of crèches for the children of civil servants in ministries and government bodies and institutions with 50 or more employees who have no fewer than 20 children under the age of 4 between them.

67. The State encourages the establishment of public welfare associations, and issued Federal Act No. 2 of 2008, concerning civil public welfare associations and institutions. The

Government offers technical and material support and provides premises for some associations to help them to carry out their activities. There are a total of 121 associations pursuing different aims and activities, including in the social, sports, cultural, legal and vocational domains.

II. COMMENTS ON THE SUBSTANTIVE ARTICLES OF THE CONVENTION: MEASURES TAKEN BY THE UNITED ARAB EMIRATES TO IMPLEMENT THE CONVENTION

Article 1: Definition of racial discrimination under domestic law

68. The United Arab Emirates consistently strives to promote the principles of justice and equality in all its domestic legislation and regulations, based on the values of the Islamic faith, which is a source of legislation. Since its inception, the State has taken care to enact laws that regulate rights and obligations and prohibit discrimination, which is incompatible with the values, customs and traditions of the people of the State.

69. In keeping with article 1 [of the Convention], which defines racial discrimination and with the provisions of that guarantee everyone, whether nationals or residents, protection against any form of discrimination, general norms have been written into the Constitution and domestic criminal, civil and economic laws, enunciating the principle of equal public rights and obligations and the prohibition of all forms of racial discrimination.

Article 2: General policies on the elimination of all forms of racial discrimination

70. The Emirates consistently condemns racial discrimination, promotes justice and equality and endeavours to implement laws and legislation to guard against any form of discrimination. Accordingly, it has taken steps to strengthen the judiciary, granting it full independence which ensures access to legal remedies and the recognition of rights.

71. Article 16 of Federal Act No. 2 of 2008, concerning public welfare associations and institutions, states: “No association may deviate from the object specified in its statute. Associations and their members are prohibited from stirring up sectarian, racist or religious strife.”

Paragraphs (d) and (e)

72. The people of the United Arab Emirates have ever practised the values of tolerance, harmony and fellowship with different peoples and races, in keeping with the values inherent in the precepts of Islam and in the light of existing trade links and exchanges with different countries. The State is a point of contact between West and East and a conduit for commercial and cultural exchanges with the rest of the world. Hence, the people and residents of the United Arab Emirates condemn all manifestations of discrimination and live lives that demonstrate a constant awareness of the full implications of human compassion. As a result, daily life is untroubled by behaviours that are incompatible with noble values, and the State does not need to enact legislation to deal with any violations of the Convention.

73. In addition, resident expatriate communities have the right to set up their own cultural associations or pursue business activities under the Public Welfare Associations and Institutions Act. Existing associations include: the Jordanian Association; the Indian Ladies' Association; the Sudanese Women's Association; the Islamic Indian Centre; the Indian Social and Cultural Club; and the Arab Republic of Egypt Club.

74. There is more than one business council of businessmen and investors which has been formed for a specific activity. These include the Indian Business and Professional Council; the British Business Group; the French Business Council; and the German Business Council. Chambers of Commerce and Trade regulates the statutes of these bodies.

Article 3: Prohibition of all forms of racial discrimination

75. In the political positions that it has articulated in all international forums and at international and regional meetings, ever since its inception in 1971 the United Arab Emirates has consistently condemned all forms of racial discrimination and distinction, and refused to have dealings with any State that applies discriminatory policies, because it is driven by a constant desire to promote human rights principles.

76. The people and residents of the State, as well as visitors, live together in complete harmony, and the law guarantees residents the right to use health, educational and leisure facilities on an equal basis with citizens and without any discrimination.

Article 4: Criminal procedures

77. In keeping with the aims of the Constitution, the Federal Criminal Code No. 3 of 1987, as amended by Federal Act No. 34 of 2005, includes several provisions outlawing violence in general. Article 312 of the Code prescribes a term of imprisonment or a fine for any person who desecrates a sacred Islamic object, denigrates an Islamic rite or insults any of the revealed religions.

78. Article 102 of the Code defines an aggravating circumstance as: taking advantage of the victim's mental incapacity or inability to offer resistance or of circumstances which prevent the victim from defending himself or herself; using brutality in committing an offence; impersonating the victim; or a circumstance in which a civil servant abuses his authority, office or role to commit the offence.

79. The Code prescribes penalties for anyone who commits the following offences:

- Offences against religious beliefs or rites
- Offences against the family
- Offences against the person
- Offences against honour

- Defamation
- Financial crimes

Article 5: Right to justice and equity

Paragraph (a)

80. Article 25 of the Constitution states: “All persons are equal before the law, and there shall be no discrimination between citizens of the Federation on grounds of origin, place of residence, religious belief or social status.

81. Article 28 states: “Punishment is an individual matter, and accused persons are innocent until proven guilty in a fair and legal trial. Accused persons have the right to engage competent counsel to defend them at trial. The law shall specify the conditions under which counsel for the accused must be present. The infliction of physical or mental harm on an accused person is prohibited.”

82. Article 41 of the Constitution states: “Everyone has the right to submit a complaint to the competent authorities, including the judicial authorities, concerning violations of the rights and freedoms set forth in the present chapter.”

Paragraph (b)

83. Article 10 of the Constitution states that the goals of the Federation are to: preserve its independence, sovereignty, security and stability; repel all attacks against it or member Emirates; protect the rights and freedoms of the people of the Federation; establish close cooperation between the Emirates for the sake of the common good, in order to achieve these aims and in furtherance of prosperity and progress in all areas; provide a better life for all citizens; and ensure that each member Emirate respects the independence and sovereignty of the other Emirates in respect of their domestic affairs in the scope of the present Constitution.

84. Article 26 of the Constitution states: “Personal freedom is guaranteed to all citizens. No person may be arrested, searched, detained or imprisoned except in accordance with the law, and no one may be subjected to torture or degrading treatment.”

85. Although it is in the public interest that punishment should be effective and swift, the law has established a number of safeguards to protect individual freedoms and rights. Accused persons are afforded a wide range of guarantees to enable them to defend themselves and to protect them from harm or torture. Hence, article 2 of Federal Act No. 29/2005 states: “It is prohibited to inflict bodily or mental harm on an accused person or to subject a person to torture or degrading treatment.”

86. Article 298 of the Act states: “Where a man and his wife are sentenced to deprivation of liberty, enforcement of the sentence in respect of one of them may be deferred until the other person is released, if they are responsible for the care of a minor below the age of 15.” In this way, the Act guarantees the welfare of the child as a party that is innocent of the sins of the parents and thus ensures the child’s social stability and protection.

Paragraph (c)

87. With regard to political rights, chapter IV of the Constitution of the United Arab Emirates is entirely devoted to the subject of the Federal National Council, the members of which represent all the people of the Federation, as stated in article 77.

88. Supreme Federal Council Decision No. 4 of 2006, followed by Presidential Decision No. 3 of 2006 define methods for selecting representatives of the Emirates to the Federal National Council: half of its members are elected directly by an electoral college, and a national committee is formed to run the elections.

89. For the first time ever, the State conducted a new and unique experiment in which the Federal National Council was elected by designated electoral colleges between 16 and 20 December 2006. Citizens were given ample opportunity to express their views and opinions on many issues relating to development. The electoral college consisted of a total of 6,688 persons, of whom 1,189 were women. In this way, the first parliamentary assembly of the Emirates was formed, with half its members being chosen by direct ballot.

90. Women of the United Arab Emirates made a strong showing in the Council; eight were appointed and one was elected. That this number of women entered the Council for the first time testifies to the political wisdom of the leadership of the State and the attention paid to women's role in the development of political participation. It also illustrates how the role of women in society has come to the fore in recent years, with four women ministers in the present Government line-up, one each at the Ministry of International Trade and the Ministry of Social Affairs and two occupying positions as Ministers of State. Women's entry into the political fray is a genuine turning point in the democratic process on which the Emirates has embarked and is likely to add value to the work that women do in all fields.

Paragraphs (d) (i) and (ii)

91. Article 29 of the Constitution states: "Freedom of movement and residence is guaranteed to citizens within the limits set by law." Article 22 of Federal Act No. 17 of 1972, concerning nationality, driving licences and passports, stipulates: "Every citizen is entitled by law to a passport. A passport is a document issued by the State under the present Act and allows the holder to travel from country to country, subject to the conditions imposed by each country."

92. Article 23 states: "No citizen of the State may leave or return to the country without a passport."

93. Article 24 states: "Departure from and return to the country may only be effected at designated ports, after the passport has been stamped." Article 25 provides: "Citizens have the freedom to move between the member Emirates of the Federation."

94. Federal Act No. 6 of 1973, as amended, concerning alien entry and residence, regulates the procedures for obtaining entry visas to the State, the different types of visas (tourist or work visas), and the procedures for obtaining resident status for the purposes of work.

95. With regard to the legislation prohibiting travel, a person with a criminal record may be prohibited from travelling pursuant to a court order and article 329 *et seq*. of the Federal Code of Civil Procedures. Paragraph 3 of article 329 states: “Where a court issues an order banning a person from travelling, it may give orders for the passport of the convicted person to be placed in the court vault and may disseminate the travel ban or injunction to all ports of entry and exit in the State.”

Paragraph (d) (iii)

96. Article 8 of the Constitution stipulates: “Citizens of the Federation shall have a single nationality, as defined by law, and shall enjoy abroad the protection of the Government of the Federation in accordance with the applicable international rules.” “Nationality may not be revoked or withdrawn from a citizen, other than in the exceptional circumstances specified by law.”

97. With regard to acquisition of nationality by the children of a female citizen of the United Arab Emirates who is married to a foreign man, further to instructions issued by the President of the State on 13 August 1998 asking for information to be submitted to the Office of the President on the children of female citizens married to foreigners, including the wife’s name, the name, nationality, place of work and address of the husband and the names of the children, a circular was sent to immigration and residence departments instructing them to fill in forms with the requisite information and to append supporting documentation.

98. As for the “Bidun”, Ministerial Decision No. 167 of 2006 on the restructuring of the Committee on the Status of Stateless Persons (the “Bidun”) tasked the Committee with the conduct of a census of persons entitled to nationality who were present in the State prior to the establishment of the Federation and had been counted previously. Priority was given to persons in government jobs with a long service record. The Committee was required to submit tables with the names of eligible persons and their family members. A decree was issued granting the nationality of the State to 1,294 persons. The remaining tables were submitted to the Ministry of Presidential Affairs and the procedures for granting nationality to the persons concerned will be completed in due course.

Paragraph (d) (iv)

99. Article 19 of Federal Act No. 28/2005, concerning personal status, regulates marriage contracts and the conditions set out therein with a view to guaranteeing that families are established on stable foundations which ensure that the spouses carry out their duties lovingly and compassionately.

100. In keeping with the sharia, consent is a key element of the marriage contract. Indeed, this is how consent is described in article 38, paragraph 3, of the Personal Status Code. Thus, under article 61 of the Code, if consent is not given, the marriage contract is null and void. Article 39 of the Code explicitly states that the wife must consent to the marriage. Article 20 furthermore states that the spouses may stipulate whatever conditions they may agree upon, provided that they do not agree to something which is forbidden and or forbid that which is permitted.

Paragraph (d) (v)

101. Any person may legitimately own and acquire any property that he or she may desire, and such property shall be safeguarded, provided that it was lawfully acquired. This right is recognized in article 21 of the Constitution, which states: “Private property shall be protected. The law shall specify the restrictions which may be imposed on property, and no one shall be deprived of his property other than in circumstances dictated by the public good, in accordance with the law and in exchange for fair compensation.”

102. Article 22 of the Constitution articulates the principle of the inviolability of public property, while article 39 recognizes the right to protection against expropriation and revocation of property.

103. According to the Constitution, the natural resources in each Emirate constitute public property for the benefit of the national economy. Under article 23, private ownership of natural wealth and resources is prohibited. In order to prevent the over-concentration of economic power in the hands of any one party, the Constitution allows for limits to be set on private ownership and for the public expropriation of private property in exchange for fair compensation.

104. On the basis of these rights, individuals have the unrestricted right to dispose of their property by selling, leasing, gifting or legally transferring it upon the death of an ascendant or a descendant.

105. Under the Constitution, members of society can freely engage in economic, trade and industrial activities. Article 24 states: “The national economy is founded on social justice and genuine cooperation between public and private enterprise.” The Trade Act and the Companies Act recognize that this right may be exercised according to the procedures set out therein.

106. The State has concluded a number of bilateral agreements on economic and trade cooperation, investment protection and the avoidance of dual taxation and is a member of the World Trade Organization, the World Bank and the International Monetary Fund.

Paragraph (d) (vi)

107. With regard to the right to inherit, which the Convention classifies as a civil right, Federal Act No. 28/2005, concerning personal status, contains detailed provisions on inheritance under the sharia rules by Muslims in the State. These provisions are binding, constituting as they do ordinary law norms from which no derogation is permitted.

108. Article 274 states: “A bequest is any property and legal title that a deceased person bequeathed.” Article 276 provides: “The claimant must submit a request to the competent court for certification of the death and the inheritance, together with an attestation indicating the date of the death, the last address of the deceased, the names and addresses of the heirs and their testamentary tutors and all the moveable and immoveable property included in the bequest.” The registry of the court will summon the heirs and testamentary tutors to appear before the court on

the date that it decides. The court will examine the testimony of trustworthy persons and may order whatever additional administrative inquiries it deems necessary. The probate certification shall be taken as legal proof, unless a judgement to the contrary is issued or the competent court rules that it is invalid. The court shall issue a document listing the names of the heirs and the share of the bequest due to each of them.

109. Foreigners who are not Muslims are subject to the rules of international inheritance law on inheritance disputes.

Paragraph (d) (vii)

110. In keeping with the constitutional provisions which prohibit discrimination on grounds of belief or religion, article 312 of the Federal Criminal Code provides:

> "A penalty of imprisonment and/or a fine shall be imposed on any person who:
>
> (a) Desecrates a sacred Islamic object or denigrates an Islamic rite;
>
> (b) Insults a recognized revealed religion.

111. The State allows all residents who are followers of a revealed religion to practise their religious observances and to worship in approved places of worship."

Paragraph (d) (viii)

112. The Federal Printing and Publications Act No. 15 of 1980 regulates and guarantees press freedom. The Act places restrictions on the exercise of the Minister's administrative powers in order to prevent any violation of the right to freedom of expression as guaranteed under the Constitution. The Act also recognizes the right of the press to publish material at its discretion.

Paragraph (d) (ix)

113. Article 2 of Federal Act No. 2/2008, concerning civil public welfare associations and institutions, provides: "A public welfare association is any group of individuals or bodies corporate established for a definite or an indefinite period of time for the purpose of carrying out social, religious, cultural, scientific, educational, vocational, women's, creative or artistic activities, providing humanitarian services, performing charitable work or expressing solidarity through the provision of material or moral support for technical expertise. The sole purpose of all its activities must be to serve the public good without receiving any material reward. Membership must be open to everyone under the terms of the present Act. The decisive factor in defining the object of an association is the main purpose for which it was established."

114. A total of 112 civic and vocational associations, which carry out their activities in full freedom, have been established under the Act.

Paragraph (e) (i)

115. With regard to the right to work and to remain in employment, the Federal Labour Code No. 8 of 1980 makes no distinction between individuals on grounds of race, sex, social class or belief. Everyone is equal before the law, save with respect to the specific requirements of a job and compliance with labour standards.

Equality in employment

116. The Code provides a general and an abstract definition of a worker as follows: "A worker is any male or female who works for an employer in exchange for a wage of any kind." This definition guarantees equality among workers, regardless of their nationality, religion, political beliefs or any other distinguishing feature.

Protection of wages

117. The Code regulates and guarantees payment of wages. Pay is a central component of an employment contract and a contract is not valid unless it defines the amount of pay to be given. The legislation guarantees workers the right to dispose of their wages freely. A worker may not be obliged to purchase food or goods produced by his employer from a particular shop. The Code states that wages must be paid on a working day, in the workplace and in convertible national currency. In 2007 the Ministry of Labour signed an agreement with the Infospan Inc. company providing for the issuance of wage slips to workers residing in the United Arab Emirates.

118. The Minister for Labour and Social Affairs issued Decision No. 156 of 2003, concerning protection of wages, article 1 of which states that workers entitled to an annual or monthly salary must be paid at least once a month. Article 2 states that, without prejudice to article 1, all workers must be paid their wages at least every two weeks.

119. On 14 May 2003, the Minister of State for Labour issued administrative circular No. 11 of 2003 on the procedures for implementing ministerial Decision No. 156 of 2003, concerning the protection of wages. The Enterprise Affairs Unit was designated as the competent body in the Labour Department for implementation. In principle, the Decision applies solely to the following:

(a) All enterprises in the construction and building sector (contracting and public maintenance), the cleaning and transport sector and the clothing industry which, according to the information in the Ministry's computer database, have 200 or more employees;

(b) All enterprises against which repeated complaints have been brought for non-payment of their employees' wages, on condition that the Decision is applied upon the recommendation of the Director of the Department of Inspections, the Director of the Labour Relations Department or directors of labour offices and the reasons for applying the Ministerial Decision are explained.

120. The Minister of State for Labour subsequently issued administrative circular No. 4 of 2004 on 7 March 2004, stating: "All enterprises which undertake contracting and maintenance work and employ more than 50 persons must submit salary payment tables for their employees."

Working hours and leave

121. The Code defines working hours in accordance with international labour standards. A working day must be not longer than eight hours, interspersed with rest breaks to allow workers to eat and pray. Such breaks must not exceed one hour, and Friday must be as a paid weekly day of rest for all workers. The Code defines four different types of leave: official leave, annual leave, sick leave and leave in order to undertake the *hajj* (pilgrimage to Mecca).

Workers' safety, health and social welfare

122. The Code specifies that the employer must provide safety equipment to protect workers from industrial injuries, diseases and the risks associated with the operation of equipment and use of other work tools. The employer must comply with all the safety standards specified by the competent government authority, while employees must use safety equipment and protective clothing and carry out the employer's instructions on safety procedures and the work environment. The Code contains full details on the protection of workers, including fire prevention, workplace hygiene, ventilation, lighting, safe drinking water, toilets, regular medical tests for employees and the provision of medical care as required by the competent government authorities.

Compensation for industrial injuries and diseases

123. The Code spells out the procedures to be followed in the event of an industrial injury or disease, stipulating that the employer must provide for the treatment of the employee concerned.

Settlement of individual and collective labour disputes

124. An employer, a worker or a beneficiary of either party who disputes any of the rights of that party under the Labour Code must apply to the competent labour department to consider the case. The labour department will endeavour to settle the dispute amicably within a period of two weeks. If no settlement is reached, the labour department must refer the dispute to the courts and submit an accompanying memorandum containing a brief description of the dispute and of the magnitude of the losses of the two parties, together with its own comments. The court must set a date for a hearing within three days of the date on which the request is received. In this way, the dispute will continue to be heard by the courts in accordance with legal procedure.

125. The mechanism for settling collective labour disputes consists of four phases:

(a) Amicable settlement through negotiations between the two sides;

(b) Mediation at the request of the competent labour department;

(c) Arbitration through arbitration boards including representatives of the employer and the employees concerned, in addition to a representative of the labour department;

(d) Mediation through the Higher Mediation Board for the Resolution of Collective Labour Disputes.

126. The executive branch oversees the implementation of the Labour Code through on-site labour inspections, during which employers and employees are provided with technical information and guidance on how to implement the Code.

Ratification of the fundamental International Labour Organization Conventions concerning human rights

127. The State has ratified nine fundamental International Labour Organization (ILO) Conventions with a view to ensuring that it keeps pace with progressive labour legislation in the contemporary world on such matters as: equality of treatment and opportunity; the rejection of any form of discrimination or distinction based on sex, status, religion and belief; respect for the human right to work without any coercion; and respect for the rights of the child. The ILO conventions concerned are:

- The Employment Service Convention, 1948 (No. 89)
- The Hours of Work (Industry) Convention, 1919 (No. 1)
- The Forced Labour Convention, 1930 (No. 29)
- The Labour Inspection Convention, 1947 (No. 81)
- The Equal Remuneration Convention, 1951 (No. 100)
- The Abolition of Forced Labour Convention, 1957 (No. 106)
- The Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- The Minimum Age Convention, 1973 (No. 138)
- The Worst Forms of Child Labour Convention, 1999 (No. 182)

The State has also signed two Arab Labour Organization Conventions:

- Convention No. 18 of 1996 concerning the employment of Minors
- Convention No. 19 of 1998 concerning Labour Inspection

128. The State has furthermore signed several bilateral memorandums of understanding on manpower with fraternal and friendly States such as India, Pakistan, China, the Philippines, Sri Lanka and Indonesia in order to protect workers' rights, regulate the process for workers' entry into the State and familiarize these persons with their rights and obligations under their employment contract.

Human resources development

129. In the framework of its efforts to diversify the economy and achieve sustainable development, the State has implemented a number of programmes and plans to modernize the labour market. In that connection, the national Human Resources Development and Employment Authority was established in November 1999 pursuant to Federal Act No. 27 of 1999 and went into operation in November 2000. The Authority carries out its work through an organizational structure which was approved by the Cabinet and consists of three specialized centres, two ancillary departments and branch offices in the Emirates of the State.

130. The Authority pursues four strategic objectives under the Act by which it was established: full employment of national human resources; reducing the proportion of foreign workers in the overall workforce; increasing the supply of qualified national human resources capable of meeting the requirements of the labour market; and developing and improving the practical skills and capacities of the national workforce.

131. Since it was established, the Authority has achieved a great deal in its fields of expertise, building platforms for communication with end-users of its services, i.e. nationals looking for work, providing advice, running training and skills development programmes and establishing good relations with employers looking for skilled national staff. The Authority has also created links with educational and training institutions at different levels.

Legislation on domestic service

132. In conformity with the Government's directives on the protection of workers' rights, the Ministry of the Interior announced the introduction of a standard employment contract for domestic workers and persons of similar status, which entered into effect in the Federation on 1 April 2007.

133. The standard employment contract regulates the work of persons in these categories based on the nature of the work and tasks undertaken, granting these workers the right to adequate rest breaks and medical treatment and care in accordance with the health regulations in force in the State. Wages are set by agreement between the two parties. Paragraph 1 of the contract must indicate the full amount of the wage to be paid at the end of each month. The two sides must sign the wage table, drawn up in both Arabic and English, showing that payment has been made and received. The sponsor must keep the table on file in order to be able to produce it when necessary.

134. The employment contract states that the sponsor may not employ a person in work that is dangerous or incompatible with the maintenance of public order, nor may the sponsor oblige the person to work for another, as stipulated in the conditions specified in the Act on Entry and Residence of Aliens and its implementing regulation. The sponsor must provide the employee with assistance to remit his salary in accordance with the State's banking regulations, and must enable him to communicate with his family members, to send and receive letters and ensure respect for their confidential nature. In the event that a worker dies during service, the sponsor must defray the full cost of repatriation of the mortal remains and personal effects of the deceased as promptly as possible and must remit the person's outstanding entitlements to the relevant authority. The employment contract is valid for two years from the date of effective

commencement of employment and may be extended by agreement between the two parties. If the first party (the sponsor) wishes to terminate the contract before the expiry date, he must provide the second party (the employee) with a ticket to return to his home country and pay him a month's salary as compensation. Under the contract, the sponsor must provide the employee with suitable living quarters and treat him in a manner which ensures his dignity and physical well-being.

Paragraph (e) (iii)

135. The United Arab Emirates, in the framework of housing policy schemes and plans, has endeavoured to provide citizens with access to modern housing which meets their housing needs and is suited to their local environment. The architectural design must be such as to ensure them a decent life and social stability. Several federal and local bodies, including the Ministry of Public Works, the Sheikh Zayed Housing Programme, the Mohammed bin Rashid Housing Programme, the Sharjah Housing Committee and municipal departments of housing in the State have intensified their efforts to create tens of thousands of homes and modern cities throughout the State, complete with a comprehensive network of services.

136. As the State is determined that employers must comply with the law, the Ministry of Labour decided not to issue collective work permits (25 workers or more), unless the employer demonstrates a tangible commitment to providing workers with suitable accommodation. Enterprises must submit evidence that they have concrete plans and the resources to provide appropriate facilities. In 2007, a total of 12 companies failed to convince the Ministry that they had the capacity to provide their workers with suitable housing and their applications for collective work permits were therefore rejected.

137. In 2007, some 60 companies in the Dubai construction industry took steps to improve workers' housing conditions; this was out of a total of 100 companies to which warnings were issued in 2006. Thirty warnings were issued to other enterprises in 2007.

138. The Department of Civil Defence has announced that it will reject applications for permits and renewal of permits from all enterprises which are unable to obtain safety certificates for all workers' housing. The Government of Dubai has also announced that it is prohibited to house workers on industrial sites and in workshops and warehouses.

139. In March 2007, the Government of Sharjah issued a decision on providing proper living quarters. Every person must be given adequate space, and accommodation must include a washing area, a kitchen and an eating area. Enterprises which breach the regulations face huge fines - up to Dh 50,000 - which will be doubled in the event of a repeat offence.

140. In October 2007, the Riyan Investment Company, which is a private company, responded to the Government's campaign to provide appropriate accommodation for workers with a project for the construction of a large workers' housing complex in Abu Dhabi to accommodate up to 32,000 workers, technicians and supervisors. The project envisages the construction of six complexes around a main building, offering a range of leisure facilities, including a modern commercial hypermarket, banks, medical clinics, travel agencies, a post office, a security services unit, a mosque, dining and games halls, laundries, gardens and public courtyards. The project is expected to be completed by the middle of 2008.

Paragraph (e) (iv)

141. Everyone has the right to health care and to easy access to methods to prevent, treat, and protect against, infectious diseases. This right is recognized in the Constitution of the State, article 19 of which stipulates: “Society provides citizens health care and the means to prevent and treat infectious diseases, and encourages the construction of hospitals, clinics and public and private sanatoriums.” A number of laws recognizing the right to health security and health care have been enacted, such as Federal Act No. 6 of 1975, regulating the registration of births, Federal Act No. 7 of 1975, concerning the medical profession, and Act No. 27 of 1981, concerning the prevention of infectious diseases. Hospitals and health centres are found in many different parts of the State and deliver treatment and health services free of charge to all citizens and residents of the State. The State encourages private sector participation in health services delivery, and a number of hospitals and clinics providing services for everyone in different areas of specialization have been established.

142. Pursuant to Cabinet Decision No. 1 of 1980, as amended, concerning treatment abroad, the State bears the costs of treatment in medical centres abroad which is not available in the State. The State has set up health sections in different countries to provide follow-up for patients and assistance them with treatment.

143. The State endeavours to provide high-quality services and to comply with international best practices in the delivery of treatment and preventive health services. It has taken steps to consolidate relations with the World Health Organization and specialized scientific and medical institutions in various parts of the world, establishing mechanisms for exchanges of medical and research expertise with a view to developing health services to the highest international standards. In 2007, the State had 40 hospitals in total, over 115 primary health centres, 14 Ministry of Health hospitals, 67 medical centres, 11 school health centres, 10 maternal and child health centres, 110 units for mothers and children in primary care centres, dozens of large hospitals and thousands of private clinics.

144. Article 13 of Federal Act No. 7 of 1984, concerning health services costs and fees for medical certificates and reports, deals with the subject of State provision of free public health services for all nationals and residents, including basic preventive health services for mothers and children. These services include:

- Premarital screening
- Breastfeeding support and promotion
- Monitoring the growth and development of under-fives
- Prevention of hereditary diseases
- National screening programme for early detection of diseases in newborns
- National screening programme for early detection of breast cancer

145. These services are offered through specialized maternal and paediatrics' units in primary health care centres in all health districts. All preventive health services offered to children of preschool and school age are free of charge for both nationals and migrants. Private schools must provide access to health professionals and offer this service to their students. Vaccinations are free of charge, as are some health education materials. Free training for these schools is provided by the State's school health departments. The school health programme includes the following:

(a) Preventive health and treatment services;

(b) Health education for schoolchildren;

(c) Monitoring the school environment;

(d) Improving the health of school staff;

(e) School meals and monitoring the school canteen;

(f) Physical education;

(g) Psychological and counselling services.

146. The programme offers preventive health and treatment services to all students at government schools. Private schools are required to engage a nurse and a doctor to provide these services. These persons take part in training courses in which they learn about techniques and methods for delivering the services included in the programme. Schools provide free health and nutritional education and support for efforts to combat infectious diseases.

Programme for the prevention and treatment of infectious and non-infectious diseases

147. A number of preventive programmes for all are implemented at State level, and free drugs are dispensed by preventive health units for the treatment of infectious diseases that post a threat to public health. These include:

- The National Expanded Vaccination Programme, which provides free vaccination for all children from birth until they leave school.
- The Infant Poliomyelitis Eradication Programme.
- The Measles and German Measles Elimination Programme.
- The Anti-Malaria Programme.
- The Anti-Tuberculosis Programme.
- The Anti-AIDS Programme.
- The Anti-Cancer Programme.
- The Programme against Infectious Diseases.

- Emergency and first aid services.

- Health education is provided to different social groups through the audio-visual media. These services are on offer in health and educational facilities and in the workplace, and are also provided by public welfare associations such as the Women's Federation, boy scouts and girl guides' associations, charities, etc.

148. All migrants and nationals are entitled to health services. Health services are offered in government medical facilities, either via the health card scheme in force in the northern Emirates or under a health insurance scheme such as the one in effect in Abu Dhabi pursuant to Act No. 23 of 2005. Under the Act, health insurance is compulsory for all public and private sector employees in Abu Dhabi.

149. The Ministry of Health has adopted a strategic plan for 2008-2010, under the slogan "Excellence … empowerment ... integration", comprising the following goals:

- Strengthening the Ministry's lawmaking role in coordination with relevant institutions

- Following international best practices in health-care provision

- Building and developing technical and administrative capacities

- Strengthening the role of the Ministry of Health in various areas of preventive medicine

- Ensuring access to comprehensive health-care services for all inhabitants of the Emirates

- Raising health awareness in society and reducing morbidity rates

- Developing health administration and financing systems

The Ministry undertook the following initiatives in implement the plan:

- Establishment of a strategic planning department

- Design of a self-administration system for hospitals

- Creation of a system to increase the assets of the National Fund for the Financing of Health Services

- Implementation of a health insurance system

- Establishment of a system to promote investment in the private health sector

- Commencement, by the Emirates Health Authority, of its duties and functions

- Implementation of a modern system for maintaining medical records and a system for licensing and importing drugs in line with international best practices

- Creation of a database for health information and scientific evidence

Article 6: General framework for judicial practices

150. The right to bring legal proceedings and to seek a legal remedy is guaranteed to everyone under article 41 of the Constitution, which states: "Everyone has the right to lodge complaints to the competent authorities, including the judicial authorities, concerning any infringement of the rights and freedoms recognized in the present chapter." Article 94 of the Constitution states: "Justice is the basis of government. In performing their duties, judges are independent and are subject to no authority other than the law and their own conscience." The Code of Civil Procedures, the Criminal Code, the Code of Civil Transactions and the Judicial Authority Act specify the procedures for seeking a legal remedy. There is nothing in these laws which discriminates between nationals and residents with respect to the procedures or treatment of parties before the courts or the enforcement of judgements. Hence, everyone is equal before the courts.

151. The Emirates Human Rights Association was established under Federal Act No. 6 of 1974, as amended, concerning public welfare associations, with the approval of the Ministry of Social Affairs as issued on 5 February 2006. In accordance with its statutes, the Association follows up on complaints and grievances concerning racial discrimination and works with governmental and local authorities to follow up on and resolve cases and complaints.

Article 7: Countering prejudice and improving mutual understanding and tolerance

152. With regard to improving levels of education and encouraging the pursuit of learning, the Constitution affirms the right to education in article 17, which states: "Education is a basic component of social progress in the Federation, and is compulsory at the primary stage and free of charge at all stages."

153. The State has established primary, intermediate and secondary schools, as well as universities and vocational colleges in order to offer the highest standards of State education and eradicate illiteracy. Since the founding of the State in 1971, the Ministry of Education has taken two different approaches to illiteracy. The first focuses on education of the rising generation, while the second focuses on adult education. In addition to day school, the State has opened the doors of education to those who missed the education boat, by establishing evening study centres for the employed.

154. The number of schoolchildren rose from 52,751 in 1975 to 658,814 in 2005/06, and the number of government and private schools in 2007 stood at 1,259. In addition, there are dozens of State and private universities with a total of some 69,578 students in 2004/05. The ratio of female to male students at these institutions was 186.3 per cent, while the number of graduates for the same year was 13,973.

155. The Ministry of Education and the Ministry of Higher Education have taken steps to build up their learning curricula by including a number of subjects relating to human rights, children's rights, women's rights, and combating racial discrimination, including the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, and disseminating the values of religious and racial tolerance among all students. The educational atmosphere in schools and universities and the involvement of all citizens and residents in education have created a cohesive and harmonious relationship between different groups which in turn have laid the foundations for tolerance and non-discrimination between social groups.

156. The State provides its nationals with opportunities to pursue higher education and to continue their studies abroad with funding from the State. The State has established several educational and cultural sections in various parts of the world to follow up on the education of its students abroad.

157. A number of federal laws have been enacted, such as Federal Act No. 11 of 1972, concerning compulsory education, Federal Act No. 10 of 1972, concerning educational missions, as amended by Federal Act No. 2 of 1977, Act No. 9 of 1972, concerning private schools, Federal Act No. 4 of 1976, concerning the establishment and regulation of the University of the United Arab Emirates, as amended by Act No. 4 of 1978, Federal Decree No. 42 of 1974, concerning the establishment of nursery schools, and the Act establishing Zayed University.

158. The Constitution involves all members of society in delivering the right to education by allowing, in article 18, for the establishment of private schools and universities, as follows: "Individuals and institutions may establish private schools in accordance with the law, subject to monitoring by the competent public authorities and compliance with their guidelines." Hence, private schools and universities with international curricula have proliferated. They provide services to different sectors of society in an atmosphere of freedom and inter-racial tolerance which is guaranteed by the State.

159. The State is bound by a number of bilateral treaties with fraternal and friendly States on education and culture, and has joined various international organizations specializing in education, such as the United Nations Educational, Scientific and Cultural Organizations. (UNESCO).

160. Each year, the State organizes special events to mark the occasion of International Women's Day, Universal Children's Day and International Workers' Day. Commemorative mascots are handed out, the audio-visual and print media cover these events and reports are issued on the State's accomplishments in all areas, including the promotion of human rights in society.

161. The Ministry of Education, based on the objectives of its strategy for 2007-2012, seeks to achieve a number of objectives in furtherance of the education process, including the following:

> Strategic objective 1: Restructure the Ministry of Education as an effective and proactive educational institution which employs highly-skilled national experts and staff, pursues decentralized decision-making policies and practices, clearly defines the relationship with educational authorities, education boards and education districts and ensures that schools are the foundation of the educational development process.

Strategic objective 2: Design modern curricula and assessment methods and tools that meet international academic standards, in order to contribute to the creation of an educational environment in which students are the central focus of the education process.

Strategic objective 3: Establish a modern technology infrastructure for all stages of education, and use it in the education process, while allowing schools to use it to manage and carry out their activities.

Strategic objective 4: Develop human resources policies and systems in order to help improve and develop the qualitative performance of public education institutions and of education managers, teachers and other employees in the sector.

Strategic objective 5: Develop and improve school buildings and facilities and supply them with equipment and resources that meet modern educational standards in order to enable schools to design and deliver curricula and planned activities.

Strategic objective 6: Improve vocational development schemes and programmes for all education sector employees (managers, teachers, technicians) in order to achieve the Ministry's goals.

Strategic objective 7: Develop systems for involving parents in monitoring their children's academic performance and for providing stakeholders in society with full information about the performance of the education system.

Annex 112

CERD Committee, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, document CERD/C/GC/32 (24 September 2009)

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The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination

I. INTRODUCTION

A. Background

1. At its seventy-first session, the Committee on the Elimination of Racial Discrimination ("the Committee") decided to embark upon the task of drafting a new general recommendation on special measures, in light of the difficulties observed in the understanding of such notion. At its seventy-second session, the Committee decided to hold at its next session a thematic discussion on the subject of special measures within the meaning of articles 1, paragraph 4, and 2, paragraph 2 of the International Convention on the Elimination of Racial Discrimination ("the Convention"). The thematic discussion was held on 4 and 5 August 2008 with the participation of States parties to the Convention, representatives of the Committee on the Elimination of Discrimination against Women, the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and non-governmental organizations. Following the discussion, the Committee renewed its determination to work on a general recommendation on special measures, with the objective of providing overall interpretative guidance on the meaning of the above articles in light of the provisions of the Convention as a whole.

B. Principal sources

2. The general recommendation is based on the Committee's extensive repertoire of practice referring to special measures under the Convention. Committee practice includes the concluding observations on the reports of States parties to the Convention, communications under article 14, and earlier general recommendations, in particular general recommendation No. 8 (1990) on article 1, paragraphs 1 and 4, of the Convention,[1] as well as general recommendation No. 27 (2000) on Discrimination against Roma and general recommendation No. 29 (2002) on article 1, paragraph 1, of the Convention (Descent), both of which make specific reference to special measures.[2]

3. In drafting the recommendation, the Committee has also taken account of work on special measures completed under the aegis of other United Nations human rights bodies, notably the report by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights[3] and general recommendation No. 25 (2004) of the Committee on the Elimination of Discrimination against Women on temporary special measures.[4]

C. Purpose

4. The purpose of the general recommendation is to provide, in the light of the Committee's experience, practical guidance on the meaning of special measures under the Convention in order to assist States parties in the discharge of their obligations under the Convention, including reporting obligations. Such guidance may be regarded as consolidating the wealth of Committee recommendations to States parties regarding special measures.

D. Methodology

5. The Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context for the present recommendation includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards on the principles of non-discrimination and special measures. Context-sensitive interpretation also includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. The nature of the Convention and the broad scope of its provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, such variations must be fully justifiable in the light of the principles of the Convention.

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1 *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 18* (A/45/18), chap. VII.

2 Ibid., *Fifty-fifth Session, Supplement No. 18* (A/55/18), annex V. sect. C.; and *Fifty-seventh Session, Supplement No. 18* (A/57/18), chap. XI, sect. F.

3 "The Concept and Practice of Affirmative Action", Final report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5 (E/CN.4/Sub.2/2002/21).

4 *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 38* (A/59/38), annex I.

II. EQUALITY AND NON-DISCRIMINATION AS THE BASIS OF SPECIAL MEASURES

A. Formal and de facto equality

6. The Convention is based on the principles of the dignity and equality of all human beings. The principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law, with substantive or de facto equality in the enjoyment and exercise of human rights as the aim to be achieved by the faithful implementation of its principles.

B. Direct and indirect discrimination

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The "grounds" of discrimination are extended in practice by the notion of "intersectionality" whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable "distinction, exclusion or restriction" but also by an unjustifiable "preference", making it especially important that States parties distinguish "special measures" from unjustifiable preferences.

8. On the core notion of discrimination, in its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee observed that differential treatment will "constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".[5] As a logical corollary of this principle, in its general recommendation No. 14 (1993) on article 1, paragraph 1, of the Convention, the Committee observes that "differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate".[6] The term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same**.** The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

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5 Ibid., *Supplement No. 18* (A/59/18), chap. VII, para. 4.

6 Ibid., *Forty-eighth Session, Supplement No. 18* (A/48/18), chapter VIII, sect. B.

C. Scope of the principle of non-discrimination

9. The principle of non-discrimination, according to article 1, paragraph 1, of the Convention, protects the enjoyment on an equal footing of human rights and fundamental freedoms "in the political, economic, social, cultural or any other field of public life". The list of human rights to which the principle applies under the Convention is not closed and extends to any field of human rights regulated by the public authorities in the State party. The reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in the light of the provisions in the Convention mandating measures by States parties to address racial discrimination "by any persons, group or organization".[7]

10. The concepts of equality and non-discrimination in the Convention, and the obligation on States parties to achieve the objectives of the Convention, are further elaborated and developed through the provisions in articles 1, paragraph 4, and 2, paragraph 2, regarding special measures.

III. THE CONCEPT OF SPECIAL MEASURES

A. Objective of special measures: Advancing effective equality

11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.

B. Autonomous meaning of special measures

12. The terms "special measures" and "special and concrete measures" employed in the Convention may be regarded as functionally equivalent and have an autonomous meaning to be interpreted in the light of the Convention as a whole, which may differ from usage in particular States parties. The term "special measures" includes also measures that in some countries may be described as "affirmative measures", "affirmative action" or "positive action" in cases where they correspond to the provisions of articles 1, paragraph 4, and 2, paragraph 2, of the Convention, as explained in the following paragraphs. In line with the Convention, the present recommendation employs the terms "special measures" or "special and concrete measures" and encourages States parties to employ terminology that clearly demonstrates the relationship of their laws and practice to these concepts in the Convention. The term "positive discrimination" is, in the context of international human rights standards, a *contradictio in terminis* and should be avoided.

[7] Article 2, paragraph 1 (d); see also article 2, paragraph 1 (b).

13. "Measures" include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include, as required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed to specific sectors in the light of the range of human rights referred to in article 5 of the Convention, and through plans, programmes and other policy initiatives referred to above at national, regional and local levels.

C. Special measures and other related notions

14. The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.

15. Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men.[8] Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies. States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice. The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.[9]

D. Conditions for the adoption and implementation of special measures

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural[10] status and conditions of the various

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[8] See Committee on the Elimination of Discrimination against Women, general recommendation 25 (note 4 above), paragraph 16.

[9] See for example paragraph 19 of general recommendation 25 of the Committee on the Elimination of Discrimination against Women (note 4 above), and paragraph 12 of the Recommendations of the Forum on Minority Issues on rights to education (A/HRC/10/11/Add.1).

[10] Article 2, paragraph 2, includes the term "cultural" as well as "social" and "economic".

groups in the population and their participation in the social and economic development of the country.

18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

IV. CONVENTION PROVISIONS ON SPECIAL MEASURES

A. Article 1, paragraph 4

19. Article 1, paragraph 4, of the Convention stipulates that "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved".

20. By employing the phrase "**shall not be deemed racial discrimination**", article 1, paragraph 4, of the Convention makes it clear that special measures taken by States parties under the terms of the Convention do not constitute discrimination, a clarification reinforced by the *travaux préparatoires* of the Convention which record the drafting change from "should not be deemed racial discrimination" to "shall not be deemed racial discrimination". Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.

21. In order to conform to the Convention, special measures do not amount to discrimination when taken for the "sole purpose**"** of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures and the instruments designed to put the measures into effect. The reference to "sole purpose" limits the scope of acceptable motivations for special measures within the terms of the Convention.

22. The notion of "adequate advancement" in article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove "historic" discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.

23. The term "protection" in the same paragraph signifies protection from violations of human rights emanating from any source, including discriminatory activities of private persons, in order to ensure the equal enjoyment of human rights and fundamental freedoms. The term "protection" also indicates that special measures may have preventive (of human rights violations) as well as corrective functions.

24. Although the Convention designates "racial or ethnic groups or individuals requiring … protection**"** (article 1, paragraph 4), and "racial groups or individuals belonging to them" (article 2, paragraph 2), as the beneficiaries of special measures, the measures shall in principle be available to any group or person covered by article 1 of the Convention, as clearly indicated by the *travaux préparatoires* of the Convention, as well as by the practice of States parties and the relevant concluding observations of the Committee.[11]

25. Article 1, paragraph 4, is expressed more broadly than article 2, paragraph 2, in that it refers to individuals "requiring … protection" without reference to ethnic group membership. The span of potential beneficiaries or addressees of special measures should however be understood in the light of the overall objective of the Convention as dedicated to the elimination of all forms of racial discrimination, with special measures as an essential tool, where appropriate, for the achievement of this objective.

26. Article 1, paragraph 4, provides for limitations on the employment of special measures by States parties. The first limitation is that the measures "should not lead to the maintenance of separate rights for different racial groups". This provision is narrowly drawn to refer to "racial groups" and calls to mind the practice of Apartheid referred to in article 3 of the Convention, which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible "separate rights" must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights.

27. The second limitation on special measures is that "**they shall not be continued after the objectives for which they have been taken have been achieved**". This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved.[12] The length of time permitted for the duration of the measures will vary in the light of their objectives, the means utilized to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned.

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[11] See also paragraph 7 above.

[12] Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on Non-Discrimination in Economic, Social and Cultural Rights, paragraph 9.

B. Article 2, paragraph 2

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

29. Article 1, paragraph 4, of the Convention is essentially a clarification of the meaning of discrimination when applied to special measures. Article 2, paragraph 2, carries forward the special measures concept into the realm of obligations of States parties, along with the text of article 2 as a whole. Nuances of difference in the use of terms in the two paragraphs do not disturb their essential unity of concept and purpose.

30. The use in the paragraph of the verb "shall" in relation to taking special measures clearly indicates the mandatory nature of the obligation to take such measures. The mandatory nature of the obligation is not weakened by the addition of the phrase "when the circumstances so warrant**"**, a phrase that should be read as providing context for the application of the measures. The phrase has, in principle, an objective meaning in relation to the disparate enjoyment of human rights by persons and groups in the State party and the ensuing need to correct such imbalances.

31. The internal structure of States parties, whether unitary, federal or decentralized, does not affect their responsibility under the Convention, when resorting to special measures, to secure their application throughout the territory of the State. In federal or decentralized States, the federal authorities shall be internationally responsible for designing a framework for the consistent application of special measures in all parts of the State where such measures are necessary.

32. Whereas article 1, paragraph 4, of the Convention uses the term "special measures", article 2, paragraph 2, refers to "special and concrete measures". The *travaux préparatoires* of the Convention do not highlight any distinction between the terms and the Committee has generally employed both terms as synonymous.[13] Bearing in mind the context of article 2 as a broad statement of obligations under the Convention, the terminology employed in article 2, paragraph 2, is appropriate to its context in focusing on the obligation of States parties to adopt measures tailored to fit the situations to be remedied and capable of achieving their objectives.

33. The reference in article 2, paragraph 2, regarding the objective of special measures to ensure "adequate development and protection" of groups and individuals may be compared with the use of the term "advancement" in article 1, paragraph 4. The terms of the Convention signify that special measures should clearly benefit groups and individuals in their enjoyment of human rights. The naming of fields of action in the paragraph – "social, economic, cultural and other

[13] The United Nations Declaration on the Elimination of All Forms of Racial Discrimination referred, in article 2, paragraph 3, to 'special and concrete measures' (General Assembly resolution 1904 (XVIII)). See also paragraph 12 above.

fields" – does not describe a closed list. In principle, special measures can reach into all fields of human rights deprivation, including deprivation of the enjoyment of any human rights expressly or impliedly protected by article 5 of the Convention. In all cases, it is clear that the reference to limitations of "development" relates only to the situation or condition in which groups or individuals find themselves and is not a reflection on any individual or group characteristic.

34. Beneficiaries of special measures under article 2, paragraph 2, may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals. The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.

35. Provisions on the limitations of special measures in article 2, paragraph 2, are in essence the same, mutatis mutandis, as those expressed in article 1, paragraph 4. The requirement to limit the period for which the measures are taken implies the need, as in the design and initiation of the measures, for a continuing, system of monitoring their application and results using, as appropriate, quantitative and qualitative methods of appraisal. States parties should also carefully determine whether negative human rights consequences would arise for beneficiary communities consequent upon an abrupt withdrawal of special measures, especially if such have been established for a lengthy period of time.

V. RECOMMENDATIONS FOR THE PREPARATION OF REPORTS BY STATES PARTIES

36. The present guidance on the content of reports confirms and amplifies the guidance provided to States parties in the Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents (HRI/MC/2006/3) and the Guidelines for the CERD-specific document to be submitted by States parties under article 9, paragraph 1, of the Convention (CERD/C/2007/1).

37. Reports of States parties should describe special measures in relation to any articles of the Convention to which the measures are related. The reports of States parties should also provide information, as appropriate, on:

- The terminology applied to special measures as understood in the Convention
- The justifications for special measures, including relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen, and the results to be expected from the application of measures
- The intended beneficiaries of the measures
- The range of consultations undertaken towards the adoption of the measures including consultations with intended beneficiaries and with civil society generally
- The nature of the measures and how they promote the advancement, development and protection of groups and individuals concerned
- The fields of action or sectors where special measures have been adopted
- Where possible, the envisaged duration of the measures
- The institutions in the State responsible for implementing the measures

- The available mechanisms for monitoring and evaluation of the measures
- Participation by targeted groups and individuals in the implementing institutions and in monitoring and evaluation processes
- The results, provisional or otherwise, of the application of the measures
- Plans for the adoption of new measures and the justifications thereof
- Information on reasons why, in the light of situations that appear to justify the adoption of measures, such measures have not been taken.

38. In cases where a reservation affecting Convention provisions on special measures is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time frame. In cases where States parties have adopted special measures despite the reservation, they are invited to provide information on such measures in line with the recommendations in paragraph 37 above.

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Annex 113

CERD Committee, *General Recommendation No. 35: Combating racist hate speech*, document CERD/C/GC/35 (26 September 2013)

United Nations CERD/C/GC/35

International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

General recommendation No. 35

Combating racist hate speech*

I. Introduction

1. At its eightieth session, the Committee on the Elimination of Racial Discrimination (the Committee) decided to hold a thematic discussion on racist hate speech during its eighty-first session. The discussion took place on 28 August 2012 and focused on understanding the causes and consequences of racist hate speech, and how the resources of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention) may be mobilized to combat it. Participants in the discussion included, in addition to members of the Committee, representatives from permanent missions to the United Nations Office in Geneva, national human rights institutions, non-governmental organizations, academics and interested individuals.

2. Following the discussion, the Committee expressed its intention to work on drafting a general recommendation to provide guidance on the requirements of the Convention in the area of racist hate speech in order to assist States parties in discharging their obligations, including reporting obligations. The present general recommendation is of relevance to all stakeholders in the fight against racial discrimination, and seeks to contribute to the promotion of understanding, lasting peace and security among communities, peoples and States.

Approach adopted

3. In drafting the recommendation, the Committee has taken account of its extensive practice in combating racist hate speech, concern about which has engaged the full span of procedures under the Convention. The Committee has also underlined the role of racist hate speech in processes leading to mass violations of human rights and genocide, and in conflict situations. Key general recommendations of the Committee that address hate speech include general recommendations No. 7 (1985) relating to the implementation of article 4;[1] No. 15 (1993) on article 4, which stressed the compatibility between article 4 and

* Adopted by the Committee at its eighty-third session (12–30 August 2013).

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 18* (A/40/18), chap. VII, sect. B.

the right to freedom of expression;[2] No. 25 (2000) on gender-related dimensions of racial discrimination;[3] No. 27 (2000) on discrimination against Roma;[4] No. 29 (2002) on descent;[5] No. 30 (2004) on discrimination against non-citizens;[6] No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system;[7] and No. 34 (2011) on racial discrimination against people of African descent.[8] Many general recommendations adopted by the Committee relate directly or indirectly to hate speech issues, bearing in mind that effectively combating racist hate speech involves the mobilization of the full normative and procedural resources of the Convention.

4. By virtue of its work in implementing the Convention as a living instrument, the Committee engages with the wider human rights environment, awareness of which suffuses the Convention. In gauging the scope of freedom of expression, it should be recalled that the right is integrated into the Convention and is not simply articulated outside it: the principles of the Convention contribute to a fuller understanding of the parameters of the right in contemporary international human rights law. The Committee has integrated this right to freedom of expression into its work on combating hate speech, commenting where appropriate on its lack of effective implementation and, where necessary, drawing upon its elaboration in sister human rights bodies.[9]

II. Racist hate speech

5. The drafters of the Convention were acutely aware of the contribution of speech to creating a climate of racial hatred and discrimination, and reflected at length on the dangers it posed. In the Convention, racism is referred to only in the context of "racist doctrines and practices" in the preamble, a phrase closely linked to the condemnation in article 4 of dissemination of ideas of racial superiority. While the term hate speech is not explicitly used in the Convention, this lack of explicit reference has not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention. The present recommendation focuses on the ensemble of Convention provisions that cumulatively enable the identification of expression that constitutes hate speech.

6. Racist hate speech addressed in Committee practice has included all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups. In the light of the principle of intersectionality, and bearing in mind that "criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished,[10] the Committee's attention has also been engaged by hate speech targeting

[2] Ibid., *Forty-eighth Session*, *Supplement No. 18* (A/48/18), chap. VIII, sect. B, para. 4.
[3] Ibid., *Fifty-fifth Session*, *Supplement No. 18* (A/55/18), annex V, sect. A.
[4] Ibid., annex V, sect. C.
[5] Ibid., *Fifty-seventh Session*, *Supplement No. 18* (A/57/18), chap. XI, sect. F.
[6] Ibid., *Fifty-ninth Session, Supplement No. 18* (A/59/18), chap. VIII.
[7] Ibid., *Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX.
[8] Ibid., *Sixty-sixth Session*, *Supplement No. 18* (A/66/18), annex IX.
[9] Notably Human Rights Committee general comment No. 34 (2011) on freedoms of opinion and expression (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V).
[10] Ibid., para. 48.

persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee.

7. Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives. In line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them. The principles articulated in the present recommendation apply to racist hate speech, whether emanating from individuals or groups, in whatever forms it manifests itself, orally or in print, or disseminated through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events.

III. Resources of the Convention

8. The identification and combating of hate speech practices is integral to the achievement of the objectives of the Convention — which is dedicated to the elimination of racial discrimination in all its forms. While article 4 of the Convention has functioned as the principal vehicle for combating hate speech, other articles in the Convention make distinctive contributions to fulfilling its objectives. The due regard clause in article 4 explicitly links that article with article 5, which guarantees the right to equality before the law, without racial discrimination in the enjoyment of rights, including the right to freedom of opinion and expression. Article 7 highlights the role of "teaching, education, culture and information" in the promotion of interethnic understanding and tolerance. Article 2 incorporates the undertaking by States parties to eliminate racial discrimination, obligations that receive their widest expression in article 2, paragraph 1 (d). Article 6 focuses on securing effective protection and remedies for victims of racial discrimination and the right to seek "just and adequate reparation or satisfaction" for damage suffered. The present recommendation focuses principally on articles 4, 5 and 7 of the Convention.

9. As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively.

Article 4

10. The chapeau of article 4 incorporates the obligation to take "immediate and positive measures" to eradicate incitement and discrimination, a stipulation that complements and reinforces obligations under other articles of the Convention to dedicate the widest possible range of resources to the eradication of hate speech. In general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee summarized "measures" as comprising "legislative, executive, administrative, budgetary and regulatory instruments…as well as plans, policies, programmes and…regimes".[11] The Committee recalls the mandatory nature of article 4, and observes that during the adoption

[11] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 18* (A/64/18), annex VIII, para. 13.

of the Convention, it "was regarded as central to the struggle against racial discrimination",[12] an evaluation which has been maintained in Committee practice. Article 4 comprises elements relating to speech and the organizational context for the production of speech, serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails. The article also has an expressive function in underlining the international community's abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society.

11. In the chapeau and subparagraph (a), regarding "ideas or theories of superiority" or "racial superiority or hatred" respectively, the term "based on" is employed to characterize speech impugned by the Convention. The term is understood by the Committee in the context of article 1 as equivalent to "on the grounds of"[13] and in principle holds the same meaning for article 4. The provisions on dissemination of ideas of racial superiority are a forthright expression of the preventive function of the Convention and are an important complement to the provisions on incitement.

12. The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.[14]

13. As article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope. In the light of the provisions of the Convention and the elaboration of its principles in general recommendation No. 15 and the present recommendation, the Committee recommends that the States parties declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

(e) Participation in organizations and activities which promote and incite racial discrimination.

14. The Committee recommends that public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, should be declared as offences punishable by law, provided that they clearly constitute incitement to racial

[12] General recommendation No. 15, para. 1.

[13] The latter phrase is employed in the seventh preambular paragraph of the Convention. See also paragraph 1 of general recommendation No. 14 (1993) on article 1, paragraph 1, of the Convention (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 18* (A/48/18), chap. VIII, sect. B).

[14] Human Rights Committee general comment No. 34, paras. 22- 25; 33-35.

violence or hatred. The Committee also underlines that "the expression of opinions about historical facts" should not be prohibited or punished.[15]

15. While article 4 requires that certain forms of conduct be declared offences punishable by law, it does not supply detailed guidance for the qualification of forms of conduct as criminal offences. On the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account:

- **The content and form of speech**: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.
- **The economic, social and political climate** prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.[16]
- **The position or status of the speaker** in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention, and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.
- **The reach of the speech**, including the nature of the audience and the means of transmission: whether the speech was disseminated through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.
- **The objectives of the speech:** speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.[17]

16. Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4, States parties should take into account, as important elements in the incitement offences, in addition to the considerations outlined in paragraph 14 above, the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question, considerations which also apply to the other offences listed in paragraph 13.[18]

[15] Ibid., para. 49.

[16] Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 18* (A/60/18), chap. II, para. 20.

[17] Adapted from the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para. 22.

[18] Human Rights Committee general comment No. 34, para. 35; Rabat Plan of Action, para. 22.

17. The Committee reiterates that it is not enough to declare the forms of conduct in article 4 as offences; the provisions of the article must also be effectively implemented. Effective implementation is characteristically achieved through investigations of offences set out in the Convention and, where appropriate, the prosecution of offenders. The Committee recognizes the principle of expediency in the prosecution of alleged offenders, and observes that it must in each case be applied in the light of the guarantees laid down in the Convention and in other instruments of international law. In this and other respects under the Convention, the Committee recalls that it is not its function to review the interpretation of facts and national law made by domestic authorities, unless the decisions are manifestly absurd or unreasonable.

18. Independent, impartial and informed judicial bodies are crucial to ensuring that the facts and legal qualifications of individual cases are assessed consistently with international standards of human rights. Judicial infrastructures should be complemented in this respect by national human rights institutions in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).[19]

19. Article 4 requires that measures to eliminate incitement and discrimination must be made with due regard to the principles of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The phrase due regard implies that, in the creation and application of offences, as well as fulfilling the other requirements of article 4, the principles of the Universal Declaration of Human Rights and the rights in article 5 must be given appropriate weight in decision-making processes. The due regard clause has been interpreted by the Committee to apply to human rights and freedoms as a whole, and not simply to freedom of opinion and expression,[20] which should however be borne in mind as the most pertinent reference principle when calibrating the legitimacy of speech restrictions.

20. The Committee observes with concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention. States parties should formulate restrictions on speech with sufficient precision, according to the standards in the Convention as elaborated in the present recommendation. The Committee stresses that measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition.

21. The Committee underlines that article 4 (b) requires that racist organizations which promote and incite racial discrimination be declared illegal and prohibited. The Committee understands that the reference to "organized…propaganda activities" implicates improvised forms of organization or networks, and that "all other propaganda activities" may be taken to refer to unorganized or spontaneous promotion and incitement of racial discrimination.

22. Under the terms of article 4 (c) regarding public authorities or public institutions, racist expressions emanating from such authorities or institutions are regarded by the Committee as of particular concern, especially statements attributed to high-ranking officials. Without prejudice to the application of the offences in subparagraphs (a) and (b) of article 4, which apply to public officials as well as to all others, the "immediate and positive measures" referred to in the chapeau may additionally include measures of a disciplinary nature, such as removal from office, where appropriate, as well as effective remedies for victims.

[19] General recommendation No. 31, para. 5 (j).

[20] Committee on the Elimination of Racial Discrimination, communication No. 30/2003, *The Jewish community of Oslo et al. v Norway*, opinion adopted on 15 August 2005, para. 10.5.

23. As part of its standard practice, the Committee recommends that States parties which have made reservations to the Convention withdraw them. In cases where a reservation affecting Convention provisions on racist speech is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time frame.[21]

Article 5

24. Article 5 of the Convention enshrines the obligation of States parties to prohibit and eliminate racial discrimination 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 civil, political, economic, social and cultural rights, including the rights to freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and association.

25. The Committee considers that the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial.

26. In addition to its inclusion in article 5, freedom of opinion and expression is recognized as a fundamental right in a broad range of international instruments, including the Universal Declaration of Human Rights, which affirm that everyone has the right to hold opinions and to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers.[22] The right to freedom of expression is not unlimited but carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but only if they are provided by law and are necessary for protection of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.[23] Freedom of expression should not aim at the destruction of the rights and freedoms of others, including the right to equality and non-discrimination.[24]

27. The Durban Declaration and Programme of Action and the outcome document of the Durban Review Conference affirm the positive role of the right to freedom of opinion and expression in combating racial hatred.[25]

28. In addition to underpinning and safeguarding the exercise of other rights and freedoms, freedom of opinion and expression has particular salience in the context of the Convention. The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims.

29. Freedom of expression, indispensable for the articulation of human rights and the dissemination of knowledge regarding the state of enjoyment of civil, political, economic, social and cultural rights, assists vulnerable groups in redressing the balance of power

[21] Adapted from the Committee's general recommendation No. 32, para. 38.
[22] Universal Declaration of Human Rights, art. 19.
[23] International Covenant on Civil and Political Rights, art. 19, para. 3.
[24] Universal Declaration of Human Rights, art. 30.
[25] Durban Declaration, para. 90; outcome document of the Durban Review Conference (A/CONF.211/8), paras. 54 and 58.

among the components of society, promotes intercultural understanding and tolerance, assists in the deconstruction of racial stereotypes, facilitates the free exchange of ideas, and offers alternative views and counterpoints. States parties should adopt policies empowering all groups within the purview of the Convention to exercise their right to freedom of expression.[26]

Article 7

30. Whereas the provisions of article 4 on dissemination of ideas attempt to discourage the flow of racist ideas upstream, and the provisions on incitement address their downstream effects, article 7 addresses the root causes of hate speech, and represents a further illustration of the "appropriate means" to eliminate racial discrimination envisaged in article 2, paragraph 1 (d). The importance of article 7 has not diminished over time: its broadly educational approach to eliminating racial discrimination is an indispensable complement to other approaches to combating racial discrimination. Because racism can be the product of, inter alia, indoctrination or inadequate education, especially effective antidotes to racist hate speech include education for tolerance, and counter-speech.

31. Under article 7, States parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating universal human rights principles, including those of the Convention. Article 7 is phrased in the same mandatory language as other articles in the Convention, and the fields of activity — "teaching, education, culture and information" — are not expressed as exhaustive of the undertakings required.

32. The school systems in States parties represent an important focus for the dissemination of human rights information and perspectives. School curricula, textbooks and teaching materials should be informed by and address human rights themes and seek to promote mutual respect and tolerance among nations and racial and ethnic groups.

33. Appropriate educational strategies in line with the requirements of article 7 include intercultural education, including intercultural bilingual education, based on equality of respect and esteem and genuine mutuality, supported by adequate human and financial resources. Programmes of intercultural education should represent a genuine balance of interests and should not function in intention or effect as vehicles of cultural assimilation.

34. Measures should be adopted in the field of education aimed at encouraging knowledge of the history, culture and traditions of "racial or ethnical"[27] groups present in the State party, including indigenous peoples and persons of African descent. Educational materials should, in the interests of promoting mutual respect and understanding, endeavour to highlight the contribution of all groups to the social, economic and cultural enrichment of the national identity and to national, economic and social progress.

35. In order to promote inter-ethnic understanding, balanced and objective representations of history are essential, and, where atrocities have been committed against groups of the population, days of remembrance and other public events should be held, where appropriate in context, to recall such human tragedies, as well as celebrations of successful resolution of conflicts. Truth and reconciliation commissions can also play a

[26] Adapted from the Rabat Plan of Action, para. 25.

[27] International Convention on the Elimination of All Forms of Racial Discrimination, art. 7.

vital role in countering the persistence of racial hatred and facilitating the development of a climate of inter-ethnic tolerance.[28]

36. Information campaigns and educational policies calling attention to the harms produced by racist hate speech should engage the general public; civil society, including religious and community associations; parliamentarians and other politicians; educational professionals; public administration personnel; police and other bodies dealing with public order; and legal personnel, including the judiciary. The Committee draws the attention of States parties to general recommendation No. 13 (1993) on the training of law enforcement officials in the protection of human rights[29] and to general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system. In these and other cases, familiarization with international norms protecting freedom of opinion and expression and norms protecting against racist hate speech is essential.

37. Formal rejection of hate speech by high-level public officials and condemnation of the hateful ideas expressed play an important role in promoting a culture of tolerance and respect. The promotion of intercultural dialogue through a culture of public discourse and institutional instruments of dialogue, and the promotion of equal opportunities in all aspects of society are of equal value to educational methodologies and should be encouraged in a vigorous manner.

38. The Committee recommends that educational, cultural and informational strategies to combat racist hate speech should be underpinned by systematic data collection and analysis in order to assess the circumstances under which hate speech emerges, the audiences reached or targeted, the means by which they are reached, and media responses to hate messages. International cooperation in this area helps to increase not only the possibilities of comparability of data but also knowledge of and the means to combat hate speech that transcends national boundaries.

39. Informed, ethical and objective media, including social media and the Internet, have an essential role in promoting responsibility in the dissemination of ideas and opinions. In addition to putting in place appropriate legislation for the media in line with international standards, States parties should encourage the public and private media to adopt codes of professional ethics and press codes that incorporate respect for the principles of the Convention and other fundamental human rights standards.

40. Media representations of ethnic, indigenous and other groups within the purview of article 1 of the Convention should be based on principles of respect, fairness and the avoidance of stereotyping. Media should avoid referring unnecessarily to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance.

41. The principles of the Convention are served by encouraging media pluralism, including facilitation of access to and ownership of media by minority, indigenous and other groups in the purview of the Convention, including media in their own languages. Local empowerment through media pluralism facilitates the emergence of speech capable of countering racist hate speech.

[28] Adapted from the Rabat Plan of Action, para. 27.

[29] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 18* (A/48/18), chap. VIII, sect. B.

42. The Committee encourages self-regulation and compliance with codes of ethics by Internet service providers, as underlined in the Durban Declaration and Programme of Action.[30]

43. The Committee encourages States parties to work with sports associations to eradicate racism in all sporting disciplines.

44. With particular reference to the Convention, States parties should disseminate knowledge of its standards and procedures, and provide associated training, particularly for those concerned with its implementation, including civil servants, the judiciary and law enforcement officials. The concluding observations of the Committee should be made widely available in the official and other commonly used languages at the conclusion of the examination of the report of the State party; opinions of the Committee under the article 14 communications procedure should similarly be made available.

IV. General

45. The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.

46. The prevalence of racist hate speech in all regions of the world continues to represent a significant contemporary challenge for human rights. The faithful implementation of the Convention as a whole, integrated into wider global efforts to counter hate speech phenomena, represents the best hope of translating the vision of a society free from intolerance and hatred into a living reality and promoting a culture of respect for universal human rights.

47. The Committee regards the adoption by States parties of targets and monitoring procedures to support laws and policies combating racist hate speech to be of the utmost importance. States parties are urged to include measures against racist hate speech in national plans of action against racism, integration strategies and national human rights plans and programmes.

[30] Durban Programme of Action, para. 147.

Annex 114

CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, document CERD/C/ARE/CO/18-21 (13 September 2017)

United Nations CERD/C/ARE/CO/18-21

International Convention on the Elimination of All Forms of Racial Discrimination

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Committee on the Elimination of Racial Discrimination

Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*

1. The Committee considered the combined eighteenth to twenty-first periodic reports of the United Arab Emirates (CERD/C/ARE/18-21), submitted in one document, at its 2556th and 2557th meetings (CERD/C/SR. 2556 and 2557), held on 7 and 8 August 2017. At its 2571st meeting, held on 17 August, it adopted the present concluding observations.

A. Introduction

2. The Committee welcomes the submission of the combined eighteenth to twenty-first periodic reports of the State party, which included responses to the concerns raised by the Committee in its previous concluding observations (CERD/C/ARE/CO/17). The Committee welcomes the open and constructive dialogue held with the State party's high-level delegation.

B. Positive aspects

3. The Committee welcomes the following legislative and policy measures taken by the State party:

(a) Adoption of Federal Decree-Law No. 2 of 2015 on combating discrimination and hatred;

(b) Launch, in 2016, of the National Tolerance Programme aimed at combating discrimination on grounds of race, religion and national origin and promoting tolerance and coexistence, including the creation of a ministry of tolerance and appointment of a minister of tolerance in February 2016;

(c) Creation and dissemination of a tolerance charter for teachers in public and private educational institutions;

(d) Adoption of Ministerial Decree No. 764 of 2015 on Ministry of Labour-approved Standard Employment Contracts, stating that the model contract for employment approved by the Ministry of Human Resources and Emiratisation must be translated into English, Arabic and the language of the worker;

(e) Adoption of the national strategy for the empowerment of Emirati women in the United Arab Emirates for 2015-2021.

4. The Committee welcomes the ratification by the State party of the following international instruments:

* Adopted by the Committee at its ninety-third session (31 July to 25 August 2017).

(a) The Convention on the Rights of Persons with Disabilities, in 2010;

(b) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 2012;

(c) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in 2016.

C. Concerns and recommendations

Statistical data

5. While noting the limited statistical data provided by the State party during the dialogue, including the updated census data of 2016 on the overall population disaggregated by gender, the Committee regrets the lack of demographic information on the ethnic composition of the population, including non-citizens, and the lack of data on the enjoyment of economic, social and cultural rights by ethnic groups in the State party. The Committee also regrets the lack of data on the ethnic make-up of the prison population (arts. 1 and 5).

6. The Committee welcomes the State party's commitment to provide disaggregated data to the Committee. Recalling paragraphs 10-12 of its guidelines for reporting under the Convention (CERD/C/2007/1), the Committee recommends that the State party:

(a) **Provide statistical data in its next periodic report on the demographic composition of the population, disaggregated in the manner specified in article 1 (1) of the Convention, on the basis of self-identification of ethnic groups;**

(b) **Provide it with detailed statistical information on the enjoyment of economic, social and cultural rights by ethnic groups, so as to provide the Committee with an empirical basis for evaluating the equal enjoyment of rights under the Convention.**

(c) **Provide it with data on the ethnic make-up of the prison population.**

National human rights institution

7. The Committee welcomes information that the State party intends to establish a national human rights institution modelled to achieve "A" status, but regrets that the institution has not yet been established.

8. **Recalling its general recommendation No. 17 (1993) on the establishment of national institutions to facilitate the implementation of the Convention, the Committee recommends that the State party take immediate steps to establish a national human rights institution in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) that is mandated to promote and protect human rights and is adequately resourced to effectively and independently fulfil its mandate.**

Constitutional prohibition of racial discrimination

9. The Committee is concerned that article 25 of the Constitution, which prohibits discrimination on the grounds of "race, nationality, religious belief or social status", does not include all of the grounds specified in article 1 of the Convention, including colour, descent or ethnic origin. The Committee is further concerned that article 25 states that the prohibition of discrimination applies to "citizens of the Union" and might not apply equally to non-citizens, who constitute approximately 90 per cent of the population (art. 1).

10. **The Committee recommends that the State party enact legislation to bring its laws fully into line with the Convention, by including all prohibited grounds of discrimination as specified in article 1 and ensuring that the prohibition of discrimination applies in respect of fundamental rights equally to citizens and non-citizens, bearing in mind the provision in article 1 (2) regarding differences between citizens and non-citizens.**

Law on discrimination and hate speech

11. The Committee notes the enactment of Federal Decree-Law No. 2 of 2015 on combating discrimination and hatred, which criminalizes blasphemy, defamation of religions, discrimination and hate speech, among other offences. The Committee is concerned that the definition of discrimination in the law is not fully in line with article 1 of the Convention, as the grounds of descent and national origin are missing. The Committee is also concerned that the prescribed punishments may not be proportional to the crimes (arts. 1 and 4).

12. **Recalling its general recommendation No. 35 (2013) on combating racist hate speech, the Committee urges the State party to ensure that:**

(a) **Any legislation prohibiting racial discrimination is fully in line with the Convention;**

(b) **The definition of discrimination in Federal Decree-Law No. 2 of 2015 is fully in line with article 1 of the Convention;**

(c) **Any legislation on hate speech fulfils the requirements of article 4 of the Convention, which requires States parties to prohibit the dissemination of ideas based on racial superiority and hatred, incitement to racial hatred, acts of violence against any race or groups of persons of another colour or ethnic origin and incitement to such acts;**

(d) **Criminal sanctions are governed by principles of legality, proportionality and necessity.**

Complaints of racial discrimination

13. The Committee welcomes the data provided by the State party during the dialogue on the number of cases filed annually between 2015 and 2017 under Federal Decree-Law No. 2 of 2015 on combating discrimination and hatred. The Committee regrets the lack of detailed information on the nature and outcome of the complaints, including data on the number of investigations, prosecutions and convictions resulting from complaints and the national or ethnic origin of the victims. While noting that the law was only recently enacted, the Committee is concerned about the low number of complaints filed, and reminds the State party that a low number of complaints does not signify the absence of racial discrimination in the State party, but may signify barriers in invoking the rights in the Convention domestically (arts. 6-7).

14. **The Committee recommends that the State party:**

(a) **Provide it with detailed information on the implementation and impact of Federal Decree-Law-No. 2 of 2015 on combating discrimination and hatred in its next periodic report, including statistical data on the number and type of complaints of racial discrimination and hate speech and prosecutions and convictions of perpetrators, disaggregated by the age, gender and ethnic origin of the victim, as well as information on compensation to victims;**

(b) **Undertake public education campaigns specifically on the rights provided in the Convention and the domestic legislation under which those rights can be invoked, and on the methods for filing complaints of racial discrimination and hate speech;**

(c) **Ensure that methods for judicial recourse, including with respect to lodging complaints, are administered in a manner that is open and accessible to all victims;**

(d) **Provide information in the next periodic report on training of security forces, prosecutors, judges, labour inspectors and other public officials in identifying and registering racist incidents.**

Access to justice

15. While noting with interest information provided by the State party on the creation of mechanisms for labour complaints, including electronic complaint mechanisms for workers, and efforts to educate workers on their legal rights under labour laws, the Committee regrets the lack of detailed information on the number of complaints filed by foreign workers to complaint mechanisms or to the national courts regarding abusive labour practices and on the outcome of such complaints. The Committee is further concerned that foreign workers may face barriers in access to justice, such as a lack of empowerment to submit complaints, for fear of adverse repercussions (arts. 5-6).

16. **In the light of its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system the Committee recommends that the State party:**

(a) **Take measures to prevent barriers in access to justice by foreign workers in the State party;**

(b) **Ensure that foreign workers can submit complaints regarding abusive labour practices to independent and effective mechanisms;**

(c) **Consider the creation of a labour ombudsman to effectively monitor and resolve labour disputes;**

(d) **Provide detailed information in its next periodic report on the number of complaints submitted by foreign workers and the number of inspection visits, investigations, prosecutions and convictions resulting from such complaints, as well as on compensation provided to victims.**

Discrimination in employment

17. While noting that Federal Decree-Law No. 2 of 2015 on combating discrimination and hatred contains some articles imposing penalties for discrimination in employment, the Committee is concerned by the lack of information on the implementation and impact of those provisions on preventing racial discrimination in the workplace. The Committee is also concerned at reports of wage differentials among foreign employees from different geographical regions (art. 5).

18. **The Committee requests that the State party provide detailed information in its next periodic report on the impact and implementation of legislation to prevent discrimination in employment and in the workplace. The Committee recommends that the State party implement existing legislation robustly with the aim of eliminating discriminatory pay differentials that may be based on ethnic and national origin, in line with article 5 of the Convention.**

Sponsorship system

19. The Committee welcomes the recent adoption by the Ministry of Labour of measures such as: (a) decision 766/2015, by which it repealed resolution No. 1186/2010; and (b) resolution 1094/2016, by which it amended decision No. 766/2015, to grant workers a new work permit to move from one establishment to another. It is concerned, however, that gaps in protection of foreign workers under the sponsorship contractual relationship system still exist. The Committee also regrets the lack of information on the effective implementation and impact of protective measures (arts. 5 and 6).

20. **The Committee recommends that the State party end the sponsorship system and regulate residency permits through its ministries. The Committee further recommends that policies and measures protecting foreign workers currently under the sponsorship system be fully implemented, and that any worker facing abuse or exploitation under this system be able to fully access appropriate remedies. The Committee recommends that the State party include detailed information in its next periodic report regarding the status of the sponsorship system and the implementation and impact of protective measures on the situation of foreign workers.**

Situation of foreign workers

21. The Committee notes with appreciation efforts made by the State party to improve the situation of foreign workers in the State party, such as efforts to increase recruitment transparency, prevent contract substitution, prevent the illegal withholding of passports, create wage protection systems, conduct inspections to regulate working hours and educate workers about their legal rights, among other good practices. However, the Committee is concerned that, without regular monitoring and enforcement of protective policies and measures, abusive working practices, such as the withholding of passports, false imprisonment, substandard working conditions, long working hours, non-payment of wages, non-payment of overtime, unlawful deduction of wages, insufficient rest or break periods and overcrowded living conditions will continue to persist against foreign workers. Foreign workers appear not to enjoy the right to family reunification in the State party (art. 5).

22. **The Committee recommends that the State party:**

(a) **Continue its efforts to enact laws to protect foreign workers from exploitative labour practices;**

(b) **Ensure that inspections are conducted by qualified officials in an effective manner to identify and end abusive practices;**

(c) **Provide detailed information in its next periodic report on the impact of policies and measures to protect foreign workers from exploitative labour practices;**

(d) **Guarantee the right to family reunification to foreign workers.**

Pensions for foreign workers

23. The Committee notes that the State party is considered one of the most attractive destinations for foreign workers and is the third-highest source of foreign remittances by foreign contract workers from over 200 different nationalities (see CERD/C/ARE/18-21, paras. 21 and 94). The Committee is concerned, however, that foreign workers who return to their home countries may not be entitled to pensions even after long periods of service.

24. **The Committee recommends that the State party examine the feasibility of establishing a State-administered pension system for foreign workers, possibly financed by employers and employees, based on length of service and other relevant criteria.**

Protection of foreign domestic workers

25. The Committee is concerned that domestic workers, who are mostly foreign women, are not protected under national labour laws. The Committee is further concerned at reports that foreign domestic workers have experienced unpaid wages, lengthy work days with insufficient time off or rest periods, restrictions on freedom of movement and, in some cases, sexual exploitation by employers. The Committee welcomes information provided by the State party during the dialogue that a draft law on domestic workers is currently under consideration (art. 5).

26. **Recalling its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee recommends that the State party ensure that the domestic worker rights bill of 2017 contains protections for domestic workers from abuse and labour exploitation, in line with international law and the Convention, including protection from the withholding of wages, lengthy work days with insufficient rest periods, restrictions on freedom of movement and sexual exploitation. The Committee further recommends that the State party expedite the enactment of the law on domestic workers, in consultation with civil society, and ensure that sufficient monitoring mechanisms are in place for its effective implementation. The Committee recommends that the State party ratify the Domestic Workers Convention, 2011 (No. 189) of the International Labour Organization. The Committee requests that the State party provide detailed information in its next periodic report on the enactment of the bill, and the subsequent implementation,**

monitoring and impact of the law with regard to improving the situation of foreign domestic workers.

Situation of Bidoon (stateless persons)

27. The Committee notes information provided by the State party during the dialogue that some Bidoon were allowed to obtain citizenship during a grace period where they were entitled to rights and not subject to penalties. However, the Committee is concerned at the lack of detailed information, including statistical data, on the situation of Bidoon in the State party who have not obtained nationality, including the impact of the lack of nationality on their ability to access health care, education, employment and State-provided services, without discrimination (art. 5).

28. **Recalling its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee recommends that the State party take measures to consider applications for citizenship from Bidoon residing in the State party. The Committee also recommends that the State party provide Bidoon with the documentation necessary to access health care, education, employment and State-provided services, without discrimination. The Committee recommends that the State party accede to the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons.**

Nationality rights

29. While welcoming that a royal directive of 2 December 2011 allows citizenship to be granted to children of female citizens married to foreigners, the Committee regrets that citizenship cannot be granted until the child reaches the age of 18 (arts. 2 and 5).

30. **Recalling its general recommendation No. 30, especially paragraph 16 on reduction of statelessness, particularly among children, the Committee recommends that the State party revise the directive of 2 December 2011 to allow women to transmit their citizenship to their children from birth, without discrimination.**

Training courses on racial discrimination

31. The Committee welcomes information on training courses on human rights conducted for employees, the police and the judiciary, as well as initiatives to encourage tolerance in the State party, including in schools. The Committee is concerned at the lack of detailed information and statistics on training conducted specifically on the rights enshrined in the Convention and on the impact such trainings have had on the elimination of racial discrimination (art. 7).

32. **The Committee recommends that the State party continue its efforts to increase tolerance and respect for diversity in the State party and continue to conduct training courses on human rights. The Committee recommends that the State party also conduct training courses for law enforcement officers, judges, lawyers and State officials on the rights enshrined in the Convention, including specialized training on the prevention of racial discrimination. The Committee requests that the State party provide updated, detailed information and statistics in its next periodic report on such training courses and their impact on eliminating racial discrimination in the State party.**

D. Other recommendations

Ratification of other treaties

33. **Bearing in mind the indivisibility of all human rights, the Committee encourages the State party to consider ratifying those international human rights instruments that it has not yet ratified, in particular treaties with provisions that have direct relevance to communities that may be subjected to racial discrimination, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on**

the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Domestic Workers Convention, 2011 (No. 189), of the International Labour Organization.

Follow-up to the Durban Declaration and Programme of Action

34. **In the light of its general recommendation No. 33 (2009) on the follow-up to the Durban Review Conference, the Committee recommends that, when implementing the Convention in its domestic legal order, the State party give effect to the Durban Declaration and Programme of Action, adopted in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, taking into account the outcome document of the Durban Review Conference, held in Geneva in April 2009. The Committee requests that the State party include in its next periodic report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action at the national level.**

International Decade for People of African Descent

35. **In the light of General Assembly resolution 68/237, in which the Assembly proclaimed 2015-2024 the International Decade for People of African Descent, and Assembly resolution 69/16 on the programme of activities for the implementation of the Decade, the Committee recommends that the State party prepare and implement a suitable programme of measures and policies. The Committee requests that the State party include in its next periodic report specific information on the concrete measures adopted in that framework, taking into account its general recommendation No. 34 (2011) on racial discrimination against people of African descent.**

Consultations with civil society

36. **The Committee wishes to underscore the importance that it attaches to reports that are submitted by non-governmental organizations, which enrich the dialogue between the Committee and the State party delegation during the consideration of State parties' reports. The State party should develop its dialogue with civil society organizations working in the area of human rights protection, in particular those working to combat racial discrimination, in connection with the preparation of the next periodic report.**

Amendment to article 8 of the Convention

37. **The Committee recommends that the State party ratify the amendment to article 8 (6) of the Convention adopted on 15 January 1992 at the fourteenth meeting of States parties to the Convention and endorsed by the General Assembly in its resolution 47/111.**

Declaration under article 14 of the Convention

38. **The Committee encourages the State party to make the optional declaration provided for in article 14 of the Convention recognizing the competence of the Committee to receive and consider individual communications.**

Common core document

39. **The Committee encourages the State party to submit a common core document in accordance with the harmonized guidelines on reporting under the international human rights treaties, in particular those on the common core document, as adopted at the fifth inter-committee meeting of the human rights treaty bodies, held in June 2006 (HRI/GEN/2/Rev.6, chap. I). In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 42,400 words for such documents.**

Follow-up to the present concluding observations

40. **In accordance with article 9 (1) of the Convention and rule 65 of its rules of procedure, the Committee requests the State party to provide, within one year of the adoption of the present concluding observations, information on its implementation of the recommendations contained in paragraphs 26 and 28 above.**

Paragraphs of particular importance

41. **The Committee wishes to draw the attention of the State party to the particular importance of the recommendations contained in paragraphs 8, 22 and 24 above and requests the State party to provide detailed information in its next periodic report on the concrete measures taken to implement those recommendations.**

Dissemination of information

42. **The Committee recommends that the State party's reports be made readily available and accessible to the public at the time of their submission and that the concluding observations of the Committee with respect to those reports be similarly publicized in the official and other commonly used languages, as appropriate.**

Preparation of the next periodic report

43. **The Committee recommends that the State party submit its combined twenty-second and twenty-third periodic reports, as a single document, by 20 July 2021, taking into account the reporting guidelines adopted by the Committee during its seventy-first session (CERD/C/2007/1) and addressing all the points raised in the present concluding observations. In the light of General Assembly resolution 68/268, the Committee urges the State party to observe the limit of 21,200 words for periodic reports.**

Annex 115

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Response of the United Arab Emirates
(7 August 2018)

NATIONS UNIES
DROITS DE L'HOMME
HAUT-COMMISSARIAT

UNITED NATIONS
HUMAN RIGHTS
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REFERENCE: ICERD-ISC 2018/2
CE/VL/ak

The Secretariat of the United Nations (Office of the High Commissioner for Human Rights) presents its compliments to the Permanent Mission of the State of Qatar to the United Nations Office at Geneva, and has the honour to refer to the communication submitted by the State party under article 11 of the Convention on the Elimination of All Forms of Racial Discrimination concerning the United Arab Emirates (ICERD-ISC-2018/2).

The Secretariat has the honour to transmit herewith the submission from the United Arab Emirates, received on 7 August 2018, in response to the State party's communication of 8 March 2018.

The Secretariat avails itself of the opportunity to renew to the Permanent Mission of the State of Qatar the assurances of its highest consideration.

8 August 2018

Annex 115

Before the Committee on the Elimination of Racial Discrimination

RESPONSE OF THE UNITED ARAB EMIRATES

To the Communication dated 8 March 2018 Submitted by the State of Qatar Pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination

Submitted to the Office of the High Commissioner for Human Rights, United Nations Office, Geneva, Switzerland

7 August 2018

TABLE OF CONTENTS

This Response is submitted by the United Arab Emirates ("**UAE**") pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination ("**CERD**" or "**Convention**"). This Response addresses the allegations made by the State of Qatar ("**Qatar**") in its 8 March 2018 communication ("**Submission**") to the Committee on the Elimination of Racial Discrimination ("**Committee**"). A copy of Qatar's Submission was communicated to the United Arab Emirates on 7 May 2018 by the Secretary General of the United Nations (High Commissioner for Human Rights).

I. INTRODUCTION

1. Qatar alleges in its Submission that the UAE has violated the Convention by virtue of certain measures that it has taken following the UAE's termination of relations with Qatar on 5 June 2017. Qatar's complaint misrepresents the facts and the actions taken by the UAE, as well as the circumstances resulting in the UAE's termination of relations with Qatar. Furthermore, Qatar's complaint does not fall within the scope of CERD Article 11 because: (i) it does not involve a situation in which a "State Party is not giving effect to the provisions of this Convention," as the UAE did not expel Qatari citizens and therefore did not deny them any protections provided for in the Convention; (ii) the UAE did not enforce the portion of the 5 June 2017 announcement by the Ministry of Foreign Affairs and International Cooperation ("**MoFA**") calling on Qatari citizens to depart UAE territory; the UAE has since made clear that Qatari citizens resident in the UAE may remain in the country and non-resident Qatari citizens can apply to enter the UAE; and (iii) Qatar has not shown that UAE domestic remedies available to Qatari citizens have been exhausted as required by CERD Article 11(3).

2. This Response first details why, contrary to Qatar's claims, there has been no mass expulsion of Qatari citizens from the UAE. The announcement of 5 June 2017 by MoFA did not constitute an order for deportation. Under UAE law, only the Ministry of Interior has the authority to issue orders for deportation. Subsequent to the 5 June 2017 announcement, neither did the UAE Ministry of Interior issue any such orders, nor did the UAE issue any other legislation or regulations to deport Qatari citizens. Further, the UAE took no other action to compel Qataris to leave the UAE. On the contrary, as discussed in more detail in Section II of this Response, official UAE immigration records indicate that Qatari nationals remained in the UAE in overwhelming numbers and that Qatari nationals continue to reside in and visit the UAE in substantially the same numbers as they did prior to the break in relations.

3. The UAE has also not instituted a travel ban against Qataris who wish to enter the UAE. Instead, the UAE established a new requirement that Qatari nationals request permission to enter the UAE, which is a common requirement that States impose routinely on visitors to their territory of various nationalities. Section III of this Response provides information about this requirement, including official data showing that the majority of applications to enter or re-enter the UAE submitted by Qatari nationals have been approved. Indeed, given Qatar's misstatement of the facts, MoFA made an announcement on 5 July 2018 clarifying that there was never a legal order deporting Qatari citizens from the UAE and that any Qatari citizen

could apply to enter the UAE on an individual basis and would be permitted to do so if they do not pose a security risk and otherwise meet neutral immigration criteria.[1]

4. Qatar's claims regarding the UAE's alleged violations of the right to family, education, and health are premised on the existence of an expulsion order and a travel ban. Since there was no expulsion order and there is no travel ban, Qatar's allegations regarding these alleged violations necessarily lack merit.

5. Qatar's claim of discrimination with respect to access to justice is equally unfounded. Qatari nationals have access to the UAE courts as demonstrated in Section IV.G. There are presently hundreds of active proceedings in the UAE courts to which Qatari citizens are parties.

6. Moreover, the allegation that the UAE is mounting or supporting a campaign of hate speech against Qatari citizens, or that such a campaign exists, is unfounded.

7. The reality is that the UAE's targeted measures are aimed at the Qatari government and not the Qatari people. From the very beginning of the regional crisis, 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."[2] Since then, the UAE has made clear the entry and residence rights applicable to Qatari nationals, including as recently as 5 July 2018, when MoFA issued a public statement confirming that Qataris continue to have the right to live in the UAE and that there is no expulsion order applicable to Qatari citizens.[3]

8. The current situation in the Gulf region unfortunately was precipitated by Qatar's own actions and its failure to respect its international obligations. In 2013, following years of diplomatic engagement on the issues, several members of the Gulf Cooperation Council, including Qatar, concluded an agreement by which Qatar committed itself to cease supporting, financing, or harbouring persons or groups, in particular, terrorist and extremist groups. Two supplemental agreements for the same purpose were concluded among the Gulf Cooperation Council members in 2014. The three agreements are collectively referred to, and known to the larger public as, the "Riyadh Agreements." The obligations under the Riyadh Agreements supplemented the parties' existing obligations under other international legal instruments, including the International Convention for the Suppression of the Financing of Terrorism, relevant UN Security Council resolutions, and customary international law.

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[1] *An Official Statement by The UAE Ministry of Foreign Affairs and International Cooperation,* Statement by the Ministry of Foreign Affairs and International Cooperation (5 July 2018), https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx.

[2] *UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar,* statement by the Ministry of Foreign Affairs and International Cooperation (5 June 2017), https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-06-2017-UAE-Qatar.aspx.

[3] *An Official Statement by The UAE Ministry of Foreign Affairs and International Cooperation,* Statement by the Ministry of Foreign Affairs and International Cooperation (5 July 2018), https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx.

9. Qatar failed to abide by the Riyadh Agreements and continues to violate its obligations under other international agreements. To cite just one example, in April 2017 Qatar paid US $1 billion as "ransom" to entities affiliated with known terrorist organizations such as Al Qaida, a matter that the Arab Republic of Egypt brought to the attention of the Security Council.[4]

10. On 5 June 2017, after repeated calls upon Qatar to honour its commitments proved ineffective, the UAE and no less than ten other States took the decision to terminate or downgrade relations with Qatar. Qatar continues to fund numerous terrorist organizations, harbour and provide material support to known terrorists, and interfere in the internal sovereign affairs of States in the region. This violation by Qatar of its express commitments under the Riyadh Agreements and of its other international obligations puts at risk the national security of the UAE and the safety of its citizens.

11. Qatar's Submission conveniently excludes these underlying facts, which provide essential and legally significant context. Instead, Qatar deliberately misrepresents the UAE's measures against the Qatari government as measures taken against the people of Qatar. To the contrary, the UAE has taken significant steps to ensure that the current crisis with Qatar does not affect the rights of ordinary citizens. In this Response, the UAE will demonstrate that the facts do not support Qatar's allegations.

12. Finally, the UAE would like to draw the Committee's attention to the ongoing proceedings in the International Court of Justice ("**ICJ**" or "**Court**") relating to this matter, which were initiated by Qatar. The UAE maintains that Qatar should not be permitted to advance a complaint under Article 11 while simultaneously initiating proceedings in relation to the same issues before the ICJ. The UAE intends to lodge jurisdictional objections with the ICJ on this basis.

13. As part of the ICJ proceedings, an order was issued on 23 July 2018 in respect of provisional measures requested by Qatar. The ICJ refused to grant any measures in the form sought by Qatar, and instead indicated limited measures in three areas (family re-unification, education and access to justice), in which UAE policy already reflects and complies with the order of the Court. Moreover, the Court indicated a general measure urging both parties not to take any steps that could aggravate the dispute. The UAE is confident that its practice in these areas

[4]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* Erika Solomon, *The $1bn Hostage Deal that Enraged Qatar's Gulf Rivals*, FINANCIAL TIMES (5 June 2017), https://www.ft.com/content/dd033082-49e9-11e7-a3f4-c742b9791d43; Michelle Nichols, *Egypt Calls for U.N. Inquiry into Accusation of Qatar Ransom Payment*, REUTERS (8 June 2017), https://www.reuters.com/article/us-gulf-qatar-un/egypt-calls-for-u-n-inquiry-into-accusation-of-qatar-ransom-payment-idUSKBN18Z26W; Alex Lockie, *Qatar May Have Paid $1 Billion in Ransom for Release of Royal Family Members Captured While Hunting with Falcons*, BUSINESS INSIDER (5 June 2017), http://www.businessinsider.com/qatar-ransom-al-qaeda-iran-falconry-2017-6; *Egypt Calls for UN Probe on Qatar Giving Terrorists $1 Bln in Iraq*, AL ARABIYA ENGLISH (8 June 2017), https://english.alarabiya.net/en/News/middle-east/2017/06/08/Egypt-calls-for-probe-on-Qatar-giving-terrorist-groups-in-Iraq-1-billion.html.

fully conforms to both the ICJ's order and to its obligations under the CERD, and that upon a close examination of the facts the Court will reach the same conclusion.

14. The UAE is grateful to the Committee for its work and its attention to the important matters before it. The UAE became a Party to the CERD almost 45 years ago. It has been and remains today firmly committed to the principles that inspired the Convention. The UAE would like to take this opportunity to reaffirm its full commitment to the Convention's objective of eliminating racial discrimination in all its forms.

II. QATARI NATIONALS WERE NOT EXPELLED FROM THE UAE

15. In its Submission, Qatar alleges that the UAE "has expelled all Qatari residents and visitors within its borders."[5] The Submission alleges that expulsions were mass and arbitrary, stating that "UAE authorities expelled Qatari residents with no consideration of the personal circumstances of each individual."[6]

16. The UAE unequivocally rejects these claims. The UAE has carried out no mass expulsion of Qatari citizens, despite Qatar's insistence on repeating these false charges. The UAE urges the Committee to examine the evidence that Qatar has provided in support of these allegations. Beyond merely referring to the statement issued on 5 June 2017 by MoFA, Qatar has not provided any specific or credible evidence of such a mass expulsion or any specific examples of individual expulsions of Qatari citizens based on their nationality.

17. To the contrary, official UAE immigration records show that thousands of Qataris continue to reside in the UAE and have continued to visit its territory since the UAE's termination of relations with Qatar on 5 June 2017.

18. One aspect of the 5 June 2017 announcement was a call for citizens of Qatar to leave UAE territory for precautionary security reasons. While this call was made as a matter of precaution, it does not constitute a legal order for the deportation or expulsion of Qatari citizens. In the UAE, the authority to expel individuals from UAE territory falls solely under the authority of the Ministry of Interior by virtue of Federal Law No. 6 of 1973 Concerning Immigration and Residence ("**Immigration Law**"). Absent an order by the Ministry of Interior, a person cannot be administratively deported from UAE territory. Since the Ministry of Interior issued no such orders, there was never any legal requirement for Qatari citizens to leave UAE territory.

19. UAE's official immigration records confirm beyond any doubt that there were no expulsions and that Qataris residing in the UAE understood that they were not required to leave its territory. Those records show that the vast majority of Qatari residents in the UAE on 5 June 2017 chose to continue their residence in the UAE, and did not depart. As of mid-June 2018,

[5] Qatar's Submission, para. 4.

[6] *Id*. at, para. 71.

there were 2,194 Qatari nationals in the UAE, largely the same as the number of Qataris residing in the UAE on 5 June 2017.[7]

20. While the UAE issued no deportation orders and took no other steps to compel Qatari citizens to leave its territory, the Committee should note that the Qatari Embassy in the UAE did issue its own instruction for Qatari citizens to depart the UAE.[8] It is possible that some Qataris who left the UAE did so as a result of the instructions of the Qatari Embassy.

21. Qatar recently repeated these false allegations of mass expulsion before the ICJ in the context of its application for provisional measures under the CERD. Qatari government-owned media outlets – which broadcast widely throughout the Middle East – have repeatedly broadcast Qatar's false allegations. Due to this misinformation, MoFA issued a statement on 5 July 2018 affirming the UAE's long-standing policy on the rights of Qatari citizens to travel to and reside in the UAE and, more importantly, confirming that Qatari citizens are not under any expulsion order.[9] The statement reads, in part, as follows:

> "[t]he 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…. the UAE has not issued any legal or administrative laws or orders relating to the expulsion of Qatari citizens from UAE territory. The UAE took no action to expel Qatari citizens and national[s] who remained in the UAE following the expiry of the 14 day period referred to in the June 5, 2017 announcement."[10]

22. The Committee should note that in its order of 23 July 2018, the ICJ refused to grant the provisional measure requested by Qatar for "suspending operation of the collective expulsion of all Qataris from, and ban on entry into, the UAE." The ICJ's order is a tacit recognition that there has been no collective expulsion, and that no travel ban exists. Qatar's false allegations regarding the "travel ban" are addressed in more detail in the next Section below.

III. THERE IS NO TRAVEL BAN RELATING TO QATARI NATIONALS

23. Qatar's Submission alleges that its citizens are banned from travelling to the UAE. As with the expulsion allegation, this is also false. While Qataris are no longer allowed to travel to the UAE on a visa-free basis, they may still travel to the UAE after requesting permission to do

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[7] *See* Immigration – Qataris in the UAE (Attached as Annex 1); Immigration - ID & Citizenship Authority Cover Letter Re Excel Immigration Stats (Attached as Annex 2).

[8] *Qatar asks citizens to leave UAE within 14 days- embassy*, Reuters (5 June 2017), https://www.zawya.com/uae/en/story/Qatar_asks_citizens_to_leave_UAE_within_14_days_embassy-TR20170605nL8N1J22FFX3/.

[9] *An official Statement by The UAE Ministry of Foreign Affairs and International Cooperation,* Statement by the Ministry of Foreign Affairs and International Cooperation (5 July 2018), https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx.

[10] *Id*.

so. Thousands of Qatari nationals have travelled to or from the UAE on this basis since 5 June 2017.

24. Prior to 5 June 2017, Qatari citizens could travel to the UAE without a visa or any other prior permission. Following the termination of relations with Qatar, the UAE implemented a new system whereby Qatari nationals must obtain prior permission to travel to the UAE. The principle of obtaining permission prior to travel applies to many other nationalities and is a basic immigration control measure used by governments worldwide. The right to apply entry requirements to foreign nationals is a sovereign right reserved for all States and is not ceded in the Convention or under international law more generally. The UAE maintains a limited list of countries whose nationals may enter the UAE on a visa-free basis or with a visa on arrival; citizens of most countries must apply for permission in advance, as is now the case for Qataris.[11]

25. Qatari citizens may and do apply for permission to travel to the UAE through the hotline established on 11 June 2017.[12] Contrary to Qatar's claims, the hotline operates efficiently and the vast majority of applications for permission to travel are approved. In the first six months of 2018 alone, the hotline received 1,390 applications. Of this total number, only 12 applications were rejected for security or other reasons, meaning that approximately 99% of applications for entry were approved.[13]

26. The efficient working of the hotline is evidenced by the extensive travel logs of movements by Qatari citizens across UAE borders, as evidenced by the UAE's official immigration records. Since 5 June 2017, entry and exit records enclosed with this Response show 8,442 movements by Qatari citizens across UAE borders, all of which were facilitated by the work of the hotline.[14]

IV. QATAR'S ALLEGATIONS OF VIOLATION OF OTHER RIGHTS RECOGNIZED UNDER THE CERD LACK MERIT

27. As explained in the prior sections of this Response, Qatar's claim that the UAE has carried out a collective expulsion of Qatari nationals is demonstrably false. Qatar's claim that the UAE has instituted a travel ban against Qatari citizens is also false. These factual matters entirely undermine Qatar's other claims of violations of the CERD that are premised on the purported expulsion and travel ban.

28. In particular, the absence of any expulsion of Qatari nationals or travel ban significantly undermines Qatar's claims that the UAE has interfered with the "right to marriage and choice of spouse," the "right to public health and medical care," the "right to education," the "right to

[11] *See Do you need an entry permit or a visa to enter the UAE?*, The Official Portal of the UAE Government, https://government.ae/en/information-and-services/visa-and-emirates-id/do-you-need-an-entry-permit-or-a-visa-to-enter-the-uae.

[12] *See* Hotline - UAE MoFA Announcement re Directive for Hotline Addressing Mixed Families (Attached as Annex 3).

[13] *See* Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration, pg. 2 (Attached as Annex 4).

[14] *See* Immigration - Complete Entry-Exit Records (Attached as Annex 5).

work," the "right to property" and the "right to equal treatment before tribunals" of Qatari nationals. No evidence is provided by Qatar to suggest that these rights are denied to Qataris in the UAE. Instead, these claims are premised on the false assumption that Qataris' enjoyment of these rights within the UAE has been obstructed by their inability to enter the UAE. The fact is that none of these rights can be interpreted so expansively so as to allow a foreign national an unconditional right to enter the territory of a State. As indicated earlier in this Response, any interpretation of the CERD must take into account the fact that States have a right to determine for themselves the entry and residence restrictions applicable to foreign nationals who enter their territories. In any event, this is a moot issue, since as discussed in Sections II and III above, official UAE records indisputably show that Qatari citizens continue to reside in the UAE and travel in large numbers across its borders.

29. Nevertheless, the UAE specifically responds below to each of these separate allegations. In the following sub-sections, the UAE will explain why – aside from there having been no expulsion or travel ban – the allegations made by Qatar are without merit.

A. Right to Marriage and Choice of Spouse

30. Qatar alleges that the UAE has unlawfully interfered with the rights to marriage and family life "[i]n forcing family separation by expelling Qatari nationals."[15]

31. The UAE recognizes the importance of ensuring that UAE-Qatari families are not separated and that their lives are not detrimentally impacted by the absence of relations between the UAE and Qatar. As indicated earlier in this Response, the hotline has received and granted thousands of applications, refusing only a very small minority of them, and refusing almost no applications by Qatar-UAE mixed families.[16] To the contrary, not only do Qatari nationals still enter the UAE in large numbers, official UAE records show that a number of marriages involving a Qatari citizen have been registered in the UAE since the start of the crisis.[17] It is simply false to allege that the UAE is interfering in individuals' right to marriage and choice of spouse, as Qatar's Submission suggests.

32. The Committee should note that Qatar's assertions in relation to family separation do not include any specific details to substantiate the allegations made. For example, according to Qatar, its National Human Rights Committee ("**Qatari Committee**") has documented "620 cases of 'family separation' [of which 78 cases are allegedly attributable to the UAE]."[18] Details of these families have not been provided. Further, it is notable that most of the information presented by Qatar regarding "family separation" relates to the days or weeks after the start of the crisis on 5 June 2017. There is no information regarding the current status of any of those cases or anything to suggest that those cases have not been resolved. Given their

[15] Qatar's Submission, para. 75.

[16] *See* Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration, pgs. 15-27 (Attached as Annex 4); Part 2 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration (Attached as Annex 6).

[17] *See* Immigration – Qataris in the UAE, pg. 50 (Attached as Annex 1).

[18] Qatar's Submission, para. 42.

anonymous nature, there is also no way for the UAE (or the Committee) to confirm that the alleged complaints are in fact authentic.

33. Similarly, other human rights organizations reporting on alleged family separations provide only general statements and statistics. No specific facts are given. For example, the report dated December 2017 in respect of the OHCHR Technical Mission to Qatar ("**OHCHR Report**") does not mention any specific instances of family separation and simply relies upon the overall statistics of mixed-marriages between Qataris and other Gulf states in order to give an indication of the number of families that could potentially be affected.[19] Amnesty International and Human Rights Watch simply offer conclusory statements concerning alleged family separation unsupported by any facts.[20] As such, there is no basis on which the UAE can confirm the authenticity of the complaints.

34. The UAE reiterates that its policy since the start of the crisis has been to ensure that UAE-Qatari mixed families are not separated. With Qataris having entered and exited the UAE at least 8,442 times since the start of the crisis, it is implausible to suggest that the UAE is "forcing family separation," as Qatar alleges.

B. Right to Freedom of Opinion and Expression

35. The UAE does not, and has not, in any manner curtailed freedom of expression or in any way incited hatred against Qatari citizens. Qatar's allegations in this area focus on the statement of the UAE Attorney General, in which he is quoted as saying "strict and firm action will be taken against anyone who shows sympathy or any form of bias towards Qatar…" and that sympathy with the policies of Qatar could amount to a violation of Federal Decree Law No. 5 of 2012.[21] As explained below, there is nothing in the Attorney General's statement that implicates the UAE's obligations under CERD.

36. First, there is nothing in the Attorney General's statement that criminalizes support for Qatari citizens or restricts their freedom of expression. The Attorney General correctly refers to the fact that speech in support of Qatar, in particular its policy of aiding terrorist organizations and individuals, may constitute a criminal offense under UAE law. There is nothing controversial about outlawing statements in support of terrorism, and there is nothing in UAE law, or in the

[19] *See* OHCHR Technical Mission to the State of Qatar, 17-24 November 2017, Report on the impact of the Gulf Crisis on Human Rights, December 2017, para. 34 (Attached as Annex 7).

[20] *See Gulf Crisis Shows How Discrimination in Saudi Arabia, Bahrain, UAE, and Qatar Tears Families Apart*, Human Rights Watch (21 July 2017), https://www.hrw.org/news/2017/07/21/gulf-crisis-shows-how-discrimination-saudi-arabia-bahrain-uae-and-qatar-tears; *Qatar: Isolation Causing Rights Abuses*, Human Rights Watch (12 July 2017), https://www.hrw.org/news/2017/07/13/qatar-isolation-causing-rights-abuses; *Gulf/Qatar dispute: Human Dignity Trampled and Families facing uncertainty as sinister deadline passes*, Amnesty International (19 June 2017), https://www.amnesty.org/en/latest/news/2017/06/gulf-qatar-dispute-human-dignity-trampled-and-families-facing-uncertainty-as-sinister-deadline-passes/.

[21] Qatar's Submission, paras. 34 and 86.

Attorney General's statement, that indicates a crime for an expression of support for the Qatari people.

37. The Committee should also note Article 7 of the UAE Federal Decree Law No. 2 of 2015 On Combatting Discrimination and Hatred[22] ("**Anti-Discrimination Law**"), which exists to ensure, among other things, that the discriminatory and racially prejudicial views of terrorist groups are not propagated within the UAE. Not only would prosecuting such speech be consistent with the Anti-Discrimination Law, it would also be consistent with the aims of the Convention and, in particular, State Parties' obligations under Article 5 to prohibit and eliminate racial discrimination, and their obligations under Article 2(1)(d) to prohibit racial discrimination by any person, group or organization.

38. Second, UAE Federal Decree Law No. 5 of 2012, which Qatar cites as a law targeting Qatari citizens, is a law of general application that was enacted well in advance of the crisis with Qatar. It includes no provisions that are specific to Qatar or to Qatari citizens. It is similar to the cybercrime laws in existence in many other countries, including the cybercrime law passed by Qatar in 2014.[23] Qatar's suggestion that this law is targeted at speech supporting Qatar or Qatari citizens is entirely false.

39. Third, in furtherance of the objective of limiting discriminatory and hate speech, the UAE has blocked certain Qatari media outlets that are known to provide a platform for terrorist groups and individuals. Chiefly among those outlets is Al Jazeera, which – particularly through its Arabic language network – acts as a major purveyor of discrimination and hate speech in the region. Al Jazeera regularly interviews and disseminates the views of known terrorists, employs program hosts that sympathize with internationally outlawed groups, and gives them an outlet to broadcast their messages to audiences throughout the Middle East.

40. For example, in January 2009, AI Jazeera conducted an interview with the then leader of Al Qaida in the Arabian Peninsula (AQAP) Nasir al-Wuhayshi. During the interview, al-Wuhayshi called for the destruction of "America and Europe" and their "Crusader interests."[24] Al Jazeera has also interviewed senior Al Qaida leader Abu Hafs al-Mauritani several times, including as recently as 2017. In an interview with Al Jazeera, Abu Hafs al-Mauritani emphasized his "joy" in seeing the 9/11 attacks and Al Qaida's readiness to fight US and NATO forces in Afghanistan in a "crusader war."[25]

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[22] UAE Federal Decree Law No. 2 of 2015, Article 7, http://ejustice.gov.ae/downloads/latest_laws2015/FDL_2_2015_discrimination_hate_en.pdf.

[23] Qatar Law No. 14 of 2014 – Promulgating the Cybercrime Prevention Law, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=100242.

[24] *See Abu Basir: We support Gaza by striking Wester Interests in the region*, Al Jazeera (27 January 2009), http://www.aljazeera.net/news/reportsandinterviews/2009/1/27/أبو-بصير-ننصر-غزة-بضرب-المصالح-الغربية-بالمنطقة.

[25] *See Abu Hafs al-Mauritanian. The Attacks of September 11*, Al Jazeera (20 October 2012), http://www.aljazeera.net/programs/today-interview/2012/10/20/أبو-حفص-الموريتاني-هجمات-11-سبتمبر-ج1.

41. In the end, however, the complaint raised by Qatar against the UAE in relation to these media outlets do not implicate CERD in any way. Contrary to the assertions in paragraph 35 of Qatar's Submission, the CERD applies to individuals and not corporations. Corporations are not beneficiaries of rights under the CERD. Moreover, banning these media outlets, which propagate hate speech, is consistent with the CERD's objectives and does not impermissibly curtail freedom of expression.

42. Beyond all of the above, the UAE's legitimate criticisms of and opposition to the Qatari government's policies of supporting terrorism – which are shared by a number of other countries – do not constitute racial discrimination under the CERD.

C. Right to Health and Right to Medical Treatment

43. Qatar states that "Qataris requiring medical attention in UAE that is not available in Qatar have been denied necessary care."[26] This is followed by the allegation that "the Qatar Ministry of Health had received 130 reports of medical complications resulting from the Coercive Measures."[27] Notably, Qatar neither provides specific details of any of these cases, nor elaborates upon their current status.

44. The UAE is not denying Qatari nationals access to medical treatment. Qatari citizens in the UAE enjoy the same healthcare rights as any other residents or visitors. In fact, over 800 Qatari nationals are currently covered by the UAE Government health insurance provider, Daman (Abu Dhabi).[28] Neither those persons, nor any other Qataris in the UAE, are under any restriction regarding the type of medical attention they may seek within the UAE. Any allegation that the UAE is denying medical treatment to Qataris is false, as evidenced by the official records submitted with this Response, which include registration and visitation records for Qatari citizens to UAE health institutions.

45. Separately, it is unclear why Qatar considers the UAE a sole and essential provider of medical care to Qatari citizens who are outside the UAE. This claim is disingenuous and its sole purpose seems to be to manufacture a perceived breach of the Convention, based on the false claim regarding the existence of a travel ban. In any event, as indicated in Section III above, there is no ban preventing Qatari citizens from traveling to the UAE. Should Qatari citizens consider it fit to seek healthcare in the UAE, they may apply for permission to travel and may make an appointment with any doctor of their choosing, as is the case with any other person of any other nationality.

46. The Committee should note that the OHCHR Report, upon which Qatar relies for evidence, states that "[m]edical services in Qatar are known to be of high quality. Since September 2017,

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[26] Qatar's Submission, para. 45.

[27] *Id*. at para. 93.

[28] *See* Health – Qataris with Daman Health Insurance (Attached as Annex 8) (pgs. 13-19 contain records of over 300 visits from July 2017 onward by Qatari nationals to hospitals and clinics within the UAE).

the Ministry of Health recorded 388,000 visits to public health services by patients, including by 260,000 patients from KSA, UAE, Bahrain and Egypt."[29]

47. Also, in paragraph 46 of its Submission, Qatar alleges that "the restrictions on ports and shipping have affected Qatar's access to medicines and medical supplies."[30] Aside from the fact that this allegation in no manner implicates rights under the CERD, the allegation is entirely lacking in credibility given that Qatar appears to have issued a directive to all pharmacies within its territory to remove all medicines and medical supplies imported from the UAE, as well as those from Saudi Arabia, Bahrain and Egypt.[31]

D. Right to Education

48. Qatar's Submission states that "[o]ver 4,000 Qatari students studied alongside peers at universities in the Four States… [u]niversities in the Four States, including [the] UAE, summarily withdrew Qatari students from courses and told them to return to Qatar."[32] Further, Qatar states that "the Ministry of Education of Qatar estimates that over 200 Qatari students have been unable to transfer in order to pursue their studies for a range of reasons."[33] Qatar does not specify whether any of those complaints relate to the UAE, and further does not provide any evidence regarding the current status of those complaints today.

49. The UAE has taken no steps to prevent Qatari students enrolled in UAE educational institutions from continuing their studies, or from obtaining access to records that they may need to continue their studies elsewhere, if they so choose. While it is possible that some Qatari students may have discontinued their studies at the start of the crisis, the UAE's long-standing policy is that those students are welcome to resume their studies within the UAE, should they choose to return and provided that they meet other entry requirements applicable to foreign nationals generally.

50. Owing to the disinformation emanating from Qatar regarding this particular issue, the UAE has taken active steps to ensure that Qatari students know that they are welcome to continue their studies in the UAE. For example, the Office of the Undersecretary of Higher Education sent instructions on 8 March 2018 to Directors of Higher Education Institutions declaring:

> "[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

[29] *See* OHCHR Technical Mission to the State of Qatar, 17-24 November 2017, Report on the impact of the Gulf Crisis on Human Rights, December 2017, para. 45 (Attached as Annex 7).

[30] Qatar's Submission, para. 46.

[31] *See* Qatar Health Ministry Letter Re Medical Supplies Removal, 6 June 2018 (Attached as Annex 9).

[32] Qatar's Submission, para. 48.

[33] *Id*. at para. 49.

with the dropped out students immediately and check the reasons, stressing that studies are available to all students who meet the required conditions."[34]

51. Official UAE records indicate that, as of 20 June 2018, there were 694 Qatari students enrolled or re-enrolled in educational institutions in the UAE.[35] Of these, 195 students were enrolled in pre-university educational institutions for the 2017/2018 academic year.[36]

E. Right to Work

52. As part of its allegations that the UAE has violated Qatari citizens' right to work, Qatar claims that "Qatari business owners have been prevented from entering UAE in order to manage and oversee their businesses, renew necessary business and worker licenses, or renew their leases."[37] As indicated in the earlier sections of this Response, it is simply not true that Qataris have been prevented from entering the UAE.

53. The number of Qatari-owned companies in the Emirate of Dubai alone has reached 618 companies, and the number of licenses issued to Qataris nationals has reached 870.[38] From 5 June 2017 to 18 June 2018, there were 390 business license transactions in the Emirate of Dubai, including new issuances of licenses and renewals.[39] Qatari entities and companies owned by Qataris in the UAE, such as the Qatar Insurance Company, Doha Bank and Gulf Liquid Air Factory continue to hold their business licenses to operate and continue to operate without restriction.[40] These are all Qatari-owned and managed companies. It is implausible to suggest that the UAE is preventing Qataris from managing and operating these companies, given their continued operations more than one year after the start of the crisis.

54. Moreover, Qataris living in the UAE continue to be employed in the UAE in significant numbers. UAE records show that Qataris not only continue to work in the private sector, but that Qataris also continue to be employed in public service positions by the UAE Government.[41]

F. Right to Property

55. Qatar's Submission makes two main allegations with respect to the right to property. First, that Qatari nationals are being barred from accessing, buying or selling property within the UAE

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[34] *See* Education - Undersecretary of Academic Affairs Email (Attached as Annex 10).

[35] *See* Immigration - ID & Citizenship Authority Cover Letter Re Excel Immigration Stats (Attached as Annex 2); Immigration - Student Entry Records (Attached as Annex 11).

[36] *See* Qatari Student Records (Attached as Annex 12).

[37] Qatar's Submission, para. 99.

[38] *See* Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration, pg. 14 (Attached as Annex 4).

[39] *Id*.

[40] *See* Commercial Licenses – Sample Materials (Attached as Annex 13).

[41] *See* Business – UAE Embassy – Authentication Records, pg. 27 (Attached as Annex 14).

(including through representatives appointed through a power of attorney).[42] Second, that the UAE has "advanced or condoned measures against property held by Qataris, including freezing assets of Qatari nationals and limiting financial transfers to citizens or residents of Qatar."[43]

56. As stated earlier in this Response, there is no prohibition on the entry of Qataris into the UAE. Thus, it is not true that Qatari nationals are being barred from accessing their property within the UAE.

57. Even if there were such a prohibition, Qatari nationals are able to, and have, executed valid powers of attorney that allow their property to be bought, sold and otherwise managed notwithstanding that such nationals may not themselves be present in the UAE.[44] Such powers of attorney have been authenticated for use in the UAE on behalf of Qataris through the various UAE embassies worldwide. In addition, since the UAE no longer maintains an embassy in Qatar, Qatari nationals can instead submit their powers of attorney, or any other documents for authentication by the UAE, to the Kuwaiti Embassy in Qatar. The Kuwaiti Embassy then forwards them for authentication to the UAE Embassy in Kuwait. After authentication, the documents are sent back to the Kuwaiti Embassy in Qatar for collection by the Qatari applicant, who may then use them for any official purpose within the UAE.[45] At least 36 powers of attorney were registered on behalf of Qatari nationals between 1 June 2017 and 30 May 2018 in the Emirate of Abu Dhabi alone.[46]

58. Regarding Qatar's second allegation relating to the freezing of assets of Qatari nationals, the UAE Central Bank did not issue any circular or decision with regards to dealing with or closing Qatari banks, accounts associated with Qataris or banning dealing with Qatari currency.[47]

59. The UAE Central Bank did issue freezing orders in relation to persons and organizations designated as terrorists or terrorist financiers pursuant to Federal Law No. 7 of 2015 on Combatting Terrorism Crimes ("**Terrorism Crimes Law**"). The designation lists issued by the UAE pursuant to the Terrorism Crimes Law includes citizens of Qatar, as well as a number of other countries. In addition, many of the individuals and entities designated as terrorists by the UAE have also been similarly designated by the United Nations, the United States, the European Union and others.[48]

60. Additionally, the UAE has instituted enhanced due diligence requirements in relation to transactions involving six banks that have facilitated financial transactions for persons designated under the Terrorism Crimes Law. Those six banks are Qatar Islamic Bank, Qatar

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[42] Qatar's Submission, paras. 100-106.

[43] *Id*. at para. 107.

[44] *See* Business – UAE Embassy – Authentication Records, pgs. 19-25 (Attached as Annex 14); Power of Attorney (Attached as Annex 15); International Judicial Cooperation Department – Ministry of Justice Letter (Attached as Annex 16).

[45] *See* Power of Attorney (Attached as Annex 15).

[46] *See* International Judicial Cooperation Department – Ministry of Justice Letter (Attached as Annex 16).

[47] *See* Banking - Central Bank Circulars and Remittances, pg. 2-3 (Attached as Annex 17).

[48] *Id*. at pgs. 6-31.

International Islamic, Bank, Barwa Bank, Masraf Al Rayan, Qatar National Bank and Doha Bank.

61. Notwithstanding the above, there have been very substantial transfers and remittances between the UAE and Qatar covering billions of UAE dirhams since 5 June 2017.[49] Bank transfers between the Central Bank of the UAE and Qatar banks from June 2017 to April 2018 amounted to 42,210,763,000 UAE dirhams (about USD 11,549,087,000) in inward and outward remittances.[50] Thus, Qatar's assertion that its nationals' assets have been frozen because of their Qatari nationality, or that their ability to make financial transfers has been limited, is simply untrue.

G. Right to Equal Treatment before Tribunals

62. Qatar alleges that Qataris have been denied equal treatment before tribunals as they have been "unable to enter [the] UAE, hire an attorney, or otherwise exercise their rights."[51] As indicated in Section IV.F of this Response, Qatari citizens are able to execute valid powers of attorney for any legal purpose, including to appoint lawyers to represent them before the UAE courts. Moreover, should they choose to do so, they may apply for travel permission to attend any legal proceedings within the UAE in person.

63. There is clear evidence showing active court filings, and participation in proceedings in the UAE legal system generally, by Qataris. For the period between 6 June 2017 and 20 June 2018, there have been over 340 cases involving Qataris across the various Emirates.[52] These include first instance cases, appeal cases and cases in the courts of cassation. In addition, Qataris have freely applied for and received notarized documents; in the Emirate of Dubai alone 280 notarized documents have been issued to Qataris since 6 June 2017.[53] There is absolutely no evidence to suggest that Qataris' access to tribunals in the UAE has been hindered or that they do not enjoy equal treatment before those tribunals.

V. QATAR'S ALLEGATIONS ARE NOT SUBSTANTIATED BY ANY DIRECT EVIDENCE

64. Qatar's Submission relies largely on two categories of documents as evidence. The first category of documents is the reporting done by its own human rights organization, the Qatari Committee. The second category of documents is the reporting done by other international human rights bodies, based on information provided to them by the Qatari Committee and by the Qatari government. As alluded to earlier in this Response, there are various deficiencies in the evidence that Qatar has provided. The present Section addresses more specifically the

[49] *Id*. at pg. 4.

[50] *Id*.

[51] Qatar's Submission, para. 109.

[52] *See* International Judicial Cooperation Department – Ministry of Justice Letter (Attached as Annex 16); Judicial Records (Attached as Annex 18).

[53] *Id*.

deficiencies and lack of reliability of the information provided by Qatar to support its allegations, especially that which is sourced from the Qatari Committee.

A. The Qatari Committee Reports

65. Three distinct points should be noted in regards to the reliability of information sourced from the Qatari Committee.

66. First, the Qatari Committee is an entity formed, funded by and subject to the control of the Qatari government. It has quite obviously taken the side of its government in its political dispute with the UAE and the other States that have terminated relations with Qatar. This is evident in particular from the politicized language it uses in its reports, which toes the government line. It writes of the measures taken against Qatar as a "siege" and a "blockade," mimicking the Qatari government's mischaracterization of those measures.[54]

67. There in fact is no "blockade" of Qatar. According to Oxford Public International Law, a "blockade" is "a belligerent operation to prevent vessels and/or aircraft … from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation." A blockade "should not be confused with embargoes."[55] Aircraft and vessels arrive to and depart from Qatar on a daily basis. The UAE has taken no measures that meet the legal definition of "blockade." The measures taken by the UAE are limited to its own territory. The Qatari Committee's deliberate and incorrect use of the term "blockade" in all its publications is a signal of its political bias and lack of independence.

68. In fact, Qatar has announced the launching of new shipping routes to Iraq,[56] Oman[57] and multiple destinations in China and the Mediterranean.[58] Qatar is even constructing a new port (Hamad Port) spanning 26 square kilometers to increase international shipping.[59] Hamad Port director Abdul Aziz Nasser al-Yafei "highlighted the port's commitment to providing all necessary facilities to companies, adding that it was ready to receive all types of shipments from different parts of the world."[60] Qatar is also increasing and expanding flight routes to and from Qatar. In March 2018, Qatar Airways announced 16 new destinations in line with its

[54] *See* National Human Rights Committee First Report, 13 June 2017 (Attached as Annex 19); National Human Rights Committee Second Report, 1 July 2017 (Attached as Annex 20).

[55] *See* Oxford Public International Law, Definition of "Blockade",
http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252.

[56] *Iran Plans Direct Shipping Route to Qatar*, Financial Tribune (8 July 2017), https://financialtribune.com/articles/economy-domestic-economy/67886/iran-plans-direct-shipping-route-to-qatar.

[57] *Qatar launches new shipping routes to Oman amid food shortage fears*, Reuters (12 June 2017), https://www.reuters.com/article/gulf-qatar-ports-idUSL8N1J9112.

[58] *Qatar Launches Shipping Routes to China, East Mediterranean to Bypass Blockade*, Albawaba Business (18 September 2017), https://www.albawaba.com/business/qatar-launches-shipping-routes-china-east-mediterranean-bypass-blockade-1023270.

[59] http://www.npp.com.qa/overview.html.

[60] *Qatar Launches Shipping Routes to China, East Mediterranean to Bypass Blockade*, Albawaba Business (18 September 2017), https://www.albawaba.com/business/qatar-launches-shipping-routes-china-east-mediterranean-bypass-blockade-1023270.

"aggressive expansion plans for 2018."[61] Qatar Airways Chief Executive, Akbar Al Baker stated "[d]uring the blockade Qatar Airways continued its expansion…and Qatar Airways will keep on expanding and keep on raising the flag for my country all over the globe."[62] These are not the actions of a country subject to a blockade.

69. Second, the listing in the Qatari Committee reports of the complaints by anonymous individuals, which forms the foundation of each one of the Qatari Committee's reports Qatar has relied upon in its Submission, constitute mere assertions, which are unverified (and unverifiable), and unsubstantiated by any primary documentary evidence. Indeed, even assuming these represent actually initiated complaints, there is no way of knowing whether any or all of the alleged complaints have been resolved.

70. For example, it is stated that the Qatari Committee has found that "at least 78 families have been separated…"[63] Yet only two anonymous cases are cited in the reports.[64] Moreover, 85% of the complaints referred by the Qatari Committee in relation to the UAE were lodged prior to 30 August 2017, and more than half of those were reported prior to the end of June 2017, mere weeks after the start of the crisis. Assuming for the sake of argument that these claims were actually made (a fact the Committee can neither assume nor verify), such claims would have obviously been made in the immediate, and undoubtedly confused, aftermath of the termination of diplomatic relations and before use of the hotline had become routine.

71. Third, as inherently unreliable as the Qatar Committee's reports appear to be, there is the highly relevant fact that since September 2017, the number of complaints recorded by the Qatari Committee itself has dramatically fallen. For example, since 1 September 2017, according to the Qatari Committee, there have been no complaints recorded against the UAE about "work" or "residency" matters, only two complaints about health care and only four complaints about "family separation."[65] Since 6 December 2017, the number of complaints has fallen further; not a single complaint was recorded as having been received by the Qatari Committee against the UAE concerning "residency" matters, "work" matters or "health" care matters, and only two complaints regarding "education" and "family separation" matters were said to have been received.[66]

72. What the Qatari Committee's own statistics indicate as to the incidence of complaints since 5 December 2017 is that they have dramatically dropped, and in some cases disappeared

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[61] *Qatar Airways to add 16 destinations this year*, The Peninsula (8 March 2018), https://www.thepeninsulaqatar.com/article/08/03/2018/Qatar-Airways-to-add-16-destinations-this-year.

[62] *Id*.

[63] *See* National Human Rights Committee Third Report, pg. 5 (Attached as Annex 21).

[64] *Id*. at pg. 6.

[65] *Compare* tables in National Human Rights Committee Third Report, pg. 5 (Attached as Annex 21), National Human Rights Committee Fourth Report, 5 December 2017, pg. 6 (Attached as Annex 22), and National Human Rights Committee Fifth Report, June 2018, pg. 13 (Attached as Annex 23).

[66] *Id*.

altogether. For example, since 5 December 2017, the Qatari Committee has registered the following numbers of complaints supposedly involving the UAE:

a) Under Article 5(d)(iv) of CERD, right to family life: two complaints;[67]

b) Under Article 5(e)(iv) of the CERD, right to medical care: no complaints;[68]

c) Under Article 5(e)(v) of the CERD, right to education: two complaints;[69]

d) Under Article 5(e)(i) of the CERD, right to work: no complaints; and [70]

e) Under Article 5(a) of the CERD, right to equal treatment before tribunals: one complaint.[71]

The dearth of new complaints in the Qatari Committee's own reporting demonstrates that Qatar's allegations that the UAE has systematically targeted Qatari citizens for discrimination are untrue and without basis.

B. Reports by Various Human Rights Bodies

73. In conjunction with the reports of the Qatari Committee, Qatar's Submission relies on reports by Amnesty International and Human Rights Watch, as well as referring to the OHCHR Report. All of these reports are based substantially on information provided by Qatar. While best international practice requires human rights organizations to contact States that are concerned with their reports for comments, the reports cited by Qatar do not include any comments or input from the UAE, and therefore disregard the facts contained in this Response. The Committee must take note of these issues when assessing the reliability and completeness of these reports.

74. It is also important for the Committee to bear in mind how the OHCHR Report – which was never intended to be published – became public. As the High Commissioner for Human Rights is aware, the Qatari Committee improperly leaked the OHCHR Report during a press conference held in Doha, Qatar, on 8 January 2018, notwithstanding that the OHCHR Report was intended to be used only for internal purposes. Instead, after having requested the OHCHR Report under the guise of technical assistance, Qatar presented it as the formal and conclusive findings of the OHCHR.

75. We remind the Committee of the following statement by the High Commissioner for Human Rights to the Representative of Qatar, made on 8 March 2018, during the 37th Session of the

[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.

Human Rights Council, in which he expressed his disapproval of Qatar's leak of the OHCHR Report:

> "*There was another question from the State of Qatar concerning the coercive measures taken against Qatar and its effects and its demand for providing reparations.*
>
> *I have publicly spoken on this issue and a technical mission was undertaken at the request of Qatar and an* ***internal report*** *was prepared, drafted and released to the authorities of Qatar.* ***It was not meant to be public*** *but it became public."*[72]

This statement was repeated by the High Commissioner in a letter to the UAE dated 29 June 2018. The High Commissioner re-affirmed that the OHCHR Report was not meant to be public.[73] He further stated that "the OHCHR Mission to Qatar (17-24 November 2017) was technical in nature and did not aim at qualifying the *Gulf crisis* nor determining states' responsibilities/liabilities."

76. This would not be the first time that Qatar has misrepresented the OHCHR's position. We remind the Committee that in June 2017 the OHCHR took the extraordinary step of publicly rebuking Qatar for distorting remarks made by the High Commissioner. Qatar deliberately misrepresented the comments made by the High Commissioner regarding the current crisis, prompting the UN Human Rights Office to issue a statement that said, in part, "[t]he UN Human Rights Office does not normally comment on bilateral meetings with States, except on the rare occasions where it believes the State concerned has publicly misrepresented the content of the meeting."[74]

77. Qatar similarly misrepresented other UN reports during the ICJ provisional measures hearings that took place in June 2018. In its pleadings before the ICJ, Qatar quoted sections of the Joint Communication from Special Procedures Mandate Holders of the Human Rights Council to the United Arab Emirates, AU ARE 5/2017 (18 August 2017) as definitive findings of fact, while neglecting to acknowledge with clarity to the ICJ that the portions it included in its pleadings begin with the following language "While we do not wish to prejudge the accuracy of these allegations …."[75]

78. The Amnesty International report, upon which Qatar relies heavily, was released on 19 June 2017, a mere two weeks after the break in relations between the UAE and Qatar and one week

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[72] *See* Letter from the UAE to the OHCHR, 16 May 2018, pg. 3 (Attached as Annex 24).

[73] *See* Letter from the OHCHR Regarding UAE letter of 16 May 2018, 29 June 2018 (Attached as Annex 25).

[74] http://english.alarabiya.net/en/News/gulf/2017/06/30/UNHCR-issues-correction-to-distorted-reports-appearing-in-Qatari-media-.html.

[75] *See* CR 2018/12, pg. 55, paras. 15-16 (Goldsmith), the pleadings of Qatar before the International Court of Justice in *the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), 27 June 2018, https://www.icj-cij.org/files/case-related/172/172-20180627-ORA-01-00-BI.pdf.

after the procedures for use of the telephone hotline were announced.[76] Other than the limited information that was available to the Amnesty International, this brief report was obviously issued in the immediate, and undoubtedly confused, aftermath of the termination of diplomatic relations and before use of the hotline had become routine. Moreover, the report clearly cannot be relied upon as evidence of the circumstances of Qatari citizens in the UAE following that date, which as the evidence provided by the UAE has demonstrated, is much the same as it was before 5 June 2017. Finally, the report obviously does not address the question whether any of the difficulties noted have since been resolved.

79. Similarly, the Human Rights Watch report was released on 12 July 2017, a little over a month after the break in relations between the UAE and Qatar.[77] These brief statements – again, made over a year ago – cannot possibly be regarded as evidence of the circumstances prevailing in the UAE for Qatari citizens, particularly in light of the evidence showing that Qatari citizens are living their lives in the UAE today much the same as they were before. Moreover, it is notable that the Human Rights Watch report makes no specific allegations in respect of the UAE's treatment of Qatari citizens within the UAE other than noting several cases of students who said they had to interrupt their education and return to Qatar.[78] The evidence provided by the UAE together with this Response, showing that all UAE educational institutions were instructed to establish contact with any Qatari students who had interrupted their studies to advise them that they were welcome to return, and that almost 700 Qatari students are currently enrolled in in the UAE, indicates that the reported difficulties of the students did not concern the UAE or in any case have since been adequately resolved.

80. All of these reports relied considerably upon Qatari sources including the Qatari Committee and other Qatari government entities. Because of this reliance, these reports likewise only list broad general statistics with very little supporting detail regarding specific alleged violations.[79] As examples, the OHCHR Report states that 130 individuals (from all Four States, not specifically from the UAE) reported medical issues.[80] But only three anonymous examples are given, all related to KSA and not the UAE.[81] In a similar fashion, it is stated that 157 students from the UAE have been affected; but no individual examples are given.[82] Regarding the right to equal treatment before tribunals, the OHCHR Report simply states "legal cooperation has been suspended, including power of attorney."[83] Again no examples are given and the

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[76] *Gulf/Qatar dispute: Human Dignity Trampled and Families facing uncertainty as sinister deadline passes*, Amnesty International (19 June 2017), https://www.amnesty.org/en/latest/news/2017/06/gulf-qatar-dispute-human-dignity-trampled-and-families-facing-uncertainty-as-sinister-deadline-passes.

[77] *Qatar: Isolation Causing Rights Abuses*, Human Rights Watch (12 July 2017), https://www.hrw.org/news/2017/07/13/qatar-isolation-causing-rights-abuses.

[78] *Id*. at pgs. 3, 7 and 8.

[79] *See* OHCHR Technical Mission to the State of Qatar, 17-24 November 2017, Report on the impact of the Gulf Crisis on Human Rights, December 2017 (Attached as Annex 7).

[80] *Id*. at para. 43.

[81] *Id*. at para. 44.

[82] *Id*. at para. 52.

[83] *Id*. at para. 40.

statement that no powers of attorney have been issued is demonstrably false, as shown in the official records enclosed with this Response.

VI. STATEMENT OF LAW

A. Substantive and Procedural Defects in Qatar's Submission

81. Qatar's complaint is defective because it does not conform to the terms of CERD Article 11, which states:

> ***Article 11***
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> 1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
>
> 2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
>
> 3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has 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.
>
> 4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.
>
> 5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

82. Qatar's complaint fails to meet key requirements of Article 11 for several reasons.

83. First, Qatar has not demonstrated that the UAE is "not giving effect to the provisions" of the Convention pursuant to Article 11(1). As this Response shows, there has been no mass expulsion of Qatari citizens from the UAE. Qatari citizens are able to enter and reside in the UAE upon prior application and they enjoy the same rights within the UAE as other foreign nationals. Qatar's complaint simply ignores the fact that the UAE did not take any steps to

deport Qatari citizens and that the Ministry of Interior, which is the UAE government entity charged with the regulating and altering the residence status of non-citizens, did issue an order deporting Qatari citizens. Above, the Committee will find detailed information showing that the vast majority of Qatari citizens remained in the UAE after 5 June 2017. Qatar's complaint also conveniently ignores that the Qatari government itself issued orders for its citizens to leave the UAE.

84. Second, whatever the significance the Committee might ascribe to the portion of the 5 June 2017 announcement calling upon Qatari citizens to depart from UAE territory, the UAE subsequently made clear that there is no deportation order in effect and that Qatari citizens may remain within the UAE. As mentioned above, on 5 July 2018, MoFA announced that Qatari citizens in the UAE could remain and affirmed procedures – which have existed since the start of the crisis – allowing Qatari citizens outside the UAE to enter the country. Thus, there is no current or ongoing basis for Qatar to allege that the UAE "is not giving effect to the provisions of" the Convention as required by CERD Article 11(1). It is important to note in this regard that Article 11(1) uses the word "is," evidencing an intention for the Committee to consider only matters involving present conflicts with CERD. It does not appear to contemplate that the Committee would examine measures that are no longer in effect, or were never in effect. This interpretation is confirmed by Articles 11(2) and 11(3), which call for the Committee to take up a complaint only if the parties cannot resolve the matter within six months and the Committee is convinced that available domestic remedies have been exhausted. To the extent that any of these conditions has not been met, a matter is not properly before the Committee.

85. Finally, the UAE would like to draw the Committee's attention to Article 11(3) of the CERD, which provides that the Committee shall deal with a matter referred to it in accordance with Article 11(2) after it has ascertained that "all available domestic remedies have been invoked and exhausted." Two issues should be noted with respect to this requirement. First, Qatar has failed to provide any evidence to show that domestic remedies have been invoked or exhausted. Second, as this Response demonstrates, it should be clear that if any individual Qatari considers himself or herself entitled to redress for any loss of rights, whether related to the CERD or otherwise, such redress is readily available through UAE institutions. Qatari nationals who seek entry to the UAE are able to apply for entry through the hotline. Persons whose property and other rights are improperly prejudiced, no matter the cause, may seek redress through the UAE judicial system, in which there is presently active participation by Qatari nationals.

B. There is no Violation of the Convention

86. Qatar claims that the UAE has unlawfully targeted Qatari citizens on the basis of their nationality.[84] Qatar raises claims under Articles 2, 4, 5, and 6 of the CERD, in addition to which it alleges that the UAE is in breach of the "moral principles underlying the CERD and the customary law principle of non-discrimination on arbitrary grounds."[85] Qatar asserts that the

[84] Qatar's Submission, para. 58.

[85] *Id.* At para. 57.

UAE has not only "failed to enact measures to prevent, prohibit, and criminalize racial discrimination," but has also "engaged in racial discrimination and criminalized actions intended to benefit Qataris."[86]

87. Given the pending proceedings before the ICJ, the UAE does not consider it appropriate to put forward detailed legal arguments in this Response. Instead, in this Section the UAE briefly outlines two main arguments to show that the facts alleged in Qatar's Submission –even if assumed to be true, which they are not – do not amount to violations of the CERD.

88. First, the CERD contains no express reference to nationality as a ground of discrimination. Qatar's entire Submission, and allegations that the UAE has violated the CERD, is predicated on the interpretation of the term "national…origin" in the definition of racial discrimination as encompassing present nationality.[87] The CERD contains no express reference to nationality as a prohibited ground of discrimination but instead, based on the plain reading of Article 1 and in conjunction with the drafting history, the CERD allows for special measures based on an individual's present nationality.

89. Differentiation based on nationality is common in the international practice of States and is not uncommon in international law. Countries routinely apply different entry and residence rules to nationals of different States, and periodically review and revise those rules. This "discrimination" based on nationality is further supported in General Recommendation XXX in which the Committee explicitly recognized that "Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens."[88] As the UAE's measures are based on present Qatari nationality, and as the measures relate at their core to entry and residence restrictions, there is no violation of the CERD as there is no racial discrimination as defined in Article 1.[89]

90. Second, the rights contained in the CERD do not create a general right of entry to a country, which is suggested and relied upon throughout Qatar's Submission. Even assuming for the sake of argument that difference in treatment based on present nationality amounts to a violation of the CERD (as Qatar claims in its Submission), the rights asserted by Qatar are over-broad and in fact are not contained within the CERD. Qatar takes the rights enumerated in the CERD and treats each provision (e.g. right to health, right to education etc.) as encompassing an absolute right for an individual to enter a State for that purpose. The provisions of the CERD are intended to outlaw racial discrimination and ensure equal treatment in the various areas enumerated. These rights do not encompass an absolute ability for an individual to receive the treatment listed (e.g. right to health, right to education etc.) or the right of an individual to enter a State in order to do so. As such, Qatar's Submission attempts

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[86] *Id.* at para. 57.

[87] *Id.* at paras. 59 and 64-65.

[88] *See* CERD Committee, General Recommendation XXX (2004), para. 1 (Attached as Annex 26).

[89] *See* CR 2018/13, pgs. 38-48, paras. 17-60 (Olleson), the pleadings of the UAE before the International Court of Justice in *the case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), 28 June 2018 https://www.icj-cij.org/files/case-related/172/172-20180628-ORA-01-00-BI.pdf.

to create rights not contained within the CERD. As such, the UAE cannot violate these rights asserted by Qatar and furthermore, has not violated the CERD rights of Qatari individuals.[90] Any conclusion to the contrary would be contrary to established State practice, which gives countries the ability to regulate the entry and residence conditions within its territory applicable to foreign nationals.

VII. ICJ PROCEEDINGS

91. Finally, the UAE recalls that Qatar has instituted proceedings against the UAE in the ICJ under Article 22 of the CERD. Specifically, on 11 June 2018, Qatar filed an Application Instituting Proceedings as well as a Request for the Indication of Provisional Measures of Protection under the CERD. The ICJ issued its order in respect of the provisional measures requested by Qatar on 23 July 2018. The ICJ refused to grant any measures in the form sought by Qatar, and instead indicated limited measures in three areas (family re-unification, education and access to justice), in which UAE policy already reflects and complies with the order of the Court. Moreover, the Court indicated a general measure urging both parties not to take any steps that could aggravate the dispute.

92. The ICJ's provisional measures order reflects the UAE's long-standing policy and practice with respect to the UAE residence and entry rights applicable to Qatari citizens, as well as the availability to Qatari citizens of access to UAE courts and tribunals. The UAE is confident that its practice in these areas fully conforms to both the ICJ's order and to its obligations under the CERD, and that upon a close examination of the facts the Court will reach the same conclusion.

93. Notwithstanding the above, the UAE intends to lodge objections under which it will challenge the ICJ's jurisdiction to hear the case on the merits. The UAE has significant jurisdictional objections in respect of Qatar's claims in the ICJ proceedings, based on, *inter alia*, the pre-conditions to jurisdiction of the Court set out in Article 22 of the CERD. In particular, the UAE maintains that, having submitted an Article 11 complaint to the Committee, Qatar should not be permitted to simultaneously initiate proceedings in relation to the same issues in the ICJ. Having made the choice to submit an Article 11 complaint, Qatar must wait for that process to be completed prior to commencing proceedings in the ICJ, as is required by the plain text of Article 22 of the Convention. At this stage of the ICJ proceedings, the UAE has not yet had the opportunity to challenge the jurisdiction of the ICJ to hear Qatar's complaint.

VIII. CONCLUSION

94. The UAE urges the Committee to reject the complaints made by Qatar. The UAE believes that upon an examination of the evidence enclosed with this Response, the Committee will find that the UAE is not in violation of any aspect of the CERD. There are no measures instituted by the UAE limiting the rights of Qatari citizens; the restriction on entry into UAE territory is

[90] *Id.* at pgs. 51-53, paras. 77-91.

applied to individuals of numerous nationalities and does not constitute any infringement of rights of Qataris. Official UAE data shows that applications are accepted in the vast majority of cases. Today, substantially the same number of Qataris live in the UAE as prior to the start of the crisis on 5 June 2017. The entry and residence rights applicable to Qatari citizens, and the rights that they may exercise within the UAE more generally, are consistent with those available to foreign nationals of many other countries in the UAE.

95. The UAE reserves its right to supplement and amend this Response.

Annex 116

Letter from the Permanent Mission of the State of Qatar to the United Nations Office and other international organizations in Geneva to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) referring the matter at issue in ICERD-ISC-2018/2 again to the CERD Committee (29 October 2018)

Mission permanente
de l'État du Qatar
auprès de l'Office
des Nations-Unies à Genève

الوفـــد الدائـــم لدولـة قطـــر
لدى مكتب الأمم المتحدة
جنيـــــف

Ref:

Subject: Communication Submitted Pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination

The Permanent Mission of the State of Qatar to the United Nations Office and other international organizations in Geneva presents its compliments to the Secretariat and to the Committee on the Elimination of Racial Discrimination ("Committee"), and has the honor to refer to the Communication submitted by the State of Qatar under Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination ("Convention") concerning the United Arab Emirates (ICERD-ISC-2018/2) ("Communication"), as well as the Response of the United Arab Emirates received by the Secretariat on 7 August 2018 and transmitted to the State of Qatar on 8 August 2018.

The Permanent Mission of the State of Qatar recalls that pursuant to Article 11(2) of the Convention, "[i]f the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee[.]" Six months have elapsed since the receipt by the United Arab Emirates of Qatar's Communication, and not only has the United Arab Emirates not withdrawn the coercive measures it imposed against Qatar and Qataris that constitute the subject matter of the Communication, but it has also categorically rejected that its discrimination against Qataris could come within the scope of the Convention.

The State of Qatar rejects the claim of the United Arab Emirates that the discrimination set forth in Qatar's Communication could not come within the scope of the provisions of the Convention and hence is outside the competence of the Committee. The State of Qatar affirms its position that by targeting all Qataris and only Qataris with a series of coercive measures, the United Arab Emirates has violated multiple Convention obligations, including its obligations under Articles 2, 4, 5, 6, and 7, and is thereby "not giving effect to the provisions of the Convention" as required for submission of a matter to the Committee under Article 11.

The Response of the United Arab Emirates to the State of Qatar's Communication confirms that the United Arab Emirates is unwilling to engage constructively with the State of Qatar to settle the matter amicably. It is equally clear that Qataris do not have domestic remedies to invoke or exhaust in the United Arab Emirates. Any nominal remedies are either unavailable or ineffective in light of the expulsion of Qataris from the United Arab Emirates and ensuing travel restrictions, as well as the ongoing campaign of hatred against Qatar and Qataris in the territory of the United Arab Emirates.

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Mission permanente
de l'État du Qatar
auprès de l'Office
des Nations-Unies à Genève

الوفـــد الدائـــم لدولـة قطـــر
لدى مكتب الأمم المتحدة
جنيـــــف

In view of the above, the matter has not been adjusted to the satisfaction of the State of Qatar. Accordingly, the Permanent Mission of the State of Qatar hereby informs the Committee that the State of Qatar elects to exercise its right under Article 11(2) to refer the matter again to the Committee.

The Permanent Mission of the State of Qatar also recalls the Committee's 30 August 2018 information note on inter-state communications, in which the Committee observed that "if one of the States will refer the matter again to the Committee before 8 November 2018, the Committee will have to consider the admissibility of the communication. The Committee has also to ascertain that all available domestic remedies have been exhausted." Accordingly, as further suggested in the Committee's 30 August 2018 note, the State of Qatar stands ready to provide the Committee with any other relevant information that the Committee may request.

In accordance with Article 11(2), the State of Qatar respectfully requests that this notification be provided to the United Arab Emirates.

The Permanent Mission of the State of Qatar avails itself of this opportunity to renew to the Secretariat and to the Committee on the Elimination of Racial Discrimination the assurances of its highest consideration.

Geneva, October 29th, 2018

Committee on the Elimination of Racial Discrimination

Human Rights Treaties Division (HRTD)

Office of the United Nations High Commissioner for Human Rights (OHCHR)

UNOG-OHCHR

Palais Wilson - 52, rue des Pâquis

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Annex 117

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Response of the United Arab Emirates
(7 November 2018)

NATIONS UNIES
DROITS DE L'HOMME
HAUT-COMMISSARIAT

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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REFERENCE: ICERD-ISC 2018/2
AP/VL/mg

The Secretariat of the United Nations (Office of the High Commissioner for Human Rights) presents its compliments to the Permanent Mission of the State of Qatar to the United Nations Office at Geneva, and has the honour to transmit herewith the submission from the United Arab Emirates dated 7 November 2018, submitted by the State party under article 11 of the Convention on the Elimination of All Forms of Racial Discrimination, concerning the United Arab Emirates (ICERD-ISC-2018/2).

The Secretariat avails itself of the opportunity to renew to the Permanent Mission of the State of Qatar the assurances of its highest consideration.

9 November 2018

Annex 117

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Ref: 2/3/32 - 552
Date: 7 November 2018

The Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Secretariat of the United Nations, (Office of the High Commissioner for Human Rights) and with reference to its note verbal dated 9 October 2018, concerning **subject: ICERD-ISC-2018/2,** has the honour to forward the response of the United Arab Emirates regarding the submission from the State of Qatar dated 29 October 2018, pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination.

The Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organizations in Geneva avails itself of this opportunity to renew to the Secretariat of the United Nations, (Office of the High Commissioner for Human Rights), the assurances of its highest consideration.

OHCHR REGISTRY

0 8 NOV. 2018

Recipients : Petitions T

Enclosure .....

Secretariat of the United Nations, (Office of the High Commissioner for Human Rights)

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The Permanent Mission of the United Arab Emirates to the United Nations Office and other international organizations in Geneva presents its compliments to the Committee on the Elimination of Racial Discrimination ("Committee") and to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) ("Secretariat"), and refers to the Secretariat´s note of 31 October 2018 transmitting the submission from the State of Qatar dated 29 October 2018.

The United Arab Emirates reiterates its unwavering commitment to eliminating racial discrimination in all of its forms and to combatting hate speech.

Qatar's allegations contained in its submission are unfounded both in fact and in law. As explained in its previous submission dated 7 August 2018, as a matter of fact the United Arab Emirates has not expelled Qatari citizens from its territory, nor has there been any law passed or administrative practice adopted having that effect; further, Qatari citizens are not prohibited from travelling to the United Arab Emirates. The allegation of an "ongoing campaign of hatred" against Qataris in the territory of the United Arab Emirates is plainly contradicted by repeated public statements made by officials of the United Arab Emirates. In addition, Qatar's accusations are based on the incorrect premise that distinctions made on the basis of present nationality constitute "racial discrimination" falling within the scope of the Convention. These issues are all matters for the ad hoc Conciliation Commission in considering the merits.

Qatar's submission of 29 October 2018 presents no new evidence or argument and fails to provide any substantive response to the points made in the United Arab Emirates' prior submission.

Article 11, paragraph 3 of the Convention provides that the Committee "shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law". The question of whether available domestic remedies have in fact been invoked and exhausted is therefore a preliminary question, which must be decided by the Committee before any further steps are

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taken in relation to a matter communicated to the Committee under Article 11, paragraph 1 of the Convention.

In its submission of 29 October 2018, as in its earlier submission, Qatar has failed to provide any evidence that the requirement in Article 11, paragraph 3 of exhaustion of available domestic remedies had been complied with in relation to the alleged breaches of the Convention at issue in its communication. Qatar's position in its submission of 29 October 2018 is instead that any remedies "are either unavailable or ineffective in light of the expulsion of Qataris from the United Arab Emirates and ensuing travel restrictions". As already noted, the factual premise underlying that position is fundamentally flawed, insofar as there has been no expulsion of Qataris, as alleged, and Qatari nationals are not, and have not in the past been, prevented from entering and re-entering the United Arab Emirates.

The burden is on Qatar to establish that the express requirement of exhaustion of available domestic remedies foreseen by Article 11, paragraph 3 of the Convention has been fulfilled. Nevertheless, the United Arab Emirates wishes to inform the Committee and the Secretariat that it intends to file a submission directly addressing in more detail Qatar's failure to demonstrate that all available domestic remedies have been invoked and exhausted. The United Arab Emirates intends to submit this document shortly.

To the extent that the Committee finds that all available domestic remedies have been invoked and exhausted, and that Qatar's complaint is therefore admissible, the United Arab Emirates further reserves the right to provide additional submissions and information to the Committee regarding the merits of Qatar's allegations.

Finally, we note that the Committee has indicated that it will consider procedural matters relating to pending communications made under Article 11 of the Convention at its upcoming session. We understand that the Committee is currently scheduled to consider those matters at the meeting to be held on 30 November 2018 at 3 pm. We would be grateful if the Committee could confirm whether the UAE and other States that are parties to pending Article 11 communications will have the opportunity to attend and take part in this meeting in accordance with Article 11, paragraph 5 of the Convention.

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Annex 118

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Supplemental Response of
the United Arab Emirates (29 November 2018)

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In a matter before the
Committee on the Elimination of Racial Discrimination

ICERD-ISC-2018/2

SUPPLEMENTAL RESPONSE

of the United Arab Emirates
to the request made by the State of Qatar
pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination

submitted to the Office of the High Commissioner for Human Rights, United Nations Office, Geneva, Switzerland on

29 November 2018

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I. INTRODUCTION

1. The Permanent Mission of the United Arab Emirates (the "**UAE**") to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) and refers to its submission to the Committee on the Elimination of Racial Discrimination (the "**Committee**") and the Secretariat dated 7 November 2018, in which the UAE indicated that it would submit before the Committee a Supplemental Response (the "**Supplemental Response**") on the Communication of the State of Qatar ("**Qatar**") under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (the "**CERD**"), dated 8 March 2018 ("**Qatar's Article 11 Communication**").

2. This Supplemental Response supplements the submission of the UAE of 7 August 2018 (the "**Response**"). It addresses in further detail Qatar's request, dated 29 October 2018, that its Article 11 Communication again be referred to the Committee in accordance with Article 11.2 of the CERD.

II. EXECUTIVE SUMMARY

3. The allegations made in Qatar's Communication and subsequent statements are entirely without merit. They are mere unsupported and empty assertions made up of self-interested speculation. Most importantly for the purposes of the Committee's evaluation of the Communication, Qatar has provided no evidence whatsoever in support of its politically-motivated allegations. Indeed, rather than protecting the integrity of the CERD, Qatar is attempting to manipulate the Committee to further Qatar's foreign policy, which notoriously includes the financing and promotion of extremism and international terrorism. For the present case, the Committee does not need to enter into any difficult evaluation of the level of proof required to proceed with the dispute resolution mechanisms of the CERD in an inter-State complaint: it cannot

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be possible that an inter-State complaint can proceed to the appointment of an *ad hoc* Commission without any evidence whatsoever of the assertions being made.

4. Qatar has had multiple opportunities to provide evidence in support of its factual assertions, including in response to the UAE's specific and detailed denials of the allegations being made. If there had been any evidence, Qatar would have been in possession of it and would have, of course, already submitted it to the Committee. It is notable that judges at the International Court of Justice (the "**ICJ**") in a pending parallel case concerning the application of the CERD to these very same facts[1] also noted that Qatar had failed to submit any evidence to support its allegations in that proceeding. So, in two separate judicial or investigatory proceedings dealing with the same allegations and supposed facts, Qatar has repeatedly failed to submit any evidence of what it alleges are publicly known facts. It would make a mockery of the CERD dispute resolution mechanisms and certainly delegitimise the institutions of the CERD were the Committee to proceed with an inter-State complaint merely on the basis of politically-motivated, self-interested assertions with no evidence whatsoever of the alleged wrongdoings. If the Committee determines that that is the standard required, it will be opening the CERD up to become a tool for baseless and abusive manipulation.

5. With respect, the Committee lacks jurisdiction to consider Qatar's Article 11 Communication because even on its face, Qatar's allegations fall outwith the scope of the CERD. Any action taken by the Committee to further Qatar's complaint would thus be *ultra vires*.

6. The UAE also submits that the Committee should decline to pursue the dispute resolution process envisaged under Article 11 of the CERD any further. In the present circumstances, it is clear that there is no ongoing situation of prejudice to Qatari nationals and there is certainly no evidence to support a different conclusion. Consequently, there is no role to play for the CERD's forward-looking facilitation of an

1 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice.

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amicable solution and no jurisdiction for the Committee to take any action under the CERD.

7. The Committee should also dismiss Qatar's Article 11 Communication as inadmissible. The UAE submits that three grounds of inadmissibility apply to Qatar's complaint:

   a. First, no Qatari national supposedly affected by the measures adopted by the UAE has invoked or exhausted the available and effective domestic remedies, as required under Article 11.3 of the Convention. For that reason alone, the Committee cannot proceed to consider the matter referred to it by Qatar;

   b. Second, the Committee should decline to entertain Qatar's complaint on the basis that Qatar has abused the CERD process by prematurely referring its CERD complaint to the ICJ. By doing this, Qatar has created a situation where two separate proceedings under the CERD dispute resolution mechanisms are being pursued in parallel. This is not allowed under the architecture of the CERD dispute resolution. When Qatar began the CERD process, the architecture of the CERD dispute resolution provisions required it to allow the CERD process to run its course. Under the architecture of the CERD dispute resolution provisions, an application to the ICJ is only possible if that process has not been successful. By making its premature application to the ICJ, Qatar abandoned the CERD process. It is not open for Qatar to pick and choose which parts of the CERD dispute resolution architecture it wishes to pursue, when and in which order. The case before the ICJ (the "**Pending ICJ CERD Proceedings**") on 23 July 2018 produced an Order on the Request for the Indication of Provisional Measures (the "**CERD Provisional Measures Order**").[2] By doing so, Qatar itself has made the Committee process moot. Yet despite that Order, the content of which must be deemed to resolve any question about the future application of the CERD

[2] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the Indication of Provisional Measures, Order, 23 July 2018 ("**CERD Provisional Measures Order**").

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within the UAE in relation to the issues raised by Qatar in its Article 11 Communication, Qatar now seeks to resume the very process under the CERD that it previously abandoned in favour of seeking and obtaining the CERD Provisional Measures Order. Qatar is thereby illegally making the UAE the respondent in two parallel proceedings. This is not permissible under the procedures set out in the CERD. It amounts to an abuse of process and an abuse of Qatar's rights under the CERD that affects the admissibility of its Article 11 Communication;

c. Third, Qatar's allegations are completely without merit on fact and law. They should therefore not be allowed to trigger a further process involving the appointment of a Conciliation Commission. It is not consistent with a good faith interpretation of the relevant provisions of the CERD that a State Party should be allowed to subject other States Parties to completely spurious claims without presenting any proof of its allegations.

8. For all of the above reasons, the UAE respectfully submits that the Committee must dismiss Qatar's request. It must decline to entertain Qatar's Article 11 Communication any further. Qatar's litigation tactics have deprived the Committee of its legitimate role with respect to this matter and the Committee's further actions in this matter would be *ultra vires*.

9. The UAE is mindful of the importance of the CERD and the work of the Committee and therefore respectfully requests that the Committee carefully consider the precedents that would be set if it progressed Qatar's Article 11 Communication. Qatar's Article 11 Communication represents nothing but the latest gambit in Qatar's notorious policy of seeking to disguise its support, instigation, financing and fomenting of extremism and international terrorism through public relations diversions. Qatar is trying to use the Committee, an innocent bystander, as an instrument in its international public relations campaign to obfuscate the situation in the region and distract from its own violations of numerous international agreements. These violations include Qatar's historic and ongoing violation of the Riyadh Agreements, UN Security Council resolutions and

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Qatar's violations of its own obligations under the CERD through its support and sponsorship of terrorism and its propagation of hate speech.

III. QATAR'S ALLEGATIONS ARE UNFOUNDED, MADE WITHOUT EVIDENCE AND DISTORT THE TURBULENT GEOPOLITICAL BACKGROUND UNDERLYING ITS ARTICLE 11 COMMUNICATION

10. In its Article 11 Communication, Qatar refers to "[t]he arbitrariness of the Coercive Measures" of which it complains.[3] Yet not less than the first 40 paragraphs of its Article 11 Communication describe in detail the diplomatic crisis among GCC countries and responses of Qatar's neighbours to its policies and conduct, of which the UAE Statement of June 2017 is one. This exposes Qatar's Article 11 Communication for what it is: a politically-motivated public relations exercise; there is no good faith attempt to promote and protect the CERD. Not only does this part of Qatar's Article 11 Communication confirm that this geopolitical reality is the true reason why Qatar has made the present application to the CERD, as well as initiating other aggressive actions more broadly against the UAE elsewhere. Through this lengthy background description to its complaint, Qatar also distorts the facts underpinning the actions of its neighbours and seeks to mislead the Committee. It is notorious on the public record that Qatar has been responsible for supporting, instigating, financing and fomenting terrorism throughout the Middle East and beyond. It was in response to this overriding security imperative that, since 5 June 2017, the UAE and almost every one of Qatar's neighbours severed or downgraded diplomatic relations with Qatar. The reasons given by Qatar's neighbours for this cited Qatar's ongoing breaches of international law and its continued support for extremist and terrorist groups, including the Muslim Brotherhood, as well as Qatar's sustained endeavours to promote the ideologies of Daesh and Al Qaeda, which rank amongst the gravest threats to human rights and peace and security in the region and beyond.

[3] Qatar's Article 11 Communication, 8 March 2018, paragraph 61.

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11. Qatar egregiously violates its international obligations – including the CERD – through its direct and indirect support for terrorist activities. This is most unapologetically perpetrated in relation to heinous terrorism crimes committed against, *inter alia*, Christian Copts in the Arab Republic of Egypt ("**Egypt**"). It is notorious that Qatar is responsible for supporting, instigating, financing and fomenting terrorism throughout the Middle East and beyond.[4] It is notorious that Qatar has offered and continues to offer support for the Muslim Brotherhood, which has caused untold suffering to innocent human beings, in particular in Egypt, where it has targeted the Coptic Christian minority. It is on the public record that the Muslim Brotherhood officially espouses violence, including terrorism, to promote its Islamist agenda where it deems that peaceful methods are ineffective. It has been a main instigator of terrorist attacks in the region, in particular in Egypt,[5] where in 2013 its supporters attacked 70 Coptic Christian churches and put to the flame more than 1,000 homes and businesses of Coptic Christian families.[6] At least six States have banned or designated the Muslim Brotherhood as a terrorist organisation and many other countries are actively contemplating the same.[7] Qatar's support – both historic and ongoing – of such activities amounts to violation *inter alia* of Article 6(b) of the CERD.

12. Qatar also owns and funds Al Jazeera, which is a notorious spokespiece for propaganda of violent extremists in the Middle East, Africa and beyond.[8] By allowing its State media company to propagate hate speech, Qatar fails to give effect to CERD provisions with respect to, *inter alia*, Articles 1.1, 4(a) and 5(b).

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4 See for instance Robert F. Worth, "Kidnapped Royalty Become Pawns in Iran's Deadly Plot," *The New York Times Magazine*, 14 March 2018 (recounting how Qatar in a ransom deal "paid vast sums to terrorists on both sides of the Middle East's sectarian divide, fueling the region's spiraling civil wars").

5 See, for example, Institute for Economics and Peace, Global Terrorism Index 2016: Measuring and Understanding the Impact of Terrorism (2016), page 33.

6 *See* Muslim Brotherhood Terrorist Designation Act, H.R. 3892, 114th Cong. (2015-2016), page 17.

7 *See for instance* Muslim Brotherhood Terrorist Designation Act, H.R. 3892, 114th Cong. (2015-2016), pages 2 to 3 (referring to Egypt, the Kingdom of Saudi Arabia, the UAE, the Kingdom of Bahrain, the Syrian Arab Republic and the Russian Federation). *See also* Muslim Brotherhood Terrorist Designation Act of 2017, H.R. 377, 115th Cong. (2017-2018).

8 Several States in the Middle East share this assessment, see for instance "Saudi Arabia, Egypt, UAE, Bahrain Issue a Joint Statement on Combating Terrorism", *Asharq Al-Awsat English*, 9 June 2017; "Qatar Must Stop Using Al Jazeera for Aggression Toward Bahrain – Ambassador", *Sputnik News*, 16 June 2017.

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13. Qatar has further attracted severe international criticism for its treatment of migrant workers as it prepares to host the 2022 FIFA World Cup. Such treatment has been "widely depicted as a form of bonded if not forced labor".[9] In 2016, the ILO had given Qatar 12 months to end migrant worker exploitation. The ILO withdrew its complaints following the signature by Qatar of 36 worker protection agreements with countries that provide much of its labour force.[10] A recent report by Amnesty International however asserts that these problems persist.[11] Qatar's actions fails to give effect to Article 5(d)(ii) of the CERD (the right to leave any country, including one's own, and to return to one's country) and Article 5(e)(i) CERD (rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work and to just and favourable remuneration).

14. Furthermore, there are news reports of additional violations by Qatar of international law in its preparations for hosting the World Cup. It has been reported that Qatar is persecuting the Al-Ghufran tribe;[12] revoking the Qatari nationality of many of its members[13] and seizing their lands, including for building football stadiums.[14] In light of Qatar's measures, members of the Al-Ghufran tribe have called on the United

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9 John Ruggie, "For the Game. For the World: FIFA and Human Rights," April 2016, page 8. See also Amnesty International, "Unpaid and abandoned: the abuse of Mercury MENA workers," 26 September 2018.

10 See Reuters, "ILO closes workers' complaint against World Cup host Qatar," 8 November 2017.

11 See Amnesty International, "Unpaid and abandoned: the abuse of Mercury MENA workers," 26 September 2018. See also "Qatar migrant workers are still being exploited, says Amnesty report", *The Guardian*, 26 September 2018.

12 "Qatari tribe calls on UN to urgently intervene to solve their case", *Al Sharq Al-Awsat English*, 13 March 2018; "Qatar accused of building World Cup stadiums on land stolen from persecuted tribe", *Arab News*, 24 September 2018.

13 "Qatari Tribe Calls on UN to Urgently Intervene to Solve Their Case", *Al Sharq Al-Awsat English*, 13 March 2018; "Qatar accused of building World Cup stadiums on land stolen from persecuted tribe", *Arab News*, 24 September 2018.

14 "Qatar accused of building World Cup stadiums on land stolen from persecuted tribe", *Arab News*, 24 September 2018. The persecution against the Al-Ghufran tribe by the Qatari authorities began in 1996, in retaliation for the support provided by some of its members to Sheikh Khalifa Al-Thani, the Qatari emir deposed the by his son Hamad, father of the current emir, Sheikh Tamim. Since then, more than 6,000 members of the Al-Ghufran tribe have been stripped of their citizenship and had their property seized by the Qatari authorities.

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Nations,[15] FIFA[16] and international human rights organisations[17] to intervene to bring an end to the discrimination and persecution by the Qatari authorities.

15. The Committee is, of course, already aware of Qatar's violations. During the current ninety-sixth session of the Committee, Qatar has been faulted for allowing employers to abuse migrant workers with impunity and not making sure that judgments of its courts on such matters are made public so as to discourage future violations.[18] Its access to justice for migrant workers and victims of racial discrimination has been deemed lacking, with reports that the burden of proof is unjustifiably imposed on such victims in civil and labour cases.[19] Qatar has also faced criticism regarding transfer of nationality under its law, as reportedly it has within its country over 6,000 people who are Stateless. The UAE understands that the Committee and the country rapporteur has recommended changes to Qatari law in this respect. Qatar also does not ensure decent housing for migrant workers and its current housing policy was decried by one of the Committee's experts as amounting to racial discrimination.[20]

16. Among these multiple and egregious persistent violations, Qatar's support for terrorist acts in particular lie at the very heart of the diplomatic crisis that gave rise to the UAE's declaration of 5 June 2017 invoked by Qatar in its Article 11 Communication.[21] It is unthinkable that this Committee would choose sides in the ongoing geopolitical dispute between, on the one hand, Qatar and its support for terrorism, and, on the other hand, almost all other States in the world. By way of example of the almost-universal condemnation of Qatar's support of terrorism, on 9 June 2017, the President of the

15 "Qatari tribe calls on UN to urgently intervene to solve their case", *Al Sharq Al-Awsat English*, 13 March 2018.
16 "Qatar accused of building World Cup stadiums on land stolen from persecuted tribe", *Arab News*, 24 September 2018.
17 "Qatari tribe calls on UN to urgently intervene to solve their case", *Al Sharq Al-Awsat English*, 13 March 2018.
18 *See* Twitter@IMADR_Geneva #CERD #Qatar #migrant (27 and 28 November 2018).
19 *See* Twitter@IMADR_Geneva #CERD #Qatar #migrant (27 and 28 November 2018).
20 *See* Twitter@IMADR_Geneva #CERD #Qatar #migrant (27 and 28 November 2018).
21 Interview with United Arab Emirates Ambassador Omar Saif Ghobash, *Today (BBC Radio 4)*, 8 June 2017 (calling for Qatar to "completely change Al Jazeera so it isn't just a mouthpiece for violent extremists").

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United States of America, referring to conversations with other world leaders, stated in a public press conference:

> [Qatar] has historically been a funder of terrorism at a very high level. . . . I decided, along with Secretary of State Rex Tillerson . . . the time had come to call on Qatar to end its funding – they have to end that funding – and its extremist ideology in terms of funding.[22]

17. As set out further in this submission and as accepted by multiple Judges at the ICJ,[23] there is simply no factual or legal basis whatsoever in Qatar's Article 11 Communication that might ground a breach of the CERD or any proper process under Articles 11 to 13 thereof. The only tenable explanation for the Article 11 Communication is that Qatar seeks to manipulate the Committee to further its aggressive foreign policy objectives against the UAE. The UAE respectfully urges the Committee to remain on guard against Qatar's hostile ideology, lest the Committee be unwittingly co-opted, at great damage to the promotion and protection of human rights and the CERD, into providing an instrument for Qatar's continuing campaign to destabilise its neighbours and foment extremism and terrorism in the Middle East region and beyond.

18. In its Article 11 Communication, Qatar maintains that the UAE is in violation of the CERD by virtue of certain measures that the UAE has taken following its termination of relations with Qatar on 5 June 2017. Its allegations are untrue and misrepresent the policies of the UAE. In fact, there has been no change in the treatment of Qatari nationals, other than the introduction of legitimate and commonplace minimal requirements on the entry of Qatari nationals into the UAE. The UAE has neither expelled Qatari nationals from its territory nor instituted a travel ban against Qatari nationals who wish to enter the UAE.[24]

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22 Remarks by President Trump and President Iohannis of Romania in a Joint Press Conference, 9 June 2017, page 2, Official Website of the White House.

23 See below, *passim*.

24 See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the

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19. Nationals of Qatar with permission to enter and reside in the UAE enjoy rights to the same extent as other non-UAE nationals lawfully present within the UAE, including freedom of movement and residence, right to marriage and choice of spouse, right to freedom of opinion and expression, right to health and medical treatment, right to education, right to work, right to property and right to equal treatment before tribunals. Qatari nationals who lawfully enter and reside in the UAE enjoy all of the foregoing to the same extent as any other non-national UAE resident without any form of prohibited discrimination (whether racial or otherwise) in form or practice. Critically for the purposes of the Committee's work, there is no evidence to the contrary.

20. It is notable that Qatar has not presented any evidence in support of its allegations to the Committee. In its Communication and over the subsequent months, Qatar has submitted many sweeping rhetorical generalities but it has supplied the Committee with no evidence to support them. The UAE has already addressed in its Response that the two categories of evidence relied upon by Qatar in its Article 11 Communication are wholly unreliable.[25] Clearly, if there were credible evidence of the things that Qatar alleges, Qatar would be in possession of it. Qatar would easily be able to furnish the Committee with this evidence. The fact that Qatar has not submitted any such evidence confirms that Qatar is fabricating sensationalist stories of hardship and woe. It should be emphasised that, in the Pending ICJ CERD Proceedings, Qatar also has failed conclusively to establish that its nationals suffered treatment in violation of CERD.

21. Out of an abundance of caution, and in the face of Qatar's deliberate misrepresentation of the facts, the UAE's Ministry of Foreign Affairs made an announcement on 5 July 2018 clarifying that there was no legal order envisaging the deportation of Qatari nationals from the UAE and that any Qatari national could apply to enter the UAE on an individual basis. The announcement also confirmed that Qatari nationals already

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Indication of Provisional Measures, Order, 23 July 2018, Dissenting Opinion of Judge Crawford ("**Dissenting Opinion of Judge Crawford**"), paragraph 4 ("it appears that no legislative or administrative action was taken to give effect to paragraph 2 [of the State of 5 June 2017 with respect to Qatari nationals]").

25 UAE's Response dated 7 August 2018, paragraphs 54 to 80.

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resident in the UAE need not apply for permission to continue such residence.[26] Again, Qatar has submitted no evidence to rebut this.

22. For Qatari nationals who left the UAE voluntarily at the start of the crisis, the UAE has implemented special re-entry procedures managed through a hotline. This hotline has been available to Qataris since shortly after the termination of relations on 5 June 2017. It has been used successfully by Qataris who wish to do so to gain or re-gain entry into the UAE. No Qatari national has been denied entry through this service by virtue of his or her Qatari nationality – still less, on account of his or her race, colour, descent or national or ethnic origin. The UAE provides this benefit specifically to Qatari nationals, and not to other nationalities, thereby demonstrating the UAE's commitment to supporting the Qatari people during this time of conflict between the UAE and Qatari governments. Yet again, Qatar has submitted no evidence to rebut this.

IV. THE COMMITTEE MUST REJECT QATAR'S ARTICLE 11 COMMUNICATION FOR LACK OF JURISDICTION

23. In this Section IV, the UAE explains why the Committee lacks the jurisdiction to hear Qatar's Article 11 Communication. Consequently, it is respectfully submitted that the Committee must reject Qatar's Article 11 Communication and immediately terminate the procedure under Part II of the CERD with respect to this application.

24. All international bodies established under treaty derive their jurisdiction exclusively from the specific consent of the States Parties to that treaty. Such bodies, including investigatory or dispute resolution bodies, are required to conduct themselves according to the procedures established by the treaty.[27] Under fundamental norms of public international law, States submit to the binding force of a treaty and the authority of any body established by such treaty under the principle of *pacta sunt servanda*.[28] This

26 Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation, 5 July 2018.
27 The Committee is established pursuant to Article 8 of the CERD.
28 See Article 26 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

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consent to submit is necessarily constrained by the terms of the treaty to which the State has consented.

25. The Committee is such an international body. It is established under a treaty. It is subject to the norms of public international law. It enjoys jurisdiction for its authority only to the extent – and no further – that the States Party to the CERD have consented to submit to the dispute resolution procedures established in the CERD. The States Parties to the CERD have vested the Committee with jurisdiction to carry out the dispute resolution functions described in that treaty. The Committee has no jurisdiction beyond that. All other functions fall outwith the scope of the Committee's legitimate authority.

26. The Committee can only act with legitimacy if it acts within the jurisdiction that it has been granted by the States Party to the CERD in the treaty. Any act beyond that is not a legitimate act of authority by the Committee. Such an act would be an act *ultra vires* the authority of the Committee.

27. In the present circumstances, the Committee must examine carefully the basis for its competence to take any action. Being an international dispute settlement body, the Committee has the inherent power to decide on the limits of its competence, within the confines of its constituent treaty. Shabtai Rosenne, a leading authority on the functions of international courts and tribunals, has summarised the legal position on this issue by noting that:

> It is now a generally accepted principle that an international court or tribunal has the power to determine its own jurisdiction. This power is commonly interpreted and applied as referring also to the admissibility of the case as a whole or of an individual claim in the case. … A provision to this effect is commonly found in the constituent instrument of a standing international tribunal, but the rule is also applicable

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in an *ad hoc* tribunal should a question on jurisdiction arise there.[29]

28. The Committee is being asked by Qatar to act far beyond its authority. This raises important questions that go to the legitimacy of the functioning of the Committee in the present matter. However, these questions of legitimacy are also relevant more broadly. The functions assigned to the Committee are set out in Part II of the CERD. For present purposes, the relevant provisions are found in Articles 11 to 13, which describe the inter-State complaints mechanism under the Convention. The gateway provision in Article 11.1 CERD allows a State Party to bring a matter to the attention of the Committee if it "considers that another State Party *is not giving effect to the provisions of this Convention*" (emphasis added). This language circumscribes the Committee's jurisdiction, in the sense that the Committee has no competence to hear complaints about conduct that is not prohibited by the CERD. Nor can the Committee entertain or investigate allegations of infringement of rights that are not protected under the CERD.

29. The present inter-State communication under Article 11 falls outwith the Committee's jurisdiction for two fundamental reasons, each one of which on its own suffices to dispose of the Article 11 process entirely. First, the Committee lacks any jurisdiction because Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outwith the scope of the CERD. Second, and at the same time, the Committee also lacks jurisdiction because the dispute resolution procedure under Articles 11 to 13 of the CERD is strictly confined to ongoing alleged breaches of the CERD. In the instant case, Qatar's Article 11 Communication is entirely moot because it relies only on a non-binding policy statement made by the UAE that was never implemented in practice, in respect of which the UAE has already taken definitive action to rectify any possible misunderstanding, as recognised expressly by multiple judges in the Pending ICJ

[29] Shabtai Rosenne, "International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications," *Max Planck Encyclopaedia of International Law*, paragraph 23.

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CERD Proceedings, and which in any event is currently addressed by the ICJ's CERD Provisional Measures Order.[30] Each of these grounds is addressed in turn below.

A. The Committee lacks jurisdiction in the present dispute because Qatar has not made an Article 11 Communication that falls within the scope of the CERD's substantive protections

30. As noted above, the Committee lacks any jurisdiction in the present proceeding because Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outwith the scope of the CERD. Only a claim that falls within the scope of the CERD can possibly fall within the jurisdiction of the Committee and of any *ad hoc* Conciliation Commission that may eventually be appointed.

31. Allegations of differentiated treatment on account of nationality or citizenship do not come within the jurisdiction of the Committee. This is because Article 1 of the CERD critically and deliberately distinguishes between, on the one hand, discrimination on grounds of national origin, which is equated to racial discrimination and prohibited *per se*, and on the other hand, differentiation on the basis of nationality, which is not prohibited under the CERD.[31] The CERD simply does not purport to regulate or govern in any way differentiated treatment of individuals on the basis of their nationality or citizenship, as distinct from racial discrimination on the specific grounds

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30 *See* Dissenting Opinion of Judge Crawford, paragraphs 3 to 4 ("it appears that no legislative or administrative action was taken to give effect to paragraph 2 [of the State of 5 June 2017 with respect to Qatari nationals]"); *see also* See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the Indication of Provisional Measures, Order, 23 July 2018, Dissenting Opinion of Judge Bhandari ("**Dissenting Opinion of Judge Bhandari**"), paragraph 3.

31 See Dissenting Opinion of Judge Crawford, paragraph 1. See also Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press 2016), pages 103 to 105; Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill Nijhoff 2015), pages 33 to 34 ("it was made clear that these words ['national origin'] were not utilized as equivalents of the term 'nationality' or 'citizenship'"). See further Karin de Vries, *Integration at the Border* (Hart Publishing 2013), pages 304 to 305 ("nationality as a legal status is not included in the definition of 'racial discrimination' provided in Article 1(1) of the CERD"); Päivi Gynther, *Beyond Systemic Discrimination: Educational Rights, Skills Acquisition and the Case of Roma* (Martinus Nijhoff Publishers 2007), page 127 ("the CERD does not prohibit as a 'racial discrimination' distinctions based on nationality").

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of race, colour, descent or national or ethnic origin. The drafters of the CERD made a deliberate choice in that regard and the States Party to the CERD only signed up to that.

32. The distinction between 'nationality' and 'national origin' is clearly delineated in the *travaux préparatoires* of the CERD. For example, in the discussions on this point, the US representative pointed out that:

> [n]ational origin differed from nationality in that national origin related to the past – the previous nationality or geographical region of the individual or of his ancestors – while nationality related to present status. The use of the former term in the Convention would make it clear that persons were protected against discrimination regardless of where they or their ancestors had come from.[32]

33. It is notable that neither the provisional measures ordered in the Pending ICJ CERD Proceedings, nor any of the separate or dissenting opinions issued in the case, gave any support to the notion that 'nationality' and 'national origin' are synonymous. On the contrary, the distinction between these two concepts has been authoritatively embraced by a number of distinguished judges in the Pending ICJ CERD Proceedings. For example, in his dissenting opinion, Judge Crawford emphasised that the distinction between 'national origin' and 'nationality':

> finds its reflection in widespread State practice giving preferences to nationals of some countries over others in matters such as the right to enter or to reside, entitlement to social security, university fees and many other things, in peace and during armed conflict.[33]

34. The Joint Declaration of Judges Tomka, Gaja and Gevorgian expressed the same legal conclusion:

> When the Convention considers "national origin" as one of the prohibited bases for discrimination, *it does not refer to nationality. In our view, the two terms are not identical and should not be understood as synonymous.* The *travaux*

32 *Travaux préparatoires* of the CERD, UN Doc. A/C.3/SR.1304, paragraph 23.
33 *See* Dissenting Opinion of Judge Crawford, paragraph 1.

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> *préparatoires* support this view and indicate that *States sought to exclude distinction on the basis of nationality from the scope of CERD.* In the discussions of the draft Convention in the Third Committee of the General Assembly, an amendment specifying that "the expression 'national origin' does not mean 'nationality' or 'citizenship'" was withdrawn by their sponsors, but this was done only in favour of the final text of Article 1, which evidently was considered to make matters equally clear. (Emphasis added.)[34]

35. Similarly, in his dissenting opinion, Judge Salam pointed out that 'nationality' and 'national origin' are two conceptually different notions and that the CERD applies only to issues related to 'national origin'.[35] Judge Salam echoed the above statement from the *travaux préparatoires* in noting that 'national origin' targets individuals who – "regardless of their nationality at that time"[36] – traced their origin to a particular country and suffered discrimination as a result of that heritage (citing the examples of US citizens of Japanese origin interned following the attack on Pearl Harbour during the Second World War, as well as discrimination against persons of German origin, regardless of their nationality, in several countries after the First World War and during and after the Second World War).[37]

36. Any finding that nationality falls within the scope of the CERD and within the Committee's jurisdiction would upend this legal reality.[38] Any such finding would constitute an improper, dangerous and unacceptable distortion of the clear terms of the

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34 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the Indication of Provisional Measures, Order, 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian ("**Joint Declaration of Judges Tomka, Gaja and Gevorgian**"), paragraph 4.

35 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the Indication of Provisional Measures, Order, 23 July 2018, Opinion Dissidente de M. le Juge Salam ("**Opinion Dissidente de M. le Juge Salam**"), paragraphs 3(c) and 5.

36 *See* Opinion Dissidente de M. le Juge Salam, paragraph 5.

37 *See* Opinion Dissidente de M. le Juge Salam, paragraphs 5 to 6, with further reference to *Travaux préparatoires* of the CERD, UN Doc. A/C.3/SR.1304 and Report of the Third Committee, 18 December 1965, UN Doc. A/6181.

38 Karin de Vries, *Integration at the Border* (Hart Publishing 2013), pages 304 to 305 ("adding nationality in the legal sense as a ground to the definition of racial discrimination with be incompatible with the text and history of Article 1 CERD").

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carefully negotiated provisions of the CERD which alone determine the extent of the obligations accepted by the CERD's contracting States under public international law. Indeed, if the States Party to the CERD had intended to include 'nationality' instead of 'national origin' in Article 1 of the CERD, they could and would have easily done so.[39] They deliberately chose not to do so. The States Party did not sign up to this. And it is not open to Qatar now to impose this unilaterally upon the UAE. As noted by Judges Tomka, Gaja and Gevorgian in the Pending ICJ CERD Proceedings, "[t]he omission of a reference to nationality may be easily explained."[40] Indeed, these three Judges remarked in their Joint Declaration in the Pending ICJ CERD Proceedings that:

> Should CERD be considered as covering also discrimination based on nationality, the Convention would be a far-reaching instrument, that contains a clause providing that, with regard to the wide array of civil rights that are protected under CERD, all foreigners must be treated by the host State in the same way as nationals of the State who enjoy the most favourable treatment.[41]

37. The act of conferring nationality is within the jurisdiction of States. It is an attribute of State sovereignty to determine the benefits appertaining to such status.[42] Similarly, it is uncontroversially and entirely properly within the unilateral sovereign jurisdiction of individual States to decide which rights and benefits to confer upon foreign nationals depending on what nationality they hold, provided that distinctions are not drawn on the basis, for example, of colour or religion.[43] Respect for this sovereign right is an incontrovertible norm of customary international law.[44] It is reflected and enshrined in Articles 1.2 and 1.3 of the CERD, which provide that:

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39 *See* Opinion Dissidente de M. le Juge Salam, paragraph 7.

40 See Joint Declaration of Judges Tomka, Gaja and Gevorgian, paragraph 4.

41 *See* Joint Declaration of Judges Tomka, Gaja and Gevorgian, paragraph 4.

42 Ian Brownlie, *Principles of International Law* (Oxford University Press 1998, 5.ed), pages 385, 388, 390.

43 *See* W. Michael Reisman et al., *International Law in Contemporary Perspective* (Foundation Press 1981), page 500, notes and questions No. 2. *See* also United Nations Human Rights Office of the High Commissioner, *Handbook for Parliamentarians No. 24* (2015), pages 19 to 20.

44 *See* Ian Brownlie, *Principles of Public International Law* (Oxford University Press 1998, 5.ed), page 289. *See also* Samantha Besson, "Sovereignty," *Max Planck Encyclopaedia of Public International Law* (2011), paragraph 56. See also *Customs Regime between Germany and Austria*, Advisory Opinion of 5 September 1931, PCIJ, Series A/B, Individual Opinion of Judge Anzilotti, page 57.

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> 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

38. To the extent that the Committee as previously constituted might be interpreted to have taken a different view, it is critical to note that a number of eminent ICJ judges, each of whom is independently a highly respected authority on public international law,[45] declared in the Pending ICJ CERD Proceedings that they were unconvinced by statements from the CERD Committee that conflate 'national origin' and 'nationality'.[46]

39. A plurality of ICJ judges that are hearing Qatar's identical allegations as advanced in the context of the Pending ICJ CERD Proceedings have agreed that Qatar has failed to put forward a claim that falls within the scope of the CERD. None of the judges of the ICJ, including the majority, concluded that it was certain that Qatar had put forward a claim that falls within the scope of the CERD.

40. For example, Judge Crawford, one of the foremost authorities on public international law and a pioneer of international human rights law, asserted that Qatar's allegations of collective expulsion of Qataris from UAE territory:

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45 The ICJ judges siding with the UAE on this point are eminent scholars and seasoned practitioners of international law. They have published widely on public international law and human rights, held various positions in UN bodies and appeared in various practical functions in international dispute settlement proceedings.

46 In particular, Judges Tomka, Gaja and Gevorgian unequivocally rejected the view expressed by a previously constituted CERD Committee in its General Recommendation No. XXX in 2004 that the CERD may cover differences of treatment on the basis of nationality, finding that "[i]t would be difficult to give weight to this view of the CERD Committee since it gives no reason for its interpretation that different treatment based on nationality constitutes racial discrimination under CERD, albeit only to a certain extent", *see* Joint Declaration of Judges Tomka, Gaja and Gevorgian, paragraph 5.

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simply … is not apparently covered by the CERD.[47]

41. Similarly, Judges Tomka, Gaja and Gevorgian underlined in their Joint Declaration in the Pending ICJ CERD Proceedings that:

> [t]he basis of the alleged discrimination in the treatment of individuals by the UAE of which Qatar has complained consists in the Qatari nationality of the persons concerned. However, CERD only applies to some specific factors of discrimination: 'race, colour, descent, or national or ethnic origin'. Nationality is not listed in Article 1, paragraph 1, among the bases of discrimination to which CERD applies.[48]

42. It is critical for the purposes of the Committee and its jurisdiction that not a single ICJ judge supported the interpretation of the CERD put forward by Qatar in the Pending ICJ CERD Proceedings and which Qatar has also, in identical form, put before the CERD Committee in this present Article 11 Communication.

43. Even the narrow majority of only eight judges that granted provisional measures in favour of Qatar in the Pending ICJ CERD Proceedings did not endorse Qatar's erroneous view that the CERD's reference to 'national origin' was synonymous with 'nationality'. They restricted themselves to concluding that they did not need to decide the question at that preliminary stage of the proceedings for the purposes of the CERD Provisional Measures Order.[49] This part of the CERD Provisional Measures Order situates the conclusions of the majority of the Court within the particular context of *prima facie* jurisdiction, as opposed to actual jurisdiction.

44. Qatar has conspicuously failed to furnish the Committee with any arguments or proof that any part of its Article 11 Communication falls properly within the scope of the CERD. In its Communication of 29 October 2018, it merely asserts, with generalised and sweeping rhetoric, that "by targeting all Qataris and only Qataris with a series of coercive measures, the United Arab Emirates has violated multiple Convention

47 Dissenting Opinion of Judge Crawford, paragraph 1.
48 Joint Declaration of Judges Tomka, Gaja and Gevorgian, paragraph 3.
49 CERD Provisional Measures Order, paragraph 27.

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obligations, including its obligations under Articles 2, 4, 5, 6, and 7".[50] With respect to the UAE's objection that the conduct described by Qatar in its Article 11 Communication could not come within the scope of the CERD, Qatar simply "rejects" the UAE position. Qatar has provided no reasoning or evidence in support of its "rejection". This failure on the part of Qatar is notable and it is not sufficient for the purposes of the dispute resolution mechanisms of the CERD. It is not tenable that the Committee rely merely on a "rejection" by a State of the evidence of another party. The Committee must bear in mind that how it deals with this sort of imperious disregard for fact and evidence will constitute a precedent for unrelated complaints brought by individuals against States Party to the CERD (and even complaints brought by States Party against other States Party): if a haughty and regal "rejection" is established by the Committee to constitute a sufficient answer, it does not take much imagination to see how genuine complaints in the future will be responded to by States Party. Qatar has not advanced a complaint within the scope of the Committee jurisdiction; therefore, its Article 11 Communication must be dismissed and the present proceeding terminated for lack of jurisdiction.

45. Were the CERD Committee to find, contrary to public international law norms, the text of the CERD itself and the opinions of the preponderance of ICJ judges, that treatment on the basis of nationality falls within the scope of the CERD – for example, by progressing Qatar's Article 11 Communication to an *ad hoc* Conciliation Commission – the Committee would be putting itself at odds with customary international law, eminent judges of the ICJ and leading public international law authorities. It would undermine the very foundations of public international law by imposing upon the UAE and other States Party to the CERD a new and extraneous obligation to which those States, by becoming parties to the CERD, had never accepted. The Committee would be doing this all at a time when the ICJ, the pre-eminent Court in the United Nations system, remains seised of the very same question in the Pending ICJ CERD Proceedings and does not support this approach.

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50 Qatar's Communication to the Committee, dated 29 October 2018.

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B. The Committee lacks jurisdiction over Qatar's Article 11 Communication because there is no evidence of any ongoing violation

46. The Committee and any *ad hoc* Conciliation Commission that may be appointed only has jurisdiction to consider allegations of ongoing violations of the CERD. The mechanism established under Article 11 to 13 of the CERD is a process of conciliation, aimed at arriving at an amicable solution in a situation where a State Party "is not giving effect to the provisions of the Convention".[51] The use of the present tense in the relevant text of the CERD is deliberate and determinative. To achieve an end to the situation in dispute, any *ad hoc* Conciliation Commission appointed under Article 12 is authorised to employ its good offices to assist the disputing Parties and to issue recommendations as it may think proper for the amicable solution of the dispute.[52] The dispute resolution process established under Articles 11 to 13 is deliberately and necessarily framed in the CERD as forward-looking. The role and function of the Committee or the *ad hoc* Conciliation Commission thus presupposes that the situation to be reviewed is still in effect. There is no possible conceptual role for retrospective dispute resolution.

47. Thus, even on the hypothetical scenario that a State Party was failing to give effect to the provisions of the Convention at the time of a first referral to the Committee, the Committee is necessarily prevented from continuing to entertain or progress to an *ad hoc* Conciliation Commission a matter once that previous failure to give effect to CERD's provisions has already been rectified. It is simply not the function or role of the Committee or any *ad hoc* Conciliation Commission to assign blame to States Parties for past transgressions. Thus, if the moving State cannot show an ongoing situation of prejudice to its nationals in respect of rights covered by the CERD at the time when a decision is to be made on the admissibility of a case for the purposes of appointing an *ad hoc* Conciliation Commission to deal with the matter, there is no place for resort to conciliation under the CERD dispute resolution architecture.

51 See Articles 11.1, 12.1(a) and 13.1 of the CERD.
52 Article 13 of the CERD.

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48. In the Pending ICJ CERD Proceedings, a plurality of judges found as points of fact that, at least as of July 2018, any adverse impact that may or may not have afflicted Qatari nationals had been eliminated.[53] For instance, Judge Crawford noted that Qatar had failed to demonstrate that any measures directed at Qatari nationals were still in effect or could still cause prejudice to their rights under the CERD. He acknowledged as an established fact that the UAE took immediate action to assist any Qatari nationals affected by its 5 June 2017 statement, to rectify any misunderstandings about the status and rights of such individuals and to regularise the presence of such individuals in the UAE.[54] From this, Judge Crawford drew the conclusion that:

> [i]t is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018. Most of the reports by national and international organizations submitted by Qatar relate to the period June to August 2017.[55]

49. Indeed, Judge Crawford noted that evidence on the record in the Pending ICJ CERD Proceedings showed that "Qataris have entered or exited the UAE more than 8,000 times since June 2017 and that over 1,300 applications via the hotline system to enter the UAE have been granted."[56] These conclusions of fact are based on evidence on the record and they definitively refute the empty and unsupported allegations made by Qatar.

50. Moreover, Judge Crawford emphasised that the UAE Ministry of Foreign Affairs issued an official statement on 5 July 2018 clarifying the legal position of Qatari nationals living in the UAE, namely that Qatari nationals "need not apply for permission to continue residence in the UAE" and were encouraged to obtain prior permission for re-entry.[57]

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53 Evidence to this effect is also on the record with the Committee, having been annexed to UAE's Response, dated 7 August 2018.
54 *See* Dissenting Opinion of Judge Crawford, paragraphs 6 to 8.
55 Dissenting Opinion of Judge Crawford, paragraph 9.
56 Dissenting Opinion of Judge Crawford, paragraph 15.
57 *See* Dissenting Opinion of Judge Crawford, paragraphs 12 to 16.

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51. Similarly, Judge Bhandari noted the UAE's "unqualified statements that the declaration of 5 June 2017 has not been implemented or given effect to" and the fact that "[c]onversely, Qatar could not produce sufficiently cogent evidence, in writing or orally, to demonstrate that the declaration of 5 June 2017 has been implemented."[58] Judge Bhandari further found, referring to the above-mentioned statement by the UAE's Ministry of Foreign Affairs on 5 July 2018, that the "unqualified undertaking by the UAE [has] removed the risk of irreparable prejudice in the circumstances".[59]

52. It is also worth noting that, in the Pending ICJ CERD Proceedings, Qatar based part of its allegations on a report of the Technical Mission of the OHCHR.[60] This report relates to events which occurred many months before the ICJ's determination. Its relevance to the circumstances prevailing at that moment and *a fortiori* the present moment is highly questionable and certainly has not been established by Qatar.[61]

53. Besides the empty assertion made by Qatar many months ago, there is nothing before the Committee even to suggest that the UAE is in violation of the CERD at this particular time. Indeed, it is notable in this respect that the submission in the instant case from the State of Qatar of 29 October 2018, although it post-dated the above-mentioned findings in the Pending ICJ CERD Proceedings, did not even mention the statement by the UAE's Ministry of Foreign Affairs on 5 July 2018. Even if the Committee were to accept Qatar's complaint at face value, against the UAE's insistent protestations that it is and always has been giving effect to the provisions of the CERD, subsequent judicial opinions by eminent ICJ judges, who have heard the same evidence that is before the Committee, confirm that at the very least as of July 2018, there is no

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58 Dissenting Opinion of Judge Bhandari, paragraph 3.

59 Dissenting Opinion of Judge Bhandari, paragraph 9.

60 Office of the United Nations High Commissioner for Human Rights ("**OHCHR**"), "*OHCHR Technical Mission to the State of Qatar, 17- 24 November 2017, Report on the impact of the Gulf Crisis on human rights*", December 2017. This report is a gathering of information about the impact of the UAE-Qatar crisis on human rights in Qatar as of December 2017. In its report, the OHCHR concludes that the measures implemented by the UAE "have a potentially durable effect on the enjoyment of the human rights and fundamental freedoms of those affected", see at paragraph 60. The findings of the OHCHR in its report are relied upon by Qatar as factual evidence of "the violations of human rights caused by the unjust blockade and the unilateral coercive measures imposed on [the] country"; *see* CERD Provisional Measures Order, paragraph 37.

61 *See* CERD Provisional Measures Order, paragraphs 47 and 49.

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evidence that the UAE fails to give effect to the CERD. As a result, there is no ongoing situation over which the Committee or any *ad hoc* Conciliation Commission has any jurisdiction to seek to resolve through an amicable solution. To continue the procedure before the Committee under such circumstances would be nonsensical and irresponsible. As a result, the Committee must decline any jurisdiction to entertain Qatar's Article 11 Communication any further.

V. THE COMMITTEE MUST REJECT QATAR'S ARTICLE 11 COMMUNICATION FOR LACK OF ADMISSIBILITY

54. In this Section V, the UAE explains why Qatar's Article 11 Communication is inadmissible for any one of three independent reasons:

a. First, the Committee must decline to hear Qatar's Article 11 Communication because Qatar has failed to establish that local remedies have been exhausted as required under Article 11.3 of the CERD;

b. Second, the Committee must decline to hear Qatar's Article 11 Communication because Qatar, by commencing the Pending ICJ CERD Proceedings, has abandoned the Article 11 process in favour of a judicial procedure before the pre-eminent United Nations World Court now seised of the very same dispute;

c. Finally, the Committee must also dismiss the proceeding because Qatar's Article 11 Communication constitutes an abuse of rights and process.

55. Whether taken separately or cumulatively, each of these grounds – addressed in turn in further detail below – suffices to dispose of Qatar's Article 11 Communication entirely. As a result, if the Committee accepts even one of the above grounds, the Committee must dismiss Qatar's Article 11 Communication as inadmissible and immediately terminate the present procedure under Part II of the CERD.

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A. The Committee must decline to hear Qatar's Article 11 Communication because Qatar has failed to establish that local remedies have been invoked or exhausted as required under Article 11.3 of the CERD

56. In its Communication of 29 October 2018, Qatar refers the present matter to the Committee again pursuant to Article 11.2 of the CERD. Before advancing to the next step, i.e., any possible appointment by the Chairman of the Committee of an *ad hoc* Conciliation Commission, the Committee is obligated by the terms of its jurisdiction under the CERD to establish that all domestic remedies have been invoked and exhausted by persons on behalf of whom Qatar makes its Article 11 Communication. Article 11.3 of the CERD provides:

> The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has 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.

57. This rule is a reflection of the customary international law principle that States may not exercise diplomatic protection on behalf of its nationals by instituting international proceedings unless local remedies first have been exhausted.[62] This well-established rule[63] is embraced in ICJ jurisprudence[64] and codified in the 2006 Draft Articles on Diplomatic Protection[65] and the 2001 Draft Articles on State Responsibility.[66] It

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62 *See*, e.g., General Assembly, Third Committee, Summary Meeting of the 1353rd meeting, 24 November 1965, UN Doc. A/C.3/SR.1353, at paragraph 42.

63 See Christopher F. Dugan, Don Wallace, Jr., Noah Rubins, Borzu Sabahi, *Investor State Arbitration* (Oxford University Press 2008), page 347.

64 See *Interhandel* (Switzerland v. United States of America), I.C.J. Reports 1959, p. 6, at page 27; *Elettronica Sicula S.p.A. (ELSI)* (Italy v. United States of America), I.C.J. Reports 1989, p. 15, at paragraph 50; *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, at paragraph 42.

65 *See* Article 14 of the 2006 Article on Diplomatic Protection ("[a] state may not present an international claim in respect of an injury to a national … before the injured person has … exhausted all local remedies").

66 Articles on Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001, vol. II(2), page 26 ff. (annexed to United Nations General Assembly Resolution 56/83, 12 December 2001, UN Doc. A/RES/56/83).

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guarantees that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[67]

58. The *travaux préparatoires* to the CERD confirm that this rule was adopted with near consensus to operate as a preliminary condition for the bringing of inter-State communications under the Convention. A proposal by the Tanzanian delegation to do away with this essential requirement[68] was emphatically opposed and rejected by vote.[69] Similar requirements can be found in numerous other human rights treaties.[70]

59. If available domestic remedies have not been exhausted in respect of an alleged violation of the CERD, a communication made under Article 11 must be declared inadmissible.[71] The ICJ has previously held that:

> Such an objection consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein. Such a reason is often of such a nature that the

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67 See *Interhandel* (Switzerland v. United States of America), I.C.J. Reports 1959, p. 6, at page 27; *see also Ambatielos* (Greece v. United Kingdom), (1956), XII *Reports of International Arbitral Awards* 83, at page 120 ("It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.").

68 General Assembly, Third Committee, Summary Meeting of the 1353rd meeting, 24 November 1965, UN doc. A/C.3/SR.1353, paragraph 25 (Tanzania) (inclusion of a requirement of exhaustion "would be an escape clause for any signatory which did not wish to apply the Convention in good faith").

69 *See* General Assembly, Third Committee, Summary Meeting of the 1353rd meeting, 24 November 1965, UN doc. A/C.3/SR.1353, paragraph 57: (the Tanzanian proposal was rejected by 2 votes for, 70 votes against, and 12 abstentions); *see also at* paragraph 28 (Italy): ("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"); and at paragraph 48 (Senegal): (the requirement to exhaust local remedies would "prevent a proliferation of complaints at the international level").

70 *See,* e.g., International Covenant on Civil and Political Rights, Article 41.1 (c); European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 ("European Convention on Human Rights"), Article 35. Other human rights bodies have also drawn on the customary general principles relating to exhaustion of domestic remedies, and have required the exhaustion of all remedies that are available and effective. *See*, e.g., HRC, Communication No. 669/1995, *Malik v. The Czech Republic*, Decisions of 21 October 1998, UN doc. CCPR/C/64/D/669/1995, at paragraph 6.2.

71 *See, 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, paragraph 120 (failure to exhaust local remedies is normally considered as a question relating to the admissibility of the claim). See also J. R. Crawford and T. D. Grant, "Exhaustion of Local Remedies," *Max Planck Encyclopaedia of Public International Law* (2007), paragraph 5.

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> matter should be resolved *in limine litis*, for example where without examination of the merits it may be seen that there has been a failure to comply with the rules as to nationality of claims; failure to exhaust local remedies; the agreement of the parties to use another method of pacific settlement; or mootness of the claim.[72]

60. That a failure to exhaust local remedies must result in the inadmissibility of the complaint is further confirmed by the Committee's jurisprudence with respect to the parallel procedure for hearing complaints from individuals under the mechanism described in Article 14 of the CERD.[73] This jurisprudence has bearing *mutatis mutandis* on Qatar's Article 11 Communication, as the requirement to exhaust local remedies is common to Articles 11 and 14 of the CERD. Furthermore, in the proceedings before the ICJ that bear upon this case, Qatar has acknowledged that the "local remedies requirement" applies both to the "inter-state procedure before the Committee and potentially a Conciliation Commission (Articles 11-13)" and to "an individual-State procedure before the CERD Committee (Article 14)."[74]

61. Under Article 11.3, CERD jurisprudence and customary international law, the requirement to exhaust local remedies may be dispensed with if there are no available remedies, if these are ineffective or if they are "unreasonably prolonged".[75] The bar is high for finding that local remedies need not be exhausted. The available exceptions do not pertain to, for instance, the likelihood of success or the difficulty or cost of the process. It is a matter of whether the municipal system of the respondent State is reasonably capable of providing effective relief.[76] Indeed, in the context of individual communications under Article 14, the Committee has found the exception to be

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72 *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, paragraph 120.

73 *See, Ahmad Najaati Sadic v. Denmark*, CERD/C/62/D/25/2002 16 April 2003, *Sarwar Seliman Mostafa v. Denmark*, CERD/C/59/D/19/2000 15 August 2001, *Nikolas Regerat et al. v. France*, CERD/C/62/D/24/2002 16 April 2003, *POEM and FASM v. Denmark*, Communication No. 22/2002, 21 March 2003, U.N. Doc. No. CERD/C/62/D/22/2002.

74 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Response on behalf of the State of Qatar to the questions posed by Judge Cançado Trindade on Friday, 29 June 2018, 3 July 2018, at paragraph 8.

75 *See,* Article 15(a) of the Articles on Diplomatic Protection; Article 11.3 of the CERD.

76 *See,* Articles on Diplomatic Protection, Commentary to draft Article 15, paragraphs 3 to 4, ILC Yearbook 2006, vol. II(2), at pages 47 to 48.

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applicable only in exceptional situations. This has been the case, for example, when an administrative process had already lasted for two years in a matter that "did not require complex investigation".[77]

62. Under customary international law, Qatar bears the burden "to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved [it]…of the obligation to exhaust available local remedies."[78] Customary international law has bearing upon the CERD in this regard, as the relevant provision builds upon that law and does not provide any specific rule on the allocation of the burden of proof.

63. Under its burden of proof, Qatar must show that local remedies have been exhausted "in the case", pursuant to the wording of Article 11.3.[79] In other words, the case referred to the Committee must be the same case for which available domestic remedies have previously been exhausted. CERD jurisprudence also provides that local remedies must be exhausted by the affected person or persons.[80] It is thus incumbent upon Qatar to demonstrate that, in a concrete case involving an affected individual on whose behalf the present Article 11 Communication is made, all reasonably available domestic

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77 CERD, Communication No. 33/2003, *Mr. Kamal Quereshi v. Denmark,* Opinion of 9 March 2005, UN doc. CERD/C/66/D/33/2003, at paragraph 6.4.

78 *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, at paragraph 44; *Elettronica Sicula S.p.A. (ELSI)*, (Italy v. United States of America), I.C.J. Reports 1989, p. 15, at paragraph 53.

79 This follows from an interpretation of the ordinary meaning of the text of the Convention, as prescribed by the customary international law canon of treaty interpretation codified in Article 31 VCLT. This construction finds further support from the CERD Committee's jurisprudence with respect to the identical condition under Article 14(7)(a) of the Convention. *See* CERD, Communication No. 22/2002, *POEM and FASM v. Denmark*, Inadmissibility Decision of 19 March 2003, UN Doc. CERD/C/62/D/22/2002, at paragraph 6.3; *see also* Communication No. 38/2006, *Zentralrat Deutscher Sinti und Roma et al. v, Germany*, Opinion of 22 February 2008, UN Doc. CERD/C/72/D/38/2006, at paragraph 7.4.

80 The Committee has rejected as inadmissible communications where domestic remedies have been pursued by other organizations or individuals than those submitting the communication with the Committee. See CERD, Communication No. 38/2006, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Opinion of 22 February 2008, UN Doc. CERD/C/72/D/38/2006, at paragraph 7.4; Communication No. 22/2002, *POEM and FASM v. Denmark*, Inadmissibility Decision of 19 March 2003, UN Doc. CERD/C/62/D/22/2002, at paragraph 6.3.

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remedies have been exhausted. Such remedies include administrative remedies, as well as judicial ones.[81]

64. Qatar has failed to provide any concrete evidence that Qatari nationals have attempted to invoke, let alone exhaust, the local remedies available under Emirati law to seek redress for the supposed injuries they have suffered. Qatar has not established that such remedies are unavailable as a result of measures taken by the UAE. Any perception on behalf of Qatari nationals of a "campaign of hatred" is irrelevant to the Committee's determination on the issue of inadmissibility for failure to exhaust local remedies. Similarly, anecdotal accounts of individuals' mistrust or paranoia in respect of the remedies available, including administrative remedies such as hotlines and other application procedures set up by the UAE,[82] are merely self-interested assertions by Qatar and do not constitute evidence of anything. They certainly do not mean that such remedies are unavailable, ineffective or unreasonably prolonged. Such feelings in individuals, even were they fact, do not absolve them of the obligation to seek and exhaust local remedies before escalating the matter to an international dispute. The Committee itself has clarified in respect of individual communications that mere doubts on the part of the petitioner as to the effectiveness of domestic remedies do not absolve a petitioner from pursuing them.[83] Finally, Qatar has not even argued, let alone established, that the resort to local remedies in the UAE is unreasonably prolonged such that local remedies need not be exhausted in the instant case.

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81 *See Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, at paragraph 47. *See also*, e.g., HRC, Communication No. 1184/2003, *Brough v. Australia*, Views of 17 March 2006, UN Doc. CCPR/C/86/D/1184/2003, at paragraph 8.6; Communication No. 1403/2005, *Gilberg v. Germany*, Inadmissibility Decision of 25 July 2006, UN doc. CCPR/C/87/D/1403/2005, paragraph 6.5. See further Article 14(2) of the Articles on Diplomatic Protection; see also Articles on Diplomatic Protection, Commentary to draft Article 14, paragraph 5, ILC Yearbook 2006, vol. II(2), at page 45.

82 *See* Qatar's Article 11 Communication, 8 March 2018, paragraphs 44 and 81.

83 Communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, Inadmissibility Decision of 10 August 2001, UN Doc. CERD/C/59/D/19/2000, at paragraph 7.4; Communication No. 21/2001, *D.S v. Sweden*, Inadmissibility Decision of 10 August 2001, UN Doc. CERD/C/59/D/21/2001, at paragraphs 4.2 to 4.3; Communication No. 47/2010, *Kenneth Moylan v. Australia*, Inadmissibility Decision of 27 August 2013, UN doc. CERD/C/83/D/47/2010, at paragraph 6.5.

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65. To the contrary, numerous effective domestic remedies are available within the UAE to any Qatari nationals who claim to be victims of violations of any of the rights set forth in the CERD. Qatari nationals in the UAE have at all times been entitled to access the UAE's courts. The right of access of individuals to the UAE judicial system is firmly recognized in the UAE Constitution.[84] Article 41 of the UAE Constitution guarantees the rights of individuals to challenge perceived violations of their rights and freedoms by filing "a complaint with a competent authority, including a judicial entity."[85] Further, Article 40 of the UAE Constitution enshrines that:

> Foreigners in the UAE enjoy the rights and freedoms stipulated in the applicable international instruments or in the treaties and conventions to which the UAE is a party and have to perform the duties which correspond to those rights and freedoms.[86]

66. Importantly, access to courts specifically to resolve complaints against the UAE Government is guaranteed by Article 102 of the Constitution, which states that:

> [t]he UAE shall have one or more Federal Court of First Instance which shall sit in the permanent capital city of the UAE or in certain capital cities of the Emirates. A Federal Court of First Instance has, within the territory of its jurisdiction, the powers to hear … civil, commercial and administrative disputes between the UAE and an individual no matter whether the UAE is the plaintiff or the defendant…[87]

67. The rights and freedoms guaranteed under CERD are therefore amongst the rights and freedoms that can be directly vindicated through complaints to competent authorities, including judicial entities. Court remedies in the UAE are available and effective and can be pursued without difficulty, either in person or through powers of attorney. Numerous effective administrative remedies are also available to Qatari nationals – including through powers of attorney – to the extent that any violation of the CERD is

84 *See* UAE Constitution, Articles 40, 41 and 102 (2011).
85 UAE Constitution, Article 41 (2011).
86 UAE Constitution, Article 40 (2011).
87 UAE Constitution, Article 102 (2011).

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perceived in the form of complaint procedures specific to various governmental authorities.[88]

68. Through the use of powers of attorney, available and effective local remedies may be accessed by Qatari nationals whether or not they are physically present in the UAE. Qatar has put forward not a shred of evidence, despite multiple opportunities to do so, of a single Qatari national seeking to avail himself or herself of these readily available and effective procedures if any violation of the protections in CERD is perceived.

69. Following from this, it is not surprising that evidence already submitted by the UAE shows that Qataris can, and do, continue to use local remedies available to them in the UAE.[89] Contrary to Qatar's allegations, the court system remains fully open to Qatari nationals without any discrimination.[90] The use by Qatari nationals of the UAE judicial system is due, no doubt in part, to its ease of access; in particular, a number of courts in the UAE provide various e-services for the filing of a claim.[91]

70. As there are and have been no restrictions on Qataris using this system, these remedies continue to be available and effective. In fact, Qatari nationals use the UAE judicial system in significant numbers in other areas of activity. It is striking that Qatar has

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88 By way of example, the Government of Dubai Legal Affairs Department (the "**Department**") is tasked pursuant to Law No. (32) of 2008 and Law No. (3) of 1996 with receiving complaints and claims made against the Government of Dubai. Qatari nationals can file a complaint against a Dubai government entity through the Department's website. The Department requests and receives feedback from the appropriate government entity in response to each complaint. The Department then attempts to settle the dispute amicably and if this cannot be achieved, a formal statement is issued to that effect. If no settlement is reached within two months, the complainant can file claims directly against the government entity before the UAE courts. *See* Government of Dubai website "Complaints Against Government Entities," https://legal.dubai.gov.ae/en/Services/Pages/Services-Desc.aspx?ServiceID=10; Government of Dubai website "Complaint filed against a Government Entity," https://cms.legal.dubai.gov.ae/en/Website/Pages/ComplaintAgainstGovernmentEntity.aspx.

89 UAE's Response of 7 August 2018, paragraphs 62 to 63.

90 In the period of June 2017 to June 2018, Qatari nationals have made frequent use of the UAE courts for various dispute resolution and status applications. See, for example, the fact that 390 commercial licences to Qatari nationals were either granted or renewed in the period 5 June 2017 to 13 June 2018, pursuant to UAE's Response dated 7 August 2018, Annex 4, page 14 and Annex 13. Similarly, more than 160 cases were pursued by Qatari nationals before the UAE courts during the relevant time period, see UAE's Response dated 7 August 2018, Annex 16; see also for similar data Annex 18.

91 *See* Government of Dubai website "Case Registration Services," https://www.dxbpp.gov.ae/portal/Services.aspx; *see also* Abu Dhabi Judicial Department website "eService," https://www.adjd.gov.ae/EN/Pages/EserviceHome.aspx.

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made no allegation they have done so in order to complain of any violations of the CERD. Accordingly, even if the UAE were not giving effect to the provisions of the CERD (*quod non*), this Committee has no power to hear the Qatar's Article 11 Communication because Qatar has failed to demonstrate that any Qatari nationals who have allegedly suffered CERD violations have in fact invoked and exhausted the local remedies available to them in the UAE.

71. Since Qatar has failed to overcome the admissibility hurdle in Article 11.3 CERD, the Committee must dismiss its Article 11 Communication and discontinue any further procedure addressing that communication.

B. The Committee must decline to hear Qatar's Article 11 Communication because Qatar, by commencing proceedings before the ICJ, has abandoned the Article 11 process

72. While Article 22 of the CERD does envisage that States can resort to the ICJ to settle disputes with respect to the interpretation or application of the Convention, it makes this recourse available only at the end of a carefully crafted linear and hierarchical process. Article 22 provides:

> Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

73. It is clear from the plain wording of this provision that the CERD envisages that the treaty-specific dispute resolution mechanism it offers to its States Parties should be explored and exhausted before escalating to an ICJ process. Nevertheless, Qatar submitted the matter for the consideration of the ICJ while the CERD Article 11 process was still underway or in fact had not even properly commenced. Qatar has thus submitted the present matter both to this Committee and to the ICJ. The two proceedings relate to the same factual situation, concern the same alleged violations and

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apply the same international legal framework. After making its initial Article 11 Communication to the Committee, Qatar allowed the passage of no more than a third of the time prescribed under the CERD for the UAE to provide a written explanation,[92] before making an application to the ICJ.[93] Having done so, and having obtained the CERD Provisional Measures Order from the ICJ, Qatar now comes back to the Committee and seeks to resume the very process it has previously bypassed in favour of the ICJ.

74. Through its actions Qatar has created a *lis pendens* situation, where two parallel proceedings bearing on the exact same dispute are progressing simultaneously. The dangers and disadvantages of litigation tactics that induce parallel proceedings are well documented:

> Such duplicative practices draw heavily on scarce judicial resources, carry the risk of legal havoc, which might be caused by inconsistent decisions, and place an undue burden on some or all of the parties due to increased litigation expenses and reduced legal certainty . . . The co-existence of two or more simultaneous proceedings before different fora places an unusually heavy burden on the parties to litigation, which are required to maintain two legal teams or shuttle between two or more tribunals. It also entails the investment of unnecessarily duplicative judicial time and resources by courts and tribunals that are faced with similar (if not identical) tasks and yet are unable to rely on the work of each other.[94]

75. By prosecuting these two procedures simultaneously, Qatar violates the principle of *electa una via non datur recursus ad alteram* ("when one way has been chosen, no recourse is given to another", sometimes known as the principle of election):

> The choice of a specific forum can be perceived as indicative of the intent to resolve the dispute in the selected forum to

92 Article 11.1 of the CERD.
93 Application instituting proceedings in the International Court of Justice (Qatar v. United Arab Emirates), 11 June 2018.
94 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), pages 155 to 156.

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> the exclusion of all alternative fora. This means that a party is estopped from initiating parallel proceedings or relitigating a settled case if the first-in-time forum was seized on his or her initiative (or with that party's approval).[95]

76. By failing to respect this principle, Qatar has sought to abuse the CERD complaints mechanism process and its rights under the CERD by pursuing in parallel the very same CERD complaint against the UAE before two mutually exclusive *fora*. This is in direct violation of the hierarchical and linear dispute resolution architecture of the CERD.

77. If the Committee nevertheless proceeds with the CERD process, there will no longer be a linear and incremental dispute resolution procedure, as set out in the CERD. This would turn the CERD complaints mechanism from a hierarchical and linear process into an "all you can eat" buffet, where States Parties are allowed to parse the aspects of that process they believe will work in their favour and manipulate the process to fit a grander and, importantly, extra-legal scheme or strategy. The UAE respectfully invites the Committee to consider the broader implications to its legitimacy that are embedded in Qatar's conduct. If the Committee were to allow the present Article 11 Communication to continue – notwithstanding that the ICJ is presently seised of the very same dispute (as a result of Qatar's improper and extra-jurisdictional application to it), between the very same Parties and commenced under the very same instrument – it would cause the breakdown of the legitimate institutions established by the CERD and make a mockery of both the CERD dispute resolution mechanism's systemic integrity and the procedural rights of the UAE.

78. With respect, the Committee must therefore decline to entertain Qatar's complaint as a matter of inadmissibility. In the UAE's respectful submission, the termination of the present Article 11 process is a necessary consequence of Qatar's decision to abandon the Article 11 process by invoking the formal ICJ procedure under Article 22 of the CERD, which may be accessed only after the cumulative preconditions that any dispute has "not been settled either by negotiation or by the procedures expressly provided for

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[95] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), page 23.

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in this Convention" – including the procedures under Articles 11 to 13 of the CERD – have been met.

79. With respect, given that Qatar has abandoned the present process by commencing the Pending ICJ CERD Proceedings, the Committee must now yield to the ICJ procedures. It would be absurd and paradoxical for the Committee to proceed in parallel at a time when the ICJ, as the pre-eminent World Court in the United Nations system, remains seised of the very same question in the Pending ICJ CERD Proceedings. To continue in parallel would jeopardise the systemic integrity of the system and risk resulting in fragmented jurisprudence. It would wreak irreparable harm on the procedural rights of the UAE, which would be required to defend itself against the same allegations in two simultaneous and overlapping procedures. Such an approach would be particularly indefensible in the present case given that, in the Pending ICJ CERD Proceedings, a plurality of Judges at the ICJ has already rejected unequivocally the view expressed by a differently constituted CERD Committee that the CERD may cover differences of treatment on the basis of nationality.[96]

C. The Committee must decline to hear Qatar's Article 11 Communication since that communication amounts to no more than empty speculation and thus constitutes an abuse of rights and process

80. As demonstrated above, Qatar has failed, despite many of opportunities to do so, to present even a shred of evidence of any ongoing discrimination against Qatari nationals – still less, any discrimination actually falling within the scope of the CERD on the basis of race, colour, descent or national or ethnic origin as required under Article 1(1). Indeed, Qatar cannot produce any evidence as its allegations are without foundation either in fact or in law. Its Article 11 Communication cannot be deemed admissible

[96] *See* Joint Declaration of Judges Tomka, Gaja and Gevorgian, paragraph 5, noting that "[i]t would be difficult to give weight to this view of the CERD Committee since it gives no reason for its interpretation that different treatment based on nationality constitutes racial discrimination under CERD, albeit only to a certain extent".

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within the CERD complaints mechanism because it amounts to no more than empty speculation and abuse of process.

81. Allegations that are completely without merit on fact and law should not be further entertained under Article 11 of the CERD, still less under the further procedures under Articles 12 and 13. In particular, empty allegations with no basis in law or fact cannot be used to found the constitution of any Article 12 Conciliation Commission and should be preliminarily dismissed. Although the Conciliation Commission is not a judicial body, it is a fact-finding body and its findings may result in reputational damage to the responding State. The Conciliation Commission's review of the matter, if allowed to continue, will result in the preparation of a report, to which Qatar will be allowed to append a declaration where it may seek to make damning statements about the UAE to affect its standing among its peers. As noted above, it should be unthinkable for this Committee to choose sides in the ongoing geopolitical dispute between, on the one hand, Qatar and its support for terrorism, and, on the other hand, almost all other States in the world. The UAE respectfully urges the Committee to dismiss Qatar's Article 11 Communication as baseless speculation intended only to further Qatar's hostile agenda in the region and beyond.

82. It is worth noting that nothing in the ICJ's CERD Provisional Measures Order runs contrary to this position. This is because the ICJ in the Pending ICJ CERD Proceedings has thus far evaluated Qatar's allegations only against a lower threshold of "plausibility" relevant to the provisional measures stage.[97] As pointed out by Judge Crawford, the Court failed to identify any evidence to support the further statement that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain

[97] *See* CERD Provisional Measures Order, paragraphs 43 to 44: "At this stage of the proceedings, the Court, however, is not called upon to determine definitively whether the rights which Qatar wishes to see protected exist; it need only decide whether the rights claimed by Qatar on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested". The "plausibility" threshold is described by Judge *ad hoc* Cot as "rather low", *see Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Request for the Indication of Provisional Measures, Order, 23 July 2018, Opinion Dissidente of Judge *ad hoc* Cot, paragraph 5.

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vulnerable with regard to their rights under Article 5 of the CERD.[98] Most importantly, the Court failed to mention UAE's Statement of 5 July 2018.[99]

83. By submitting, in bad faith, a self-serving application based purely on unilateral speculation, Qatar abuses its rights to resort to the process under Article 11 of the CERD. If allowed, Qatar may manage to force the UAE to submit to a futile and redundant fact-finding procedure that will amount to nothing more than an opportunity for Qatar to engage in further public relations theatrics. This is not what the dispute resolution mechanisms of the CERD was intended to achieve. It would tarnish the CERD for it to become a tool of cynical State Party diplomacy.

84. It would be consistent with a good faith interpretation of the CERD in light of its object and purpose, as provided for in Article 31 of the Vienna Convention on the Law of Treaties,[100] to require of Qatar to have proved a genuine case to answer before progressing the matter to an *ad hoc* Conciliation Commission. Otherwise, the Committee will expose the CERD procedure to the risk of abuse of process by Qatar. The Committee is respectfully urged to prevent such abuse by dismissing Qatar's Article 11 Communication as inadmissible. In this respect, the Committee is reminded of its *compétence de la compétence* under public international law and its role, assigned to it under Article 11.3, to ensure that the CERD complaints mechanism is not burdened by claims that do not meet the fundamental criteria of admissibility.

VI. ANY ACTION OF THE COMMITTEE TO ENTERTAIN FURTHER OR PROGRESS QATAR'S ARTICLE 11 COMMUNICATION WOULD BE *ULTRA VIRES*

85. Through its procedural tactics, Qatar has made any recourse to the dispute resolution process under Articles 11 to 13 of the CERD moot. Through its 11 June 2018

98 Dissenting Opinion of Judge Crawford, paragraph 14.
99 Dissenting Opinion of Judge Crawford, paragraph 14.
100 Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012), page 587, paragraph 59.

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application to the ICJ, it abandoned the CERD process. By doing so, Qatar has deprived the Committee of its role and its authority to act. There is no longer any jurisdiction for the Committee to move forward with Qatar's complaint and no proper role for the lower-hierarchy stages of the CERD dispute resolution process to play. Indeed, it is imperative that the CERD Committee presently leave the matter where Qatar itself has placed it: into the hands of the ICJ in the Pending ICJ CERD Proceedings.

86. Qatar cannot feasibly and in good faith litigate against the UAE in formal judicial proceedings under the CERD while simultaneously seeking to pursue the recommendatory conciliation process under Articles 11 to 13. Despite this, Qatar – having commenced and while continuing to pursue the Pending ICJ CERD Proceedings – now seeks to resume the Article 11 to 13 process to achieve a two-pronged legal attack on the UAE. For the Committee to accept this abuse of its process would undermine the broader perception of legitimacy of the Committee and the CERD dispute resolution mechanisms. Fatally for Qatar's Article 11 Communication, it would be *ultra vires* the Committee's jurisdiction for the Committee to accept this abuse of process. It is not within the Committee's competence to entertain a recommendatory conciliation process which the moving Party has abandoned by jumping ahead to the CERD's formal judicial process under Article 22. Furthermore, were the Committee to endorse and reward Qatar's tactics, it risks setting a dangerous procedural precedent, allowing States Party to the CERD to pick and choose the order and timing of the different dispute resolution options in the CERD in a manner wholly incompatible with the procedural rights of the responding Party.

VII. CONCLUSION

87. For the reasons set out above in this Supplemental Response and in the previous submissions of the UAE before the Committee, the UAE respectfully requests that the Committee dismiss Qatar's Article 11 Communication *in limine* for lack of jurisdiction and/or lack of admissibility.

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88. The UAE reserves the right to respond to any communication submitted by Qatar in this matter and respectfully requests the Committee to make provision for such responses in any time-table or order it may intend to make.

89. The UAE takes this opportunity to reaffirm its unwavering commitment to eliminating racial discrimination in all of its forms and to combating hate speech.

Dated 29 November 2018

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Annex 119

Note Verbale of the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) to the Permanent Mission of the State of Qatar to the United Nations Office at Geneva regarding interstate communication ICERD-ISC-2018/2 (14 December 2018), *available at* https://www.ohchr.org/Documents/HRBodies/CERD/NV_QatarUAE_14Dec2018%20_003.pdf

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REFERENCE: ICERD-ISC 2018/2
AP/VL/mg

The Secretariat of the United Nations (Office of the High Commissioner for Human Rights) presents its compliments to the Permanent Mission of the State of Qatar to the United Nations Office at Geneva, and has the honour to refer to the interstate communication ICERD-ISC-2018/2, submitted by the State party under article 11 of the Convention on the Elimination of All Forms of Racial Discrimination concerning the United Arab Emirates.

The Secretary-General has the honour to inform the State party of a decision adopted by the Committee on the Elimination of Racial Discrimination during its 97th session held in Geneva from 26 November to 14 December 2018, as follows:

Noting that the State of Qatar sent an interstate communication concerning the United Arab Emirates on 8 March 2018, which was transmitted to the State concerned on 7 May 2018;

Noting that the United Arab Emirates replied to that communication by Notes verbales of 7 August, 7 and 30 November 2018, which were transmitted to the State of Qatar;

Also noting that the State of Qatar submitted observations on the replies of the United Arab Emirates dated 7 August and 7 November 2018 in a note dated 29 November 2018, and that observations were transmitted to the United Arab Emirates;

Being aware that the matter has not been adjusted to the satisfaction of both parties;

Acknowledging that on 29 October 2018, the State of Qatar has referred the matter again to the Committee in accordance with article 11(2) of the Convention;

Decides

1. To request the United Arab Emirates to inform the Committee whether it wishes - within a period of one month after receipt of this request - to supply any relevant information on issues of jurisdiction of the Committee or admissibility of the communication, including the exhaustion of all available domestic remedies;

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2. That the Secretariat will immediately transmit any reply received to all members of the Committee and to the State of Qatar giving it the opportunity to provide its observations on that reply within one month of receiving it;

3. That both the United Arab Emirates and the State of Qatar may decide to confine their respective replies to the information already contained in their previous notes in which those issues have been raised;

4. To give the United Arab Emirates the opportunity to provide its comments on any observations that may be communicated by the State of Qatar pursuant to operative paragraph 2 above within one month of having received them, without raising any issue not previously raised by either of the States concerned;

5. To invite the States parties concerned to appoint one representative to take part in the proceedings before the Committee, without voting rights, while the matter is under consideration, and to inform the Chairperson of the Committee of that appointment not later than 1 March 2019;

6. To examine any preliminary question at its 98th session that will take place from 23 April to 10 May 2019;

7. To invite the appointed representative to present at that session the views of the State party concerned, for a maximum of 45 minutes, and in rebuttal for a further period of 15 minutes.

A copy of the decision has been transmitted to the Permanent Mission of the United Arab Emirates to the United Nations Office at Geneva.

The Secretariat avails itself of the opportunity to renew to the Permanent Mission of the State of Qatar the assurances of its highest consideration.

14 December 2018

Annex 120

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Supplemental Response of the UAE
on Issues of Jurisdiction and Admissibility
(14 January 2019)

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REFERENCE: ICERD-ISC 2018/2
CE/JD/mg

The Secretariat of the United Nations (Office of the High Commissioner for Human Rights) presents its compliments to the Permanent Mission of the State of Qatar to the United Nations Office and other international organizations in Geneva, and has the honour to transmit herewith, for comments, the reply of the United Arab Emirates, dated 14 January 2019, concerning communication No. ICERD-ISC 2018/2, which was submitted by the State of Qatar to the Committee on the Elimination of Racial Discrimination under article 11 of the Convention on the Elimination of All Forms of Racial Discrimination.

Your comments on the United Arab Emirates' submission should reach the Committee in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva within one month of the date of this note, which is no later than 15 February 2019.

15 January 2019

In a matter before the
Committee on the Elimination of Racial Discrimination

ICERD-ISC-2018/2

SUPPLEMENTAL RESPONSE ON ISSUES OF JURISDICTION AND ADMISSIBILITY

of the United Arab Emirates pursuant to the Decision adopted by the Committee on the Elimination of All Forms of Racial Discrimination during its 97th Session (26 November – 14 December 2018)

to the request made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination

submitted to the Office of the High Commissioner for Human Rights, United Nations Office, Geneva, Switzerland on

14 January 2019

Page

I. Introduction

1. The Permanent Mission of the United Arab Emirates (the "**UAE**") to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) and refers to the Office of the High Commissioner's Note of 14 December 2018 (ICERD-ISC 2018/2) in which the Office of the High Commissioner transmits a decision taken by the Committee on the Elimination of All Forms of Racial Discrimination (the "**Committee**" or the "**CERD Committee**") at its 97th Session (the "**Decision**") concerning the Communication under Article 11 of the Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**" or the "**Convention**"), submitted by the State of Qatar ("**Qatar**") to the Committee on 8 March 2018 ("**Qatar's Article 11 Communication**").

2. The Decision requests the UAE to "inform the Committee whether it wishes – within a period of one month after the receipt of this request – to supply any relevant information on issues of jurisdiction of the Committee or admissibility of the communication, including the exhaustion of all available domestic remedies."[1]

3. In response to the Decision, the UAE has the honour to submit the present Supplemental Response on Issues of Jurisdiction and Admissibility. This submission must be read together with the Response and Supplemental Response submitted by the UAE on 7 August 2018 and on 29 November 2018, respectively, in connection with these CERD Committee proceedings ("**CERD Committee Proceedings**").

4. In particular, the arguments concerning issues of jurisdiction and admissibility set out in the UAE's Supplemental Response of 29 November 2018 (the "**29 November 2018 Submission**") are hereby confirmed. The UAE therefore draws the attention of the Members of the Committee to the arguments set out in the 29 November 2018 Submission, which provide more than sufficient grounds on which the Committee may

[1] Note from the Secretariat of the United Nations (Office of the High Commissioner for Human Rights), dated 14 December 2018 (ICERD-ISC 2018/2).

proceed to dismiss Qatar's Article 11 Communication out of hand for lack of jurisdiction and for being inadmissible.

5. In light of the detailed arguments and information set out in the 29 November 2018 Submission, the UAE could have seized the possibility, mentioned in the Committee's Decision, to state that it wished "to confine" its reply "to the information already contained in [its] previous notes."[2] It has decided not to do so for two reasons. First, because it considers that it may be of help to the Committee to have at its disposal a synthetic statement of the UAE's objections to jurisdiction and admissibility, which moreover takes account of additional relevant evidence relating to the past several months.[3] In stark contradiction to the unsupported claims of Qatar, such evidence clearly establishes the continuing freedom of entry to the UAE by Qatari nationals and, importantly in relation to the questions before the Committee, the accessibility of the UAE courts to Qatari nationals. Second, because the UAE considers necessary, for legal and policy reasons, to develop further the arguments concerning the relationship between these CERD Committee Proceedings and those pending before the International Court of Justice ("**ICJ**" or "**Court**") ("**Pending ICJ CERD Proceedings**"). Both proceedings involve the same parties and the same factual allegations and legal arguments.[4]

6. This submission is organized as follows. Section II contains general remarks on the context of the dispute and the fatal lack of evidentiary support for Qatar's claims. Section III summarizes the UAE's objections to the Committee's jurisdiction, adding a number of observations related to recent developments which further reinforce the strength of those objections. Section IV then restates the UAE's objections to admissibility of Qatar's claims, including further considerations based on the pending case on the same matter before the ICJ and the lack of exhaustion of local remedies in accordance with Article 11.3 of the Convention. Finally, Section V offers some concluding remarks.

[2] *Id.*

[3] *See* paras. 8-12, *infra*.

[4] *See* paras. 25-38, *infra*.

II. Context of the Dispute and Lack of Evidence of the Allegations

Qatari Nationals are not Mistreated or Targeted by the UAE

7. The complaint Qatar has brought before this Committee relates to allegations that the UAE has carried out a series of measures targeting Qatari nationals. As the UAE has explained in two previous submissions, and as it will further elaborate in this submission, those allegations are false. While the UAE has, along with twelve other States, severed or downgraded diplomatic relations with Qatar[5] and, for the reasons stated in paragraphs 14-16 below, taken certain other lawful measures to restrict air transportation, postal service and trade (measures which do not in any case implicate obligations under CERD), it has, since the break in diplomatic relations on 5 June 2017, taken only one measure directly affecting the treatment of Qatari nationals. That one measure was the introduction of minimal, cost-free, requirements on the entry of Qatari nationals into the UAE, essentially requiring that they apply for and obtain approval for such entries. These requirements are less burdensome than a typical entry visa which the UAE requires of nationals of many other States around the world. Prior to the current diplomatic crisis between Qatar and the UAE, Qataris enjoyed visa-free access to the UAE as did members of other neighbouring countries. By revoking these privileges and requiring Qataris to meet minimal entry requirements, the UAE is not violating the rights of Qataris or any

[5] Egypt, Saudi Arabia, Bahrain, Chad, Comoros, the Maldives, Mauritania, Senegal and Yemen also severed diplomatic ties with Qatar. *See* Declaration of the Arab Republic of Egypt, 4 June 2017, available at: http://www.sis.gov.eg/section/7278/7261?lang=en-us#1, Declaration of the Kingdom of Saudi Arabia, 5 June 2017, available at: https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1637327, Kingdom of Bahrain Ministry Foreign Affairs News Details, "Statement of the Kingdom of Bahrain on the severance of diplomatic relations with the State of Qatar", 5 June 2017, available at: https://www.mofa.gov.bh/Default.aspx?tabid=7824&ItemId=7474&language=en-US, "Chad shuts down Qatar embassy", *Emirates News Agency*, 23 August 2017, available at: http://wam.ae/en/details/1395302628900, "Comoros severs diplomatic relations with Qatar", *Saudi Press Agency*, 7 June 2017, available at: https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1638089, "Statement by the Government of Maldives", *Ministry of Foreign Affairs of the Republic of Maldives*, 5 June 2017, available at: https://www.foreign.gov.mv/index.php/en/mediacentre/news/3905-statement-by-the-government-of-maldives-3, "La Mauritanie décide de rompre ses relations diplomatiques avec Qatar", *Agence Mauritanienne d'Information*, 6 June 2017, available at: http://fr.ami.mr/Depeche-41008.html, "Senegal, Gabon join boycott of Qatar", *Middle East Monitor*, 9 June 2017, available at: https://www.middleeastmonitor.com/20170609-senegal-gabon-join-boycott-of-qatar/, "Yemen cuts diplomatic ties with Qatar: state news agency", *Reuters*, 5 June 2017, available at: https://www.reuters.com/article/us-gulf-qatar-yemen-idUSKBN18W0RS. Additionally, Jordan and Niger downgraded diplomatic relations with Qatar. *See* "Jordan downgrades relations with Qatar and bans Al Jazeera", *The National*, 7 June 2017, available at: https://www.thenational.ae/world/jordan-downgrades-relations-with-qatar-and-bans-al-jazeera-1.74433, "Niger recalls ambassador to Qatar", *Khaleej Times*, 10 June 2017, available at: https://www.khaleejtimes.com/region/qatar-crisis/niger-recalls-ambassador-to-qatar.

provision of any international instrument, including CERD, but is merely eliminating an advantage it previously extended to one particular nationality. Notably, in *D.F. v. Australia*, where a New Zealand petitioner ceased to enjoy rights exclusively granted by Australia to New Zealanders, this Committee found no violation of CERD, noting that the act implementing the change "did not result in the operation of a distinction but rather in the removal of a distinction which had placed the petitioner and all New Zealand citizens in a more favourable position compared to other non-citizens."[6]

8. That such cost-free entry requirements are indeed minimal is evidenced by the number of Qatari nationals who have, since 5 June 2017, entered and exited the UAE despite the political difficulties between the two countries. The UAE has submitted uncontested evidence to this Committee and to the ICJ proving that, from 5 June 2017 through June 2018, "Qatari nationals have entered and exited the UAE on over 8,000 occasions".[7] Updated evidence submitted herewith for the Committee's consideration demonstrates that from 9 July 2018 through 31 December 2018, 3,563 applications by Qatari nationals were lodged with the UAE authorities for entry permits to the UAE, 3,353 of which were accepted.[8] The actual registered entries and exits of Qatari nationals into and out of the UAE from 1 June 2018 through 31 December 2018 amounted to 2,876.[9]

9. The UAE respectfully requests the Committee to take particular note that at no time, whether in the course of the proceedings before this Committee or in the proceedings

[6] CERD, Communication No. 39/2006, *D.F. v. Australia,* Opinion of 22 February 2008, UN doc. CERD/C/72/D/39/2006, para. 7.1.

[7] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Request for the Indication of Provisional Measures: Order, 23 July 2018, Dissenting Opinion of Judge Crawford ("Dissenting Opinion of Judge Crawford"), para. 7, citing to evidence submitted by the UAE in the ICJ proceedings. The same evidence was attached as Annex 5 to the UAE's Response of 7 August 2018.

[8] **Annex 1**, Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics. *See*, in particular, **Annex 1.2**, [Excel Redacted] Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 31 December 2018 (Arabic original, English translation).

[9] **Annex 1**, Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics. *See*, in particular, **Annex 1.1**, [Excel Redacted] Entrance and Exit for Qatari Nationals from 1 June 2018 until 31 December 2018 (Arabic original; English translation).

before the ICJ addressing the same factual and legal allegations, has Qatar contested or rebutted this evidence.

10. Neither has Qatar contested nor rebutted the evidence put forward by the UAE demonstrating that Qatari nationals continue to reside freely in the UAE, as clarified by the statement of the UAE Ministry of Foreign Affairs and International Cooperation of 5 July 2018.[10] The documentary evidence submitted by the UAE shows that there are thousands of Qatari nationals that continue to visit and reside in the UAE.[11] As of June 2018, the number of Qataris in the UAE amounted to 2,194.[12] In addition to these figures and those mentioned in paragraph 8 above of Qataris entering or exiting the UAE since the beginning of the crisis in June 2017 until the end of 2018, the UAE Federal Authority for Identity and Citizenship has confirmed that as of 10 January 2019 there are 702 Qatari nationals residing in the UAE who hold UAE identification documents.[13]

11. There is only one conclusion the Committee may reasonably draw from the evidence presented to it, which is that, contrary to the unfounded statements made by Qatar to this Committee, Qatari nationals are free to enter and exit the UAE and are in fact doing so in large numbers. Moreover, Qatari nationals continue residing in the UAE in the same manner as they did before 5 June 2017.

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[10] "An Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation", 5 July 2018, available at: https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx ("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.").

[11] **Annex 1**, Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics. *See also*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 28 June 2018, at 10:00 a.m.(CR 2018/13), p. 12, para. 9 (Alnowais).

[12] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 28 June 2018, at 10:00 a.m. (CR 2018/13), p. 64, para. 27 (Shaw).

[13] **Annex 1**, Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics. *See*, in particular, **Annex 1.3**, [Excel Redacted] Holders of UAE Resident Permits (Arabic Original, English Translation).

12. Other evidence of particular relevance for this Committee which has remained unrebutted by Qatar throughout these CERD Committee Proceedings and the Pending ICJ CERD Proceedings includes that related to:

a. The unrestricted access Qatari nationals in or outside the UAE have to domestic courts in the UAE. The evidence submitted by the UAE shows that Qatari nationals have appeared as plaintiffs or defendants before the UAE courts hundreds of times since June 2017.[14]

b. The number of Qatari nationals in the UAE who have received or are receiving medical treatment at UAE medical facilities. The records show over 300 visits from July 2017 onward by Qatari nationals to hospitals and clinics within the UAE.[15]

c. The number of Qatari nationals who are enrolled in UAE educational institutions. On this, a 3 January 2019 letter from the Ministry of Education shows that the number of Qatari students who continue to study in all Emirates and at all levels of study for the academic year 2017/2018 amounts to 477 and for the academic year 2018/2019 this number amounts to 310.[16]

d. The number of Qatari nationals who own or are engaged in operating licensed businesses in the UAE;[17] and

e. The continuous enjoyment by Qatari nationals of their right to property in the UAE, which is evidenced by their ability to own, purchase, sell and manage real

[14] *See*, *e.g.*, UAE's Response of 7 August 2018, Annex 16 (International Judicial Cooperation Department – Ministry of Justice Letter) and Annex 18 (Judicial Records). **Annex 2**, Statement of the cases involving a Qatari citizen and being examined by the UAE courts in the period 6 June 2017 until 25 September 2018. These statistics are broken down by the Federal Courts and in some cases they contain information on the courts of some of the emirates.

[15] UAE's Response of 7 August 2018, para. 44, citing to Annex 8 "Health – Qataris with Daman Health Insurance", pp. 13-19.

[16] **Annex 3**, Letter from the Ministry of Education to the Ministry of Foreign Affairs and International Cooperation, dated 3 January 2019. *See also*, UAE's Response of 7 August 2018, para. 51, citing to Annex 11 (Immigration - Student Entry Records) and Annex 12 (Qatari Student Records).

[17] UAE's Response of 7 August 2018, paras. 52-54, citing to Annex 4 (Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration, p. 14) and Annex 13 (Commercial Licenses – Sample Materials).

estate in the UAE, including through the execution of powers of attorney.[18] Regarding powers of attorney, statistics of the Federal Court in the period 6 June 2017 to 25 September 2018 indicate that there were 146 powers of attorney granted by Qatari citizens.[19]

13. Again, the UAE respectfully calls upon the Committee to take due notice that Qatar has not contested this empirical evidence with anything other than unsupported and sensationalized vitriol.[20] Qatar's silence in the face of the facts and its inability to reply in any coherent or direct manner to the evidence submitted by the UAE confirms that Qatar's allegations before this Committee of mistreatment of Qatari nationals by the UAE are false.

Qatar's Support for Extremist Violence and Terrorism Caused the Gulf Crisis

14. In its previous two submissions, the UAE also asked the Committee to consider that the lawful measures taken by the UAE on 5 June 2017 did not occur in a vacuum. The context is the persistent and pernicious support by Qatar for extremist and terrorist groups targeting ethnic and religious minorities, established governments and regional stability. This conduct led in 2013 and 2014 to the conclusion of a series of agreements among the Gulf States, including Qatar (the "**Riyadh Agreements**"[21]) under which Qatar agreed to

[18] UAE's Response of 7 August 2018, paras. 55-57, citing to Annex 14 (Business – UAE Embassy – Authentication Records, pp. 19-25), Annex 15 (Power of Attorney) and Annex 16 (International Judicial Cooperation Department – Ministry of Justice Letter).

[19] **Annex 2**, Statement of the cases involving a Qatari citizen and being examined by the UAE courts in the period 6 June 2017 until 25 September 2018, p. 2.

[20] *See*, *e.g.*, *Note Verbale* of Qatar to the CERD Committee, dated 29 October 2018, requesting the Committee to re-initiate Qatar's complaint against the UAE, in which Qatar states, without any support whatsoever, that "It is equally clear that Qataris do not have domestic remedies to invoke or exhaust in the United Arab Emirates. Any nominal remedies are either unavailable or ineffective in light of the expulsion of Qataris from the United Arab Emirates and ensuing travel restrictions, as well as the ongoing campaign of hatred against Qatar and Qataris in the territory of the United Arab Emirates." No reference is made in this unsupported and outrageous statement to the documented ease of access to the UAE and its courts by Qatari nationals.

[21] First Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 55378 ("First Riyadh Agreement"); Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 55378 ("Mechanism Implementing the Riyadh Agreement"); Supplementary Riyadh Agreement, 16 November 2014, United Nations Registration Number 55378 ("Supplementary Riyadh Agreement"). The Parties to the Riyadh Agreements are: the UAE, Qatar, Bahrain, Kuwait, Oman and Saudi Arabia.

cease support for such groups and to stop the promotion of hate speech, including through its state-owned media outlets such as Al-Jazeera Arabic.[22]

15. The very existence of the Riyadh Agreements, and Qatar's signing up to them, is in itself sufficient proof that Qatar was engaging in the vile behaviour those agreements were intended to bring to an end; indeed, it is an admission by Qatar of that behaviour. Moreover, there is no dearth of other evidence of Qatar's support for groups engaged in extremist violence, both before and after the conclusion of the Riyadh Agreements. The UAE brought this to the Committee's attention in summary fashion in its previous submissions. The UAE further noted that Qatar's violation of the Riyadh Agreements is what directly led to the break in diplomatic relations between numerous States, including the UAE, and Qatar on or about 5 June 2017, as well as to the other measures then taken.[23] Indeed, these events were foreshadowed by the Riyadh Agreements themselves, which provided that in the event any signatory were to violate them, "the other GCC Countries shall have the right to take any appropriate action to protect their security and stability."[24]

16. This context is relevant to the Committee's consideration of this matter not only because it is important that the Members of the Committee appreciate the true nature and character of the Qatari government's actions, but also because it helps explain why Qatar has been prepared to advance outright falsehoods in pursuing its aggressive campaign of legal actions alleging all manner of international responsibility against the UAE, including before this Committee. The answer is abundantly clear. It is through such falsehoods and exaggerations that Qatar seeks to distract attention and cover its own responsibility for its reprehensible behavior.

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[22] Pursuant to the Riyadh Agreements, Qatar expressly undertook not to support "the Muslim Brotherhood or any organizations, groups or individuals that threaten the security of the [GCC] states" or any type of "antagonistic media". First Riyadh Agreement, Articles 1 and 2. Qatar further undertook not to "give refuge, employ, or support […] any person or a media apparatus that harbours inclinations harmful to any [GCC] state". Supplementary Riyadh Agreement, Article 3(c). The Riyadh Agreements also expressly referred to Qatar's State-owned and controlled news network Al Jazeera. Supplementary Riyadh Agreement, Article 3(d).

[23] UAE's Response of 7 August 2018, paras. 8-10; UAE's Supplemental Response of 29 November 2018, paras. 10-12.

[24] Mechanism Implementing the Riyadh Agreement, p. 3 ("Thirdly: Compliance Procedures, 3. With regards to the internal security of the GCC Countries").

III. Lack of Jurisdiction

17. The Committee's attention has previously been drawn to at least two jurisdictional grounds on which Qatar's Article 11 Communication should be rejected. These are (i) Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outside the scope of the CERD; and (ii) the dispute resolution procedure under Articles 11 to 13 of the CERD is strictly confined to ongoing alleged breaches of the CERD, which under any view of the facts of this dispute are not present.

A. The CERD Does Not Prohibit Differentiated Treatment Based on Current Nationality

18. As elaborated in greater detail in the UAE's 29 November 2018 Submission, Qatar's complaint before the CERD Committee is entirely based on alleged differentiated treatment by the UAE of persons having Qatari nationality.[25] While the UAE has provided overwhelming and unrebutted evidence to the Committee that it has not imposed such differentiated treatment on Qatari nationals and that Qatari nationals enjoy the same or better rights in the UAE as persons of other non-UAE nationalities, the definition of racial discrimination under Article 1 of the CERD, and thus the protections provided under the Convention, do not in any case extend to distinctions based on current nationality.[26] Therefore, any such distinctions, even if they were to exist (*quod non*), do not involve rights protected by the CERD and could not provide a basis on which to lodge a complaint with the CERD Committee. For the same reason, and because the CERD Committee's jurisdiction extends only to circumstances in which a State Party "is not giving effect to the provisions of this Convention"[27], the Committee has no jurisdiction to entertain the dispute or to progress it to an *ad hoc* Conciliation Commission as that "dispute" simply does not relate to the provisions of the Convention.

[25] UAE's Supplemental Response of 29 November 2018, paras. 30-45.

[26] *Id*.

[27] Convention on the Elimination of All Forms of Racial Discrimination, Article 11(1).

19. While the ICJ in the Order for provisional measures rendered on 23 July 2018 deferred the "question whether the expression 'national . . . origin' mentioned in Article 1, paragraph 1, of CERD, encompasses discrimination based on the 'present nationality' of the individual", holding that the Court "need not decide . . . which of these diverging interpretations of the Convention is the correct one,"[28] it should be noted that not a single judge pronounced his or her support for Qatar's inclusion of current nationality as a prohibited basis of differentiated treatment under the CERD.

20. On the contrary, a number of eminent judges whole-heartedly supported the opposite and self-evident conclusion that nationality, as a basis for differentiated treatment, is not proscribed by the CERD. These include Judges Tomka, Gaja, Gevorgian, Crawford and Salam, whose reasoned views on this important issue, quoted below at length, the UAE respectfully urges the Committee to adopt:

    a) Judges Tomka, Gaja and Gevorgian stated in a Joint Declaration that: "When the Convention considers 'national origin' as one of the prohibited bases for discrimination, it does not refer to nationality. In our view, the two terms are not identical and should not be understood as synonymous. The *travaux préparatoires* support this view and indicate that States sought to exclude distinction on the basis of nationality from the scope of CERD. . . The omission of a reference to nationality may be easily explained. Should CERD be considered as covering also discrimination based on nationality, the Convention would be a far-reaching instrument, that contains a clause providing that, with regard to the wide array of civil rights that are protected under CERD, all foreigners must be treated by the host State in the same way as nationals of the State who enjoy the most favourable treatment."[29]

[28] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Order, 23 July 2018, para. 27.

[29] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Order, 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian, para. 4.

b) Judge Crawford stated that the "legal difficulty" with Qatar's request for provisional measures "is that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (equated to racial discrimination and prohibited per se) and differentiation on grounds of nationality (not prohibited as such). Moreover, that distinction finds its reflection in widespread State practice giving preferences to nationals of some countries over others in matters such as the rights to enter or to reside, entitlement to social security, university fees and many other things, in peace and during armed conflict."[30]

c) Judge Salam stated that "the terms 'national or ethnic origin' used in the Convention differ in their ordinary meaning to the term nationality. … 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. . . 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 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'. 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. 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. In any event, had States wanted to say 'nationality' rather than 'national origin' in Article

[30] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Order, 23 July 2018, Dissenting Opinion of Judge Crawford, para. 1.

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."[31]

21. The UAE respectfully submits that the Committee should follow the sound reasoning supporting the views of these eminent ICJ judges.

B. The CERD Committee's Jurisdiction Extends Only to Current and Ongoing Violations of CERD, Not Allegations of Past Conduct

22. As elaborated in greater detail in the 29 November 2018 Submission, under Article 11 of the Convention, the jurisdiction of the Committee extends exclusively to allegations of ongoing and current conduct, rather than retrospective dispute resolution.[32] This is clear from the ordinary meaning of the terms of Article 11, which permits a State Party to refer a matter to the Committee when another State Party "is not giving effect" to the provisions of the Convention (emphasis added). This interpretation is confirmed when reading Article 11 in its context and in the light of its object and purpose. The only remedy envisaged in the CERD for the inter-State procedure is the facilitated negotiated amicable resolution of the situation. It must therefore be for the State submitting a complaint to make a credible case that there is a situation to resolve.

23. Qatar has failed to do so. It has not provided the Committee with any probative evidence of any ongoing conduct by the UAE even arguably in violation of the Convention. Indeed, even as of the time of the ICJ hearing on provisional measures in June 2018 a number of judges noted the lack of evidence of any allegations of continuing effects on Qatari nationals since the break in diplomatic relations between the UAE and Qatar.[33] Just as importantly, Qatar has not provided to the Committee any proof to contest or rebut

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[31] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Order, 23 July 2018, Dissenting Opinion of Judge Salam, paras. 3(c), 5, 6, 7.

[32] UAE's Supplemental Response of 29 November 2018, paras. 46-53.

[33] *See*, *e.g.*, Dissenting Opinion of Judge Crawford, para. 9 ("It is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018. Most of the reports by national and international human rights organizations submitted by Qatar relate to the period June to August 2017."); Dissenting Opinion of Judge Bhandari, para. 3.

the evidence which the UAE has submitted to this Committee demonstrating that the treatment afforded to Qatari nationals in the UAE at present (including with respect to entry and exit from the country, residence, health care, education, property ownership, conducting business affairs and access to judicial tribunals) reflects no hint of mistreatment or discrimination.[34]

24. The information provided by Qatar in support of its complaint is generalized, exaggerated and outdated. It is noteworthy that the numerous publications issued by Qatar's National Human Rights Committee (the "NHRC") since June 2018 on the alleged effects of the break in relations between the UAE and Qatar essentially restate the same anonymous claims previously included in other NHRC reports.[35] Certainly, none of the information relied upon by Qatar is capable of demonstrating anything near a "campaign of hatred against Qatar and Qataris in the territory of the United Arab Emirates".[36]

25. Under these circumstances, the claims of "coercive measures" supposedly being inflicted by the UAE on Qatari nationals in a continuing "campaign of hatred" disingenuously advanced by Qatar lack all credibility. The UAE respectfully submits that the Committee therefore has no reasonable evidentiary basis on which to consider that any allegations of violations of the Convention by the UAE may be ongoing. It would therefore be

[34] *See* paras. 7-13, *supra*.

[35] The UAE notes that the website of the Qatari National Human Rights Committee ("NHRC") includes in its section entitled "Publications" a series of 9 short reports each entitled "Effects of the Blockade on" a specific human right, such as "the right to litigation", "the right to private property", "the right to family reunification", "the right of education", "the right to freedom of movement and residence", amongst others. *See* Qatar's National Human Rights Committee, Publications, available at: http://nhrc-qa.org/en/publications/nhrc-publications/. These reports are pamphlets that contain information with statistics as of 25 April 2018 and that merely restate the information contained in the five NHRC reports that Qatar submitted to the ICJ. One such example is the NHRC's report on "Effects of the Blockade on the right to litigation", which mentions the case of the two Qatari brothers "Mr. B. Th. And Mr. A. M." and their alleged inability to access their inheritance in the UAE. This same case was relied upon by Qatar before the ICJ and the only evidence cited for it was the NHRC's Report of December 2017. *See* NHRC, *6 Months of Violations, What Happens Now? The Fourth General Report on the Violations of Human Rights Arising from the Blockade of the State of Qatar*, 5 Dec. 2017, p. 19. *See also*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 27 June 2018, at 10:00 a.m. (CR 2018/12), p. 44, para. 44 (Amirmar); Verbatim Record of Public Sitting of 29 June 2018 at 4:30 p.m. (CR 2018/15), p. 29, para. 12 (Buderi).

[36] *Note Verbale* of Qatar to the CERD Committee, dated 29 October 2018 (referring its dispute once again to the Committee under Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination).

inappropriate for the Committee to proceed to entertain Qatar's request any further or to refer it to a Conciliation Commission under Articles 11-13 of the CERD. Indeed, rather than entertaining such unsubstantiated claims, the Committee would be fully justified in issuing a rebuke to Qatar for pursuing them when they so obviously lack any factual basis.

IV. Lack of Admissibility

26. In its previous submissions, the UAE has pointed to three grounds on which Qatar's Article 11 Communication should be dismissed for reasons of admissibility. These grounds are summarized below, along with some additional considerations which the Committee should take into account.

A. The Committee Must Decline to Hear Qatar's Article 11 Communication Because Qatar's Initiation of Parallel Proceedings Undermines the Integrity of the Dispute Resolution Provisions of CERD and of the ICJ

27. Article 22 of the CERD provides:

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

28. It is clear from the ordinary meaning of the terms of this provision that the CERD envisages that the treaty-specific dispute resolution mechanism it offers to its States Parties (*i.e.*, resort to the CERD Committee under Article 11) should be explored and exhausted before escalating to an ICJ process. Unlike other treaties, the CERD dispute resolution provisions do not provide that a State Party may seize the ICJ of the dispute or seek provisional measures from the ICJ while the other methods of dispute settlement under the CERD are being pursued.[37] The Court has confirmed the linear nature of

[37] *Cf.* with respect to other permanent international tribunals, *see e.g.*, United Nations Convention on the Law of the Sea of 10 December 1982, Article 290, which provides that in certain situations, "[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the

dispute resolution under the CERD by holding that the lack of settlement by negotiations or by the procedures expressly set out in the CERD are "procedural preconditions to be met before the seisin of the Court."[38]

29. This holding by the ICJ confirms that Qatar was legally obliged to exhaust the procedures expressly provided in the CERD "before the seisin of the Court". The ordinary meaning of the term "precondition" confirms that much.

30. However, Qatar submitted the matter for the consideration of the ICJ on 11 June 2018 while the CERD Article 11 process it had started by its Communication of 8 March 2018 was still underway. In fact, that process had not even properly commenced. It is unquestionable that the two proceedings relate to the same factual situation, concern the same alleged violations and apply the same international legal framework. A comparison between the Qatari Communication submitted pursuant to Article 11 of the CERD on 8 March 2018, and communicated to the UAE on 7 May 2018, and the Qatari Application instituting proceedings before the ICJ on 11 June of the same year confirms this overlap.[39] After making its initial Article 11 Communication to the Committee, Qatar rushed to make its application to the ICJ.[40] Having done so, and having seized the Court of the same dispute which is in front of this Committee, on 29 October 2018[41] after the setting up of the procedural calendar on the merits by the Court,[42] Qatar came back to the

tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires." *See also*, American Convention on Human Rights of 22 November 1969, Article 63.2, which provides for the power of the Inter-American Court of Human Rights to indicate provisional measures and allows for this power to be exercised at the request of the Inter-American Commission "[w]ith respect to a case not yet submitted to the Court."

[38] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 29, confirming *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 128, para. 141.

[39] *See* Communication Submitted Pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, Qatar v. United Arab Emirates, dated 8 March 2018; International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings, 11 June 2018.

[40] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application instituting proceedings, 11 June 2018.

[41] *Note Verbale* of Qatar to the CERD Committee, dated 29 October 2018 (referring again to the Committee Qatar's complaint against the UAE).

[42] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Order of 25 July 2018, Fixing of Time Limits: Memorial and Counter-Memorial.

Committee in order to seek to resume the very process it had previously bypassed in favour of the ICJ.

31. Through its actions, Qatar has created a *lis pendens* situation, where two parallel proceedings bearing on the exact same dispute between the same parties are progressing simultaneously. By its conduct of concurrently bringing and pursuing identical proceedings before the CERD Committee and the ICJ, Qatar has acted against the principle of avoidance of duplicative litigation. Case law and scholarly writing has warned against the dangers and disadvantages of duplicative litigation tactics such as the one employed by Qatar:

- The Permanent Court of International Justice in *Polish Upper Silesia* explained that the object of the "doctrine of *litispendence*" is "to prevent the possibility of conflicting judgments."[43]

- Yuval Shany: "Such duplicative practices draw heavily on scarce judicial resources, carry the risk of legal havoc, which might be caused by inconsistent decisions, and place an undue burden on some or all of the parties due to increased litigation expenses and reduced legal certainty . . . The co-existence of two or more simultaneous proceedings before different fora places an unusually heavy burden on the parties to litigation, which are required to maintain two legal teams or shuttle between two or more tribunals. It also entails the investment of unnecessarily duplicative judicial time and resources by courts and tribunals that are faced with similar (if not identical) tasks and yet are unable to rely on the work of each other."[44]

[43] *German Interests in Polish Upper Silesia* (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25), p. 20.

[44] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), pp. 155-156.

- Campbell McLachlan: "[T]here is widespread acceptance that duplicative litigation within the same legal system is not permitted, as being contrary to due process and the Rule of Law. . . The proposition that the avoidance of duplicative litigation is a general principle of law gains further powerful support from the 2004 Resolution of the Institut de Droit International. . .

  Furthermore, the application of a general principle of the avoidance of duplicative litigation gains force from its close connection . . . with the doctrine of *res judicata*. . . .

  [T]he avoidance of the risk of inconsistent judgments is one of the reasons commonly advanced for both the doctrine of *res judicata* and the doctrine of *lis pendens*.[45]

32. Similarly, by prosecuting these two procedures simultaneously, Qatar violates the principle of *electa una via non datur recursus ad alteram* ("when one way has been chosen, no recourse is given to another"), sometimes known as the principle of election:

> The choice of a specific forum can be perceived as indicative of the intent to resolve the dispute in the selected forum to the exclusion of all alternative fora. This means that a party is estopped from initiating parallel proceedings or relitigating a settled case if the first-in-time forum was seized on his or her initiative (or with that party's approval).[46]

33. By failing to respect this principle, Qatar is abusing the CERD complaints mechanism process and its rights under the CERD. It is pursuing in parallel the very same CERD complaint against the UAE before two mutually exclusive *fora*. This is in direct violation of the hierarchical and linear dispute resolution architecture of the CERD, and moreover may entangle the Court and the CERD Committee in conflicting interpretations of the same CERD provisions in connection with the same dispute and at the same time.

34. The need to avoid conflicting interpretations should be a sufficient argument[47] to justify a decision of the CERD Committee declaring Qatar's Article 11 Communication

[45] Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), pp. 461-463.

[46] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press 2003), p. 23.

[47] *See* para. 31, *supra*, citing to Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), pp. 461-463.

inadmissible. In situations of *lis pendens*, other international courts and tribunals have been very sensitive to the risk generated by parallel proceedings. For example, the Arbitral Tribunal established on the basis of Annex VII to the UN Law of the Sea Convention for the settlement of the *MOX Plant* dispute between Ireland and the United Kingdom invoked "considerations of mutual respect and comity which should prevail between judicial institutions"[48] as a basis for suspending its proceedings while awaiting a decision of the European Court of Justice on the question whether the European Community had exclusive or partial competence on matters dealt with by certain provisions of the Law of the Sea Convention.[49] When making its decision suspending the proceedings, the Arbitral Tribunal also stressed that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties."[50]

35. There is another argument in support of the same conclusion that the Committee, it is respectfully suggested, should not fail to consider. If the Committee were to declare Qatar's Article 11 Communication admissible, the architecture of the CERD system for the settlement of disputes would be compromised. It would no longer be a linear and incremental dispute resolution procedure. The clear hierarchical structure set out in the CERD under which the proceedings before the CERD Committee are "preconditions" of and, therefore, must precede those before the Court would be replaced by a confusing uncoordinated set of possibilities for engagement of whatever procedure would seem at a given moment the most convenient.

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[48] *MOX Plant Case* (Ireland v. United Kingdom), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, available at in www.pca-cpa.org, para. 28.

[49] *Id*., para. 29.

[50] *Id*., para. 28. The case brought in connection to the *MOX Plant* dispute by the European Commission against Ireland was later decided on 30 May 2006 by the European Court of Justice, affirming the exclusive competence of that very court on the basis of the obligation of EU Member States not to submit any disputes concerning the EU treaties to any method of dispute settlement other than those provided for in the EU treaties (Article 292 of the EEC treaty, now Article 344 of the TFEU). Case C-459-03, *Commission of the European Communities v. Ireland*, Judgment of the Court (Grand Chamber), dated 30 May 2006. Subsequently to the decision of the European Court of Justice, Ireland notified the Arbitral Tribunal of the withdrawal of its claim made against the United Kingdom and the Arbitral Tribunal took note of the discontinuance of the case. *MOX Plant Case* (Ireland v. United Kingdom), Order No. 6, Termination of Proceedings, 6 June 2006, available at in www.pca-cpa.org.

36. To continue in parallel would not only jeopardise the integrity of the system and risk resulting in fragmented jurisprudence. It would also wreak irreparable harm on the procedural rights of the UAE, which would be required to simultaneously defend itself against the same allegations in two overlapping and parallel procedures.

37. This would be in contradiction with the principle of the equality of the parties. Indeed, the ICJ has emphasized that: "[t]he principle of equality of the parties follows from the requirements of good administration of justice"[51]; that "the equality of the parties to the dispute must remain the basic principle for the Court"[52]; and that

> equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means.[53]

38. There cannot be equality of the parties when Qatar has unilaterally taken for itself two opportunities to litigate against the UAE in overlapping and parallel proceedings.

39. As the defending Party, the burden of the duplicative litigation and the negative consequences of the improper advantage Qatar has taken for itself, fall disproportionately on the UAE. To the extent that procedural steps in Qatar's Article 11 Communication proceedings under CERD precede those in the case before the ICJ, the UAE will be forced to choose between forsaking its rights to mount a full defence in the present CERD communication procedure or sacrificing its right to procedural equality in the ICJ case. Qatar will be afforded the wholly improper opportunity to foresee and undermine the UAE's litigation strategy, by taking responsive steps in the case before the ICJ.

40. The UAE respectfully invites the Committee to consider the broader implications to its legitimacy that are embedded in Qatar's conduct. Qatar's attempts at forum-shopping in

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[51] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.,* Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956*,* p. 86, repeated in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development,* Advisory Opinion, 1 February 2012, I.C.J. Reports 2012*,* para. 44.

[52] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, para. 31.

[53] *Questions relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), Request for the Indication of Provisional Measures: Order of 3 March 2014, I.C.J. Reports 2014, para. 27.

seeking to avoid the lawful responses to its blatant disregard for the security and stability in the Gulf region jeopardises the integrity of the system and risks resulting in fragmented jurisprudence. If the Committee were to allow the present Article 11 Communication procedure to continue – notwithstanding that the ICJ is presently seised of the very same dispute (as a result of Qatar's improper and extra-jurisdictional application to it), between the very same parties and commenced under the very same instrument – it would cause the breakdown of the legitimate institutions established by the CERD and make a mockery of both the CERD dispute resolution mechanism's systemic integrity and the procedural rights of the UAE.

41. Given that Qatar has abandoned the present process by commencing the Pending ICJ CERD Proceedings, the Committee must now yield to the ICJ procedure, in which Qatar is currently preparing its memorial on the merits. It would be inappropriate for the Committee to proceed in parallel at a time when the ICJ, as the pre-eminent World Court in the United Nations system, remains seised of the very same question in the Pending ICJ CERD Proceedings. With respect, the CERD Committee, as a United Nations Treaty body, should not act in any way to undermine the integrity of the Court.

B. The Committee Must Decline to Hear Qatar's Article 11 Communication Since the Communication Amounts to No More Than Empty Speculation and Thus Constitutes an Abuse of Rights and Process

42. As demonstrated in the UAE's previous responses, as well as in this submission,[54] Qatar has failed, despite many opportunities to do so, to present probative evidence of any ongoing discrimination by the UAE against Qatari nationals – still less, any discrimination actually falling within the scope of the CERD on the basis of race, colour, descent or national or ethnic origin as required under Article 1(1) of the Convention. Indeed, Qatar cannot produce any evidence as its allegations are without foundation both in fact and in law. Qatar's Article 11 Communication cannot be deemed admissible within the CERD complaints mechanism because it amounts to no more than unsupported allegations and abuse of process.

[54] *See* paras. 7-13, *supra*.

43. Allegations that are completely without merit on fact and law should not be further entertained under Article 11 of the CERD, still less under the further procedures under Articles 12 and 13. In particular, empty allegations with no basis in law or fact cannot be used as a basis for the establishment of any Article 12 Conciliation Commission and should be preliminarily dismissed. Although the Conciliation Commission is not a judicial body but a fact-finding body, its findings may result in reputational damage to the responding State. Moreover, as already stated, the proceedings before a Conciliation Commission will require that the UAE put forward defensive arguments which may jeopardize its strategy before the ICJ and may result in findings that may be in contradiction with those the ICJ might ascertain.

44. Nothing in the ICJ's CERD Provisional Measures Order runs contrary to this position. This is because the ICJ in the Pending ICJ CERD Proceedings has thus far evaluated Qatar's allegations only against the lower threshold of "plausibility", relevant to the provisional measures stage.[55] As pointed out by Judge Crawford, the Court failed to identify any evidence to support the further statement that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain vulnerable with regard to their rights under Article 5 of the CERD.[56] Most importantly, as also indicated by Judge Crawford, the Court failed to mention the UAE's Statement of 5 July 2018.[57]

45. By submitting a self-serving application unsupported by evidence, Qatar abuses its rights to resort to the process under Article 11 of the CERD. If allowed, Qatar may manage to force the UAE to submit to a redundant fact-finding procedure that will amount to nothing more than an opportunity for Qatar to engage in further public relations theatrics.

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[55] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Order of 23 July 2018, para. 44: "At this stage of the proceedings, the Court, however, is not called upon to determine definitively whether the rights which Qatar wishes to see protected exist; it need only decide whether the rights claimed by Qatar on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested." The "plausibility" threshold is described by Judge *ad hoc* Cot as "fairly low", *see Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Dissenting Opinion of Judge *ad hoc* Cot, para. 5.

[56] Dissenting Opinion of Judge Crawford, para. 14.

[57] *Id.*

This is not what the dispute resolution mechanisms of the CERD was intended to achieve.

46. It would be consistent with a good faith interpretation of the CERD in light of its object and purpose, as provided for in Article 31 of the Vienna Convention on the Law of Treaties,[58] to require of Qatar to have proved a genuine case to answer before progressing the matter to an *ad hoc* Conciliation Commission. Otherwise, the Committee will expose the CERD procedure to the risk of abuse of process by Qatar. The Committee is respectfully urged to prevent such abuse by dismissing Qatar's Article 11 Communication as inadmissible. In this respect, the Committee is reminded of its *compétence de la compétence* under public international law and its role, assigned to it under Article 11(3), to ensure that the CERD complaints mechanism is not burdened by claims that do not meet the fundamental criteria of admissibility.

C. The Committee Must Decline to Hear Qatar's Article 11 Communication Because Qatar Has Failed to Establish that Local Remedies Have Been Invoked or Exhausted Under Article 11(3) of the CERD

47. The Committee should declare inadmissible Qatar's Article 11 Communication because Qatar has failed to establish that any Qatari nationals who have allegedly been aggrieved by some action of the UAE in violation of CERD have invoked, let alone exhausted, any available and effective domestic remedies in the UAE as required under Article 11.3 of the CERD. The exhaustion of local remedies is a necessary precondition for consideration by the Committee of a matter referred to it in accordance with Article 11(2). Article 11(3) provides that:

> [t]he Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has 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. (Emphasis added.)

[58] Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012), p. 587, para. 59.

48. The requirement of exhaustion of domestic remedies seeks to ensure that, before a claim is brought on the international plane, "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[59] This principle requires that each injured person first seek relief from the legal remedies of judicial or administrative courts or bodies, including administrative remedies.[60]

49. Qatar has recognized that the rule of exhaustion of local remedies applies both under the inter-state procedure of Articles 11-13 and under the individual communication procedure under Article 14 of the Convention.[61] While the present inter-State communication is the first of this kind before the Committee, the Committee's jurisprudence on exhaustion of local remedies under Article 14 is also relevant for the present purposes given the similarity of the provisions on the obligation to exhaust local remedies of Article 11.3 and 14.7(a) of the CERD. In its jurisprudence relating to individual applications the CERD Committee has confirmed that all available domestic remedies that offer a prospect of success under domestic law must be exhausted before the Committee may consider the merits of situation.[62] As a matter of general international law, the burden is on Qatar to prove that such local remedies were

[59] *Interhandel* (Switzerland v. United States of America), I.C.J. Reports 1959, p. 6, at p. 27; *see also Ambatielos* (Greece v. United Kingdom), (1956), RIAA, vol. XII, p. 83 at p. 120: "[i] is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane."

[60] Article 14(2), Articles on Diplomatic Protection. Articles on Diplomatic Protection, Commentary to draft Article 14, para. 5, *ILC Yearbook 2006*, vol. II(2), p. 45. *See also Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, at p. 601, para. 47 (the remedies which must be exhausted "include all remedies of a legal nature, judicial redress as well as redress before administrative bodies").

[61] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Response on behalf of the State of Qatar to the questions posed by Judge Cançado Trindade on Friday, 29 June 2018, 3 July 2018, para. 8.

[62] *See, e.g.*, CERD, Communication No. 25/2002, *Ahmad Najaati Sadic v. Denmark*, Inadmissibility Decision of 19 March 2003, UN doc. CERD/C/62/D/25/2002, para. 6.4.

exhausted or that the circumstances relieved it of the obligation to exhaust available local remedies.[63]

50. Remedies capable of providing effective relief are indeed available within the UAE to Qatari nationals with respect to each violation of rights alleged by Qatar. It falls to Qatar to show either that these available remedies were in fact exhausted, or either such remedies would not have been effective in the particular circumstances of the case or that their application would be "unduly prolonged." Qatar has not even argued, let alone established, that Qatari nationals are exempted from exhausting local remedies in the UAE on the grounds that one of the exceptions to this rule applies. Exceptions to the obligation to exhaust local remedies have only been applied in exceptional cases by the Committee.[64] Regarding the exception of undue delay, the Committee found that this exception applied and thus the case was admissible when a court decision had not been rendered after over four and a half years.[65] As evidenced by the documents submitted by the UAE, UAE courts promptly review and decide cases submitted to them, including by Qatari nationals.[66]

51. The evidence to be provided by Qatar must be objective. As the Committee explained when declaring inadmissible an individual communication for lack of exhaustion of local remedies, "doubts about the effectiveness of such proceedings cannot absolve a petitioner from pursuing them."[67]

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[63] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, p. 600, para. 44; *Elettronica Sicula S.p.A. (ELSI)*, (Italy v. United States of America), I.C.J. Reports 1989, p. 15, pp. 43-44, para. 53.

[64] UAE's Supplemental Response of 29 November 2018, paras. 61, 64 and CERD Committee jurisprudence cited therein.

[65] CERD Committee, Communication No. 29/2003, *Mr. Dragan Durmic v. Serbia and Montenegro*, Decision of 6 March 2006, UN Doc. CERD/C/68/D/29/2003, para. 6.5.

[66] *See* **Annex 2**, Statement of the cases involving a Qatari citizen and being examined by the UAE courts in the period 6 June 2017 until 25 September 2018, pp. 12-13 (containing a table put together by the Courts Department of Ras Al-Khaimah indicating the date of listing and of ruling by the courts of suits filed by or against Qatari nationals after 5 June 2017). *See also*, Annex 16 to the UAE's Response of 7 August 2018.

[67] CERD Committee, Communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, Inadmissibility Decision of 10 August 2001, UN Doc. CERD/C/59/D/19/2000, para. 7.4.

52. The UAE has demonstrated in its previous submissions that there are available and effective remedies that Qatari nationals may resort to in order to complain of any alleged violations of their rights under the CERD.[68] A non-exhaustive exposé over some avenues for redress open to Qatari nationals will nevertheless be provided here.

53. Notably, the fact that UAE courts are authorized to rule on the rights and freedoms of foreigners contained in international conventions to which the UAE is a party such as CERD is confirmed by various provisions of the UAE Constitution.[69]

54. Qatar has put forward no evidence that these constitutionally protected remedies are in fact either unavailable to Qataris or ineffective. To the contrary, court remedies are available and effective and can be pursued without difficulty, either in person or through powers of attorney. Qatar has put forward no evidence of any Qatari national bringing a claim before the UAE courts against the UAE Government in respect of the measures at issue. By contrast, the UAE has offered proof that demonstrates that, since 5 June 2017, Qatari nationals have freely continued to resort to the UAE courts to assert their rights in legal matters, even if not necessarily related to CERD.[70] Further evidence is also herewith submitted to the Committee showing that almost one hundred and fifty powers of attorney have been executed by Qatari nationals since 5 June 2017.[71]

55. In addition, numerous administrative remedies are available to Qataris in the form of complaint procedures specific to various governmental authorities. Such administrative remedies are also effective and Qatar has offered no proof to the contrary. These remedies are easily accessible and complaints are quickly resolved.

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[68] UAE's Response of 7 August 2018, para. 85, UAE's Supplemental Response of 29 November 2018, paras. 61-71.

[69] *See* UAE Constitution (2011), Articles 40, 41 and 102; UAE's Supplemental Response of 29 November 2018, paras. 65-66.

[70] *See* Annex 18 to the UAE's Response of 7 August 2018 (containing a summary of the cases involving a Qatari citizen and being examined by federal courts during the period from 1 May 2017 until 20 June 2018); **Annex 2**, Statement of the cases involving a Qatari citizen and being examined by the UAE courts in the period 6 June 2017 until 25 September 2018.

[71] **Annex 2**, Statement of the cases involving a Qatari citizen and being examined by the UAE courts in the period 6 June 2017 until 25 September 2018, p. 2 (containing a table with statistics of the Federal Courts indicating that in the period 6 June 2017 to 25 September 2018 there had been 146 powers of attorney). *See also* Annex 16 to the UAE's Response of 7 August 2018, p. 2 (containing statistics regarding the powers of attorney concluded in the period from 1/06/2017 to 30/5/2018 with respect to Qatari citizenship in the Emirate of Abu Dhabi).

56. Specifically, Qatar has failed to show any instance of individuals seeking relief from the administrative complaints mechanisms in place by local UAE government. For example, the Government of Dubai Legal Affairs Department is tasked with receiving complaints and claims made against the Government of Dubai.[72] Qataris can file a complaint against a Dubai government entity through the Department's website.[73] If the dispute cannot be amicably settled within two months, the complainant can file claims directly against the government entity before the UAE courts.[74] Qatar has put forward no evidence of recourse to such remedies.

57. Qatar also has not shown any instance of any Qatari national having recourse to local remedies addressing hate speech. UAE Federal Decree Law No. 2 of 2015 prohibits "discrimination of any form" by various means of expression.[75] Hate speech is punishable by monetary fines and even imprisonment. Various means exist for individuals (including Qataris) to bring complaints to the attention of the authorities, including under the mechanisms provided for pursuant to Federal Decree Law No. 2 of 2015 and Law No. 5 of 2012. To facilitate complaints, Dubai police offers an e-service through which an individual can report offenders.[76] Qatar has put forward no evidence of recourse to such remedies.

58. Qatar also has not shown any instance of Qatari nationals making complaints to relevant authorities dealing with alleged blocking of media content in pursuit of their freedom of expression. The blocking of online content may be challenged by individual users

[72] Law No. (32) of 2008 and Law No. (3) of 1996. *See also* Government of Dubai website "Complaints Against Government Entities," https://legal.dubai.gov.ae/en/Services/Pages/Services-Desc.aspx?ServiceID=10.

[73] Government of Dubai website "Complaint filed against a Government Entity," https://cms.legal.dubai.gov.ae/en/Website/Pages/ComplaintAgainstGovernmentEntity.aspx.

[74] Government of Dubai website "Complaints Against Government Entities," https://legal.dubai.gov.ae/en/Services/Pages/Services-Desc.aspx?ServiceID=10.

[75] Federal Decree Law No. 2 of 2015, Article 6 (15 July 2015), http://ejustice.gov.ae/downloads/latest_laws2015/FDL_2_2015_discrimination_hate_en.pdf.

[76] "Request to Open a Criminal Case" of the Dubai Police, https://www.dubaipolice.gov.ae/wps/portal/home/services/individualservices/opencriminalcase?firstView=true; *see also* "E Crime" of the Dubai Police, https://www.dubaipolice.gov.ae/wps/portal/home/services/individualservicescontent/cybercrime.

through submissions via online forms[77] or by the media outlets themselves by petitioning the National Media Council of the UAE.[78] If challenge through this process is unsuccessful, subsequent appeals to the UAE courts to judicially review the decision of the National Media Council are available.[79] Qatar has put forward no evidence of recourse to such remedies.

59. Qatar also has put forward no evidence that any Qatari has made use of the complaint resolution procedures with respect to the alleged violation of their right to health and right to medical treatment. The UAE's Ministry of Health and Prevention ("**MOHAP**") provides a number of avenues for an individual to file a complaint.[80] Complaints are normally resolved by MOHAP within days. If challenge through this process is unsuccessful, subsequent appeals to the UAE courts to judicially review the decision of MOHAP would be available. Alongside the Federal Government's complaint procedure, for example the Dubai Health Authority has local complaint procedures available for individuals.[81] Qatar has put forward no evidence of recourse to such remedies.

60. Qatar also has not shown any instance of Qatari nationals making complaints with respect to the right of education. For example, the Abu Dhabi Department of Education and Knowledge provides a complaint mechanism for secondary school students whereby an individual can raise a complaint against a UAE school, including for failure to respond to a request for provision of transcripts.[82]

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[77] *See* "Web Content Block/Unblock Request Form," https://etisalat.ae/en/generic/contactus-forms/web-block-unblock.jsp.

[78] The Chairman of the Board's Resolution No. (30) of 2017 on Media Activities Licensing, Articles 67 and 68, http://nmc.gov.ae/en-us/NMC/Documents/Media%20Activities%20Licensing%20Resolution.pdf.

[79] The UAE's reliance on the existence of these remedies is without prejudice to its position that broadcasters do not benefit from the protection of the CERD, which only applies to individuals and not corporations.

[80] *See* Ministry of Health and Prevention website "Customer Complaints," http://www.mohap.gov.ae/en/Pages/COMPLAINS.aspx.

[81] DHA website "Medical Complaint," https://www.dha.gov.ae/en/HealthRegulation/Pages/MedicalComplaintsProcedures.aspx.

[82] Department of Education and Knowledge website "Raising a complaint against a Private school," https://www.adek.abudhabi.ae/en/Parents/PrivateSchools/Pages/RCAPS.aspx.

61. Qatar also has not shown any instance of Qatari nationals making complaints with respect to the right to work, despite the availability of ample remedies. Under UAE law, a complaint system is available through the UAE Ministry of Human Resources and Emiritisation.[83] An individual can file a complaint in person or by using the online service.[84] If a settlement is not reached within two weeks, the complaint is referred to the Labor Court.[85] The ruling of the Labor Court can, subject to certain limitations on small claims, be appealed to the Court of Appeals and further to the Court of Cassation.[86] Qatar has put forward no evidence that any Qatari has availed himself or herself of these complaint resolution procedures.

62. Finally, Qatar also has put forward no evidence that any Qatari has availed himself or herself of the available complaint resolution procedures related to alleged infringement of the right to property or had recourse to the UAE courts. With respect to complaints relating to real property, an individual can file a complaint by various means. For example, disputes between landlords and tenants may be addressed by the Rental Disputes Center of the Government of Dubai, with the option of appeal to the Appellate Division of the Center.[87] Regarding complaints relating to an individual's assets or accounts, the Central Bank of the UAE is equipped to handle these through fax, online or

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[83] As mandated by UAE Labor Law, Federal Decree Law No. 8 of 1980, Article 6. *See* UAE Ministry of Human Resources and Emiritisation website "Register Labour complaints," https://www.mohre.gov.ae/en/our-services/%D8%A8%D8%AD%D8%AB-%D8%A7%D9%84%D8%B4%D9%83%D9%88%D9%89-%D8%A7%D9%84%D8%B9%D9%85%D8%A7%D9%84%D9%8A%D8%A9.aspx. *See also* Federal Decree Law No. 8 of 1980, Article 6, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/11956/69376/F417089305/ARE11956.pdf.

[84] *See* UAE Ministry of Human Resources and Emiritisation website "Complaint Request," https://eservices.mohre.gov.ae/MOHRE.WebForms/Home/Complaint?lang=en-gb.

[85] Federal Decree Law No. 8 of 1980, Article 6, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/11956/69376/F417089305/ARE11956.pdf; UAE Official Government Portal website "The system of courts," https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary/the-system-of-courts.

[86] UAE Official Government Portal website "The system of courts," https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary/the-system-of-courts.

[87] *See* Government of Dubai Rental Disputes Center website, http://www.rdc.gov.ae/Services_Pages/Services.aspx. *See also* Government of Dubai Real Estate Legislation Decree No. (26) of 2013 Concerning the Rent Disputes Settlement Centre in the Emirate of Dubai, Articles 13-14, http://www.dubailand.gov.ae/Style%20Library/download/EN-Legislation.pdf.

in person through various Central Bank locations.[88] The UAE judiciary is also naturally available to all Qataris with grievances related to property matters. Both the complaint procedures and the UAE courts are able to provide redress to individuals who successfully prove that their right to property has been unlawfully infringed. However, again, Qatar has provided no evidence that such remedies have been exhausted.

63. To sum up, Qatar's position on the issue of the exhaustion of domestic remedies has been consistent. It is, in a word, denial. Thus, while Qatar has failed to provide any evidence that the Qatari nationals in question have attempted to invoke or exhaust domestic remedies in the UAE to vindicate their grievances, Qatar tries to explain this away by simply denying, without more, that any remedies are available or are effective given "the inability to appear in person because of expulsion from and the ban on entry to the UAE, serious difficulties finding local lawyers to provide legal representation because of the general atmosphere of hostility towards Qatar and Qataris".[89]

64. Yet, such a statement is pure fiction when measured against the facts. Evidence has previously been provided to the Committee, and is supplemented by additional evidence submitted herewith, that demonstrates that, far from a "ban on entry", Qatari nationals have entered the UAE in their thousands since 5 June 2017.[90]

65. As the complainant in this proceeding, Qatar bears the burden of proof to establish that domestic remedies have been invoked and exhausted or to establish that exceptional circumstances relieve it of that obligation.[91] Faced with the evidence demonstrating the accessibility to Qatari nationals of the UAE legal system, Qatar's burden of proof to

[88] Central Bank of the UAE website "Complaints and Enquiries," https://centralbank.ae/en/form/complaints.

[89] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 29 June 2018, at 10:00 a.m. (CR 2018/14), p. 12, para. 5 (Klein). *See also Note Verbale* of Qatar to the CERD Committee, dated 29 October 2018, requesting the Committee to re-initiate Qatar's complaint against the UAE ("Any nominal remedies are either unavailable or ineffective in light of the expulsion of Qataris from the United Arab Emirates and ensuing travel restrictions, as well as the ongoing campaign of hatred against Qatar and Qataris in the territory or the United Arab Emirates.").

[90] *See* paras. 8-10, *supra*.

[91] *See e.g.*, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, paras. 42-44.

establish that the Qatari nationals who it alleges have been aggrieved by the UAE's conduct in violation of CERD have in fact sought to invoke and have thereafter exhausted domestic remedies to seek redress for their grievances is substantially heightened. Hiding behind blanket denials unsupported by evidence will not suffice and, with respect, should not be accepted by the Committee.

66. There can be no doubt that Qatar has failed to overcome the admissibility hurdle in Article 11.3 of CERD. Because available domestic remedies have neither been invoked nor exhausted, Qatar has failed to meet the requirements of that provision.

67. For that reason alone the Committee must dismiss Qatar's Article 11 Communication and discontinue any further procedure addressing that communication.

V. Conclusion

68. For the reasons set out herein and in the UAE's 7 August Response and the 29 November 2018 Submission, the UAE respectfully urges the Committee to dismiss Qatar's Article 11 Communication for lack for jurisdiction and/or lack of admissibility.

69. With respect, in light of the manifest lack of jurisdiction and admissibility of Qatar's Article 11 Communication, any action taken by the Committee to further Qatar's complaint would be *ultra vires*.

70. The UAE once again takes this opportunity to reaffirm its unwavering commitment to eliminating racial discrimination in all of its forms and to combating hate speech.

Annex 121

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Response of the State of Qatar
(14 February 2019)

THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

State of Qatar,

Complainant

v.

United Arab Emirates,

Respondent.

ICERD-ISC-2018/2

RESPONSE OF THE STATE OF QATAR

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14 February 2019

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1. The Permanent Mission of the State of Qatar to the United Nations Office and other international organizations in Geneva presents its compliments to the Committee on the Elimination of Racial Discrimination ("***Committee***") and refers to its Communication submitted pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (the "***CERD***") against the United Arab Emirates ("***UAE***") (ICERD-ISC-2018/2) ("***Qatar's Communication***"), as well as its letter of 29 October 2018 referring the matter again to the Committee pursuant to Article 11(2) of the CERD.

2. Pursuant to the Note Verbale transmitted to the Permanent Mission of the State of Qatar by the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) on 14 December 2018 ("***Note Verbale***"), Qatar submits this response to the Supplemental Response by the UAE dated 14 January 2019 and transmitted to the State of Qatar on 15 January 2019 ("***15 January Submission***"), and the Supplemental Response by the UAE dated 29 November 2018 and transmitted to the State of Qatar on 4 December 2018 ("***4 December Submission***"). Qatar also refers to the Response of the UAE received by the Secretariat on 7 August 2018 and transmitted to the State of Qatar on 8 August 2018 ("***8 August Submission***") and the submission by the UAE dated 7 November 2018 and transmitted to the State of Qatar on 9 November 2018 ("***9 November Submission***"). In this response, Qatar will limit its observations to issues raised in the UAE's 4 December and 15 January Submissions, focused on questions of jurisdiction and admissibility, as contemplated by the Note Verbale.

I. INTRODUCTION

3. The negative impacts of the UAE's Coercive Measures[1], which include its collective expulsion of Qataris and purposeful incitement of hatred towards Qatar and Qataris, are extensive, ongoing, and well-documented, including by independent international human rights groups[2]. The UAE has sought to coerce the Qatari Government through the

[1] Qatar's Communication, p. 1, para. 3. *See also* United Arab Emirates Ministry of Foreign Affairs & International Cooperation, *UAE supports statements of Kingdom of Bahrain and Kingdom of Saudi Arabia on Qatar* (5 June 2017), https://www.mofa.gov.ae/en/mediacenter/news/pages/05-06-2017-uae-qatar.aspx.

[2] Qatar's Communication, pp. 20, 23-24, paras. 44, 52-53. These measures are detailed in Qatar's prior submissions to the Committee. *See* Qatar's Communication, pp. 12-18, paras. 26-40.

collective punishment of the Qatari people, and its actions stand contrary to the entire foundation of human rights. As a result of the UAE's Coercive Measures, Qataris in the UAE awoke on 5 June 2017 to find that they had only 14 days to flee the country, leaving behind family, loved ones, jobs, property, and educational opportunities—all while under the ominous threat from the UAE citing "precautionary security measures" as the ostensible reason for the collective expulsion. Qatari residents of the UAE who had returned to Qatar for Ramadan or were otherwise outside the UAE on 5 June 2017 awoke to find that they were now cut off from their homes, families, and their very lives—with no certainty as to when, if ever, they could return.

4. Overnight, the lives of Qataris living in or having any connection with the UAE were radically altered. Prior to the UAE's imposition of the Coercive Measures, many Qataris lived, worked, studied, and owned property in the UAE. As Gulf Cooperation Council ("***GCC***") nationals, Qataris enjoyed special status in the UAE, moving freely between the two countries and entitling them to many of the same rights and benefits as Emiratis. In this particular context of openness and close connections, mixed families of Qatari and Emirati origin were commonplace, with family members, lives, education and work spanning the two countries. Almost overnight, the Coercive Measures upended this reality—solely because these individuals were Qatari. By its conduct, the UAE has violated a host of fundamental rights protected by the CERD, including the rights of Qataris to: marriage, choice of spouse, and family life; education and training; access to public health and medical care; property; work; freedom of opinion and expression; equal treatment before tribunals; and benefit from measures that protect against incitement on racially discriminatory grounds, as well as the right to a remedy for these violations. Over a year and a half later, the UAE's violations have persisted. And since the UAE has continued in its campaign of discrimination against Qataris, the incitement of racial hatred against Qataris has only entrenched, and as the Coercive Measures move toward their second full year, the UAE's divisive and discriminatory treatment against Qataris threatens to become a permanent fixture. Tragically, incidences of racially-motivated abuse and hate speech against Qataris are now commonplace in the UAE.

5. Tellingly, the UAE—in its submissions before the Committee and indeed, in all legal and political fora relating to the crisis—both ignores and attempts to minimize these impacts, largely by misrepresenting the facts. It insists that Qataris "left the UAE voluntarily at the start of the crisis"[3]—despite the plain language of its directive of 5 June 2017 (the "***5 June Directive***") ordering them to do so within 14 days. It says nothing at all about its clear campaign of incitement against Qataris. And it makes no attempt to argue that the Coercive Measures are intended for any other purpose than to coerce and punish the State of Qatar by targeting individual Qataris. Indeed, the UAE's current characterization of the Coercive Measures as "minimal" entry requirements[4] must be seen for what it is: an ex post justification for the UAE's egregious, arbitrary, and punitive misuse of sovereign power, enacted without warning, without exception for individual circumstances, and without regard for the impacts on individual rights.

6. At the same time that the UAE attempts to dismiss the reach and impacts of the Coercive Measures, the UAE also attempts to sharply curtail the reach and focus of the CERD itself. As this Committee is well aware, the CERD is a forward-looking instrument, which obliges State Parties not only to condemn racial discrimination but also to actively pursue means of "eliminating racial discrimination in *all its forms*"[5]. Article 1(1)'s definition of "racial discrimination" seeks to further this goal not only by its list of multiple prohibited grounds, but also by explicitly covering discrimination "which has the purpose *or effect*" of impairing the enjoyment of human rights[6]. In other words, as this Committee has previously made clear, in addition to explicit and purposive discrimination, the CERD's scope encompasses actions that have "an unjustifiable

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3 4 December Submission, p. 12, para. 22.

4 15 January Submission, p. 3, para. 7.

5 CERD, Preamble (emphasis added).

6 CERD, Art. 1(1) ("In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing…human rights…") (emphasis added).

disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"[7].

7. In its submissions, the UAE ignores this basic fact about the ambit of the CERD, instead urging the Committee to look only to whether the Coercive Measures, as measured by the UAE's explicit purpose of targeting Qatari "nationals", fall within the CERD. So, the UAE's central jurisdictional objection before the Committee—mirroring its objection before the International Court of Justice ("***ICJ***")—remains on the basis that "nationality" does not constitute a protected ground for discrimination based on Article 1(1)'s use of the term "national origin"[8]. In making this argument, the UAE asserts that "present nationals" as a group are categorically excluded from the definition of "national origin", a term which it refers to instead as being associated with a person's "heritage" or ability to "trace" their origin to a particular country[9]. But the UAE's attempt to frame the question in this manner exposes the fundamental flaw in its reasoning: the UAE overlooks the fact that the discriminatory *effects* of the Coercive Measures—separate and apart from the purpose of those Measures—bring the UAE's conduct unequivocally within the ambit of the CERD.

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[7] CERD Committee, General Recommendation No. 14 on Article 1, Paragraph 1, of the Convention, U.N. Doc. A/48/18 (1993), para. 2. *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, Declaration of Crawford* (19 April 2017), para. 7 ("[T]he definition of 'racial discrimination' in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds. Moreover, whatever the stated purpose of the restriction, it may constitute racial discrimination if it has the 'effect' of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD.").

[8] 4 December Submission, p. 14, para. 29 ("[T]he Committee lacks any jurisdiction because Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outwith the scope of the CERD."); 15 January Submission, p. 9, para. 17 ("Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outside the scope of the CERD.").

[9] *E.g.*, 4 December Submission, p. 17, para. 35 (relying on the dissenting opinion of Judge Salam, in which he noted that "'national origin' targets individuals who—'regardless of their nationality at that time'—traced their origin to a particular country and suffered discrimination as a result of that heritage"). *See also Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, CR 2018/13, p. 38, para. 19 (Olleson) (arguing that the Coercive Measures fall outside the scope of the CERD, the UAE noted that "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)").

8. That is because it is indisputable that whatever the UAE's stated purpose in discriminating solely on the basis of present "nationality," the effects of the UAE's Coercive Measures are felt by persons of Qatari national origin in the sense uncontested by the UAE—namely, in the historical-cultural sense of shared "heritage" or descent or an ability to "trace" one's origin to a particular country. The UAE was well aware of the disparate impact of its measures on those of Qatari national origin: in Qatar, as in other Gulf States, nationality is inextricably intertwined with, and largely restricted to, this historical-cultural community of Qataris. As a result, the UAE's Coercive Measures targeting "Qatari nationals" unquestionably have a disparate effect on persons of Qatari national origin. Thus, the UAE's conduct indisputably falls within the scope of the Article 1(1) definition of the CERD irrespective of whether "national origin" in Article 1(1) encompasses nationality, and accordingly, the Committee has jurisdiction.

9. But the UAE's primary argument that Article 1(1) excludes discrimination on the basis of nationality is also wrong. To the contrary, that present nationality is encompassed by "national origin" in Article 1(1) of the CERD becomes clear when the ordinary meaning of the term is read in its context and in light of the CERD's object and purpose, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties ("***VCLT***")[10], as well as through an examination of the *travaux préparatoires* of the CERD. Indeed, the UAE's heavy reliance on the *dissenting* opinions of several ICJ judges conveniently overlooks that a *majority* of the ICJ, when called upon to determine whether the acts complained of by Qatar are *prima facie* capable of falling within the provisions of the CERD, concluded in the affirmative[11]. As explained in the ICJ's Order on Provisional Measures of 23 July 2018 ("***Provisional Measures Order***"):

> "In the Court's view, the acts referred to by Qatar, in particular the statement of 5 June 2017…whereby the UAE announced that Qataris were to leave its territory within 14 days and that they would be prevented from entry, and the alleged restrictions that ensued, including upon their right to marriage and choice of spouse, to education as well as to medical care and to equal

[10] VCLT, Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[11] 4 December Submission, p. 19, paras. 38-43; *see also* 15 January Submission, pp. 10-11, para. 20.

> treatment before tribunals, are capable of falling within the scope of CERD *ratione materiae*."[12]

The UAE's attempts to elevate the Court's dissenting opinions cannot elide this basic fact, which alone is sufficient to conclude that the Committee has jurisdiction to appoint an *ad hoc* Conciliation Commission to hear Qatar's claims[13].

10. The UAE's remaining objections—most of which largely mirror those raised before and dismissed by the ICJ in its hearing on provisional measures—equally have no merit, and equally attempt to restrict both the scope of the CERD's coverage and this Committee's ability to ensure its proper implementation.

11. Qatar's response is thus organized as follows:

12. *First*, Qatar will demonstrate that, as discussed above, according to both their purpose and effect, the Coercive Measures imposed by the UAE against Qatar and Qataris unequivocally fall within the scope *ratione materiae* of the CERD by discriminating against Qataris on the basis of national origin (Section II)[14]. With respect to the UAE's conceded purpose of targeting Qataris on the basis of "present nationality", the Coercive Measures fall within the CERD's scope because the text of Article 1(1) read in its context and in light of the CERD's object and purpose, make clear that "national origin" encompasses present nationality (Section II.A). This alone is sufficient for the Committee to uphold its jurisdiction. So too is the fact that the discriminatory effects of the measures are suffered by persons of Qatari national origin in the historical-cultural

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12 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Order (23 July 2018)* (hereinafter "Provisional Measures Order"), p. 11, para. 27.

13 For example, this approach is reflected in the Committee's analogous practice under Article 14 of the CERD, in which the Committee "consider[ed] that the petitioner has sufficiently substantiated, for purposes of admissibility, that his individual claim *may* fall within the scope of application of the provisions of the Convention" and "deem[ed] it more appropriate to determine the precise scope of the relevant provisions of the Convention at the merits stage of the petition." *Stephen Hagan v. Australia*, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003), p. 10, para. 6.2 (emphasis added).

14 Article 1(1) of the CERD provides: "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life."

sense uncontested by the UAE (Section II.B). For both of these reasons, the Committee's jurisdiction must be upheld.

13. *Second*, Qatar will show that the UAE's argument that the Committee lacks jurisdiction over Qatar's Communication because there is "no evidence" of an "ongoing situation of prejudice"[15] to Qataris both misconceives the legal basis for the Committee's (and subsequent Conciliation Commission's) jurisdiction and is wrong as a matter of fact (Section III). The jurisdictional requirements set by Article 11 in this regard are minimal, and indeed, the ICJ has found that the UAE's Coercive Measures have plausibly endangered rights protected under the CERD. Further, the UAE's persistent and self-serving denials of any CERD violations are at odds with the observations of the ICJ and the reports of independent international human rights observers that have recorded the continuing and severe impacts of the Coercive Measures on individual Qataris. Accordingly, the Committee should easily be able to conclude that Qatar has satisfied the standard established by Article 11 for a complaint to move forward to the conciliation process contemplated by the CERD.

14. *Third*, Qatar will demonstrate that consideration of Qatar's Communication is not barred by the CERD's Article 11(3) requirement that the Committee deal with matters referred to it "after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law". The exhaustion of domestic remedies requirement does not apply in cases such as this, where the measures at issue constitute a systemic, generalized policy and practice that impacts the rights of thousands of individuals. Further, the requirement that domestic remedies be exhausted does not apply because Qatar also asserts claims of direct injury to its own interests under the CERD. Finally, even if the domestic remedies rule did apply in this case, the UAE has failed to prove the existence of effective, available remedies that have not been exhausted. As such, the UAE's argument that

[15] Supplemental Response of the United Arab Emirates to the request made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination (29 November 2018) (hereinafter "4 December Submission"), p. 3. para. 6.

Article 11(3) of the CERD acts as a bar to consideration of Qatar's Article 11 Communication must be rejected.

15. *Fourth*, the UAE argues that Qatar has "abandoned" the Article 11 process before the Committee by commencing proceedings before the ICJ. This argument, too, must fail. As Qatar will demonstrate, the plain text of the CERD and its *travaux préparatoires* make clear that the two preconditions in Article 22 (negotiation and the CERD procedures) are alternative, not cumulative; a State party may refer a dispute to the Court without first pursuing conciliation before the CERD Committee. Nor do the *lis pendens* or *electa una via* principles have any application here. Thus, procedures before the Committee and the ICJ may be independently engaged.

16. Qatar finally notes that, as has been its practice throughout this dispute, the UAE in its 4 December and 15 January Submissions again resorts to a medley of wild and incorrect allegations against Qatar, attempting to connect Qatar to support for terrorism[16]. These allegations are not only unfounded, they are clearly pretextual, in a transparent attempt to cloak the UAE's true motivation for imposing the Coercive Measures in order to coerce Qatar into relinquishing sovereign control of its internal and external affairs. Significantly, while the UAE desperately tries to characterize its terrorism pretext as broadly supported by other countries[17], in fact, the opposite is true. Despite strong pressure by the four States that imposed the Coercive Measures[18], only ten governments ultimately cut or downgraded diplomatic ties with Qatar[19], and independent reports note

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16 4 December Submission, pp. 7-10, paras. 11-16; 15 January Submission, pp. 7-8, paras. 14-16.

17 *See, e,g.*, 4 December Submission, p. 6, para. 10.

18 *See* Qatar's Communication, p. 1, para. 3 ("On 5 June 2017, the government of UAE, in coordination with the Kingdom of Saudi Arabia, the Kingdom of Bahrain, and the Arab Republic of Egypt announced a campaign on unlawful political isolation and economic coercion…").

19 The governments of Yemen, Eastern government of Libya (Beida), Maldives, Mauritania, Comoros, and Senegal cut diplomatic ties (although the Beida government had never maintained diplomatic ties with Qatar). *See* "Qatar-Gulf crisis: Your questions answered," *Al Jazeera* (5 December 2017), https://www.aljazeera.com/indepth/features/2017/06/qatar-gulf-crisis-questions-answered-170606103033599.html; Jamie Prentis, "Beida government cuts off diplomatic relations with Qatar," *Libya Herald* (5 July 2017), https://www.libyaherald.com/2017/06/05/beida-government-cuts-off-diplomatic-relations-with-qatar/ (describing the break in relations as "entirely symbolic: there have been no relations between the Beida government and Qatar."). The governments of Jordan, Djibouti, Chad, and Niger downgraded diplomatic ties. *See* "Qatar-Gulf crisis: Your questions answered," *Al Jazeera* (5 December 2017),

that a number of these States only supported the UAE- and Saudi-led actions in order to avoid losing financial aid from Saudi Arabia[20]. Unsurprisingly, three of these governments have since restored ties with Qatar[21]. Further, the international community has recognized Qatar's counterterrorism efforts and even expressly questioned the UAE's motivation for making its accusations in the context of this dispute. For example, very soon after the imposition of the Coercive Measures, on 20 June 2017, the U.S. State Department questioned the UAE's allegations of terrorism, asking whether the UAE's measures were "really about their concerns regarding Qatar's alleged support for terrorism, or were they about the long simmering grievances among countries in the Gulf Cooperation Council"[22]. Indeed, contrary to the UAE's claims, Qatar has in fact been an active participant in the global fight against terrorism. Qatar's Al Udeid air base has for years served as a critical staging ground for U.S. and coalition forces conducting counterterrorism operations in Afghanistan, Iraq, and Syria, and currently serves as the

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https://www.aljazeera.com/indepth/features/2017/06/qatar-gulf-crisis-questions-answered-170606103033599.html.

[20] Press reports suggest, for example, that Saudi Arabia attempted to induce a number of African countries with predominantly Muslim populations to terminate relations with Qatar by threatening to cut financial aid and reduce these States' quotas for Hajj pilgrims, and further tried to entice some States to join the Blockade with the promise of additional aid and loans. *See* James M. Dorsey, "Stepping Up The Pressure: Saudi Strong Arms Muslim Nations To Take Sides In Gulf Crisis," *Huffington Post* (13 June 2017), https://www.huffingtonpost.com/entry/stepping-up-the-pressure-Saudi-strong-arms-muslim_us_593fca4fe4b094fa859f1b8f; "Gulf crisis: Saudi Arabia seeks African pressure against Qatar," *Al Jazeera* (14 June 2017), http://www.aljazeera.com/video/news/2017/06/gulf-crisis-Saudi-arabia-seeks-african-pressure-qatar-170614075802810.html.

[21] *See* Ali Mustafayev, "Senegal restores its ambassador to Doha," *AzerNews* (22 August 2017), https://www.azernews.az/region/117977.html; "Chad and Qatar restore ties cut in wake of Arab states rift," *Reuters* (21 February 2018), https://www.reuters.com/article/us-gulf-qatar-chad/chad-and-qatar-restore-ties-cut-in-wake-of-arab-states-rift-idUSKCN1G515I; "Maldives to restore ties with Qatar and Iran," *Maldives Independent* (22 November 2018), https://maldivesindependent.com/politics/maldives-to-restore-ties-with-qatar-and-iran-142905.

[22] *See, e.g.*, Gardiner Harris, "State Dept. Lashes Out at Gulf Countries Over Qatar Embargo," *The New York Times* (20 June 2017) (quoting U.S. State Department spokeswoman); Patrick Wintour, "Rex Tillerson applauds Qatar plan but Gulf rivals refuse to lift sanctions," *The Guardian* (11 July 2017). Most recently, and contrary to the UAE's extremely misleading reference to the U.S. President's June 2017 remarks, 4 December Submission, para. 16, on 15 January 2018, U.S. President Trump personally called H.H. the Emir of Qatar to thank him for "action to counter terrorism and extremism in all forms." "Trump thanks Qatar for efforts to combat terrorism," *Reuters* (15 January 2018), https://www.reuters.com/article/us-gulf-qatar-usa/trump-thanks-qatar-for-efforts-to-combat-terrorism-idUSKBN1F42HT. After a meeting in the Oval Office on 10 April 2018, President Trump acknowledged Qatar's efforts towards "stopping the funding of terrorism", regarding which the Emir was a "very big advocate." Peter Baker, "Trump Now Sees Qatar as an Ally Against Terrorism," *The New York Times* (10 April 2018), https://www.nytimes.com/2018/04/10/world/middleeast/trump-qatar-terrorism.html.

primary staging area for operations against the Islamic State. Further, the Al Jazeera network, far from being a "spokespiece" for extremists as the UAE alleges[23], is hailed as a bastion of free expression and independent content in a region where press freedom is otherwise scarce, if not non-existent[24]. International and non-governmental organizations have affirmed Al Jazeera's importance as a beacon of rigorous independent reporting in the Middle East, and have roundly condemned the UAE's attempts to silence it[25].

17. These are but a few examples of the UAE's mischaracterization of the underlying facts related to its so-called "terrorism" allegations. But the UAE's unfounded allegations are an obvious attempt at distraction, as they are entirely irrelevant to the dispute before the Committee. Such allegations could never legally justify the UAE's non-compliance with its CERD obligations: the fundamental protection against discrimination is a *jus cogens* norm and an obligation *erga omnes* from which there can be no derogation[26], as is also reflected in the text of the CERD, which provides for no derogation. In addition, it is well established that lawful countermeasures cannot violate human rights[27].

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23 4 December Submission, p. 7, para. 12.

24 Zachary Laub, "How Al Jazeera Amplifies Qatar's Clout," *Council on Foreign Relations* (12 July 2017), https://www.cfr.org/backgrounder/how-al-jazeera-amplifies-qatars-clout; *see also* Matthew Gray, *Qatar: Politics and the Challenges of Development*, (Lynne Rienner Publishers, 2013), p. 12 ("The channel provides enormous reach into the Arab world. It is a popular channel, and its reports and opinions often set the tone for debates on certain issues around the region.").

25 "Al Jazeera - collateral victim of diplomatic offensive against Qatar," *Reporters Without Borders* (7 June 2017), https://rsf.org/en/news/al-jazeera-collateral-victim-diplomatic-offensive-against-qatar; "Qatar: Demands to close Al Jazeera endanger press freedom and access to information," Article 19 (30 June 2017), https://www.article19.org/resources/qatar-demands-to-close-al-jazeera-endanger-press-freedom-and-access-to-information/; "UNESCO and Al Jazeera to promote freedom of expression in the Arab World," UNESCO (12 September 2010), http://www.unesco.org/new/en/media-services/single-view/news/unesco_and_al_jazeera_to_promote_freedom_of_expression_in_th/ (noting that UNESCO and Al Jazeera signed a memorandum of understanding to formalize the partnership).

26 *See*, *e.g.*, Inter-American Court of Human Rights, Advisory Opinion no. 18, Juridical Condition and Rights of Undocumented Migrants (17 September 2003), para. 101 ("[T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. . . . [D]iscriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.").

27 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, Art. 50(1)(b) ("Countermeasures shall not affect: ... (b) obligations for the protection of fundamental human rights.").

II. THE UAE'S IMPLEMENTATION OF THE COERCIVE MEASURES FALLS WITHIN THE SCOPE *RATIONE MATERIAE* OF THE CERD

18. The UAE's Coercive Measures have been described by the UAE itself as punitive in nature. By design, they are limited neither in scope nor effect and have resulted in differential treatment of Qataris in a manner that undeniably violates their most basic human rights as set forth in the CERD. While the UAE argues that the Committee has no jurisdiction *ratione materiae* to consider the matter, its argument is fundamentally flawed because the UAE attempts to restrict CERD's coverage only to purposive discrimination, while ignoring the effect on individuals of Qatari national origin in the sense uncontested by the UAE. In other words, the UAE argues that its framing of the nature of its illegal acts as being premised solely on present nationality should determine whether the Committee has jurisdiction; this premise is indisputably wrong. In fact, the Coercive Measures discriminate against individuals of Qatari national origin in both purpose and effect, either of which is sufficient for the Committee to uphold its jurisdiction.

19. Accordingly, the UAE's Coercive Measures fall within the jurisdiction *ratione materiae* of the Committee for two reasons.

20. *First*, the Coercive Measures explicitly and intentionally discriminate against Qataris on the basis of their nationality, in violation of the CERD's prohibition on national origin-based discrimination (Section A). The conclusion that the term "national origin" in Article 1(1) of the CERD includes "nationality"-based discrimination is fully consistent with interpretation of Article 1 of the CERD in line with Article 31 of the VCLT[28]. It is also confirmed by an examination of the *travaux préparatoires* of the CERD, in accordance with Article 32 of the VCLT[29], as well as the previous recommendations and practice of the Committee.

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[28] VCLT, Article 31 ("(1) A treaty shall be interpreted in good faith 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 propose. (2) The context for the purpose of the interpretation of a treaty shall comprise. . . the text, including its preamble and annexes…(3) There shall be taken into account, together with the context. . . Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; Any relevant rules of international law applicable in the relations between the parties.").

[29] VCLT, Article 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

21. *Second*, the Coercive Measures have the effect of discriminating against individuals of Qatari national origin as defined by their descent or ancestry, heritage, and cultural traditions (Section B). As described above, and as the UAE is well aware, the significant majority of Qatari nationals are also of Qatari national origin in the historical-cultural sense, meaning that the UAE's self-described "differentiated treatment on the basis of nationality"[30] serves as a convenient means to target individuals of Qatari origin. And since the CERD prohibits discrimination both in "purpose" and "effect", the fact that the Coercive Measures have the *effect* of adversely impacting individuals of Qatari national origin is alone sufficient to form the basis of a CERD violation and confer jurisdiction on the Committee.

A. The CERD Prohibits the Coercive Measures Based Upon the UAE's Discriminatory Purpose of Targeting Qataris on the Basis of Nationality

22. In its 4 December Submission, the UAE claims that "[a]ny finding that nationality falls within the scope of the CERD" would distort its "clear terms"[31]. However, the "clear terms" of the CERD do not exclude nationality from the scope of racial discrimination proscribed under the CERD. Instead, when the ordinary meaning of "national origin" is read in its context and in light of the CERD's object and purpose, in accordance with Article 31(1) of the VCLT, it is clear that it encompasses nationality-based discrimination. This conclusion is further supported by the *travaux préparatoires* of the CERD.

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resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: Leaves the meaning ambiguous or obscure; or Leads to a result which is manifestly absurd or unreasonable.").

30 4 December Submission, p. 15, para. 30.

31 4 December Submission, pp. 17-18, paras. 36-37.

1. The Ordinary Meaning of the Term "National Origin" in its Context and in Light of the CERD's Object and Purpose Demonstrates that the CERD Encompasses Discrimination on the Basis of Nationality

a. Ordinary Meaning of the Term "National Origin"

23. Article 1(1) of the CERD defines "racial discrimination" as follows:

> "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or *national* or ethnic *origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

24. As is the case for the other grounds of racial discrimination covered by the CERD in Article 1(1), the CERD does not define the term "national origin". Neither is it usually defined in dictionaries or understood to have a special meaning in a particular discipline, such as sociology or ethnography. As such, the ordinary meaning of "national origin" must be gleaned in part through analysis of the separate terms "national" and "origin", though in practice the terms are usually treated together. Leading dictionaries such as the Oxford and Cambridge dictionaries define the term "national" as "relating to or characteristic of a nation" or "relating to or typical of a whole country and its people"[32], and define "nation", respectively, as "a large body of people united by common descent, history, culture, or language, inhabiting a particular state or territory"[33], and a "country, especially when thought of as a large group of people living in one area with their own government, language, traditions, etc"[34]. The term "origin", on the other hand, commonly refers to "the country from which [a] person comes"[35] or a "person's social background or ancestry"[36].

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32 "National", *Oxford Dictionaries*, https://en.oxforddictionaries.com/definition/national; "National", *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/.

33 "Nation," *Oxford Dictionaries*, https://en.oxforddictionaries.com/definition/nation.

34 "Nation," *Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/nation.

35 "Origin," *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/origin.

36 "Origin," *Oxford Dictionaries*, https://en.oxforddictionaries.com/definition/origin.

25. Taken together, these two terms suggest that "national origin" relates to the country or nation where a person is from, or where a person's ancestors were from, extending to an individual's association with a particular country or nation in both a historical-cultural sense, for example by virtue of an individual's descent or heritage, as well as a legal or political sense, for example by virtue of an individual's membership in a community defined by, and subject to, a common government. The term "national origin" therefore may be understood as encompassing a person's membership in such a community on the basis of their past *or present* nationality. The official French, Spanish, Russian, and Chinese versions of Article 1(1) of the CERD are consistent with this interpretation[37].

b. "National Origin" in Its Context

26. As is evident from the plain text of Article 1(1), the CERD's definition of "racial discrimination" is a comprehensive one, and the CERD is designed to eliminate "all forms" of racial discrimination. Read in conjunction with Article 1(1), the subsequent sections of Article 1—namely, Articles 1(2) and 1(3)—confirm that present nationality falls within the ordinary meaning of "national origin" as the term is used in the CERD.

27. Article 1(2) creates a narrow exception to the prohibition on racial discrimination contained in Article 1(1), providing that:

> "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".

28. Article 1(3) then further clarifies that Article 1(1) does not affect a State's ability to confer nationality, citizenship, or naturalization, provided that, in doing so, States do not discriminate on the basis of nationality:

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[37] *See Convention internationale sur l'élimination de toutes les formes de discrimination raciale*, https://www.ohchr.org/FR/ProfessionalInterest/Pages/CERD.aspx (using the term "*l'origine nationale*"); *Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racia*l, https://www.ohchr.org/SP/ProfessionalInterest/Pages/CERD.aspx (using the term "*origen nacional*"); Международная конвенция о ликвидации всех форм расовой дискриминации, https://www.ohchr.org /RU/ProfessionalInterest/Pages/CERD.aspx (using the term "национального происхождения"); and 消除一切形式种族歧视公约, https://www.ohchr.org/CH/ProfessionalInterest/Pages/CERD.aspx (using the term "民族").

> "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality."

29. In its 4 December Submission, the UAE argues that Article 1(1) excludes present nationality because Articles 1(2) and 1(3) enshrine an "incontrovertible norm of customary international law" that it is "within the unilateral sovereign jurisdiction of individual States to decide which rights and benefits to confer upon foreign nationals depending on what nationality they hold"[38]. In addition to the fact that any such sovereign prerogative is not untrammeled under general international law, the text of the CERD itself makes clear that interpreting "national origin" as inclusive of present nationality does not threaten the sovereign rights of States Parties to make *legitimate* distinctions between citizens and non-citizens—for example, in the context of granting voting rights—or to make *legitimate* distinctions between different groups of non-nationals with respect to "nationality, citizenship, or naturalization". Rather, Articles 1(2) and 1(3) expressly allow States to make such distinctions, so long as States do not do so in a way that falls afoul of Article 1(1). Indeed, as the Committee has explained,

> "Article 1, paragraph 2 must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights"[39].

30. If racial discrimination based on "national origin" did not include nationality-based discrimination, the specific exception and preservation clauses comprising Articles 1(2) and 1(3), respectively, would be unnecessary, since the other protected grounds do not encompass non-nationals as a category directly. Further, the CERD's text makes clear that Article 1(2) is an exception to Article 1(1), rather than an explicatory provision intended to clarify that distinctions based on nationality are excluded from the scope of

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[38] 4 December Submission, p. 18, para. 37; *see also* 15 January Submission, p. 11, para. 20(b).

[39] CERD Committee, *General Recommendation No. 30 on Discrimination Against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3 (2004), para. 2 (emphasis added).

the CERD. The opening provision of Article 1(3)—"*[n]othing in this Convention* may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship, or naturalization"—also leaves little doubt on this point, as it is clearly a preservation clause rather than a clause creating additional rights and obligations[40]. To the contrary, this language demonstrates that for the prohibition on nationality-based discrimination to be preserved in Article 1(3), such prohibition must already exist in Article 1(1).

31. This interpretation of the interplay between Articles 1(1), 1(2), and 1(3) has been confirmed in past general recommendations of the Committee, which contradict the UAE's position. For example, in General Recommendation No. 11, the Committee stated that:

> "Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination. Article 1, paragraph 2, excepts from this definition actions by a State party which differentiate between citizens and non-citizens. Article 1, paragraph 3, qualifies article 1, paragraph 2, by declaring that, among non-citizens, States parties may not discriminate against any particular nationality."[41]

32. The Committee has also explained that differences of treatment between citizens and non-citizens, while permissible under the CERD, are subject to clear limitations. Indeed, the Committee has reiterated that States Parties to the CERD are "under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of" fundamental rights, and that discrimination against non-citizens is a contemporary form of discrimination of serious concern[42]. Further, contrary to the UAE's framing, Article 1(2)'s exception does not grant license to discriminate against specific groups of non-

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40 Emphasis added.

41 CERD Committee, *General Recommendation No. 11 on Non-Citizens*, Doc. A/48/18 (1993), para. 1; *see also id*. para. 3; Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-citizens* (2006), p. 8 (The CERD "requires all non-citizens to be treated similarly."), https://www.ohchr.org/documents/publications/noncitizensen.pdf.

42 CERD Committee, *General Recommendation No. 30 on Discrimination Against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3 (2004), para. 3 ("Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons.").

nationals on the basis of their nationality. To that end, the Committee has repeatedly called on States parties to address instances of discrimination against non-citizens on the basis of their nationality, including in contexts similar to those at issue in the present case, such as collective expulsion and restrictions on entry. For example, in its 1998 concluding observations on Switzerland, the Committee "express[ed] disquiet" at Switzerland's "three-circle-model" immigration policy of the time, which assigned different immigration rights to individuals coming from "three categories of source countries"[43]. The Committee explained that its concerns over the three-circle-model stemmed from the fact that it "classifies foreigners on the basis of their national origin" and that "the conception and effect of this policy [was] stigmatizing and discriminatory, and therefore contrary to the principles and provisions of the Convention"[44]. In concluding observations to the Dominican Republic a decade later, the Committee similarly expressed concerns about "information received whereby migrants of Haitian origin" were subjected to collective deportations back to Haiti, and recommending that the Dominican Republic "ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or *national origin*"[45]. More recently, the Committee issued concluding observations to Japan highlighting their concerns over the fact "that Koreans who have lived for multiple generations in Japan remain foreign nationals" and that "many Korean women suffer

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[43] CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Switzerland*, U.N. Doc. CERD/C/304/Add.44 (1998), para. 6; D.M. Gross, *Immigration Policy and Foreign Population in Switzerland, World Bank Policy Research Working Paper 3853* (2006), p. 21. Under Switzerland's policy, "[t]he first circle, or inner circle, is made of EU and EFTA member countries with which the aim is to reach free mobility and abolish the status of the seasonal worker in the medium term. The second circle, or median circle, is made of countries economically and culturally close to Switzerland such as North America, Oceania, and Eastern Europe. . . . Finally, the third circle, or outer circle, is made of all other countries from which new immigrants can be accepted only under exceptional circumstances." *Id. See also* CERD Committee, *Initial reports of States parties due in 1995, Switzerland*, U.N. Doc. CERD/C/270/Add.1. (1997), para. 56 (In its report, Switzerland describes the "three-circle" model as a "restrictive policy towards the admission of foreigners to the increasingly specialized Swiss labour market.").

[44] CERD Committee, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Switzerland*, U.N. Doc. CERD/C/304/Add.44 (1998), para. 6.

[45] CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination, Dominican Republic*, U.N. Doc. CERD/C/DOM/CO/12 (2008), para. 13 (emphasis added).

multiple and intersecting forms of discrimination based on nationality and gender", and recommending that Japan take steps to prevent discrimination against Koreans[46].

33. Further, the Committee has previously stated that "differential treatment based on citizenship or immigration status will constitute discrimination" if the criteria for such differentiation "are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim"[47]. Thus, even to the extent that States *may* differentiate between particular nationalities in implementing visa or immigration policies, the CERD does not allow for differential treatment that disproportionately negatively impacts the individual concerned, for example where it results in the denial of *fundamental human rights* to non-citizens.

34. In its 15 January Submission, the UAE cites *D.F. v. Australia* in an attempt to support its argument that the Coercive Measures are permissible under the CERD because they "merely eliminate[e] an advantage [the UAE] previously extended to one particular nationality"[48]. Yet in fact, that case—in which the Committee found that Australia's legislative changes phasing out preferential access to certain benefits for New Zealand citizens residing in Australia did not fall afoul of its CERD obligations—demonstrates

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46 CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination, Japan*, UN Doc. CERD/C/JPN/CO/10-11 (2018), paras. 21, 22. The CERD Committee has also noted its concern with respect to national-origin-based discrimination in Canada. *See* United Nations, *Official Records of the General Assembly, Fifty-seventh Session, Report of the Committee on the Elimination of Racial Discrimination, Supplement No. 18*, UN Doc. A/57/18 (2002), para. 336 (noting "with concern that [Canada's] current immigration policies, in particular the present level of the 'right of landing fee', may have discriminatory effects on persons coming from poorer countries"); CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada*, UN Doc. CERD/C/CAN/CO/19-20 (2012), para. 15 (expressing concern about Canada's Bill C-11, The Balanced Refugee Act, which proposed to expedite asylum requests for individuals arriving from "safe countries", and recommending that Canada "take appropriate measures to ensure that procedural safeguards will be guaranteed when addressing asylum requests… without any discrimination based on their national origin").

47 CERD Committee, *General Recommendation No. 30 on Discrimination Against Non-Citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004), para. 4. *See also Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997, Opinion, U.N. Doc. CERD/C/54/D/10/1997 (1999) (finding that a Tunisian national with permanent residence in Denmark had suffered discrimination where he was denied a loan by a Danish bank because he was not a Danish citizen). The Committee noted that the Tunisian author of the Communication was denied the loan "on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan." *Id.* para. 9.3.

48 UAE 15 January Submission, p. 4, para. 7.

the opposite. The limitations in that case—which related to New Zealanders' access to certain benefits in Australia—were not enacted suddenly or in a punitive manner, but rather in a considered, individualized process that guaranteed protection of basic rights. In particular, New Zealanders who were in Australia on the date the changes were enacted, as well as those who fulfilled certain "transitional arrangements", continued to be treated as Australian residents for purposes of the Act (thus retaining the benefits at issue)[49].

35. In stark contrast, the UAE's Coercive Measures were not devised and implemented as a matter of ordinary-course consideration of visa or other entry restrictions for foreign nationals, and cannot be divorced from the effects that they have had on fundamental human rights of Qataris. To the contrary, as described above, the Coercive Measures were implemented in order to punish the State of Qatar by broadly targeting the Qatari people, and indeed, the UAE's actions were not limited to travel and entry restrictions, but specifically included both collective expulsion and the incitement of racial hatred against Qataris.

36. The result of the UAE's actions has been the nullification and impairment of the recognition, enjoyment and exercise of human rights and fundamental freedoms of Qataris, and the UAE's attempt at a post-hoc distortion of the facts should not be countenanced by the Committee. The UAE's actions cannot be divorced from the context in which they were enacted[50]. Prior to the imposition of the Coercive Measures, the GCC's longstanding free-mobility and common-market policies allowed Qataris, due to their status as GCC nationals and the particular historical context, to enjoy many of the same rights and benefits within the UAE as UAE nationals, and to move freely between

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[49] *D.F. v. Australia*, CERD Committee, Communication No. 39/2006, Opinion, U.N. Doc. CERD/C/72/D/39/2006 (2008), para. 4.1*; see also D.R. v. Australia*, Communication No. 42/2008, Opinion, U.N. Doc. CERD/C/75/D/42/2008 (2009).

[50] *See* CERD Committee, General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/C/GC/32 (2009), para. 5 ("The Convention . . . is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. . . . Context-sensitive interpretation also includes taking into account the particular circumstances of the States parties without prejudice to the universal quality of the norms of the Convention.").

the two countries[51]. Indeed, prior to the Measures, thousands of Qataris resided full time in the UAE, worked and attended school in the UAE[52], owned properties in the UAE, and established and ran businesses in the UAE for many years[53]. It was extremely common for families made up of both Qataris and Emiratis to live across State lines, and to travel regularly to see one another[54]. Indeed, Qataris traveled frequently and in large numbers to the UAE under the special status afforded pursuant to the GCC framework, and prior to the imposition of the Coercive Measures had little to no difficulties doing so[55]. Thousands of Qataris built their lives around this openness. Indeed, the rights enjoyed by Qataris historically and over time within the territory of the UAE—in which, as described

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[51] *See, e.g.*, **DCL-048**, para. 11 ("Emiratis were very friendly in general. Whether I went by car or by plane, I never faced any issues with immigration. The immigration process was very simple: they would look at my passport and let me enter the country."); **DCL-079**, para. 9 ("While we were in the UAE, we did not feel like it was any different from being in Qatar. We felt like it was an extension of our country, like we were at home…In general, we were welcomed and treated as if we were Emiratis. In my experience, this is what it was like to be a national of the Gulf Cooperation Council[.]"); *Id.*, para. 10 ("Traveling to the UAE was very easy: the process was very fast, we used to travel without delay and it was not expensive to travel…We used to travel with only our ID cards and did not need our passports. At the Dubai and Sharjah airports, there was a line for 'GCC nationals' and a line for others.").

[52] **DCL-073**, paras. 9, 12 ("My program [at Emirates Aviation University] began in November 2016. It was part-time, with most coursework offered on the weekends…Between November 2016 and June 2017, I traveled to the UAE on a regular basis to attend classes."); **DCL-108**, paras. 5, 6, 8 ("Although I was born and grew up in Doha, I moved to…the UAE…in the mid-1980s…My daughters are Qatari because I am Qatari, but they feel a strong connection to the UAE because it is where they had spent their entire lives…Life in the UAE was good. My family was happy, we lived in a nice apartment, and my business was doing very well.").

[53] **DCL-048**, paras. 5, 9-10 ("I purchased an apartment in the UAE…I also purchased land [ ] for investment purposes. I was planning to build two villas to either sell or rent…In addition…I owned another piece of land that was used for industrial projects[.]"); **DCL-108**, para. 7 ("I opened a small business [ ] in Dubai. [It] was a retail shop…The store was very successful, especially for the first few years...[T]he business paid my salary [and] paid for my family's home in [the UAE].").

[54] **DCL-079**, paras. 7-8 ("[M]y family…often stayed with my mother's family in the UAE—on average four, sometimes five, times a year. We would go to the UAE for religious holidays, including the two *Eids*, and we would stay there for a month. We would also make shorter trips…We were very close with our Emirati family. I had my own room at my grandmother's house, and I did not take bags with me when I visited her because I had my own clothes there. My mother did not even take her medicine with her for the same reason.").

[55] **DCL-048**, para. 10 ("It was easy to travel to the UAE prior to June 5, 2017. The flight tickets were cheap…and I would stay at a hotel in Dubai. I also sometimes drove there. I would travel alone for business or with my family for weekends and vacation."); **DCL-073**, para. 13 ("Travelling to the UAE was relatively uneventful…[Prior to 5 June 2017,] I felt no hostility against me as a Qatari."); **DCL-079**, para. 10 ("Traveling to the UAE was very easy: the process was very fast, we used to travel without delay and it was not expensive to travel…We used to travel with only our ID cards and did not need our passports. At the Dubai and Sharjah airports, there was a line for 'GCC nationals' and a line for others."); **DCL-108**, para. 8 ("I traveled to Qatar often to see my family and for business…These trips were easy to make because I did not even need to book a flight; I would usually drive to Doha through Saudi Arabia.").

above, they are entitled to many of the same rights and benefits as UAE citizens—on its own makes clear that the Coercive Measures instituted against them since 5 June 2017 constitute discrimination prohibited on the ground of "national origin" under Article 1(1), and cannot be treated as "distinctions" or "restrictions" permitted against non-citizens under Article 1(2).

37. As a result, the UAE's sudden collective expulsion of Qataris—done arbitrarily and without any consideration of individual characteristics or the provision of even basic due process—and simultaneous imposition of discriminatory travel and entry restrictions on Qataris to prevent their return and entry—again without affording even basic due process—just cannot be reconciled with the UAE's current, self-serving characterization that the measures "merely eliminate[d] an advantage it previously extended to one particular nationality"[56]. To the contrary, the UAE's actions have targeted the Qatari people as a group and damaged the exercise of Qataris' fundamental human rights, including rights enumerated in article 5 of the CERD.

38. The Coercive Measures' adverse impact on the exercise of fundamental human rights by Qataris makes clear that they go well beyond the "legitimate" and "proportional" distinctions that the Committee has previously indicated are permissible under the CERD. As explained above, the CERD Committee has criticized State immigration policies that classified foreigners along nationality-based lines or had a disproportionate impact on individuals from certain countries[57]. Similarly, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has expressed concern about similar attempts by States to enact entry bans that disproportionately affect certain groups, stating that "[u]nder the . . . International Convention on the Elimination of all Forms of Racial Discrimination, blanket bans on specific nationalities and other immigration measures that exclude on the basis of . . . national origin are unlawful"[58].

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[56] 15 January Submission, p. 4, para. 7.

[57] *See supra*, para. 32.

[58] Human Rights Council, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, U.N. Doc. A/HRC/38/52 (2018), para. 67. *See also*

39. And contrary to the UAE's attempt to justify its Coercive Measures under general international law allowing States to "decide which rights and benefits to confer upon foreign nationals depending on what nationality they hold"[59], the Coercive Measures also fall well beyond the bounds of permissible action under general international law[60]. It is without question that the expulsion of non-nationals from a State's territory, absent "an assessment of the particular case of each individual member of the group"—of which collective expulsion based on nationality, such as that effectuated against Qataris by the 5 June Directive, is the archetypical example—is prohibited under international law[61]. Further, even if the Coercive Measures *were* solely restrictions on entry rather than a

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Donald J. Trump v. Hawaii, Case No. 17-965 (2018), *Amici Curiae* Brief of International Law Scholars and Nongovernmental Organizations in Support of Respondents, p. 3, https://www.supremecourt.gov/DocketPDF/17/17-965/41737/20180330125852277_2018-03-30%20Amici%20Curiae%20Brief%20of%20International%20Law%20Scholars.pdf (the amici brief was filed by eighty-one international law scholars and a dozen non-governmental organizations with expertise in civil rights law, immigration law or international human rights law; it describes a proposed ban on entry to the United States by individuals coming from particular countries as "a prohibited distinction in immigration policy based on national origin [that] violates the human right to freedom from discrimination based on national origin under the . . . International Convention on the Elimination of All Forms of Racial Discrimination, and customary international law."). The former UN High Commissioner for Human Rights, Mr. Zeid Ra'ad al-Hussein, took the same stance on the ban at issue in *Donald J. Trump v. Hawaii*, tweeting that "[d]iscrimination on nationality alone is forbidden under #humanrightslaw." UN Office of Human Rights, TWITTER.COM (30 January 2017), https://twitter.com/UNHumanRights/status/826034077056823296.

59 4 December Submission, p. 18, para. 37.

60 *See*, *e.g.*, OECD, *Fair and Equitable Treatment Standard in International Investment Law, OECD Working Papers on International Investment, 2004/3* (September 2004), pp. 8-9, n. 32, 34, http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf ("The international minimum standard is a norm of customary international law which governs the treatment of aliens…[it applies across] a number of areas [that] include: the administration of justice in cases involving foreign nationals…full protection and security, which is usually understood as the obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks which may target…certain groups of foreigners…[A]lthough the general right *of expulsion* by the host State has never been questioned, minimum standards have been invoked concerning the way in which it is carried out, which should be the least injurious to the person affected.") (internal citations omitted).

61 Draft Articles on the Expulsion of Aliens, with commentaries, *Yearbook of the International Law Commission, 2011*, vol. II, Part Two, Arts. 9(1)-(3) (prohibiting collective expulsion, defined as the "expulsion of aliens, as a group," without "an assessment of the particular case of each individual member of the group"); European Convention on Human Rights, Protocol No. 4, Art. 4 ("Collective expulsion of aliens is prohibited."); International Convention on the Protection of the Rights of All Migrant Workers and Their Families, Art. 22(1) ("Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually."); American Convention on Human Rights, Art. 22(9) ("The collective expulsion of aliens is prohibited."); African Charter on Human and Peoples' Rights, Art. 12(5) ("The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."); Arab Charter on Human Rights, Art. 26(2) ("Collective expulsion is prohibited under all circumstances.").

clear expulsion order, they still violate international law because they discriminate against one particular nationality, are not proportional to the achievement of any legitimate aim, and fall below the international minimum standard of justice[62].

40. Accordingly, in light of the indiscriminate, arbitrary and punitive nature of the UAE's Coercive Measures, the UAE has no basis on which to argue that the Coercive Measures are proportional to the achievement of a legitimate aim.

c. "National Origin" in Light of Object and Purpose

41. Any interpretation of the CERD that would allow States parties to discriminate on the basis of an individual's present nationality would contradict the CERD's explicit object and purpose of eliminating racial discrimination "in all its forms and manifestations", in that it would limit the CERD's ability to effectively protect against contemporary forms of racial discrimination. As the Committee has previously explained, discrimination against non-citizens is a concerning source of racial discrimination today[63]. Indeed, as Professor Thornberry has explained:

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62 *See* A. Xavier Fellmeth, "Nondiscrimination as a Claiming Paradigm," *in Paradigms of International Human Rights Law* (Oxford University Press, 2016), pp. 119-120 (noting that "[g]enerally, only the least discriminatory means available will be proportionate to the aim; superfluous discrimination is always disproportionate"; also noting that the U.N. Human Rights Committee; Committee on Economic, Social and Cultural Rights; Strasbourg Court; and Inter-American Court of Human Rights have all adopted similar proportionality tests that suggest "laws limiting rights [must be] narrowly tailored to impinge minimally on the right"). *See also* J. Crawford, Brownlie's Principles of Public International Law, Oxford, OUP, 8th ed. (2012), p. 613 ("Since the beginning of the twentieth century the preponderant doctrine has supported an 'international minimum standard.'"); U.N. General Assembly, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, U.N. Doc. A/RES/40/144 (1985), Art. 2(1); *Neer v. United Mexican States*, Doc. No. 136, Opinion (Oct. 15, 1926), R.I.A.A. Vol. IV, pp. 601-661 (setting a standard of treatment of aliens concerning denial of justice, fair and equitable treatment and the minimum standard of treatment to be accorded to aliens under international investment law); World Trade Organization, General Agreement on Tariffs and Trade, Arts. I, III (incorporating the principle of non-discrimination in international trade law).

63 CERD Committee, *General Recommendation No. 30 on Discrimination Against Non-Citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004), Preamble. While part of the objective of the CERD was to bring an end "in the decolonization period" to racial superiority and hatred, as noted by Judge Salam (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Dissenting Opinion of Judge Salam, para. 3), the CERD was directed far more broadly to address and eliminate "all forms" of racism, including as the manifestation of racism evolves over time. This is reflected in the CERD's explicit language, as well as in its object and purpose. *See infra* paras. 50–51 (citing United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1313th Meeting*, U.N. Doc. A/C.3/SR.1313 (1965), p. 121, para. 6).

> "A reading of 1(2) that rules out from the Convention any concern with non-citizens could be classified in [VCLT] terms as a 'manifestly absurd or unreasonable' reading of ICERD, and as not corresponding to its object and purpose. In light of the ambition expressed in the Convention to eliminate racial discrimination, and a human rights approach *pro homine* and *pro femina*, it is reasonable to prefer effective interpretations that protect the widest span of potential victims"[64].

42. Under the UAE's self-serving interpretation of "national origin", States Parties to the CERD would be free to engage in widespread discrimination against non-citizens as part of a campaign of hatred and mistreatment implemented in an entirely arbitrary and capricious manner, so long as a State framed this discrimination as based on present "nationality" alone. The UAE's approach eviscerates the protections contained in the CERD and cannot be reconciled with either its language or object and purpose. Indeed, such an interpretation, followed to its logical conclusion, would lead to absurd results. For example, it would suggest that, prior to the break-up of the Soviet Union, discrimination in any given country against persons of Ukrainian origin was impermissible, but not against those exact same persons once Ukraine secured Statehood. The UAE's interpretation therefore assigns the term "national origin" an arbitrary meaning—one that protects groups of persons, unless the discrimination against them is framed in terms of present nationality. Further, as the Committee has previously acknowledged, "[t]he Convention . . . is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society"[65]. That human rights treaties must be interpreted in accordance with their general protective purpose is

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64 P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 158; *see also* B. Çali, "Specialized Rules of Treaty Interpretation: Human Rights" in D.B. Hollis (ed.) *The Oxford Guide to Treaties* (Oxford University Press, 2012), p. 538 ("Effectiveness is an overarching approach to human rights treaty interpretation… [O]ther more…specific interpretive principles developed in the context of each human rights treaty…all derive from the interpretive consensus that interpretations that are devoid of actual effect for human rights protections do not cohere with good faith interpretations of the wording and context of human rights treaties in the light of their object and purpose.").

65 CERD Committee, *General Recommendation No. 32 on the Meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/GC/32 (2009), para. 5; *see also Stephen Hagan v Australia*, Communication No. 26/2002, Opinion, U.N. Doc. CERD/C/62/D/26/2002 (2003), para. 7.3 ("The Committee considers…that the Convention, as a living instrument, must be interpreted and applied taking into [*sic*] the circumstances of contemporary society.")

universally recognized, including by the ICJ and regional human rights courts[66]. To this end, the Committee has repeatedly advised States parties to the CERD to "implement real solutions to racism so that *all people*, regardless of their background, could fully exercise their human rights"[67]. This applies to discrimination against non-nationals, which the Committee has previously characterized as "one of the main sources of contemporary racism"[68].

2. The *Travaux Préparatoires* Confirm that the CERD Applies to Discrimination on the Basis of Nationality

43. In its 4 December Submission, the UAE argues that a "distinction between 'nationality' and 'national origin' is clearly delineated in the *travaux préparatoires* of the CERD"[69]. In support of this point, it relies on a single amendment proposed—and ultimately withdrawn—by the representatives of the United States and France, as well as statements

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66 See *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 24 ("The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation could produce such a result. . . . The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them"); *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment of 26 June 1989, IACtHR. (Ser. C) No. 1 (1994), para. 30 ("The object and purpose of the American Convention is the effective protection of human rights. The Convention must, therefore, be interpreted so as to give it its full meaning and to enable the system for the protection of human rights entrusted to the Commission and the Court to attain its "appropriate effects"); *Soering v. the United Kingdom*, Application no. 14038/88, Judgment of 7 July 1989, ECtHR (1989), para. 87 ("In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards "practical and effective." (citations omitted)).

67 CERD Committee, *Ninety-third Session, Summary Record (Partial) of the 2457th Meeting*, U.N. Doc. CERD/C/SR.2547 (2017), para. 2 (Emphasis added).

68 CERD Committee, *General Recommendation No. 30 on Discrimination Against Non-Citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004), Preamble.

69 4 December Submission p. 16, para. 32. The UAE cites P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), pp. 103-105 for the proposition that "differentiation on the basis of nationality [] is not prohibited under the CERD." 4 Decembr Submission, p. 15, n. 31. This reference does not, however, support the UAE's proposition; rather, it describes in general terms various discussions of "national origin" by the CERD's drafters.

made by the United States representative to clarify the meaning of that amendment[70]. In fact, lengthy discussions regarding the meaning and scope of "national origin" and its relationship to "nationality" underlie the entire drafting history of the CERD, and these discussions indicate the exact opposite of the UAE's conclusion. "National origin" and "nationality" were never delineated by the drafters as distinct terms, but instead were understood to significantly overlap in meaning and scope.

44. Throughout the CERD's drafting, delegates expressed the view that the term "national origin" could be interpreted in a number of different ways, including to encompass nationality in the sense of citizenship as well as in the sense of an individual's historical-cultural connections to a State[71]. For example, Mr. Combal, the delegate from France, explained that "the term 'national origin' . . . could be interpreted in two entirely different ways. In the Brazilian amendment it was used in the sociological sense, but it might also be equated with the word 'nationality.'"[72] The delegate from Iraq agreed with the latter

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70 *See* 4 December Submission pp. 16-17, paras. 34, 35 (noting that Judges Tomka, Gaja, Gevorgian and Salam relied on an amendment "specifying that 'the expression 'national origin' does not mean 'nationality' or 'citizenship'" in concluding that the drafters of the CERD sought to exclude distinctions on the basis of nationality from the scope of the Convention); *id*. p. 16, para. 32 (in discussing that amendment, "the US representative pointed out that: '[n]ational origin differed from nationality in that national origin related to the past—the previous nationality or geographical region of the individual or of his ancestors—while nationality related to present status. The use of the former term in the Convention would make it clear that persons were protected against discrimination regardless of where they or their ancestors had come from.").

71 *E.g.*, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 84, para. 16 (recording the representative from Senegal's statement that "national origin" should be retained in Article 1, "since it would offer protection to persons of foreign birth who had become nationals of their country of residence . . . as well as foreign minorities within a State").

72 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 84, para. 15. The Brazilian amendment (A/C.3/L.1209) referenced by Mr. Combal proposed the following changes to draft Article 1(1): "In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]" Specifically, the Brazilian amendment proposed "the deletion of the words placed between square brackets" and "the addition in parenthesis of the phrase, 'and in the case of States composed of different nationalities discrimination based on such difference', after the word 'origin.'" United Nations, *Draft International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee*, U.N. Doc. A/6181, (1965), p. 12, paras. 29-30.

meaning[73], while other delegates used the terms "national origin" and "nationality" interchangeably[74].

45. Because "national origin" was often interpreted as inclusive of nationality in the sense of citizenship, some delegates worried that the term's presence in Article 1(1) would lead to restrictions on States attempting to make legitimate distinctions between citizens and non-citizens (*e.g.*, in the case of political rights usually reserved to citizens, such as voting). The delegate from Lebanon, for example, voiced this concern during early debates of the Human Rights Commission, stating that "[t]he convention should apply to nationals, non-nationals, and all ethnic groups, but it should not bind the parties to afford the same political rights to non-nationals as they normally granted to nationals"[75]. In subsequent discussions of the Third Committee, Mr. Gueye, the delegate from Senegal, further explained that:

> "the expression 'national origin' had given rise to controversy, apparently because some delegations feared that its use would confer on aliens living in a State equality of rights in areas, political or other, which under the laws of the State were reserved exclusively to nationals"[76].

46. Thus, it is clear that the delegates understood "national origin" as capable of encompassing present nationality. It was for this very reason that the debates over the inclusion of the term "national origin" in Article 1(1) took place.

47. Although the drafters were concerned about the possibility that including "national origin" in Article 1(1) would oblige States to guarantee equal rights to citizens and non-citizens, they also recognized that the aim of the CERD was to prohibit discrimination in

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73 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 85, para. 22.

74 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 84, para. 13.

75 United Nations, *Official Records of the Economic and Social Council*, *Commission on Human Rights*, *Twentieth Session, Summary Record of the Eight Hundred and Ninth Meeting*, U.N. Doc. E/CN.4/SR.809 (1964), p. 5.

76 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 84, para. 16.

the enjoyment of fundamental rights to *all persons*, and broadly agreed that some form of the term "national origin" or "nationality" would therefore be a necessary addition to Article 1(1). And they did this in full recognition of the fact that the precise meaning and scope of "national origin" had *not* been clearly delineated, but instead was left open to varying interpretations depending on culture and context. This is because failure to include the term "national" in the CERD's definition of "racial discrimination" would exclude from the CERD's substantive protections a segment of the population that was clearly at risk for discrimination. As explained by Mr. Villgrattner, the Austrian delegate, "[d]eletion of the word [national] might lead to uncertainty concerning the rights of certain groups and perhaps, eventually, to their denial"[77].

48. It was in this context that the U.S.-France amendment relied upon by the UAE was ultimately proposed. The purpose of that amendment, as the United States representative explained, "was to ensure that the Convention applied to racial discrimination in *all its forms*, while allowing *certain accepted distinctions* between citizens and non-citizens to be made by States"[78]. Had it been adopted, the U.S.-France amendment would have resulted in a new Article 1(2) providing :

> "In this Convention the expression 'national origin' does not mean 'nationality' or 'citizenship', and the Convention shall therefore not be applicable to distinctions, exclusions, restrictions, or preferences based on differences of nationality of [*sic*] citizenship"[79].

49. However, the drafters ultimately rejected the approach of explicitly excluding nationality-based discrimination from Article 1(1). Thus, the U.S.-France amendment was withdrawn in favor of a compromise amendment that provided the final text of Articles 1(1)–1(3) of the CERD:

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77 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 84, para. 13.

78 United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1985), p. 85, para. 24 (emphasis added).

79 United Nations, *Official Records of the General Assembly, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee*, U.N. Doc. A/6181, (1965), p. 12, para. 32 (describing the amendment of France and the United States of America, U.N. Doc. A/C.3/L.1212).

> "(1) In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> (2) This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party between citizens and non-citizens.
>
> (3) Nothing in the present Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality"[80].

50. In this way, the drafters dealt with the concern that citizens and non-citizens would have to be guaranteed the same political rights through express exceptions outlined in Articles 1(2) and 1(3). As explained by Ms. Tabbara, the representative from Lebanon and one of the sponsors of the compromise amendment, "[t]he amendment made it clear that the Convention would not apply to non-citizens or effect legislation on nationality, citizenship or naturalization, provided that there was no discrimination against any particular nationality"[81]. Articles 1(2) and 1(3) were therefore introduced to narrow the broad prohibition on racial discrimination contained in Article 1(1), as explained above.

51. By adopting the compromise amendment and retaining the word "national" in Article 1(1), the drafters of the CERD aimed to maintain the CERD's primary goal of eliminating *all forms* of racial discrimination. They did this by composing a comprehensive definition of "racial discrimination" that was devoid of any "lacunae"[82].

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80 United Nations, *Official Records of the General Assembly, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Report of the Third Committee,* U.N. Doc. A/6181 (1965), para. 37 (describing the compromise amendment put forward by Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland and Senegal, U.N. Doc. A/C.3/L.1238); CERD, Arts. 1(1)-1(3).

81 United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee, 1307th Meeting*, U.N. Doc. A/C.3/SR.1307 (1965), p. 95, para. 1.

82 P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 119.

A broad application of the terms in Article 1(1), in which "national origin" is given the widest application possible, is in line with the intent of the drafters. It also accords with the drafters' intent to give practical effect to the CERD in the face of ever-evolving contemporary forms of racial discrimination. Indeed, the drafters largely rejected the approach of listing specific "types" of racial discrimination, such as Nazism and anti-Semitism, in order to ensure that "the Convention [would] be a timeless one, applicable . . . to every kind of racial discrimination"[83]. As Miss King, the representative from Jamaica, explained, "[t]he Convention was intended to condemn and provide against not only the present forms of racial discrimination but any future forms as well"[84].

52. For the reasons described above, the CERD clearly encompasses discrimination against groups of individuals of a particular nationality within Article 1(1)'s prohibition on discrimination based on "national origin". As such, the Coercive Measures enacted by the UAE violate the CERD by explicitly and intentionally discriminating against Qatari nationals.

B. The CERD Prohibits the Coercive Measures Based Upon the Discriminatory Effect on Individuals of Qatari National Origin

53. The UAE's argument that "treatment based on nationality" cannot fall within the scope of CERD cannot be squared with the fact that the CERD's prohibition on discrimination is not limited to the explicit purpose of the measures—rather, in line with the CERD's general object and purpose of eliminating "all forms" of racial discrimination, Article 1(1) makes clear that the CERD encompasses discrimination in either "purpose or effect"[85]. The Committee has thus previously determined that the CERD prohibits both "purposive or intentional discrimination and discrimination in effect"[86], and has stated that "[i]n seeking to determine whether that action has an effect contrary to the

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83 United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee*, 1313th Meeting, U.N. Doc. A/C.3/SR.1313 (1965), p. 121, para. 6.

84 United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee, 1313th Meeting*, U.N. Doc. A/C.3/SR.1313 (1965), p. 122, para. 13.

85 CERD, Art. 1(1).

86 CERD Committee, *General Recommendation No. 32 on the Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, U.N. Doc. CERD/C/GC/32 (2009), para. 7.

Convention, [the Committee] will look to see whether an action has an . . . unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin"[87].

54. Judge Crawford reached the same conclusion in *Ukraine v. Russia*, a case brought under the CERD to the ICJ:

> "[T]he definition of 'racial discrimination' in Article 1 of CERD does not require that the restriction in question be based expressly on racial or other grounds enumerated in the definition; it is enough that it directly implicates such a group on one or more of these grounds. Moreover, whatever the stated purpose of the restriction, it may constitute racial discrimination if it has the 'effect' of impairing the enjoyment or exercise, on an equal footing, of the rights articulated in CERD"[88].

55. Thus, independent of whether nationality-based discrimination is *per se* prohibited under the CERD—though it is, as discussed in Section A—the Coercive Measures violate the CERD because they have an unjustifiable negative impact on persons who are of Qatari national origin in a historical-cultural sense uncontested by the UAE: on the basis of characteristics such as "heritage" or their ability to "trace" their origin to Qatar[89].

56. As explained above, the dictionary definitions of "national" and "origin", taken together, suggest that the ordinary meaning of "national origin" refers to the belonging of a person—or a person's ancestors—to a given country or nation. In addition to present nationality, the term unquestionably encompasses such belonging in the sense of historical or family ties, geographic origins, ancestry or one's country of birth[90]. The prohibition on discrimination on the basis of belonging to a given country or nation is

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87 CERD Committee, *General Recommendation No. 14 on Article 1, Paragraph 1, of the Convention*, U.N. Doc. A/48/18 (1993), para. 2.

88 *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, Declaration of Judge Crawford* (19 April 2017), para. 7.

89 *See* 4 December Submission, p. 18, para. 35.

90 Professor Thornberry has explained that the two terms "national origin" and "ethnic origin" often function "as a yoked pair of workhorses, employed whenever issues of color ('visible minorities') are not the most prominent markers of discrimination." P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), p. 126.

therefore consistent with the CERD's object and purpose of eliminating all forms of racial discrimination, including those forms of racism that might be related to, but not entirely covered by, other enumerated grounds such as "ethnic origin" and "descent"[91]. It is also consistent with the CERD's *travaux préparatoires*[92].

57. As the UAE knows, in the present context, "Qatari" does not only refer to a "current nationality"—it also describes a historical-cultural community linked to the modern State of Qatar and, as explained above, is defined by shared heritage or descent, particular family or tribal affiliations, and participation in national traditions and culture, as well as geographical ties to what is now Qatar. This group is easily identifiable to other people living in the Gulf, including based on their uniquely "Qatari" dialect and dress. Individuals belonging to this community also generally hold Qatari nationality, and comprise the significant majority of Qatari nationals, meaning that the UAE's distinctions "on account of nationality or citizenship"[93] discriminate in effect against Qataris in the historical-cultural sense.

58. The origins of a historical-cultural community of "Qataris" can be traced at least to the mid- to late-1800s. During this time period, members of a prominent tribe living in the area that is now Qatar began to amass influence, and by the 1850s and 1860s, the tribe's

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91 *See* CERD Committee, *General Recommendation No. 29 on article 1, paragraph 1, of the Convention (Descent)* (2002), Preamble ("Confirming the consistent view of the Committee that the term 'descent' in article 1, paragraph 1, [of] the Convention does not solely refer to 'race' and has a meaning and application which complement the other prohibited grounds of discrimination.").

92 As explained above, the drafters viewed "national origin" as inclusive of both an individual's present nationality and historical-cultural affiliations linked to a particular State, and sought to balance the concern that non-citizens would be guaranteed equal rights to citizens if "national origin" was included in Article 1(1) against the need to ensure that the CERD would protect against "all forms" of discrimination. In that regard, the drafters of the CERD also expressed concerns about possible discrimination on the basis of an individual's historical-cultural affiliations such as language, ancestry, or national traditions. In so doing, the delegates confirmed that a group of people defined by certain historical-cultural "national" affiliations—for example, a "mother tongue," national traditions or beliefs, or ancestry tied to a particular geographical region—was meant to fall within the scope of the CERD's substantive protections. *See* United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, 1304th Meeting*, U.N. Doc. A/C.3/SR.1304 (1965), p. 85, paras. 21, 23; United Nations, *Official Records of the Economic and Social Council*, *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, *Sixteenth Session*, U.N. Doc. E/CN.4/Sub.2/SR.411, p. 5. In practical terms, such a people might exist across different States, might exist as a minority group living within a State, or might be tied to a particular State, either presently or historically.

93 4 December Submission, p. 15, para. 31.

patriarch—Muhammed bin Thani al-Wadhiri—had begun to operate as "de facto ruler of Qatar"[94]. In 1868, the British entered into a treaty with Muhammed bin Thani as head of "a distinct political entity"[95], recognizing him as the "primary local authority" of Qatar and as representative of the Qatari people[96]. The Al Thani family has continuously ruled over the territory that forms modern day Qatar ever since. In 1916, Muhammed bin Thani al-Wadhiri's son signed a treaty placing Qatar under British protection, a situation that was maintained until Britain's withdrawal from the Gulf region in 1971, as a result of which Qatar was formally established as an independent State[97].

59. By the 1970s, the sense of a "Qatari" identity as the primary point of self-identification[98] for the people living in this area was well-established, and it has only strengthened in the decades since[99]. As historians have explained, modern-day Gulf peoples "share a similar lifestyle but not a common identity, except perhaps in the eyes of outsiders"[100]. Today, there is a strong sense of a uniquely "Qatari" identity that is tied to belonging in the

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94 K. Eggeling, *Cultural Diplomacy in Qatar* ("The Al Thani first consolidated their power over the territory that forms modern day Qatar through two treaties with the British in 1868 and 1916 that recognized the tribe as the primary local authority.").

95 Matthew Gray, *Qatar: Politics and the Challenges of Development* (Lynne Rienner Publishers, 2010), p. 26.

96 *See* Rosemarie Said Zahlan, *The Making of the Modern Gulf States* (Unwin Hyman Ltd., 1989), p. 85 (describing Qatar's former status as a dependency of Bahrain and stating that "in the eastern villages of Doha and Wakrah . . . . Bahrain faced intermittent opposition from the people of Qatar" prior to the establishment of the Qatari State; also describing a meeting between Muhammed bin Thani (1868-76) and a British official as "implicitly recogniz[ing] Muhammed bin Thani—as well as the people of Qatar—as being independent of Bahrain.").

97 Matthew Gray, *Qatar: Politics and the Challenges of Development* (Lynne Rienner Publishers, 2010), pp. 28, 35-36.

98 CERD Committee, *General Recommendation No. 8 Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention*, U.N. Doc. A/45/18 (1990) (noting that identification as a member of a particular racial or ethnic group or groups "if no justification exists to the contrary, [shall] be based upon self-identification by the individual concerned.").

99 *See* Lawrence G. Potter, *Society in the Persian Gulf: Before and After Oil*, Center for International and Regional Studies, Georgetown University in Qatar (2017), p. 23 (describing how "state citizenship has increasingly become the most important identity" in the Gulf States, particularly within the last fifty years).

100 Lawrence G. Potter, "Society in the Persian Gulf: Before and After Oil," Center for International and Regional Studies, Georgetown University in Qatar, Occasional Paper No. 18 (2017), p. 4.

historical-cultural community of Qataris and identification with the Qatari State and its leaders[101].

60. Social scientists have similarly described identity in the Gulf in terms of a "civic ethnocracy", defined as "a political system based on kinship, real or presumed"[102]. In the particular context of the Gulf, "the defining feature [of such systems] is not race, language or religion but citizenship conceived in terms of shared descent"[103]. Indeed, across the Gulf, citizenship is granted on the basis of "shared descent" or other historical-cultural ties[104].

61. Article 1 of the CERD must be interpreted and applied in the light of this particular Gulf context, and the fact that nationality is generally only conferred on persons with a close historical-cultural connection to the State of their nationality. As explained above, Qatar generally requires that an individual be a member of the historical-cultural community of Qataris in order to qualify for Qatari nationality[105]. As a practical matter, this means that the significant majority of Qatari nationals—those belonging to the group explicitly targeted by the UAE—are also of Qatari origin in the sense of the historical-cultural

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101 The collective "Qatari" identity is celebrated on Qatar National Day. As scholars have explained, Qatar's National Day "seeks to commemorate the ascendency of a leveling nationalism over the varied pre-statal social topography." On National Day, large tents are erected for each tribe, and celebrations include "performance[s] of tribal belonging" such as poetry readings and ceremonial performances. *See* Andrew M. Gardner and Ali Alshawi, "Tribalism, Identity and Citizenship in Contemporary Qatar," 8:2 *Anthropology of the Middle East* 46 (2013), p. 54.

102 Anh Nga Longva, "Neither Autocracy Nor Democracy but Ethnocracy: Citizens, Expatriates and the Socio-Political System in Kuwait," *in* Dresch and Piscatori, eds., *Monarchies and Nations: Globalisation and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 119.

103 Anh Nga Longva, "Neither Autocracy Nor Democracy but Ethnocracy: Citizens, Expatriates and the Socio-Political System in Kuwait," *in* Dresch and Piscatori, eds., *Monarchies and Nations Nations: Globalisation and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 119.

104 *See, e.g.*, Paul Dresch, "Debates on Marriage and Nationality in the United Arab Emirates," *in* Paul Dresch and James Piscatori, eds., *Monarchies and Nations: Globalisation and Identity in the Arab States of the Gulf* (I.B. Tauris, 2005), p. 141 (describing Kuwait's nationality law, which set the pattern followed by other Gulf States and defined Kuwaitis as those who were normally resident in Kuwait before 1920).

105 *See, e.g., Qatar: Law No. 38 of 2005 on the acquisition of Qatari nationality* [Qatar], 30 October 2005, Art. 1 (defining Qatari nationals, including those historically resident in Qatar and those of Qatari heritage); *see also United Arab Emirates: Federal Law No. 17 for 1972 Concerning Nationality, Passports and Amendments Thereof*, [United Arab Emirates], 18 November 1972, Art. 5 ("[t]he nationality of the State may be granted to…[a]n *Arab individual from Omani, Qatari or Bahraini origin* residing in the State on continuous and lawful basis for at least three years directly before the date of submitting [a] naturalization application") (emphasis added).

connections described above: shared heritage or descent, particular family or tribal affiliations, geographical ties to what is now Qatar, and participation in national traditions and culture. That Qatari nationality is restrictive and largely coterminous with Qatari identity in this sense is well known to the UAE, and its attempts to characterize the Coercive Measures as "differentiated treatment on the basis of nationality"[106] alone should therefore not be credited. As the UAE is well aware, discrimination on the basis of Qatari nationality is in fact a convenient way to target individuals of Qatari origin, as discrimination on the ostensible basis of nationality will unquestionably have a disproportionate impact on individuals of Qatari heritage or descent.

62. In this case, the Coercive Measures imposed by the UAE constitute violations of the CERD regardless of their purpose, because they have in fact had a severe impact on the historical-cultural community of Qataris[107]. Further, despite the UAE's assertions that the Coercive Measures apply only "on the basis of nationality", they have adversely affected many non-Qatari nationals of Qatari heritage. As noted in Qatar's Communication, this includes the children of Qatari mothers who hold Emirati nationality, who have suffered from painful family separation as a result of the Coercive Measures[108].

63. Thus, the UAE's Coercive Measures have had a large-scale, adverse impact on individuals of Qatari national origin in the historical-cultural sense. The discriminatory effects of the Coercive Measures on these individuals alone constitute violations under the CERD and bring Qatar's Communication within the ambit of the Committee's competence. Further, while the effects alone are sufficient, the punitive nature of the UAE's actions, in combination with the specific context of the Gulf, in which nationality is largely coterminous with "national origin" in a historical-cultural sense, suggests that these effects are also by design. The UAE is well aware of the fact that nationality is closely correlated with historical-cultural ties in the Gulf region, and it must have known

106 4 December Submission, p. 15, para. 30.

107 See Qatar's Communication, pp. 19-25, paras. 41-55.

108 Qatar's Communication, p. 20, para. 43; *see also id.* pp. 48-50, paras. 113-119 (noting that the UAE's actions were "specifically designed to encourage hostility and incite hatred against Qataris" and have "contributed to a general culture of fear for Qataris and those related to them").

that the natural consequences of enforcing these measures against Qatari nationals would include severe adverse impacts on individuals of Qatari origin. Given this context, in addition to the UAE's repeated assertions that the Coercive Measures were implemented as a means to punish Qatar, it is clear that the UAE used nationality as an efficient approximation to target and damage the Qatari people.

III. THE COMMITTEE HAS JURISDICTION OVER QATAR'S ARTICLE 11 COMMUNICATION BECAUSE QATAR CONSIDERS THAT THE UAE IS NOT GIVING EFFECT TO THE PROVISIONS OF THE CERD

A. The UAE Distorts the Committee's Role and the Requirements of Article 11

64. Pursuant to the plain text of the CERD, the Chairman of the Committee "shall appoint an *ad hoc* Conciliation Commission" for any matter referred to the Committee under Article 11 where, in relevant part: (*1*) a State Party "considers that another State Party is not giving effect to the provisions of this Convention"; and (*2*) "the matter is not adjusted to the satisfaction of both parties … within six months after the receipt by the receiving State of the initial communication"[109]. These requirements under Articles 11(1) and 11(2) establish minimal standards in keeping with the Committee's contemplated role under Articles 11 to 13 as a mechanism to promote conciliation as a means to resolve disputes between States Parties to the CERD[110].

65. As an initial matter, Qatar categorically disagrees with the UAE's notion that the Committee does not have jurisdiction because the UAE's violations have ended. Qatar is not asking the Committee to find jurisdiction and proceed with the formation of a Conciliation Commission to assign blame for past transgressions; to the contrary, as addressed below in Section II.B, by virtue of the process envisaged in Articles 11 to 13, Qatar seeks to address violations that are continuing to this day.

66. But the UAE also seriously misstates the requirements of the CERD, when it argues that the Committee and any *ad hoc* Conciliation Commission that may be appointed "only has jurisdiction to consider allegations of ongoing violations of the CERD" because Article

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109 CERD Arts. 11(1)-(2).

110 The exhaustion requirement contained in Article 11(3) is addressed in Section IV, below.

11 uses the present tense when it states "another State Party *is not giving effect* to the provisions of this Convention"[111]. As an initial matter, the present tense phrase "is not giving effect to" relates to the time at which the matter is brought to the attention of the Committee and requires only that the violation was ongoing when Qatar submitted its Article 11 Communication. And notwithstanding the UAE's selective quotation, Article 11 actually starts with the language that "*if a State Party considers* that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee"[112]. The "matter" that is not adjusted "to the satisfaction of both parties" for purposes of Article 11(2) is precisely that which is referred to in the opening sentence of Article 11(1). Accordingly, the requirement triggering the advancement of the procedure is what a State Party "considers" to be the case as to whether another State Party is not giving effect to the CERD.

67. That requirement is satisfied here. Qatar certainly "considers" that the UAE is "not giving effect to the provisions of the Convention" by continuing to enforce the Coercive Measures, and therefore has properly brought this matter to the Committee under Article 11. The October and November 2018 correspondence by Qatar and the UAE before the Committee clearly demonstrates that the matter qualifies for referral under Article 11; Qatar does not consider the matter to be adjusted to its satisfaction and accordingly referred the matter back to the Committee via its letter of 29 October 2018. Accordingly, nothing more is needed under Articles 11(1) or 11(2) for the Committee to exercise its competence under Articles 11 to 13, including to appoint an *ad hoc* Conciliation Commission pursuant to Article 12.

68. Indeed, to construe Article 11 as the UAE advocates, does harm not only to the plain language of the CERD, but is also manifestly illogical in light of the protective purpose

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111 4 December Submission, p. 22, para. 46 (emphasis added); 15 January Submission, p. 12, para. 22.

112 CERD Arts. 11(1) (emphasis added). Language of this nature is deemed to be self-judging, conferring wide discretion on a contracting party to unilaterally consider the scope and applicability of a treaty provision. *See, e.g.*, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment, I.C.J. Reports 2008*, p. 226, para. 135, p. 229, para. 145 (interpreting Article 2(c) of the Convention on Mutual Assistance in Criminal Matters between Djibouti and France, which provided that assistance in proceedings relating to criminal offences "may be refused […] if the requested state *considers that*" one of several conditions was present, as providing a State to which a request for assistance has been made with "very considerable discretion").

of the CERD and the positive conciliatory role contemplated for the Committee through the Commission mechanism. In particular, while the UAE states that the Committee is "prevented from continuing to entertain…a matter once that previous failure to give effect to the CERD's provisions has already been rectified"[113], the UAE's subjective opinion that it believes the matter with Qatar to be "rectified" cannot determine whether the Committee has jurisdiction to consider Qatar's Communication. This question of whether or not a State Party is giving effect to its obligations under the CERD is precisely the matter that the Article 11 to 13 process was designed to resolve. To determine otherwise would be absurd: the Committee would be divested of jurisdiction if the allegedly offending party simply stated that the matter had been "rectified". Nothing in the language or purpose of Articles 11 to 13 supports such a nonsensical result.

B. Qatar's Communication is Properly Before the Committee

69. To the extent the UAE argues that the Committee lacks jurisdiction because there exists insufficient evidence of its ongoing violations of the CERD[114], the UAE is wrong both as a legal and factual matter. As a legal matter, the question of whether a party has put forth sufficient evidence to demonstrate that another party is in violation of the CERD should be considered by the *ad hoc* Conciliation Commission when assessing the merits of the dispute and preparing its "findings on all questions of fact relevant to the issue between the parties" in accordance with Article 13. As a result, it would make no sense for the underlying merits to be addressed by the Committee as a matter of jurisdiction or admissibility.

70. But in any event, the UAE is also wrong to question sufficiency of evidence as a factual matter. The UAE disingenuously cites the dissenting opinions of ICJ judges, but omits the fact that the majority of the ICJ ruled in favor of Qatar in those proceedings and indicated provisional measures to protect the rights of Qataris under the CERD precisely because the UAE's Coercive Measures plausibly endangered the rights of Qataris under the CERD:

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113 4 December Submission, p. 22, para. 47.

114 4 December Submission, pp. 22-24, paras. 46-53; 15 January Submission, p. 12-13, paras. 23-25.

> "In the present case, the Court notes, on the basis of evidence presented to it by the Parties, that the measures adopted by the UAE on 5 June 2017 appear to have targeted only Qataris and not other non-citizens residing in the UAE. Furthermore, the measures were directed to all Qataris residing in the UAE, regardless of individual circumstances. Therefore, it appears that some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention"[115].

71. In so holding, the ICJ drew from an evidentiary record that included multiple well-documented reports detailing the detrimental human rights impacts of the Coercive Measures, produced by independent international observers such as the UN Office of the High Commissioner for Human Rights, Amnesty International, Human Rights Watch, and Qatari organizations like Qatar's National Human Rights Committee[116]. On this

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115 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates*), Provisional Measures Order, p. 20, para. 54. Indeed, in the context of individual complaints brought pursuant to Article 14 of the CERD, the Committee has found that a complaint is admissible so long as the violations alleged *may* fall within the scope of the Convention. See, e.g., *Stephen Hagan v. Australia*, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003), p. 10, para 6.2("As to the State party's arguments that the petition falls outside the scope of the Convention and/or is insufficiently substantiated, the Committee considers that the petitioner has sufficiently substantiated, for purposes of admissibility, that his individual claim *may* fall within the scope of application of the provisions of the Convention. … [T]he Committee deems it more appropriate to determine the precise scope of the relevant provisions of the Convention at the merits stage of the petition."). Indeed, the standard for cases brought under Articles 11 to 13 of the Convention cannot be higher than the standard established for individual complaints under Article 14, particularly given the far more minimal requirements set by Articles 11 to 13 that must be met in order for a State Party to bring a matter to the Committee's attention.

116 *See* **Annex 11**, OHCHR 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 1**, Amnesty International, *Families ripped apart, freedom of expression under attack amid political dispute in Gulf* (9 June 2017), https://www.amnesty.org/en/latest/news/2017/06/families-ripped-apart-freedom-of-expression-under-attack-amid-political-dispute-in-gulf/; **Annex 3**, Amnesty International, *Gulf/Qatar dispute: Human Dignity Trampled and Families facing uncertainty as sinister deadline passes* (19 June 2017), https://www.amnesty.org/en/latest/news/2017/06/gulf-qatar-dispute-human-dignity-trampled-and-families-facing-uncertainty-as-sinister-deadline-passes/; **Annex 10**, Amnesty International, *Gulf dispute: Six months on, individuals still bear brunt of political crisis* (14 Dec. 2017), https://www.amnesty.org/en/documents/mde22/7604/2017/en/; **Annex 5**, Human Rights Watch, *Qatar: Isolation Causing Rights Abuses* (12 July 2017), https://www.hrw.org/news/2017/07/13/qatar-isolation-causing-rights-abuses; **Annex 6**, Human Rights Watch, *Gulf Crisis Shows How Discrimination in Saudi Arabia, Bahrain, UAE, and Qatar Tears Families Apart* (21 July 2017), https://www.hrw.org/news/2017/07/21/gulf-crisis-shows-how-discrimination-saudi-arabia-bahrain-uae-and-qatar-tears; **Annex 2**, National Human Rights Committee, *First Report Regarding the Human Rights Violations as a Result of the Blockade on the State of Qatar* (13 June 2017); **Annex 4**, National Human Rights Committee, *Second Report Regarding the Human Rights Violations as a Result of the Blockade on the State of Qatar* (1 July 2017); **Annex 7**, National Human Rights Committee, *100 Days Under the Blockade* (30 August 2017); **Annex 9**, National Human Rights Committee, *6 Months of Violations, What Happens Now? The Fourth General Report on the Violations of Human Rights Arising from the Blockade of the State of Qatar* (5 Dec. 2017); **Annex 12**, National Human

basis, the ICJ specifically observed that "many Qataris residing in the UAE [on 5 June 2017] appeared to have been forced to leave their place of residence without the possibility of return," noting that "a number of consequences apparently resulted from this situation and that the impact on those affected seem to *persist to this date*"[117]—namely: "UAE-Qatari mixed families have been separated; Qatari students have been deprived of the opportunity to complete their education in the UAE and to continue their studies elsewhere since UAE universities have refused to provide them with their educational records; and Qataris have been denied equal access to tribunals and other judicial organs in the UAE"[118]. Notwithstanding the ICJ's indication of provisional measures, the UAE has not rescinded its Coercive Measures, going so far as to summarily reject Qatar's offer to work collaboratively to monitor the implementation of the Provisional Measures Order[119]. Still today in its submissions before the Committee, the UAE views itself as never having violated the CERD[120], suggesting that any change in its

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Rights Committee, *A Year of the Blockade Imposed on Qatar* (June 2018). *See also* Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, U.N. Doc. A/HRC/39/54 (30 August 2018), para. 9 ("The Special Rapporteur…continues to share the concerns expressed by the United Nations High Commissioner for Human Rights in June 2017 that the measures adopted are overly broad in scope and implementation, and agrees that they have the potential to seriously disrupt the lives of thousands…simply because they belong to one of the nationalities involved in the dispute."); **Annex 8**, National Human Rights Committee, *Report of the NHRC on Violations of the Right to Private Property due to the Siege Imposed on the State of Qatar* (30 August 2017); **Annex 15**, National Human Rights Committee, *Gulf Crisis: Continuing human rights violations by the United Arab Emirates* (23 Jan. 2019).

Qatar's NHRC is an independent national human rights institution that has received an "A" rating by the Global Alliance of National Human Rights Institutions ("GANHRI") consistently since its reorganization in 2010. A GANRHI "A" rating indicates that the institution is in full compliance with the United Nations Paris Principles, which provide the international benchmarks against which national human rights institutions are accredited by GANHRI. *See* GANRHI, *Chart of the Status of National Institutions Accredited by the Global Alliance of national Human Rights Institutions: Accreditation status as of 21 February 2018*, p. 3, *available at*, https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20Chart.pdf.

117 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures Order*, p. 24, para. 68 (emphasis added).

118 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures Order*, p. 24, para. 68. On this basis, the Court ordered the UAE to ensure that (1) separated families are reunited, (2) Qatari students are afforded the opportunity to continue their studies in the UAE or to receive their educational records if they prefer to study elsewhere, and (3) Qataris affected by the Coercive Measures are allowed access to tribunals and other judicial organs of the UAE. Provisional Measures Order, p. 27, para. 79.

119 **Annex 13**, Letter from Saeed Ali Yousef Alnowais, Agent of the UAE, to Philippe Couvreur, Registrar of the International Court of Justice (12 September 2018).

120 4 December Submission, pp. 2-3, 10-12, paras. 3-4, 18-22; 15 January Submission, paras. 7-13.

policy or practice in actuality has not followed. Indeed, the UAE's statement on 5 July 2018 "clarifying the legal position of Qatari nationals living in the UAE" did not absolve it of the ongoing violations based on its initial statement and only confirmed the continued Coercive Measures. In any case, the UAE's violations as referred to the Committee are clearly ongoing, and the effects of those measures are still being deeply felt by Qataris[121].

72. In sum, Qatar has provided more than sufficient evidence in support of the Committee's jurisdiction under Article 11. The UAE, by arguing that the Committee does not have jurisdiction to consider the matter, seeks to create new jurisdictional requirements that simply do not exist in the text of the CERD. Because Qatar "considers" that the UAE is "not giving effect to the provisions of the Convention" by continuing to enforce the Coercive Measures, and the matter "has not been adjusted" to Qatar's satisfaction, it has properly referred its Communication to the Committee under Article 11.

IV. QATAR'S COMMUNICATION IS ADMISSIBLE

73. The UAE also argues that Qatar's Communication is inadmissible because, the UAE says, (1) Qatar has failed to exhaust local remedies; (2) there are concurrent proceedings pending before the ICJ; and (3) the Communication constitutes an abuse of rights and process. None of these arguments is persuasive. Article 11(3)'s exhaustion requirement does not bar Qatar's claims (**Section IV.A**); the existence of concurrent proceedings before this Committee and the ICJ does not render Qatar's Communication inadmissible (**Section IV.B**); and the Communication is not an abuse of rights and process (**Section IV.C**).

[121] Qataris continue to report violations of Convention-protected rights to this day—among others, families remain separated, students continue to be denied access to education and educational records, and Qataris continue to be denied access to justice in the UAE. *See, e.g.,* **DCL-004** and **DCL-079** (describing continued separation from family in the UAE, including one declarant's inability to attend the funerals of two family members); **DCL-073** (describing delayed graduation date resulting from student's inability to continue studies in the UAE); **DCL-125** (describing the continued denial of educational records); **DCL-048**, **DCL-135**, **DCL-093**, and **DCL-146** (describing declarants' inability to communicate with previously retained lawyers or to retain new counsel).

A. Article 11(3)'s Exhaustion Requirement Does Not Bar Qatar's Claims

74. The UAE submits that "the Committee must decline to hear Qatar's … Communication because Qatar has failed to establish that local remedies have been exhausted as required under Article 11.3"[122].

75. The UAE is wrong. As explained below, Article 11(3)'s requirement to exhaust local remedies does not apply to Qatar's claims (**Section IV.A.1**), but even if it did, the UAE has failed to discharge its burden to prove the existence of any effective and reasonably available remedies that have not been exhausted (**Section IV.A.2**).

1. Article 11(3)'s Local Remedies Rule Is Inapplicable to Qatar's Claims "In Conformity with the Generally Recognized Principles of International Law"

76. Article 11(3) provides:

> "The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has 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"[123].

77. The UAE notes that Article 11(3) "is a *reflection* of the customary international law principle that States may not exercise diplomatic protection on behalf of its [sic] nationals by instituting international proceedings unless local remedies first have been exhausted".[124] But Article 11(3) is more than just a reflection of the requirement to exhaust local remedies. Under its express terms, in assessing the local remedies rule, this Committee *must* apply "generally recognized principles of international law"[125]. And

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122 4 December Submission, para. 54(a).

123 CERD, Art. 11(3).

124 4 December Submission, para. 57 (emphasis added).

125 CERD, Art. 11(3). It should also be added that the "generally recognized principles of international law" are not static; to the contrary, they evolve. M. C. Bassiouni, "A Functional Approach to 'General Principles of International Law'", *Michigan Journal of International Law*, Vol. 11 (1990), p. 777 ("[I]t would be stifling not to inject into the sources of any legal system the capability of growth and development. Every national legal system includes such a process, either through the jurisprudence of its courts or through doctrine as developed by scholars. Thus, it can be said that legal principles evolve and that a legal

those principles make it clear that the rule does not apply to claims of the kind before this Committee. The UAE's objection must therefore be dismissed.

78. The UAE's measures giving rise to Qatar's Communication constitute a systematic, generalized policy and practice that has caused, and continues to cause, widespread violations of the CERD. Generally recognized principles of international law do not require the exhaustion of local remedies in cases involving breaches of this nature (**Section IV.A.1.a**). Qatar is also making claims in its own right that are *interdependent* with the claims brought on behalf of its nationals. Qatar's claims are also *preponderantly* based on direct injury to it, not its nationals. Under general principles of international law, there is no need to exhaust domestic remedies in cases involving "mixed" claims of either kind (**Section IV.A.1.b**).

79. Each of these reasons, which independently warrant the dismissal of the UAE's objection, is discussed in turn below.

a. The Local Remedies Rule Does Not Apply in Circumstances of Widespread Harm or Generalized State Policies and Practices

80. The "generally recognized principles of international law" that Article 11(3) expressly incorporates are unequivocal: the local remedies rule does not apply in cases of widespread harm or generalized State policies and practices. The reason is obvious: requiring all Qataris aggrieved by the UAE's measures to exhaust local remedies (assuming such remedies existed) would be impracticable, such that it would lead to the

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mechanism or process for the recognition and application of this evolutive aspect of law must exist in international law."). Needless to say, the "generally recognized principles of international law" relevant to human rights protection are undoubtedly more progressive today than they were even at the time the CERD was concluded. Indeed, "[t]he Convention, as the Committee has observed on many occasions, is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society.". CERD Committee, General Recommendation XXXII (2009), para. 5. *See also, e.g.,* CERD Committee, General Recommendation XXXIII (2009), para. 1(d) (referring to the "evolution in the field of human rights since [the] adoption" of the CERD); CERD Committee, General Recommendation XXXV (2013), para. 4 (referring to this Committee's work "in implementing the Convention as a living instrument".).

application of alleged remedies that would unquestionably be "unreasonably prolonged" and ineffective[126].

81. Indeed, in no case, before any court or body in any jurisdiction, has the local remedies rule been applied in circumstances involving widespread and systematic harms like those before this Committee.

82. For example, the ICJ has required local remedies to be exhausted *only* when the claims involved a discrete number of easily identifiable individuals[127]. By contrast, the requirement has not been applied—indeed, it is rarely even mentioned by litigant States[128]—in cases involving, in the words of counsel for the UAE at the hearing on provisional measures before the ICJ, "a high number of persons"[129].

83. Thus, in *Georgia v. Russian Federation*—a case also involving the CERD—Georgia argued that Russia had committed violations of the CERD against the entire "ethnic Georgian, Greek and Jewish populations in South Ossetia and Abkhazia"[130]. Yet even though Georgia explicitly brought claims "*as parens patriae for its citizens*"[131], Russia

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126 *See* CERD, Art. 11(3) (explicitly stating that the local remedies rule does not apply "where the application of the remedies is unreasonably prolonged".).

127 *See, e.g., Interhandel (Switzerland v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1959, p. 29 (finding that "*one interest, and one alone*, that of Interhandel […] induced the Swiss Government to institute international proceedings") (emphasis added); *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, ICJ Reports 1989, p. 43, para. 52 (noting that "the matter which colours and pervades the United States claim as a whole, is the alleged damage to *Raytheon and Machlett* [two US companies]") (emphasis added); *see also Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 2007, para. 48.

128 In the current case concerning the CERD between Qatar and the UAE now pending before the Court, the UAE has invoked the local remedies rule. While the Court refused to consider it at the Provisional Measures stage, it has not yet reached a final decision. *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, para. 42.

129 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/15, p. 10, para. 12 (Treves).

130 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, para. 16.

131 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, para. 16 (some emphasis added).

did not argue that Georgian citizens had failed to exhaust local remedies. Nor did the Court raise the issue *proprio motu*[132].

84. In the ongoing dispute between Ukraine and Russia—another case involving the CERD—Ukraine alleges that Russia is "pursuing the cultural erasure" of all "non-Russian communities [in Crimea] through a systematic and ongoing campaign of discrimination"[133]. At the provisional measures stage, neither Russia nor the Court raised the local remedies rule[134].

85. The *Case Concerning Armed Activities on the Territory of the Congo* provides yet another example. In that case, the Democratic Republic of the Congo ("***DRC***") accused Rwanda of "massive, serious and flagrant violations of human rights" under several treaties, including the CERD[135]. Admissibility and jurisdiction were vigorously contested. Yet neither the parties nor the Court raised the exhaustion issue[136].

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132 This is important because the Court has made clear that it has the power to "take up, proprio motu, *any* preliminary question, whether of admissibility or of jurisdiction", that "*might* constitute a bar to any further examination of the merits of the Applicant's case." *See, e.g., United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, para. 33 (emphasis added).

133 *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, para. 33.

134 *See generally, e.g., 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.

135 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, para. 1.

136 *See generally Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006. Cases *not* involving the CERD but involving other widespread violations of human rights confirm the irrelevance of the local remedies rule in the circumstances of this case. By way of just one example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina alleged that Yugoslavia had violated numerous obligations "toward the People and state of Bosnia and Herzegovina". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, ICJ Reports 1996, para. 13. Yugoslavia did not argue that all of the "People" of Bosnia and Herzegovina needed first to exhaust local remedies before the State could raise claims under the Genocide Convention. *See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections. Nor did the Court require such showing.

86. Human rights bodies similarly "attach different consequences to systematic breaches, *e.g.*, in terms of the *non-applicability of the rule of exhaustion of local remedies*"[137]. They do so notwithstanding the existence in the underlying treaty of provisions requiring the exhaustion of domestic remedies as a condition of admissibility[138].

87. Hence, under the European Convention on Human Rights ("ECHR"), the Court "may only deal with the matter after all domestic remedies have been exhausted, *according to the generally recognized rules of international law*, and within a period of six months" from "the date on which the final decision was taken"[139].

88. Nevertheless, in *Republic of Ireland v. United Kingdom*, the European Court of Human Rights ("ECtHR") noted that:

> "A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system … The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies … [I]n principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice"[140].

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137 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 113 ("when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the *non-applicability of the rule of exhaustion of local remedies*") (emphasis added).

138 *See, e.g.,* American Convention on Human Rights, Art. 46 ("Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a. that the remedies under domestic law have been pursued and exhausted *in accordance with generally recognized principles of international law*") (emphasis added).

139 European Convention on Human Rights, Art. 35(1) (emphasis added). This language was previously contained in Article 26 of the Convention. It is now contained in Article 35(1). Although the European Convention's exhaustion requirement only expressly applies to individual applications, the Court considers the local remedies rule to be generally applicable in the inter-State context.

140 ECtHR, *Case of Ireland v. United Kingdom*, Application No. 5130/71, Judgment (18 January 1978), para. 159 (emphasis added).

89. Both the ECtHR and the now defunct European Commission of Human Rights have applied this exception to the applicability of the local remedies rule on numerous occasions[141], including in a case—analogous to this one—arising from "a coordinated policy" of "expelling Georgian nationals" from the territory of the respondent State[142].

90. The Inter-American Commission of Human Rights has similarly found the local remedies rule inapplicable "in cases in which the existence of a generalized practice is alleged", reasoning that "[t]he mechanisms established for examining isolated instances of alleged violations" are ill-suited "for responding effectively to cases where it is claimed that the alleged violations occur as part of a generalized practice"[143].

91. In this case, the UAE's measures were undertaken as part of a policy ordered and coordinated at the highest levels of government. The measures complained of represent a generalized policy and practice that has affected all Qataris and, in accordance with generally recognized principles of international law, the principle of exhaustion of local remedies simply does not apply in such cases.

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141 *See also, e.g.,* European Commission of Human Rights, *Greece v. United Kingdom*, Application No. 176/56, Decision on Admissibility (2 June 1956), p. 3 ("the provision of Article 26 concerning the exhaustion of domestic remedies according to the generally recognised rules of international law *does not apply* to the present application, the scope of which is to determine the compatibility with the Convention of legislative measures and administrative practices in Cyprus") (emphasis added).

142 ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 159 ("Having regard to all those factors, the Court concludes that from October 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals was put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law. Accordingly, the objection raised by the respondent Government on grounds of non-exhaustion of domestic remedies must be dismissed."). *See also generally id*., paras. 111-159.

143 Inter-American Commission of Human Rights, *Nicaragua v. Costa Rica*, Inter-State Case 1/06, Report N° 11/07 (8 March 2007), para. 260. *See also id*., para. 258 (referring to the rule that, "in the event of systematic generalized violations", there is a "presumption *iuris tantum* that domestic remedies are neither suitable nor effective and, therefore, the requirement to exhaust them is dispensed with as a mere formality."). As also explained by the former President of the Inter-American Court of Human Rights, and current Judge at the ICJ, Prof. Cançado Trindade, "[i]n cases concerning legislative measures and administrative practices the individual, having shown that such a practice exists, is *not* under the duty of exhausting local remedies". A.A. Cançado Trindade, "Exhaustion of Local Remedies in Relation to Legislative Measures and Administrative Practices — The European Experience", *Malaya Law Review*, Vol. 18 (1976), p. 278 (emphasis in original). *See further* A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), p. 181 ("in a case concerning a general prevailing situation in breach of the Convention, recourse need not be had to local remedies.").

b. The Local Remedies Rule Does Not Apply in View of Qatar's Claims of Direct Injury to Its Own Interests under the CERD

92. Even assuming *arguendo* that the local remedies rule did in principle apply to claims of widespread harm caused by generalized practices, it would still not apply in this case. That is because Qatar brings claims of direct injury to its own interests under the CERD that are not subject to the local remedies rule. Moreover, such claims for direct injury are both interdependent with, and preponderant over, Qatar's claims brought on behalf of its nationals, and under general principles of international law, the local remedies rule does not apply to mixed claims of either kind.

93. According to the UAE, the local remedies rule dictates that "States may not *exercise diplomatic protection on behalf of its [sic] nationals* by instituting international proceedings unless local remedies first have been exhausted"[144]. The other side of the coin is equally axiomatic: the local remedies rule does *not apply* where a State "is not acting in the context of protection of one of its nationals"[145].

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144 4 December Submission, para. 57 (emphasis added).

145 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 330 (holding that since Uganda was "not exercising diplomatic protection on behalf of the victims but vindicating its own rights under the Vienna Convention" under its second counter-claim, the "failure to exhaust local remedies d[id] not pose a barrier"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, pp. 17-18, para. 40 ("As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies."); *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, Award (30 November 1992) (revised 18 June 1993), UNRIAA, Vol. XXIV, para. 6.6 ("There is wide support for the view that a distinction is to be drawn between cases of diplomatic protection, on the one hand, and cases of direct injury where the State is protecting its own interests, on the other hand, and that the applicability of the rule of exhaustion is excluded in cases in the second category"); *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award (6 March 1956), UNRIAA, Vol. XII, p. 118 (defining the local remedies rule as a rule applicable in situations in which "an international action is brought *for injuries suffered by private individuals*") (emphasis added); International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 44 ("Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite *for the exercise of diplomatic protection*") (emphasis added); Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Year Book of International Law, Vol. 35 (1959), p. 94 ("From now onwards, the discussion will be limited to genuine cases of diplomatic protection, *to which cases alone the rule of local remedies can be applicable*.") (emphasis added).

94. In the present case, Qatar makes both types of claims[146]. As a State Party to the CERD, Qatar has its *own* interest in ensuring that the UAE upholds its obligations under the CERD[147], *regardless* of the existence of harm the UAE's actions inflicted upon Qataris[148]. The CERD clearly entitles States Parties to demand compliance with its

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[146] Qatar does not merely assert claims as *parens patriae* on behalf of its nationals; it also asserts claims in its *own* right. As set out in Qatar's Communication:

> "*UAE has violated its obligations under (inter alia) CERD Articles 2, 4, 5, and 6, as well as the moral principles underlying the CERD and the customary law principle of nondiscrimination on arbitrary grounds*. UAE's actions contravene the negative and positive aspects of its obligations under the Convention. Not only has it failed to enact measures to prevent, prohibit, and criminalize racial discrimination, but—extraordinarily for a signatory State—UAE has actively promoted and engaged in racial discrimination and criminalized actions intended to benefit Qataris."

Qatar's Communication Submitted Pursuant to Article 11 of the International Covenant on the Elimination of All Forms of Racial Discrimination (8 March 2018), para. 57 (emphasis added); *see also id.*, para. 74 ("By enacting and enforcing the Coercive Measures, UAE has violated a number of the human rights protections recognized under international law and enumerated in Article 5 of the CERD; *and* has interfered with the rights of Qatari nationals.") (emphasis added).

[147] *See, e.g., Phosphates in Morocco (Italy v. France)*, Preliminary Objections, Judgment, PCIJ Series A/B, No. 74, 1983, p. 28 ("This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States."); *Case of the Swiss Confederation v. the German Federal Republic (No. I)*, Award (3 July 1958), UNRIAA, Vol. XXIX, pp. 421-422 ("The Applicant has not made a claim for damages against the Federal Republic. The Applicant makes no claim whatsoever, but merely requests a decision of the Arbitral Tribunal on the interpretation and application of Annex VII in conjunction with Annex II to the Debt Agreement in a particular dispute. In the present case, therefore, the lack of jurisdiction of the Arbitral Tribunal cannot be alleged by invoking the rule of the exhaustion of local remedies in the form more precisely defined above"); Theodor Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, British Year Book of International Law, Vol. 35 (1959), p. 86 ("if the diplomatic negotiations between the two States prove unsuccessful, and State B applies to the International Court of Justice complaining of a breach of certain treaty obligations by State A (as shown by its conduct towards the injured alien) and asking principally for a *declaratory judgment based on the interpretation of the treaty*, this would appear to be a case of direct injury to which the rule of local remedies would not be applicable.") (emphasis added); *id*., p. 87 (stating that "[c]ertain categories of acts have been considered to amount to direct injuries, such as…. *violations of treaties*") (emphasis added); *id.*, pp. 88-89 ("In such cases, an award of pecuniary compensation for its nationals who were incidentally injured by the impugned act is a secondary object; the primary object is to obtain from an international tribunal some *declaration of the responsibility of the respondent State in international law*, …, or some other remedy *such as a binding interpretation of a treaty*….") (emphasis added).

[148] *See, e.g., United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, Award (30 November 1992) (revised 18 June 1993), UNRIAA, Vol. XXIV, para. 6.12 (finding the local remedies rule inapplicable in circumstances in which the tribunal came "to the view that *the State's obligation to use its best efforts* to ensure that user charges are just and reasonable to those airlines is *independent of actual prejudice to them*") (first emphasis in original; second emphasis added); *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, Decision (9 December 1978), UNRIAA, Vol. XVIII, para. 31 (finding the local remedies rule inapplicable in circumstances in which it was "obvious that the object and purpose of an air services agreement such as the present one is *the conduct of air transport services*, the corresponding obligations of

obligations irrespective of the existence of distinct injuries suffered by individuals as a result of a breach of those obligations[149]. By way of example:

- Under Article 2(1), States Parties "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races"[150].

- Under the same article, States Parties commit "to discourage anything which tends to strengthen racial division"[151].

- Under Article 4, States Parties agree to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof"[152].

- Under the same article, States Parties similarly agree to "declare illegal and prohibit organizations, and also all other propaganda activities, which promote and incite racial discrimination".[153] This Committee has made clear that "it is not enough to declare the forms of conduct in [A]rticle 4 as offences; the provisions of the article must also be effectively implemented"[154].

- Under Article 5, "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms".[155] As this Committee has noted, "[w]henever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure

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the Parties being the admission of such conduct rather than an obligation requiring *a 'result' to be achieved*") (first emphasis in original; second emphasis added).

149 As noted by one representative during negotiations of the CERD, "[e]veryone agreed that domestic remedies should be exhausted before a case was taken to the international level, but it should be borne in mind that one State might bring a complaint against another, *not with respect to the treatment of individuals or groups of individuals*, *but concerning failure to comply with certain provisions of the Convention*". UN General Assembly, Third Committee, 1353rd Meeting (24 November 1965), para. 54 (emphasis added).

150 CERD, Art. 2(1).

151 CERD, Art. 2(1).

152 CERD, Art. 4.

153 CERD, Art. 4.

154 CERD Committee, General Recommendation XXXV (2013), para. 17. *See also, e.g.,* CERD Committee, General Recommendation XV (1993), para. 2 ("To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced.").

155 CERD, Art. 5. *See also* CERD Committee, General Recommendation XXX (2004), Preamble (stating that Article 5 "requires States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms".).

> that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards"[156].

95. That Qatar has claims in its own right is not only reflected in these and other provisions, which can plainly be breached and result in harm distinct from any harm suffered by individuals as a result[157]. It is also reflected in Qatar's interest in preventing *future* harm—a core objective of the CERD[158]. The local remedies rule only applies to claims brought to protect individuals who have *already* been injured[159]. By contrast, it does not apply to disputes that are not "*confined to the past*", and relate to one State party's

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156 CERD Committee, General Recommendation XX (1996), para. 2.

157 *See, e.g.,* CERD Committee, General Recommendation XXXV (2013), para. 10 (stating that Article 4 "has an *expressive function* in underlining the *international community's abhorrence of racist hate speech*") (emphasis added).

158 *See, e.g.,* CERD Committee, General Recommendation XXXV (2013), para. 10 ("Article 4 comprises elements relating to speech and the organizational context for the production of speech, serves the functions of *prevention and deterrence*, and provides for sanctions when deterrence fails.") (emphasis added); CERD Committee, General Recommendation VII (1985), Preamble ("*Bearing in mind* the *preventive* aspects of article 4 to *deter* racism and racial discrimination as well as activities aimed at their promotion or incitement") (some emphasis added). The preventative focus of the CERD is reflected, *inter alia*, in its reporting and training requirements. *See, e.g.,* CERD Convention, Arts. 7, 9; CERD Committee, General Recommendation XI (1993), para. 2 ("The Committee therefore affirms that States parties are under an obligation to report fully upon legislation on foreigners and its implementation."); General Recommendation XIII (1993), para. 2 ("Law enforcement officials should receive intensive training to ensure that in the performance of their duties they respect as well as protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.").

159 *See, e.g., The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award (6 March 1956), UNRIAA, Vol. XII, p. 118 (the local remedies rule "means that the State against which an international action is brought for injuries *suffered* by private individuals has the right to resist such an action if the persons alleged to *have been injured* have not first exhausted all the remedies available to them under the municipal law of that State".) (emphasis added). *See also, e.g., Interhandel (Switzerland* v. *United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1959, p. 27 ("the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to *have been disregarded* in another State in violation of international law.") (emphasis added); *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment, ICJ Reports 1989, p. 43, para. 52 (applying the local remedies rule in circumstances in which "alleged damage to Raytheon and Machlett" was said to "*have resulted* from the actions of the Respondent") (emphasis added); International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 1 ("diplomatic protection consists of the invocation by a State…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") (emphasis added); International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 45 (stating that paragraph 14(3) of the Draft Articles "provides that the exhaustion of local remedies rule applies *only* to cases in which the Claimant State *has been injured* 'indirectly'") (emphasis added).

interest in "obtain[ing] a solution which will also relate to the interpretation and application of [the Treaty] *in the future*"[160].

96. In the present case, of course, the harm is present and ongoing. Critically, in situations where "violations of the rights of [individuals] may entail a violation of the rights of [their national] State", and where "violations of the rights [of the national State] may entail a violation of the individual", the ICJ has found an "interdependence of the rights of the State and of individual rights" which precludes the applicability of the local remedies rule[161].

97. Such interdependence exists here: By violating the rights of Qatar, the UAE has harmed individual Qataris. Conversely, by harming individual Qataris, the UAE has necessarily harmed Qatar[162].

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160 *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, Award (30 November 1992) (revised 18 June 1993), UNRIAA, Vol. XXIV, para. 6.11 (emphasis added). *See also id.*, para. 6.19 (emphasizing that in line with the "general principles of international law underlying the local remedies rule", the rule did not apply to such disputes).

161 Indeed, in *Avena and other Mexican Nationals*, Mexico sought to protect its nationals on death row in the United States. It argued that it had "itself suffered, directly and through its nationals", injury as a result of the United States' failure to grant consular access to its nationals under Article 36(1) of the Vienna Convention on Consular Relations ("VCCR"). *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, p. 36, para. 40. The United States objected to the admissibility of Mexico's claims, arguing that Mexico had not exhausted local remedies before bringing its case. *Id.*, para. 38. The Court rejected the United States' argument, holding that

> "violations of the rights of the individual … may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals .... *The duty to exhaust local remedies does not apply to such a request*."

Id., para. 40 (emphasis added).

162 At the hearing on Qatar's request for provisional measures before the ICJ, the UAE argued that the Court's holding in *Avena* was limited to the specific context of Article 36 of the VCCR, which according to the UAE sets forth "a *sui generis* régime that was described by [the] Court in the *LaGrand* case as 'an interrelated régime designed to facilitate the implementation of the system of consular protection'". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/15, pp. 17-18, para. 11 (Treves) (citing *LaGrand (Germany* v. *United States of America*), Judgment, ICJ Reports 2001, p. 492, para. 74). This strained attempt to distinguish *Avena* falls flat. Nowhere in its judgment did the Court limit the "special circumstances of interdependence of the rights of the State and of individual rights" to the narrow framework of Article 36 VCCR. If it wanted to limit the applicability of the rule to the VCCR, the

98. But even if it could be said that Qatar's claims in its own right are not interdependent with Qatar's claims as *parens patriae* on behalf of its nationals (*quod non*), the local remedies rule would still not bar the admissibility of Qatar's Communication. Local remedies need not be exhausted where a claim is based "preponderantly on an injury to the State and not to a national"[163]. The injury inflicted by the UAE's measures to Qatar's own interests preponderates here for at least three reasons.

99. *First*, as explained above, Qatar is entitled to protect its own interests whether or not it also brings claims on behalf of its nationals[164]. As noted by the ICJ a few years after the adoption and entry into force of the CERD, the protection from racial discrimination forms part and parcel of the "principles and rules concerning the *basic* rights of the human person", which in turn give rise to obligations that transcend the ambit of the CERD and in respect of which "all States can be held to have a legal interest in their protection"[165]. The prohibition of racial discrimination has since been recognized as a peremptory norm of international law, the breach of which cannot be justified under any

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Court would have said so. It did not, and wisely so—circumstances of interdependence are by no means unique to the framework of Article 36 VCCR.

163 *See* Chittharanjan F. Amerasinghe, *Diplomatic Protection* (2008), p. 181. *See also, e.g.,* International Law Commission, *Draft Articles on Diplomatic Protection*, *with commentaries* (2006), Art. 14(3) ("Local remedies shall be exhausted where an international claim … is brought *preponderantly* on the basis of an injury to a national"); *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, Award (30 November 1992) (revised 18 June 1993), UNRIAA, Vol. XXIV, para. 6.18 ("Although examination of the nature of USG's claims and of the airlines' potential claims reveals that they overlap to a certain extent, at the same time they present significant differences; and taking the case as a whole and undivided into its constituent parts, the Tribunal is of the opinion that the predominant element is the direct interest of the US itself."); *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, Decision (9 December 1978), paras. 11, 29-30 (finding that, even though a private air carrier had allegedly been injured by a breach of rights under the Air Service Agreement, it was not required to exhaust local remedies before its State of nationality could bring an international claim).

164 *See supra* paras. 92–95

165 *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain) (New Application: 1962),* Second Phase, Judgment, ICJ Reports 1970, p. 32, paras. 33-35 (adding that "[o]bligations the performance of which is the subject of diplomatic protection are not of the same category") (emphasis added above). *See also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgment, ICJ Reports 2012, paras. 68-69.

circumstances, including the circumstances precluding wrongfulness accepted in general international law[166].

100. *Second*, the UAE itself asserts that its "targeted measures are aimed at the Qatari government and not the Qatari people"[167], and that "Qatar deliberately misrepresents the UAE's measures against the Qatari government as measures taken against the people of Qatar"[168]. The UAE cannot therefore argue that the measures it claims were neither "aimed at" nor "taken against" the people of Qatar nonetheless give rise to claims "brought *preponderantly* on the basis of an injury" to those very same people suffered as a result of the UAE's violations of the CERD[169].

101. *Finally*, Qatar's claims in its own right include claims for violations of the rights of individuals of Qatari origin who are not presently Qatari nationals. These claims relate to individuals who presently do not hold Qatari nationality but have suffered injury because of their Qatari heritage, descent, or past Qatari nationality.[170] Because a State may not exercise the right of diplomatic protection in respect of persons who are not its nationals,[171] and no special circumstance justifying derogation from this rule applies in the present context,[172] Qatar does not assert these claims as *parens patriae* of its nationals. Qatar instead asserts such claims in its own right, which reinforces the preponderant nature of Qatar's direct injury.

102. For all of these reasons, Qatar's Communication plainly passes what the ILC refers to as the "but for" test: "whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured

166 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Art. 26, p. 85, paras. 5-6.

167 7 August Submission, para. 7.

168 7 August Submission, para. 11.

169 International Law Commission, *Draft Articles on Diplomatic Protection*, *with commentaries* (2006), Art. 14(3).

170 *See supra* Section II.B.

171 *See* International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 3, p. 29.

172 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 8, p. 35.

national".[173] The answer here is clearly "yes". Qatar was directly targeted and has suffered and continues to suffer violations of interests of its own; such interests transcend the field of diplomatic protection and indeed fall under the purview of a higher normative order; and Qatar brings claims on behalf of non-nationals. In such circumstances, it is impossible to construe Qatar's Communication as having been brought "preponderantly on the basis of an injury to a national".[174] Accordingly, the local remedies rule does not apply.

103. In sum, under the "general principles of international law" to which Article 11(3) refers, the local remedies rule does not apply to claims of the kind presently before this Committee. This is not just because the UAE's measures constitute a systematic, generalized policy and practice giving rise to widespread violations of the CERD. It is also because Qatar's direct claims are interdependent with those brought on behalf of its nationals and because, even if they were not, they are preponderantly based on direct injury to Qatar. The UAE's objection must therefore be dismissed.

2. The UAE Has Failed to Prove the Existence of Any Effective and Reasonably Available Remedies that Have Not Been Exhausted

104. Qatar explained above why Article 11(3)'s local remedies rule does not apply to its claims under "generally recognized principles of international law"[175]. But even if the rule did apply, it still would not bar Qatar's claims. The UAE has failed to prove the existence of any effective and reasonably available remedies that have not been exhausted.

105. The ILC's Draft Articles on Diplomatic Protection state: "Local remedies do not need to be exhausted where" there are "no *reasonably available* local remedies to provide effective redress, or the local remedies provide no *reasonable possibility* of such

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173 *See* International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 46.

174 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 14(3).

175 CERD, Art. 11(3).

redress."[176] The ICJ has made clear that "[i]t is for the *respondent*" to prove "that there were *effective* remedies in its domestic legal system that were not exhausted"[177]. This Committee's own Rules of Procedure confirm the point: the *respondent* is "required to give details of the *effective* remedies *available* to the alleged victim in the particular circumstances of the case"[178]. Notwithstanding the UAE's suggestion to the contrary,[179] it is thus the *UAE*—not Qatar—that bears the burden of proving that local remedies exist, and *also* that those remedies are both *reasonably available* and *effective*.

106. As a substantive matter, the local remedies rule is "riddled with many far-reaching exceptions"[180]. Article 11(3) expressly acknowledges one such exception in circumstances in which the application of local remedies is "unreasonably prolonged"[181]. Under general principles of international law, local remedies also need not be exhausted where, for example, "the local courts do not have the competence to grant an appropriate and adequate remedy to the alien"[182], or where "the respondent State does not have an

176 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(a) (emphasis added). As such, even if "doubts about the effectiveness" of proceedings "cannot absolve a petitioner from pursuing them", such remedies must offer a "*reasonable possibility*" of success. CERD Committee, *Sarwar Seliman Mostafa v. Denmark*, Communication No. 19/2000, Decision (10 August 2001), UN Doc. CERD/C/59/D/19/2000, para. 7.4.

177 *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 2007, para. 44 (emphasis added).

178 CERD Committee Rules of Procedure, Rule 92(7) (emphasis added). *See also, e.g.*, CERD Committee, *Diop v. France*, Communication No. 2/1989, Opinion (10 May 1991), UN Doc. CERD/C/39/D/2/1989, para. 5.2. Qatar notes that Article 92(7) of the Rules of Procedure concerns the filing of individual complaints under Article 14, rather than inter-State complaints under Article 11, but sees no reason why the burden of proof would be allocated any differently for inter-State procedures. Indeed, the UAE itself submits that "the Committee's jurisprudence on exhaustion of local remedies under Article 14 is also relevant for the present purposes given the similarity of the provisions on the obligation to exhaust local remedies of Article 11.3 and 14.7(a) of the CERD". 15 January Submission, para. 49.

179 15 January Submission, para. 50 ("It falls to Qatar to show either that these available remedies were in fact exhausted, or either such remedies would not have been effective in the particular circumstances of the case or that their application would be 'unduly prolonged.'"); *id*., para. 54 ("Qatar has put forward no evidence that these constitutionally protected remedies are in fact either unavailable to Qataris or ineffective.").

180 Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", *International Courts and the Development of International Law* (2013), p. 564.

181 CERD, Art. 11(3).

182 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 47. *See also, e.g., Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 2007, para. 47 ("the DRC has also failed to show that

adequate system of judicial protection"[183]. Relatedly, it is "fundamental to the effectiveness of a remedy that its *independence* from the authority being complained against is observed"[184].

107. Moreover, the remedies encompassed by the rule include only "legal remedies"[185]. "[R]emedies of a judicial character, whether or not discharged by courts, are encompassed by the rule, whereas remedies based on the *discretionary* action of public organs are not."[186]

108. As a practical matter, the exercise of legal remedies "must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State"[187]. Practical obstacles can include, for example, "the closure of transport links between the two countries";[188]

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means of redress against expulsion decisions are available under its domestic law"); *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award (6 March 1956), UNRIAA, Vol. XII, p. 119; CERD Committee, *Zentralrat Deutscher Sinti und Roma et al. v. Germany*, Communication No. 38/2006, Opinion (3 March 2008), UN Doc. CERD/C/72/D/38/2006, para. 7.3; CERD Committee, *L.R. et al. v. Slovak Republic*, Communication No. 31/2003, Opinion (10 March 2005), UN Doc. CERD/C/66/D/31/2003, para. 9.2; CERD Committee, *D.R. v. Australia*, Communication No. 42/2008, Opinion (15 September 2009), UN Doc. CERD/C/75/D/42/2008, paras. 6.4-6.5.

183 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 47.

184 CERD Committee, *L.R. et al. v. Slovak Republ*ic, Communication No. 31/2003, Opinion (10 March 2005), UN Doc. CERD/C/66/D/31/2003, para. 9.2 (emphasis added). *See also, e.g., Robert E. Brown (United States) v. Great Britain*, Award (23 November 1923), UNRIAA, Vol. VI, p. 129.

185 *See, e.g.,* International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 14(2) ("'Local remedies' means *legal* remedies") (emphasis added). *See also, e.g.,* James R. Crawford & Thomas D. Grant, "Exhaustion of Local Remedies", *Max Planck Encyclopedia of Public International Law* (2007), para. 12 ("The rule is limited to legal remedies.").

186 James R. Crawford & Thomas D. Grant, "Exhaustion of Local Remedies", *Max Planck Encyclopedia of Public International Law* (2007), para. 12 (emphasis added). *See also, e.g., Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, ICJ Reports 2007, para. 47; International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 45 ("The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. *He is not required to approach the executive for relief in the exercise of its discretionary powers*.") (emphasis added); CERD Committee, *Habassi v. Denmark*, Communication No. 10/1997, Opinion (6 April 1999), UN Doc. CERD/C/54/D/10/1997, para. 6.2.

187 ECtHR, *Case of İlhan v. Turkey*, Application No. 22277/93, Judgment on Merits and Just Satisfaction (27 June 2000), para. 97. *See also, e.g., Case of Velásquez-Rodríguez v. Honduras*, Judgment (29 July 1988), Inter-American Court of Human Rights Series C, No. 4, para. 68.

188 ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 156.

difficulties in contacting the relevant authorities of the respondent State;[189] and a "widespread climate of discrimination"[190].

109. Credible fear of reprisal can also excuse the need to pursue a remedy[191]. Similarly, if an individual's "indigency or a general fear in the legal community to represent him prevents" him from "invoking the domestic remedies necessary to protect a right", he is "not required to exhaust such remedies"[192].

110. In short, the existence of "available and sufficient" remedies "must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness"[193]. As such, "the State that alleges non-exhaustion must indicate which domestic remedies should be exhausted and provide evidence of their

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189 ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 156.

190 Inter-American Commission of Human Rights, *Nicaragua v. Costa Rica*, Inter-State Case 1/06, Report N° 11/07 (8 March 2007), para. 256.

191 *See, e.g.,* Human Rights Committee, *Irving Phillip v. Trinidad and Tobago*, Communication No. 594/1992, Views (3 December 1998), UN Doc. CCPR/C/64/D/594/1992, para. 6.4 ("In these circumstances, given the author's statement that he had not filed a complaint *because of his fears of the warders*, the Committee considered that it was not precluded by [the Optional Protocol's local remedies rule] from examining the complaint.") (emphasis added). *See also, e.g.,* ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 154 ("the climate of precipitation and intimidation in which these measures were taken also explains the reluctance of the Georgian nationals to use those remedies."); CERD Committee, General Recommendation XXXI, para. 1(b); Human Rights Committee, *Avadanov v. Azerbaijan*, Communication No. 1633/2007, Views (2 November 2010), UN Doc. CCPR/C/100/D/1633/2007, para. 6.4.

192 *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* Advisory Opinion OC-11/90 (10 August 1990), Inter-American Court of Human Rights Series A, No. 11, para. 42. *See also, e.g., Case of Velásquez-Rodríguez v. Honduras*, Judgment (29 July 1988), Inter-American Court of Human Rights Series C, No. 4, para. 80.

193 ECtHR, *Case of Vernillo v. France,* Application No. 11889/85, Judgment on Merits and Just Satisfaction (20 February 1991), para. 27. It again "falls to the respondent State to establish that these various conditions are satisfied". *Id. See also, e.g., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights),* Advisory Opinion OC-11/90 (10 August 1990), Inter-American Court of Human Rights Series A, No. 11, para. 17; ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), paras. 150-151; James R. Crawford & Thomas D. Grant, "Exhaustion of Local Remedies", *Max Planck Encyclopedia of Public International Law* (2007), para. 19; Human Rights Committee, *Warsame v. Canada*, Communication No. 1959/2010, Views (1 September 2011), UN Doc. CCPR/C/102/D/1959/2010, para. 7.4.

effectiveness"[194], including in the form of "examples of the alleged remedy having been successfully utilized by persons in similar positions"[195].

111. The UAE insists in these proceedings that "numerous" effective domestic remedies are "available within the UAE to any Qatari nationals who claim to be victims of violations of any of the rights set forth in the CERD"[196]. It points to only three of these supposedly "numerous" remedies: (1) "administrative remedies such as hotlines and other application procedures";[197] (2) "[c]ourt remedies";[198] and (3) "complaint procedures specific to various governmental authorities"[199].

112. Here again, the UAE is wrong. As explained below, the UAE has not proved that *any* of these so-called "remedies" are "effective" and "reasonably available"[200]. They therefore need not be exhausted "in conformity with the generally recognized principles of international law"[201].

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194 Inter-American Commission of Human Rights, *Nicaragua v. Costa Rica*, Inter-State Case 1/06, Report N° 11/07 (8 March 2007), para. 243. *See also, e.g.*, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment (1 February 2000), Inter-American Court of Human Rights Series C, No. 66, para. 53.

195 *See* C Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", *International Courts and the Development of International Law* (2013), p. 568 ("the European Court of Human Rights has specified that the State must not only satisfy the Court that the remedy was effective, available both in theory and practice at the relevant time, but also frequently asks the State to provide examples of the alleged remedy having been successfully utilized by persons in similar positions to that of the applicant."). *See also, e.g.,* ECtHR, *Case of Kangasluoma v. Finland*, Application No. 48339/99, Judgment on Merits and Just Satisfaction (20 January 2004), para. 48 ("Nor did the Government supply any example from domestic practice showing that, by using the means in question, it was possible for the applicant to obtain such relief. *This is in itself sufficient to demonstrate that the remedies referred to do not meet the standard of 'effectiveness' for the purposes of Article 13* because, as the Court has already said … the required remedy must be effective both in law and in practice.") (emphasis added); ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 157.

196 4 December Submission, para. 65.

197 4 December Submission, para. 64. *See also* 7 August Submission, para. 85.

198 4 December Submission, para. 67. *See also* 7 August Submission, para. 85.

199 4 December Submission, para. 67.

200 *See* International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(a).

201 CERD, Art. 11(3).

a. The Hotline is Discretionary and Ineffective

113. The UAE submits that a so-called "hotline" through which "Qatari nationals who seek entry to the UAE are able to apply for entry"[202] constitutes a remedy that must be exhausted under Article 11(3) of the CERD. The UAE made a similar argument before the ICJ and lost. The Court concluded in its 23 July 2018 Order on Provisional Measures that the UAE had not indicated "*any* effective local remedies that were available to the Qataris that have not been exhausted"[203].

114. There are at least four independently sufficient reasons to reject this claim as the ICJ previously did.

115. *First*, the hotline is not a legal remedy. Indeed, the UAE has *itself* expressly stated that permission through the hotline may be granted "at the *discretion* of the UAE government"[204]. An injured alien is, however, "not required to approach the executive for relief in the exercise of its discretionary powers"[205].

116. *Second*, while the UAE disparagingly dismisses so-called "anecdotal accounts" of "individuals' mistrust or paranoia" with respect to the hotline[206], the facts demonstrate that the hotline is a "police security channel"[207] run in a police State[208]. The security

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202 7 August Submission, para. 85.

203 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates),* Provisional Measures, Order, para. 42 (emphasis added).

204 Ministry of Foreign Affairs & International Cooperation, *An official Statement by the UAE Ministry of Foreign Affairs and International Cooperation* (5 July 2018), *available at* https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx (last accessed: 8 February 2019) (emphasis added).

205 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), p. 45.

206 4 December Submission, para. 64.

207 *Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 6 (**UAE Annex 4**).

208 *See, e.g.,* Christopher M. Davidson, Foreign Policy, "The Making of a Police State" (14 April 2011), *available at* https://foreignpolicy.com/2011/04/14/the-making-of-a-police-state-2/ (last accessed: 8 February 2019); OHCHR, *Press briefing note on United Arab Emirates* (4 Jan. 2019) ("Mansoor was initially convicted in May 2018 on charges of using social media to 'publish false information that harm national unity and damage the country's reputation'. This was in relation to tweets he posted that were critical of the Government. As the Court of State Security is UAE's highest court, he has no further appeal rights under the UAE's judicial system.").

channel's "service objectives" include "[c]ombating and preventing crimes" and "[c]onsolidating the concept of 'Security Is Everybody's Responsibility.'"[209] According to the Abu Dhabi Police, "[a]ttention" is paid to "issues that are disturbing and recurrent in the society and have a high impact on security"[210]. Indeed, the service provided gathers information helpful "in knowing the behaviours and conducts that indicate the commission of the crime"[211].

117. In circumstances in which the UAE ordered the expulsion of every Qatari from its territory and then criminalized expressions of sympathy towards Qatar, it is as absurd as it is offensive for the UAE to discredit the legitimate fears of Qataris to expose themselves and their loved ones to a "police security channel" of this kind[212].

118. *Third*, the hotline is ineffective. In its 15 January submission, the UAE alleged "that from 9 July 2018 through 31 December 2018, 3,563 applications by Qatari nationals were lodged with the UAE authorities for entry permits to the UAE, 3,353 of which were accepted"[213]. Even more incredibly, in its 4 December submission, the UAE submitted that "the vast majority of applications for permission to travel are approved", and that

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209 *Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 6 (**UAE Annex 4**).

210 *Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 6 (**UAE Annex 4**).

211 *Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 6 (**UAE Annex 4**).

212 *See, e.g.,* **DCL-048**, para. 24 ("I once called the hotline and was asked to provide many personal details and documents. That just increased my fear."). *See also, e.g.,* Amnesty International, *Gulf/Qatar dispute: Human dignity trampled and families facing uncertainty as sinister deadline passes* (19 June 2017) ("Some affected families have told Amnesty International that they are too scared to call hot lines and register their presence, or their family's presence, in a 'rival' country for fear of reprisal."); for relevant jurisprudence, *see, e.g.,* Human Rights Committee, *Irving Phillip v. Trinidad and Tobago*, Communication No. 594/1992, Views (3 December 1998), UN Doc. CCPR/C/64/D/594/1992, para. 6.4 ("given the author's statement that he had not filed a complaint because of his fears of the warders, the Committee considered that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the complaint."); ECtHR, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Merits Judgment (3 July 2014), para. 154 ("the climate of precipitation and intimidation in which these measures were taken also explains the reluctance of the Georgian nationals to use those remedies.").

213 15 January Submission, para. 8.

"[i]n the first six months of 2018 alone, the hotline received 1,390 applications", of which "only 12 applications were rejected for security or other reasons"[214].

119. The UAE's argument, however, flies in the face of evidence of Qataris citing repeated instances of rejections for arbitrary reasons or having received no responses from the hotline at all[215]. Setting aside the obvious deficiencies in the evidence produced to prove its claims[216]—which would suggest that the UAE began rejecting far *more* applications *after* the ICJ issued its legally binding order on provisional measures than it did before[217]—the numbers actually incorporate extremely large numbers of applications to *exit* the country[218]. Indeed, the reality is that applicants wanting to *enter* the UAE are

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214 7 August Submission, para. 25.

215 *See, e.g.,* **DCL-079**, paras. 20-27 (describing multiple calls to the hotline, many of which went unanswered); **DCL-125**, para. 7 ("I have applied for admission to the UAE on eight occasions…My applications were not approved five times, and they were approved three times. I was often given no explanation when my application was not approved"); **DCL-004**, para. 20 (describing the declarant's son's experience of being rejected and accepted); *Comment by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on impact on human rights* (14 June 2017) (noting that measures implemented to address dual nationality families "are not sufficiently effective to address all cases"); Human Rights Watch, *Qatar: Isolation Causing Rights Abuses* (12 July 2017) ("of the 12 Gulf nationals who said they tried to contact these hotlines, only two managed to get permission to go back and forth."). *See also, e.g.,* Amnesty International, *Gulf/Qatar dispute: Human dignity trampled and families facing uncertainty as sinister deadline passes* (19 June 2017).

216 For example, the contents of UAE's Annex 4 appear to have been selectively curated from a larger document—not on the record—for use in these proceedings. *See generally Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 2 (**UAE Annex 4**) (indicating that the original document sent by the Abu Dhabi police contained underlying documentary evidence for a much larger set of applications, including a number of rejected applications). Similarly, UAE Annex 1.2 contains no corroboration, and was clearly produced by the UAE executive solely for the purposes of litigation in these proceedings. *See generally Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 31 December 2018* (**UAE Annex 1.2**).

217 The ICJ issued its order on provisional measures on 23 July 2018. If the UAE is to be believed, it nonetheless rejected *seventeen times* more applications from 9 July 2018 through 31 December 2018 than it did during the first six months of 2018 combined. *See* 15 January Submission, para. 8; 7 August Submission, para. 25.

218 While the quality of UAE Exhibit 1.2 is so poor that Qatar has been unable to convert it back to Excel for purposes of precisely tallying the numbers, it appears that a very large number, if not the majority, of the records reflect requests to *exit*, not *enter*, and that the UAE's claim that "3,563 applications by Qatari nationals were lodged with the UAE authorities for *entry* permits to the UAE, 3,353 of which were accepted" is thus incorrect. 15 January Submission, para. 8 (emphasis added). *See generally Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 31 December 2018* (**UAE Annex 1.2**). UAE's Annex 4, for its part, incorporates applications of Qataris *and Emiratis* to both enter *and exit* the country. *See, e.g., Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, pp. 2, 19, 22 (**UAE Annex 4**). In fact, the exhibit itself suggests that the *majority* of the applications accepted were actually submitted by Emiratis wanting to visit Qatar. *Cf. id.*, p. 2 ("The number of UAE Nationals' requests to visit Qatar is (828 requests) since the beginning of 2018 AD.").

very frequently unable to reach *anyone* through the UAE's hotline despite calling repeatedly[219]. When they have actually managed to apply, their applications have often not been approved without any explanation[220]. Indeed, applications have sometimes not been approved even though applications submitted with the *exact* same documents had previously been accepted on different occasions[221], a fact that highlights the arbitrary and nontransparent nature of the mechanism and contradicts the UAE's claim that Qataris are permitted to enter if they "do not pose a security risk and otherwise meet" unspecified "neutral immigration criteria"[222].

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219 *See, e.g.,* **DCL-079**, paras. 20-27 ("I…called over and over again until someone answered … Between [] and [], I called the hotline at least 50 times a day. Only around six of these calls were answered… I called the hotline another 70 times between []; they only answered six times. During my last discussion with them, they asked me to stop calling because I was calling too frequently and told me that someone would call me back. No one ever did. At that point, I stopped calling. We never heard back from the hotline again, and we all missed [] funeral."). *See also, e.g.,* Amnesty International, *Gulf/Qatar dispute: Human dignity trampled and families facing uncertainty as sinister deadline passes* (19 June 2017) ("Several people said they had tried in vain for hours or days to get through to the hot lines. Those who got through said officials asked them for minimal details about their cases and told them they would receive a call back, but there had been no follow-up."); **DCL-135**, para. 25 ("During the call, I was asked about the purpose of my visit and whether I have first degree relatives in the UAE. When I explained the purpose of my visit, the hotline representative simply said that they would look into it and get back to me. The representative gave me no further information. Despite the promise, they never did. After I had not heard from the hotline representatives for over a month, I tried again in October 2018. Again, the representative promised to call me back and did not. After this call, I gave up on the hotline."); **DCL-079**, paras. 23-24 ("Whenever I called, either a hotline operator answered, or the phone was off, or it was busy. When they did not answer, the line cut off and I would then send a text message by WhatsApp.").

220 *See, e.g.,* **DCL-125**, para. 7 ("My applications were not approved five times, and they were approved three times. I was often given no explanation when my application was not approved, but was instead told to apply again without any indication as to what I had done incorrectly or what I should do differently the next time. On at least one occasion, an application was not approved even though an application submitted with the exact same documents had previously been accepted on a different occasion. My last four applications have all been rejected. Every time I have been rejected I have had to contact the UAE authorities to find out; no one has ever told me that I was rejected until I called."). As such, even if the hotline *were* a remedy encompassed by Article 11(3)—and it clearly is not—it would be a remedy that has *already* been exhausted.

221 *See, e.g.,* **DCL-125**, para. 7 ("On at least one occasion, an application was not approved even though an application submitted with the exact same documents had previously been accepted on a different occasion.").

222 7 August Submission, para. 3. Qatar notes, moreover, that even many of those who have received approval to travel have nonetheless been refused entry onto planes run by Emirati airlines. *See, e.g.,* **DCL-004**, para. 19 ("[E]ven though he had a permit, [my son] was refused entry onto the plane traveling to []…The Etihad Airways staff stopped him at the gate, saying that they would not allow any Qataris on-board, as they were an Emirati company."); **DCL-125**, para. 12 ("my ticket was booked through the Emirates airline, and Emirates refused to allow me to board").

120. The UAE nonetheless asserted in its 4 December Submission that the "efficient working of the hotline is evidenced by the extensive travel logs of movements" since 5 June 2017, which allegedly "show 8,442 movements by Qatari citizens across UAE borders, all of which were facilitated by the work of the hotline"[223]. In its 15 January submission, it similarly claimed that "[u]pdated evidence" indicates that "registered entries and exits of Qatari nationals into and out of the UAE from 1 June 2018 through 31 December 2018 amounted to 2,876"[224].

121. It will not escape this Committee that the large majority of these "movements" and "entries and exits" unsurprisingly record Qataris *exiting* the country[225]. Nor will it escape this Committee that the UAE has provided no comparative set of data on the movements of Qataris during the period *before* the crisis. The reason is obvious: cell phone records indicate that there has been a precipitous drop in the presence of Qataris in the UAE since 5 June 2017. One carrier reports a *96% drop* in roaming in the UAE by Qatari customers[226].

122. The UAE's additional argument that "substantially" the "same number of Qataris live in the UAE as prior to the start of the crisis"[227], and that "the vast majority of Qatari

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223 7 August Submission, para. 26. Qatar notes that in its Supplemental Response of 4 December 2018, the UAE referred for the first time to "administrative remedies such as hotlines *and other application procedures*". 4 December Submission, para. 64 (emphasis added). The UAE has given no indication of what those other "application procedures" might be, or what role they are alleged to play in light of its previous assertion that "all" travel by Qataris into and out of the country was "facilitated by the work of the hotline". 7 August Submission, para. 26.

224 15 January Submission, para. 8.

225 *See generally* Excel Redacted Entrance and Exit for Qatari Nationalities (**UAE Annex 1.1)** (recording over 750 more exits than entries); *Immigration - Complete Entry-Exit Records* (**UAE Annex 5**) (again recording hundreds more exits than entries). Qatar also notes that the UAE's data does not record the dates of each movement for the year following 5 June 2017. *See generally Immigration - Complete Entry-Exit Records* (**UAE Annex 5**). This is almost certainly because including the dates would have revealed a mass exodus of Qataris from the UAE in the immediate aftermath of the 5 June 2017 expulsion.

226 *See* **Annex 16**, *Ooredoo Comparison – Before and After*, p. 1 (providing comparative data on the roaming of Qatari SIM card holders "roaming" in the UAE). *See also generally id*.; **Annex 14**, Letter on Usage from the CEO of Vodafone Qatar (30 December 2018) (providing, in a letter from the CEO of Vodafone Qatar, detailed information on the calls, messages, and internet used by users of Vodafone Qatar while roaming in the UAE from January 2016 to December 2018, and showing a large and permanent drop in usage in June 2017) (certified translation).

227 7 August Submission, para. 94. *See also Immigration - Complete Entry-Exit Records* (**UAE Annex 5**).

residents in the UAE on 5 June 2017 chose to continue their residence in the UAE"[228], completely fails to prove its facially implausible claim of the hotline's supposed effectiveness.

123. The UAE attempts to support this claim by citing immigration records, which it claims show that "[a]s of mid-June 2018, there were 2,194 Qatari nationals in the UAE, largely the same as the number of Qataris residing in the UAE on 5 June 2017"[229]. The first problem with these assertions is that the documents the UAE cites simply do not substantiate them. Even if the documents showed the presence of 2,194 Qataris "in the UAE" as of mid-June 2018—and it is not at all clear that they do[230]—they provide no comparative set of data on the number of Qataris in the UAE "*on 5 June 2017*"[231]. As such, the UAE has once again failed to provide comparative data obviously within its possession. Its failure to do so is telling.

124. But even if it were true that the number of Qataris now "in" the UAE were the same as the number of Qataris previously "*residing* in" the UAE, that fact would suggest a dramatic *reduction* in the overall number of Qataris in the country. After all, the number of Qataris "in" the country would include both residents and non-residents, whereas the number of Qataris "*residing* in" the country would not[232].

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228 7 August Submission, para. 19.

229 7 August Submission, para. 19. *See also* 15 January Submission, para. 10 ("As of June 2018, the number of Qataris in the UAE amounted to 2,194.").

230 UAE Annex 1 lists only dates of *entry* into the country. *See generally Immigration – Qataris in the UAE* (**UAE Annex 1**). UAE Annex 2, which appears to be a cover page to UAE Annex 1, then states that UAE Annex 1 shows "the number of Qatari nationals who *have been in* the country", raising the question of whether any of those Qataris have since *left* the country. *See Immigration - ID & Citizenship Authority Cover Letter Re Excel Immigration Stats*, p. 2 (**UAE Annex 2**) (emphasis added).

231 However, in the exhibit the UAE cites to support this claim, it did include—perhaps inadvertently—data not only on the year *following* 5 June 2017, but also on an approximately one-month period *before* it. *See generally Immigration – Qataris in the UAE* (**UAE Annex 1**). Incredibly, when sorted by date, the data indicates that, of the individuals listed on the spreadsheet, significantly more entered the country in the approximately one-month period *prior* to 5 June 2017 than in the *following 12 months combined*. *See* **Annex 17**, Sorted Excel Spreadsheet of UAE Annex 1, Immigration – Qataris in the UAE.

232 Indeed, whereas in its Response of 7 August 2018 the UAE suggested that there were approximately 2,194 Qataris "residing in" the UAE as of 5 June 2017, in its 15 January 2019 submission, it submitted that, as of 10 January 2019, there were only "*702* Qatari nationals residing in the UAE who hold UAE identification documents". *See* 7 August Submission, para. 19; 15 January Submission, para. 10 (emphasis added). Qatar notes that the document the UAE cites in support of this latter assertion actually records *396* of these 702

125. The UAE's characterization of its own exhibits thus confirms what should be common sense: that the UAE's measures forming the subject of Qatar's Communication have led to an enormous decrease in the number of Qataris both residing in and visiting the UAE.

126. *Finally*, even if the hotline were effective—which it is not—the hotline is only available for family-related matters, as the UAE itself made clear at the hearing on provisional measures before the ICJ[233]. Moreover, setting aside its obvious procedural deficiencies, it could only *arguably* mitigate harm with respect to travel into and out of the country. It cannot remedy past harms, restore the *status quo ante*, afford reparation, offer guarantees of non-repetition or adjudge or declare breach[234]. The hotline is therefore not an adequate remedy in any sense of the word.

127. At the hearing on provisional measures before the ICJ, the UAE emphasized "that the mechanism of the hotline is more appropriate and expeditious than more traditional

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Qatari nationals as having *exited* the country. *See* Excel Redacted Holders of UAE Resident Permits (**UAE Annex 1.3**). Moreover, many of the remaining *entries*—a mere 306—may have actually been made by the *same nationals* entering the country on more than one occasion. *Id*. (redacting information identifying those allegedly entering the country). But even accepting the UAE's submissions as true—and Qatar does not—there would apparently have been a more than *threefold* decrease in the number of Qataris residing in the UAE. That decrease would not, of course, account for the substantial numbers of additional Qataris who are no longer able to *visit* the country as a result of the arbitrary administration of the hotline.

233 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/13, para. 41 ("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."). *See also, e.g., Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 2 (**UAE Annex 4**) ("in terms of taking into consideration the Humanitarian cases of the Emirati-Qatari joint families, in recognition of the brotherly Qatari people, the Ministry of Interior has set up a toll-free hotline (009718002626) to receive such humanitarian cases and take appropriate procedures to help them."). This fact has prevented many Qataris from calling the hotline. *See, e.g.,* **DCL-135**, para. 24 ("I didn't try to contact the hotline because I heard it was for people trying to visit close relatives."); *id.,* para. 25 ("After I heard about the provisional measures order…I contacted the hotline to request a special permit to go to the UAE to try to retrieve the originals of my documents. During the call, I was asked about the purpose of my visit and whether I have first degree relatives in the UAE."); **DCL-093**, para. 28 ("I did not try to request a special permit to go to the UAE and see my property because one of my Qatari friends told me that the special permit was only for Qataris who were visiting first-degree relatives in the UAE.").

234 *See, e.g.,* Francesca Capone, "Remedies", *Max Planck Encyclopedia of Public International Law* (2007), para. 17 ("The responsible State is also under an obligation to make reparation for the injury caused by the internationally wrongful act."); *id*., para. 15 ("The State responsible for the commission of a wrongful act is under an obligation to cease the conduct and to offer appropriate assurances, normally given verbally, and guarantees of non-repetition, such as preventive measures to be taken to avoid repetition of the breach.").

mechanisms"[235]. The fact that the most "appropriate" mechanism is an admittedly discretionary—and demonstrably arbitrary and nontransparent—"police security channel"[236] speaks volumes to the nature of the other purported "remedies" available.

b. The UAE's "Court Remedies" Are Neither "Reasonably Available" nor "Effective"

128. The UAE also submits that "Qatari nationals in the UAE have at all times been entitled to access the UAE's courts"[237], and that "[c]ourt remedies in the UAE are available and effective and can be pursued without difficulty, either in person or through powers of attorney"[238].

129. It is impossible to reconcile this assertion with the ICJ's express finding that Qataris appear to have "been denied equal access to tribunals and other judicial organs in the UAE"[239]. It is equally impossible to reconcile the assertion with an undisputed fact: that, to borrow the UAE's own words, there is no evidence "of a *single Qatari national* seeking to avail himself or herself" of the courts for perceived "violation of the protections in CERD"[240].

130. Indeed, far from assisting the UAE, this admission destroys its argument entirely. As this Committee recently made clear to the UAE itself, "a low number of complaints does not signify the absence of racial discrimination in the State party, but may signify barriers in invoking the rights in the Convention domestically"[241]. More importantly, and as

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235 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/15, p. 18, para. 12 (Treves).

236 *See Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration*, p. 6 (**UAE Annex 4**).

237 4 December Submission, para. 65.

238 4 December Submission, para. 67.

239 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, para. 68.

240 4 December Submission, para. 68 (emphasis added). *See also, e.g., id*., para. 68; 15 January Submission, para. 54.

241 CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 13. *See also, e.g., id*., para. 15; CERD Committee, General Recommendation XXXI (2004), para. 1 ("States parties

explained above, it is "the State that alleges non-exhaustion"—in this case, the UAE—that must "provide *evidence*" of the effectiveness of a purported remedy[242], including in the form of "*examples* of the alleged remedy having been *successfully utilized* by persons in similar positions"[243]. But the UAE cannot present any examples of Qataris having successfully utilized court "remedies" with respect to the measures[244], and the UAE's argument must be dismissed for that reason alone[245].

131. The reality is that thousands of Qataris have been deeply aggrieved by the UAE's treatment of them[246], but know that there are no court remedies that are either "reasonably available" or "effective"[247].

132. To begin with, the UAE's justice system is deeply and demonstrably flawed. In 2018, the United Nations High Commissioner for Human Rights called on the UAE to "release

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should pay the greatest attention to the following possible indicators of racial discrimination: … The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country. Such a statistic should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism.").

242 Inter-American Commission of Human Rights, *Nicaragua v. Costa Rica*, Inter-State Case 1/06, Report N° 11/07 (8 March 2007), para. 243 (emphasis added). *See also, e.g.*, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment (1 February 2000), Inter-American Court of Human Rights Series C, No. 66, para. 53.

243 Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", *International Courts and the Development of International Law* (2013), p. 568 ("the European Court of Human Rights has specified that the State must not only satisfy the Court that the remedy was effective, available both in theory and practice at the relevant time, but also frequently asks the State to provide examples of the alleged remedy having been successfully utilized by persons in similar positions to that of the applicant.") (emphasis added above). *See also, e.g.,* ECtHR, *Kangasluoma v. Finland*, Application No. 48339/99, Judgment on Merits and Just Satisfaction (20 January 2004), para. 48; ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 157.

244 This is true despite this Committee's express call on States Parties to ensure "that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies". CERD Committee, General Recommendation XXX (2004), para. 25.

245 In fact, there is no evidence that anyone in the UAE has *ever* alleged a violation of the CERD in domestic courts. *See, e.g., Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/50/18 (22 September 1995), para. 554 (The CERD "had thus far never been invoked before a court".).

246 *See, e.g.,* **Annex 12,** National Human Rights Committee, *A year of the blockade imposed on Qatar* (June 2018), p. 13.

247 *See* International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(a).

immediately and unconditionally [peaceful activists and human rights defenders] who have been arbitrarily detained"; and to "[e]nsure the separation of powers and strengthen the independence of the judiciary, which is under the control of the executive branch and the State security service"[248]. Similarly, in a 2015 report on the UAE, the UN Special Rapporteur on the independence of judges and lawyers noted, *inter alia*,

- that she was "especially concerned that the judicial system remains under the de facto control of the executive branch of government";[249]
- that "important pieces of legislation" contain "vague and broad definitions of criminal offences, in contravention of international human rights standards", and that such provisions "defy the principle of legality and open the door to arbitrary interpretation and abuse"[250];
- that she was told that "foreigners' lack of confidence in the justice system is such that many of them do not report crimes or abuses"[251];
- that it is "often impossible for vulnerable persons to seek remedies for abuses they suffer, which is a breach of the principle of equality before the courts"[252];
- that she was "concerned at reported instances in which judges appear to have lacked impartiality and shown bias, especially with regard to non-nationals of the United Arab Emirates", and that "[a]mong foreigners residing in the United Arab Emirates, there seems to be a perception that the domestic courts cannot be trusted, and more specifically that judges do not treat nationals in the same way as non-nationals"[253];

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248 Letter from UN High Commissioner for Human Rights to UAE (7 August 2018), *available at* https://lib.ohchr.org/HRBodies/UPR/Documents/Session29/AE/UAE_LetterHC_EN.pdf (last accessed: 8 February 2019), p. 4. *See also, e.g., Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/WG.6/29/ARE/2 (13 November 2017), para. 31 ("A group of special procedure mandate holders urged the United Arab Emirates to end the harassment and intimidation of human rights defenders and respect the right to freedom of opinion and expression, including on social media and the Internet.").

249 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 33.

250 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 29.

251 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 37.

252 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 63.

253 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 37.

- that she was "particularly concerned at reports of serious breaches of fair trial and due process guarantees, especially regarding, but not limited to, crimes related to State security"[254], and "that individuals accused of having committed crimes that jeopardize State security have extremely limited access to legal counsel"[255];

- that she was "alarmed at reports that some lawyers who take up cases related to State security have been harassed, threatened and had pressure exerted on them, including through constant surveillance, public campaigns of defamation, and the arbitrary deportation of non-national lawyers"[256];

- that "[i]mpunity surrounding such breaches of the independence of the legal profession has had a chilling effect on lawyers", and that it was reported to the Special Rapporteur "that it has become extremely difficult to secure a lawyer in State security-related cases", with "[m]any lawyers refus[ing] such cases or drop[ping] them early on owing to the pressure placed on them"[257]; and

- that she "received credible information and evidence" that many individuals "were arrested without a warrant and taken to unofficial places of detention", and "were also subjected to torture or other forms of ill-treatment, including in order to extract confessions of guilt or testimonies against other detainees"[258].

133. These problems existed well *before* the UAE ordered all Qataris to leave the country, and then instituted a vague and sweeping new criminal prohibition on "expressing sympathy,

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254 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 86. *See also, e.g.,* Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/WG.6/29/ARE/2 (13 November 2017), para. 31 ("OHCHR stated that, under the pretext of national security, many activists had been prosecuted for allegations mainly related to a person's right to express his or her opinion and criticism of any public policy or institution.").

255 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 56.

256 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 79. *See also id.* (noting that the Special Rapporteur was "alarmed at the long list of obstacles that lawyers working on State security-related cases encountered on a daily basis while discharging their professional duties and representing their clients' interests."); *id*., para. 86 (noting that the Special Rapporteur was "concerned about the harassment, pressure and threats to which some lawyers are subjected, in breach of their independence, especially when they take up cases related to State security crimes".); *id*., para. 80 ("in at least one case, a lawyer was arrested when he was enquiring about the whereabouts of his clients at the State security prosecution branch.").

257 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 81.

258 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 52. *See also, e.g.,* Human Rights Watch, *UAE Continues to Flout International Law* (29 June 2018) ("Others in the UAE who speak out about human rights abuses remain at serious risk of arbitrary detention, imprisonment, and torture, and many are serving long prison terms or have felt compelled to leave the country.").

bias, or affection for [Qatar], or objecting to the position of the State of the United Arab Emirates and the strict and firm measures that it has taken against the Qatari government"[259]. This new prohibition—which, needless to say, is a particularly egregious illustration of suppression of speech[260]—is not an idle threat. On the contrary, the UAE has already arrested or punished multiple people under it[261]—including for wearing a Qatar national team shirt to an Asian Cup football match hosted by the UAE[262]—and is notorious for using the "pretext of national security" to prosecute individuals for "criticism of any public policy or institution"[263].

134. The reality is that there is nothing remotely surprising about the fact that no Qatari has sought to challenge the UAE's measures in domestic courts.

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259 Al Bayan Online, *Attorney General Warns Against Sympathy for Qatar or Objecting to the State's Positions* (7 June 2017) (certified translation).

260 *See, e.g.,* CERD Committee, General Recommendation XXXV (2013), para. 25 ("The Committee considers that the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression.").

261 Amnesty International, *United Arab Emirates 2017/2018* ("Ghanim Abdallah Matar was detained for a video he posted online in which he expressed sympathy towards the people of Qatar."). *See also, e.g.,* **Annex 12**, National Human Rights Committee, *A year of the blockade imposed on Qatar* (June 2018), p. 34 (**UAE Annex 23**) ("The UAE authorities has also dismissed Mr. Youssef Al-Sarkal, Chairman of the UAE General Authority for Sports, by reason of shaking hands with the President of the Qatar Football Association.").

262 *See* The Guardian, *British man detained in UAE after wearing Qatar football shirt to match* (5 February 2019) ("A British football fan has been arrested and detained in the United Arab Emirates after he wore a Qatar national team shirt to a match.").

263 *Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/WG.6/29/ARE/2 (13 November 2017), para. 31. *See also, e.g.,* Amnesty International, *United Arab Emirates 2017/2018*; Human Rights Watch, *Submission for the Universal Periodic Review of the United Arab Emirates* (29 June 2017) ("In March 2017, the UAE detained Ahmed Mansoor, an award-winning human rights defender. He remains detained and is facing speech-related charges that include using social media websites to 'publish false information that harms national unity.' *A coalition of 20 human rights organizations said Mansoor was the last remaining human rights defender in the UAE who had been able to criticize the authorities publicly*") (emphasis added); Human Rights Watch, *World Report 2018: United Arab Emirates* ("The UAE arbitrarily detains and forcibly disappears individuals who criticize authorities within the UAE's borders."); Human Rights Watch, *United Arab Emirates: Events of 2017* (2018) ("UAE authorities have launched a sustained assault on freedom of expression and association since 2011. UAE residents who have spoken about human rights issues are at serious risk of arbitrary detention, imprisonment, and torture.").

135. *First*, pursuant to the anti-sympathy prohibition, a Qatari could face criminal prosecution for even "*objecting*" to the measures[264]. It is facially unreasonable for the UAE to nonetheless demand that Qataris not only do exactly that, but that they do so before the very same courts the UN High Commissioner for Human Rights has made clear are "under the *control of the executive branch and the State security service*"[265].

136. *Second*, even if a Qatari were willing to take the personal risk of bringing a claim, he would be unable to find a lawyer to represent him. Not only has it "become extremely difficult to secure a lawyer in State security-related cases"[266] in general but, as the Office of the High Commissioner made clear, lawyers are particularly "unlikely to defend Qataris", as "this would likely be interpreted as an expression of sympathy towards Qatar"[267].

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264 Al Bayan Online, *Attorney General Warns Against Sympathy for Qatar or Objecting to the State's Positions* (7 June 2017) (certified translation) (emphasis added).

265 Letter from UN High Commissioner for Human Rights to UAE (7 August 2018), *available at* https://lib.ohchr.org/HRBodies/UPR/Documents/Session29/AE/UAE_LetterHC_EN.pdf (last accessed: 8 February 2019), p. 4. *See also, e.g.,* CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 15 (emphasis added).

266 UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 81 ("It was reported to the Special Rapporteur that it has become extremely difficult to secure a lawyer in State security-related cases.").

267 **Annex 11**, OHCHR Technical Mission to the State of Qatar, *Report on the impact of the Gulf Crisis on human rights* (December 2017), para. 40. In fact, many Qataris have found it difficult to find lawyers willing to represent them even on matters *unrelated* to challenging the measures. *See, e.g.,* **DCL-048**, para. 17 ("In [] 2017, my lawyer in the UAE stopped replying to my texts and answering my calls … I continued to try and contact him until February 2018 … I then gave up."); *id*., para. 18; **DCL-093**, paras. 30-33 ("My business partner and I have been unable to hire a lawyer to represent us before Emirati courts…[M]y partner contacted three lawyers by phone…None of these lawyers agreed to take our case. They told my business partner that they were busy, that they did not have time for our case, or that they wanted us to come to the UAE to discuss before they could take the case…They seemed eager to get rid of my partner. We felt that those were just excuses."); **DCL-135**, para. 18 ("I have been trying to contact my lawyer and his secretary…since June 5, 2017…During the first week following the UAE's June 5, 2017, directive, my lawyer or his secretary would sometimes answer my calls and tell me that they would get back to me with an update. They never did. Since the end of that week, neither by lawyer nor his secretary have answered or returned any of my calls."); **DCL-146**, para. 32 ("I tried to hire a lawyer in the UAE to bring a case against the company that terminated my business's lease and caused the loss of my business assets…I called two lawyers who work in the UAE and told them what had happened. One said that he could not do anything for me, and the other said that he could not represent me. They did not say why, but it was clear to me that they refused my case because I am Qatari."); **DCL-136**., para. 10 ("I tried to contact various Emirati lawyers to represent me in

137. The UAE's assertion that between 6 June 2017 and 20 June 2018 "there have been over 340 cases involving Qataris"[268] cannot change this. Setting aside the fact that in many of those cases Qataris were appellees or defendants[269]—including in *criminal proceedings*[270] resulting in at least one conviction rendered *in absentia*[271]—the fact remains that the UAE has presented *no* cases in which Qataris have challenged the measures that form the subject of Qatar's Communication[272].

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the UAE, but none of them were willing to represent me. One of them specifically said that he was scared to deal with me because I am Qatari.").

See also, e.g., **DCL-147**, paras. 21-23 ("I could not trust a lawyer from the UAE. Even if I hire and pay a UAE lawyer, he would still do what the government wants because he lives in the UAE. Because of the UAE Government's blockade and the anti-sympathy law, a lawyer in the UAE could not act against the position of his government. He would be afraid to do so, and he might not even take the case on because I'm Qatari…. I can't be sure that a lawyer would represent me at all, and if one does I can't trust him to act in my best interest."); **DCL-004**, para. 13 ("I would have also needed an Emirati lawyer to represent me, but I did not think any Emirati lawyer would agree to do so…I do not believe that the Emirati courts would ever rule in my favor because I am Qatari."); **Annex 15**, National Human Rights Committee, *Gulf Crisis: Continuing human rights violations by the United Arab Emirates: Report on the non-compliance by the United Arab Emirates with the Order of the International Court of Justice* (23 Jan. 2019), p. 11.

This is entirely unsurprising, given that even neighbors, close friends and family members are often afraid of associating with Qataris. *See, e.g.,* **DCL-135**, para. 22 ("I have tried to phone a few of my Emirati friends and acquaintances to ask for help in retrieving the documents. Some did not pick up the phone, and others refused to help. When I called a close Emirati friend of mine and asked him to go see my lawyer and retrieve my documents, he confirmed what I thought. My Emirati friend asked me to 'excuse [him] from this mission' because he was scared of the anti-sympathy laws."); *id.*, paras. 24, 28; **DCL-093**, para. 18 (describing how declarant's close Emirati friends have stopped speaking to declarant); **DCL-079**, paras. 29-30 (describing how the declarant's Emirati family stopped speaking with their Qatari family members); **DCL-048**, paras. 13, 21 (noting that Emirati friends informed declarant they were "scared to help me in case they ended up in jail"); **DCL-146**, paras. 13, 17 (noting that after the UAE's anti-sympathy law was passed, Emiratis"told me that because of the law they had to stop communicating with me"); **DCL-136**, paras. 10-11 (describing how declarant's Emirati friends ended communication with declarant).

268 7 August Submission, para. 63.

269 *See generally Judicial Records* (**UAE Annex 18**); *International Judicial Cooperation Department – Ministry of Justice Letter* (**UAE Annex 16**). Indeed, in its Supplemental Response of 4 December 2018, the UAE makes the more limited claim that between 5 June 2017 and 13 June 2018, "more than 160 cases were pursued by Qatari nationals before the UAE courts during the relevant time period". *See* 4 December Submission, fn. 90. Yet even that claim is inaccurate. Not only were some of the cases in question registered *before* 5 June 2017, but Qataris were also very frequently *defendants*, and the UAE's claim that Qatari nationals "pursued" anything in such cases is misleading to say the least. *See generally International Judicial Cooperation Department – Ministry of Justice Letter* (**UAE Annex 16**).

270 *See Judicial Records*, pp. 25, 26, 27, 28, 30, 31, 32, 33 (**UAE Annex 18**).

271 *See Judicial Records*, p. 26 (**UAE Annex 18**). In fact, the UAE's *own* exhibit accompanying its most recent submission of 15 January 2019 indicates that only *18 lawsuits* were filed by Qataris in federal courts in *well over a year*. *See Statement of the cases involving a Qatari citizen*, p. 2 (**UAE Annex 2**).

272 *See* 15 January Submission, para. 54 ("the UAE has offered proof that demonstrates that, since 5 June 2017, Qatari nationals have freely continued to resort to the UAE courts to assert their rights in legal

138. *Third,* notwithstanding the UAE's half-hearted reference to three constitutional provisions to suggest otherwise[273], the UAE's Constitution is demonstrably inadequate to protect Qataris' rights under the CERD[274]. The UAE's reference to UAE Federal Decree Law No. 2 of 2015 does not assist it[275]. While the UAE casually claims that the law "prohibits 'discrimination of any form' by various means of expression"[276], it ignores the fact that, as this Committee has *itself* previously noted[277], the law does *not encompass discrimination on the basis of national origin*[278].

139. The UAE has previously made the extraordinary submission to this Committee that "daily life is untroubled by behaviours that are incompatible with noble values, and the State does not need to enact legislation to deal with any violations of the Convention"[279]. In light of this submission, it is unsurprising that this Committee—which has repeatedly

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matters, *even if not necessarily related to CERD.*") (emphasis added). *See also generally Judicial Records* (**UAE Annex 18**); *International Judicial Cooperation Department – Ministry of Justice Letter* (**UAE Annex 16**).

273 4 December Submission, paras. 65-66.

274 *See, e.g.,* UAE Constitution (2010), Art. 25 ("There shall be no distinction among the *citizens* of the UAE on the basis of race, nationality, faith or social status.") (emphasis added); *id.*, Art. 37 ("A *citizen* may not be deported or exiled from the UAE.") (emphasis added); *id*., Art. 29 ("Freedom of movement and residence is guaranteed to the *citizens* as provided in law.") (emphasis added). *See also, e.g.,* CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 9 ("The Committee is further concerned that article 25 states that the prohibition of discrimination applies to 'citizens of the Union' and might not apply equally to non-citizens, who constitute approximately 90 per cent of the population (art. 1).").

275 *See* 15 January Submission, para. 57.

276 *See* 15 January Submission, para. 57.

277 CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 11 ("The Committee is concerned that the definition of discrimination in the law is not fully in line with article 1 of the Convention, as the grounds of descent and national origin are missing.").

278 *See* UAE Federal Decree Law No. 2 of 2015, Art. 1 ("In applying the provisions of this Decree, the following terms and phrases shall have the meanings assigned against each of them, unless the context requires otherwise: … Discrimination: Any distinction, restriction, exclusion or preference among individuals or groups based on the ground of religion, creed, doctrine, sect, caste, race, colour or ethnic origin.").

279 *See* United Arab Emirates, *Reports Submitted by States Parties in Accordance with Article 9 of the Convention: Seventeenth periodic report of States parties due in 2007*, UN Doc. CERD/C/ARE/12-17 (29 February 2008), para. 72.

called on States parties to enact legislation, enforce it and monitor the results[280]—has for *decades* expressed concerns regarding the adequacy of UAE law[281]. Indeed, as recently as September 2017, this Committee recommended that the UAE "enact legislation to bring its laws fully into line with the Convention"[282].

140. *Fourth*, even if a remedy existed in theory, UAE courts are widely perceived as biased against non-nationals in general[283]. There is every reason to believe a judiciary under the control of the very same executive that ordered the expulsion of Qataris and has

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280 *See, e.g.,* CERD Committee, General Recommendation I (1972); CERD Committee, General Recommendation VII (1985), para. 1; CERD Committee, General Recommendation XXXV (2013), paras. 13, 17; CERD Committee, General Recommendation XV (1993), para. 2.

281 *See, e.g.,* CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), paras. 10-11 ("The Committee is concerned that the definition of discrimination in the law is not fully in line with article 1 of the Convention, as the grounds of descent and national origin are missing."); *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/35/18 (1980), para. 105; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/39/18 (1984), para. 248; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/43/18 (1988), para. 194; *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/50/18 (22 September 1995) para. 562 (noting the "concerns of the Committee with regard to certain inadequacies in the legislation"). *See also, e.g.,* CERD Committee, *Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, Opinion (22 August 2005), UN Doc. CERD/C/67/D/30/2003, para. 7.2.

282 CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 10. *See also, e.g.,* Letter from UN High Commissioner for Human Rights to UAE (7 August 2018), *available at* https://lib.ohchr.org/HRBodies/UPR/Documents/Session29/AE/UAE_LetterHC_EN.pdf (last accessed: 8 February 2019), p. 3 (calling on the UAE to "[e]nact comprehensive anti-discrimination legislation, which prohibits discrimination on all grounds, including colour, language, political or other opinion, descent, national, ethnic or social origin … and is applied not only between citizens but also to non-citizens."). Moreover, the UAE grossly understates its burden by suggesting that all available domestic remedies that offer *any* "prospect of success under domestic law must be exhausted". 15 January Submission, para. 49. As the ILC's Draft Articles on Diplomatic Protection make clear, local remedies need be exhausted only where they provide a "*reasonable* possibility" of redress. International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(a) (emphasis added). *See also, e.g.,* CERD Committee, *Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, Opinion (22 August 2005), UN Doc. CERD/C/67/D/30/2003, para. 7.2 (in which this Committee indicated that uncertainties in the application of domestic law made it impossible "to conclude that such proceedings constitute[d] a useful and effective domestic remedy".).

283 *See, e.g.,* UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 37 ("Among foreigners residing in the United Arab Emirates, there seems to be a perception that the domestic courts cannot be trusted, and more specifically that judges do not treat nationals in the same way as non-nationals. The Special Rapporteur was told that foreigners' lack of confidence in the justice system is such that many of them do not report crimes or abuses."). *See also, e.g.,* General Recommendation XIV (1993), para. 1 ("Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights."); General Recommendation XX (1996), para. 3 ("Many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State.").

criminalized "sympathy" towards Qatar would *not* be impartial towards Qataris—especially in a situation that the UAE portrays as implicating State security, a circumstance in which fair trial and due process concerns are particularly acute[284].

141. *Fifth*, even if all of these obstacles could somehow be overcome, the existing "remedies" are clearly not "reasonably available"[285]. Setting aside the arbitrary and discretionary nature of the "hotline" through which Qataris are expected to apply to travel, the closure of transport links between the two countries—a fact found relevant to the local remedies rule in at least one case involving large-scale expulsion in the past[286]—means that Qataris must first take a burdensome and expensive trip through a third country[287]. They must then be willing to undertake the personal risk of entering the UAE, a country in which they do not feel safe[288] and cannot rely on their government to protect them[289].

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284 *See, e.g.,* UN Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Mission to UAE*, UN Doc. A/HRC/29/26/Add.2 (5 May 2015), para. 86 ("The Special Rapporteur is particularly concerned at reports of serious breaches of fair trial and due process guarantees, especially regarding, but not limited to, crimes related to State security.").

285 International Law Commission, *Draft Articles on Diplomatic Protection, with commentaries* (2006), Art. 15(a).

286 ECtHR, *Case of Georgia v. Russia (I),* Application No. 13255/07, Merits Judgment (3 July 2014), para. 156.

287 The UAE asserts that "a number of courts in the UAE provide various e-services for the filing of a claim". 4 December Submission, para. 69. But even if this assertion were accurate—and the UAE has failed to prove that it is—the UAE has not even argued that claims can be filed by non-lawyers, with respect to the measures in question, and then actually pursued *from abroad* through *completion* of the case.

288 *See, e.g.,* **DCL-030**, para. 11 ("I would never feel safe there even if I was allowed to visit it again someday."); **DCL-048**, para. 23 ("I am afraid of the treatment that I could receive there."); **DCL-079**, para. 16 ("I was too afraid to even think about traveling to the UAE. There was so much uncertainty as to the process, as to how we would be treated in transit and once there, as to the dangers we could face. It was just too much uncertainty…."); **DCL-093**, paras. 26-27 ("I am too afraid to go to the UAE … I do not trust Emirati authorities since they have imposed measures against Qatar and Qataris…. My business partner did not try to go to the UAE for the same reasons. He is also concerned that he would not be able to come back."); **DCL-135**, para. 24 ("I didn't try to contact the hotline because…I was [] scared to travel to the UAE."); **DCL-146**, para. 14 ("I am afraid to travel to the UAE because I have heard many stories about Qataris who went there and were abused by UAE authorities."); **DCL-136**, para. 9 ("I was scared of entering the UAE, particularly since the Qatari Embassy closed and the UAE government told all Qataris to leave within 14 days."); **DCL-113**, para.12 ("[E]ven if I *were* allowed to visit the UAE, I would not try to go, because I am scared of what might happen to me in the UAE.").

289 *See, e.g.,* **DCL-030**, para. 18 ("Since I filed my claim before the CCC, I was told about the UAE 'hotline,' but I would not try to call the number, because I do not want to visit the UAE. I would not feel safe there. If something bad happened to me in the UAE, I don't know who I would turn to for help because there is no Qatari Embassy in the country. I would feel at risk all the time…, and worried that some Emiratis would treat me badly simply because I am Qatari."); **DCL-048**, para. 22 ("The only option I have now would be

142. The UAE's final claim that 146 Qataris have executed powers of attorney since the beginning of the crisis also does not assist it. Even if this claim were substantiated—and it has not been[290]—146 is an *extremely* small number in comparison to the thousands of Qataris who have been harmed by the UAE's measures[291]. More importantly, it is a fundamental due process right for an individual to be able to attend their own legal proceedings in person. And even if it were not, many Qataris simply do not know anyone trustworthy who would be willing to execute a power of attorney[292]. Moreover, many of those who do know someone, and who have made the expensive and difficult trip to a third country in an attempt to acquire a power of attorney[293], have been rejected *expressly*

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to travel to the UAE myself. However, I do not think it is safe to do so. There is no embassy, no Qatari officials and no one would be able to guarantee my safety."); **DCL-004**, para. 14 ("If something was to go wrong in the UAE, there would be no Qatari Embassy there to protect me."); **DCL-108**, para. 20 ("I have asked my daughters to meet their grandparents in Turkey instead of [], as I don't think it's a good idea for them to enter the UAE…If anything were to happen to them, there is no Qatari embassy in the country to help them."); **DCL-136**, para. 9 ("I was scared of entering the UAE, particularly since the Qatari Embassy closed…").

290 Indeed, the UAE's "proof" of this claim is a single conclusory, uncorroborated line of a document prepared by the UAE itself. *See Statement of the cases involving a Qatari citizen*, p. 2 (**UAE Annex 2**).

291 The fact that only 146 Qataris had even *allegedly* received powers of attorney—none of which the UAE has shown were granted in connection to challenging the measures that actually form the subject of Qatar's Communication—thus *harms* the UAE's case, rather than helping it.

292 **DCL-048**, para. 21 ("I initially thought about giving a POA to my Emirati lawyer, but that is not an option anymore, as he has not been responsive. I do not know anyone else who would accept a POA in the UAE at the moment, as my friend refused to help me."). Similarly, many of those who do know someone they trust have refrained from asking them to execute a power of attorney because they fear this could create problems or be a safety issue for the person involved. *See, e.g.,* **DCL-113**, para. 14 ("I have not tried to get a Power of Attorney, because I don't know who I could give Power of Attorney to—I am afraid that if someone helped me by acting on my behalf in the UAE, it could put them in danger, or they could be charged with violating the anti-sympathy law. I don't want any of my friends or acquaintances in the UAE to be questioned by officials or Emiratis about why they are cooperating with a Qatari or why they have a Power of Attorney for a Qatari."). Experience shows that such concerns are fully justified. *See, e.g.,* **DCL-146**, paras. 27-31 ("I asked the two employees with POAs to deal with my business' lease termination, but both were prevented and deterred from taking actions due to police scrutiny and surveillance by UAE authorities. They said that they were being monitored and were not able to even reach my property.").

293 *See, e.g.,* **DCL-152**, paras. 21-22, 25-26 ("the matter took some six weeks, three lawyers' offices, and visits to two embassies and four ministries in three countries … The only reason that [the company] could manage the complicated process is that it had preexisting relationships with lawyers in the various legal fields and the existing transnational relationships among the law firms, as well as the Company's considerable resources that enabled it to complete the process at embassies and notary offices in three countries. Without these resources, the burden of the current process and its significant cost … would have been larger than it would have been able to bear"); **DCL-030**, paras. 12-13 (detailing the declarant's trip to Oman and visits to three different governmental entities in an attempt to acquire a power of attorney); **DCL-108**, para. 13 (detailing declarant's multiple trips to Oman to acquire powers of attorney and noting that "[n]ormally, it costs around 150 AED to get all of the necessary stamps for a valid POA," but that on one occasion alone, "I spent 2,000 AED.").

because they were Qataris[294]. To add insult to injury, even the very small number of Qataris who have actually received valid powers of attorney have often been unable to *use* them[295]. Indeed, individuals with valid powers of attorney have been harassed, arrested and interrogated for their association with Qataris[296].

143. In light of the evidence laid out above, the conclusion is inescapable: the UAE's courts do *not* constitute a "reasonably available" remedy, let alone an "effective" one.

c. Other Alleged "Complaint Procedures" Are Neither "Reasonably Available" nor "Effective"

144. Finally, the UAE argues that Qatari nationals can resort to "complaint procedures specific to various governmental authorities"[297].

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294 **DCL-030**, para.12 ("[T]he official working at the UAE Embassy refused to stamp the POA. He told me 'we're not stamping it' and that they 'don't stamp anything involving Qataris.' He said it was because he had 'supreme orders' not to do so. I tried to argue with him, but he wouldn't listen—he wouldn't even look at us or engage in conversation; he simply waved to the person in line behind us and said 'next.'"); *id*., para. 15; **DCL-147**, para. 19 ("the UAE Embassy official refused to stamp the POA and told my friend that the Embassy would not accept anything from Qataris. My friend pressed the matter, but the Embassy official insisted that he would not stamp the POA and said next time don't even try."); **DCL-108**, para. 16 ("[T]he UAE official at the Embassy had refused to stamp the POA. The official told my friend that the paperwork could not be stamped because it was for a Qatari…The official told my friend that…the Embassy had 'received orders' and could not authenticate any document related to Qataris."). In some cases, individuals who were denied powers of attorney on the basis of their nationality were later able to acquire them by trying again, thereby highlighting the arbitrary and discretionary nature of the process. *See*, *e.g.*, **DCL-030**, paras. 12-13; **DCL-108**.

295 **DCL-146**, paras. 8, 22, 27-29 ("In order to ensure that my employees could carry out the duties of the business, I executed Powers of Attorney for some of them…My employee went to get [an impounded] car back from the authorities, but they refused to give it to him, even after he showed them the POA that I had granted him. They told him to let the Qatari come and see about his car problem.")); **DCL-030**, para. 13 (describing the experiences of a declarant who was unable to use their power of attorney because it was valid for only three months, and the declarant did not find anyone willing to purchase their apartment within that short time).

296 *See, e.g.,* **DCL-146**, paras. 28-31 ("At the time of the blockade, I asked the two employees with POAs to deal with my business' lease termination, but both were prevented and deterred from taking actions due to police scrutiny and surveillance by UAE authorities. They said that they were being monitored and were not able to even reach my property. They were also afraid to raise objections to the lease termination to the authorities because of the anti-sympathy laws…About 20 days after the anti-sympathy law announcement, this employee was taken into custody by UAE authorities for interrogation. That employee stopped communicating with me after his interrogation. That made me think that he was interrogated because we had been in regular contact via phone and text messages. I know about his interrogation because another employee learned about it from him and told me. This other employee also told me that the UAE authorities warned the interrogated employee not to communicate with any Qataris. At that point forward, that second employee also stopped communicating with me out of fear of the UAE authorities.").

297 4 December Submission, para. 67.

145. Qatar notes that this category of purported "remedies" is an obvious afterthought. The UAE's initial Response did not even mention these so-called "complaint procedures", and in its 4 December Submission, the entire discussion of them could be found in a single sentence and footnote[298]. In that Submission, the UAE actually identified only a *single* procedure, before the Dubai Legal Affairs Department[299]. But that procedure, too, is clearly *not* a remedy encompassed by Article 11(3) of the CERD.

146. *First*, in the UAE's own words, the Dubai Legal Affairs Department is tasked with "receiving complaints and claims made against the *Government of Dubai*"[300]. However, the measures in question were not issued by the Government of Dubai but rather by the UAE as a whole, and the UAE has proffered no evidence that the Dubai Legal Affairs Department is able to hear complaints made against it[301].

147. *Second*, according to the Government of Dubai's own website, the Dubai Legal Affairs Department is tasked not only with considering complaints, but also with "[re]presenting the Government and Government entities in claims and disputes before competent judicial entities", making clear where its loyalties lie[302].

148. *Third*, as the UAE itself concedes, complaints to the Dubai Legal Affairs Department represent only a preliminary step *prior* to litigation before the courts[303]. Setting aside the fact that the Dubai Legal Affairs Department would then represent the *government* before

298 *See* 4 December Submission, para. 67, fn. 88.

299 *See* 4 December Submission, fn. 88.

300 *See* 4 December Submission, fn. 88 (emphasis added). *See also* 15 January Submission, para. 56 (referring to the procedure in question as having been instituted "by *local* UAE government".) (emphasis added).

301 Even if the complaints procedure before the Dubai Legal Affairs Department somehow constituted a "reasonably available" and "effective" remedy for purposes of Article 11(3) of the CERD—and it does not—it could not possibly be a remedy required of the many individuals with no connection to the Government of Dubai.

302 Government of Dubai, *The Government of Dubai Legal Affairs Department*, *available at* http://www.dubai.ae/en/Lists/GovernmentDepartments/DispForm.aspx?ID=49 (last accessed: 9 January 2019).

303 *See* 4 December Submission, fn. 88.

the courts[304], as Qatar has already explained, court remedies in the UAE are neither "reasonably available" nor "effective"[305].

149. *Finally*, the UAE has provided no evidence that the complaint mechanism has ever been used, let alone successfully and in relation to the measures that are the subject of Qatar's Communication. The complaints procedure before the Dubai Legal Affairs Department therefore cannot possibly be considered an effective remedy for purposes of Article 11(3)'s local remedies rule.

150. In its third submission of 15 January 2019, the UAE suddenly discovered, for the first time, a number of other purported "remedies"—none of which it had seen fit to even *mention* before the ICJ or in the 68 pages of argument it previously submitted to this Committee on two separate occasions. Unsurprisingly, this third try is not the charm.

151. As an initial matter, Qatar notes that the UAE's own framing of these newfound "remedies" makes clear that they could only *conceivably* concern narrow subsets of activity implicated by Qatar's Communication[306]. Qatar also notes the UAE's repeated suggestion that there is "no evidence of recourse to such remedies"[307]. But once again, this admission does not assist the UAE's case, but instead destroys it. It bears repeating: it is "the State that alleges non-exhaustion" that must "provide *evidence*" of the

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304 Government of Dubai, *The Government of Dubai Legal Affairs Department*, *available at* http://www.dubai.ae/en/Lists/GovernmentDepartments/DispForm.aspx?ID=49 (last accessed: 9 January 2019).

305 *See supra* Section IV.A.2.

306 *See* 15 January Submission, para. 57 (concerning mechanisms that purportedly allow *criminal* complaints against *individuals* regarding "hate speech"); *id*., para. 58 (concerning complaints regarding the alleged "blocking of media content"); *id.*, para. 59 (concerning complaints with respect to unspecified violations of the "right to health and right to medical treatment"); *id*., para. 60 (concerning an alleged complaint mechanism for "secondary school students" against "a UAE school"); *id*., para. 61 (concerning complaints with respect to unspecified violations of the "right to work"); *id*., para. 62 (concerning complaints with respect to alleged violations of the "right to property", such as those involving disputes between "landlords and tenants").

307 *Cf.* 15 January Submission, paras. 56, 57, 58, 59 ("Qatar has put forward no evidence of recourse to such remedies."). *See also, e.g., id*., para. 60 ("Qatar also has not shown any instance of Qatari nationals making complaints with respect to the right of education."); *id*., para. 61 ("Qatar has put forward no evidence that any Qatari has availed himself or herself of these complaint resolution procedures."); *id*., para. 62 ("again, Qatar has provided no evidence that such remedies have been exhausted.").

effectiveness of a purported remedy[308], including in the form of "*examples* of the alleged remedy having been *successfully utilized* by persons in similar positions"[309].

152. It is, once again, little wonder that the UAE has been unable to provide any such examples, as not a single one of its new "remedies" is "reasonably available" and "effective".

153. *First*, the UAE argues that "[v]arious means exist for individuals (including Qataris) to bring complaints to the attention of the authorities, including under the mechanisms provided for pursuant to Federal Decree Law No. 2 of 2015 and Law No. 5 of 2012"[310]. But as Qatar has already explained, Federal Decree Law No. 2 of 2015 does not prohibit discrimination on the basis of national origin, and cannot possibly serve as the basis for effective complaints. Nor can Law No. 5 of 2012, which not only does not even mention the word "discrimination"[311], but is also the *very same law* invoked by the UAE to *criminalize* "sympathy" towards Qatar[312]. The fact that the UAE would suggest that

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308 Inter-American Commission of Human Rights, *Nicaragua v. Costa Rica*, Inter-State Case 1/06, Report N° 11/07 (8 March 2007), para. 243 (emphasis added). *See also, e.g.*, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment (1 February 2000), Inter-American Court of Human Rights Series C, No. 66, para. 53.

309 Cesare P. R. Romano, "The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures", *International Courts and the Development of International Law* (2013), p. 568 ("the European Court of Human Rights has specified that the State must not only satisfy the Court that the remedy was effective, available both in theory and practice at the relevant time, but also frequently asks the State to provide examples of the alleged remedy having been successfully utilized by persons in similar positions to that of the applicant.") (emphasis added above). *See also* CERD Committee, *Concluding observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates*, UN Doc. CERD/C/ARE/CO/18-21 (13 September 2017), para. 13 ("a low number of complaints does not signify the absence of racial discrimination in the State party, but may signify barriers in invoking the rights in the Convention domestically."); CERD Committee, General Recommendation XXXI (2004), para. 1(b).

310 15 January Submission, para. 57.

311 *See generally* United Arab Emirates, *Federal Decree-Law No. 5 of 2012 on Combating Cybercrimes*, *available at* https://wipolex.wipo.int/en/text/316909 (last accessed: 24 January 2019).

312 *See* Freedom House, *Freedom on the Net 2018, United Arab Emirates*, *available at* https://freedomhouse.org/report/freedom-net/2018/united-arab-emirates (last accessed: 8 February 2019) ("In July 2017, the cybercrime law was expanded to criminalize 'sympathy for Qatar,' which carries a penalty of up to 15 years in prison.").

Qataris should nonetheless invoke these irrelevant laws by complaining through an "e-service" provided by the "Dubai police" is nothing short of absurd[313].

154. *Second*, the UAE submits that the "blocking of online content may be challenged by individual users through submissions via online forms or by the media outlets themselves by petitioning the National Media Council of the UAE"[314]. But the only "online form" the UAE refers to is a basic "Request Form" provided not by the UAE, but rather by the multinational telecommunications provider Etisalat[315]. Setting aside its apparently discretionary nature, a corporate webpage is not even arguably a "domestic remedy", let alone a legal one, encompassed by the local remedies rule.

155. Nor can the UAE rely on the alleged possibility of submitting "petition[s]" to "the National Media Council of the UAE"[316]. Even if a petition challenging the "blocking of content" were permissible in theory—and the UAE has not proved that it is[317]—the reality is that the National Media Council is a "federal government body"[318] under the control of *same executive branch that has ordered the measures subject to Qatar's Communication*[319]. In circumstances in which the UAE continues to maintain that its

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313 15 January Submission, para. 57 ("Various means exist for individuals (including Qataris) to bring complaints to the attention of the authorities, including under the mechanisms provided for pursuant to Federal Decree Law No. 2 of 2015 and Law No. 5 of 2012. To facilitate complaints, Dubai police offers an e-service through which an individual can report offenders."). Qatar notes in any event that the "Request to Open a Criminal Case" page to which the UAE refers is open only to those with an "Emirates ID", and allows complaints only with respect to a "Breach of Trust Case"; a "Hassle Case"; an "Insulting Case"; an "Insulting via Mobile Case"; a "Threat Case"; and an "Assault Case". *See* Dubai Police, *Request to Open a Criminal Case*, *available at* https://www.dubaipolice.gov.ae/wps/portal/home/services/individualservices/opencriminalcase?firstView=true (last accessed: 24 January 2019).

314 15 January Submission, para. 58.

315 *See* Etisalat, *Web Content Block/Unblock Request Form*, *available at* https://etisalat.ae/en/generic/contactus-forms/web-block-unblock.jsp (last accessed: 24 January 2019).

316 15 January Submission, para. 58.

317 The UAE cites two articles of a resolution on "Media Activities Licensing" indicating the existence of a grievance procedure with respect to that resolution. *See* 15 January Submission, para. 58. However, it provides no indication of the manner in which a resolution on "licensing" concerns the "blocking of online content" more generally.

318 *See* National Media Council, *About Us*, *available at* http://nmc.gov.ae/en-us/NMC/Pages/About-NMC.aspx (last accessed: 8 February 2019).

319 *See* United Arab Emirates, *The UAE Cabinet*, *available at* https://government.ae/en/about-the-uae/the-uae-government/the-uae-cabinet (last accessed: 18 January 2019) ("The Cabinet or the Council of Ministers of

actions were lawful, any suggestion that the National Media Council would provide an effective remedy is thus once again absurd.

156. *Third*, the UAE asserts that the UAE's Ministry of Health and Prevention "provides a number of avenues for an individual to file a complaint"[320]. The only source it cites is a "Customer Complaints" webpage allowing "customers" to "submit complaints, suggestions or Compliments"[321]. Not only is the Ministry of Health and Prevention again under the control of the executive branch, but the webpage in question also provides no indication that the Ministry is competent to handle complaints relating to the matters raised in Qatar's Communication, much less that its responses are based on anything but discretion[322].

157. *Fourth*, the UAE submits that the Abu Dhabi Department of Education and Knowledge provides a complaint mechanism for "secondary school students" whereby "an individual can raise a complaint against a UAE school"[323]. Unsurprisingly, it fails to note that the complaints page in question is *explicitly* concerned only with complaints directed against "[p]rivate" schools[324]. There is, moreover, once again no indication that the Abu Dhabi Department of Education and Knowledge is competent to handle complaints connected to measures instituted by the *federal* government, let alone in connection to the measures that form the subject of Qatar's Communication[325]. The fact that the best education-

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the United Arab Emirates is the executive branch of the federation. It *executes all internal and external affairs of the Federation* as per the provisions of UAE Constitution and the federal laws … Article 60 of the Constitution lays down the powers of the Cabinet. They are: … *Controlling the conduct of work in federal departments*") (emphasis added).

320 15 January Submission, para. 59.

321 UAE Ministry of Health & Prevention, *Customer Complaints*, *available at* http://www.mohap.gov.ae/en/Pages/COMPLAINS.aspx (last accessed: 8 February 2019).

322 UAE Ministry of Health & Prevention, *Customer Complaints*, *available at* http://www.mohap.gov.ae/en/Pages/COMPLAINS.aspx (last accessed: 8 February 2019). Similar considerations apply to the UAE's reference to the "Medical Complaint" webpage of the Dubai Health Authority, which as the UAE itself acknowledges is not even part of the federal government.

323 15 January Submission, para. 60.

324 *See* Abu Dhabi Department of Education and Knowledge, *Raising a Complaint Against A Private School*, *available at* https://www.adek.abudhabi.ae/en/Parents/PrivateSchools/Pages/RCAPS.aspx (last accessed: 8 February 2019).

related "remedy" the UAE could come up with is a *local* government webpage concerning complaints for *secondary school students* against *private* schools is truly telling.

158. *Fifth*, the UAE refers to the "availability of ample remedies" with respect to the "right to work"[326]. It submits in particular that "a complaint system is available through the UAE Ministry of Human Resources and Emiritisation"[327]. Setting aside the fact that the Ministry of Human Resources and Emiritisation is—yet again—under the control of the executive branch now claiming its actions are lawful before this Committee, the UAE's own source expressly states that it is "*not possible*" for a "worker outside the country [to] file a labor complaint"[328]. Even if that were not the case, the UAE has pointed to no substantive provision of law that could be invoked through the complaints procedure to effectively challenge the measures in question[329]. And even if such a provision of law existed, the complaints procedure concerns "amicable settlement", and is accordingly entirely discretionary[330].

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325 *See* Abu Dhabi Department of Education and Knowledge, *Raising a Complaint Against A Private School*, *available at* https://www.adek.abudhabi.ae/en/Parents/PrivateSchools/Pages/RCAPS.aspx (last accessed: 8 February 2019). The webpage in question states merely that "[a]ll cases raised through ADEC monitored complaint management system will be reviewed and monitored by ADEC for compliance to regulations". *Id*. The UAE has not produced those regulations, let alone provided any indication of how local government regulations might provide a remedy to any of the Qataris affected by *federal* government measures. Unsurprisingly, it also has not substantiated its casual claim that complaints may be raised specifically for "failure to respond to a request for provision of transcripts". 15 January Submission, para. 60.

326 15 January Submission, para. 61.

327 15 January Submission, para. 61.

328 *See* UAE Ministry of Human Resources & Emiratisation, *Register labor complaints (FAQ)*, *available at* https://www.mohre.gov.ae/en/our-services/%D8%A8%D8%AD%D8%AB-%D8%A7%D9%84%D8%B4%D9%83%D9%88%D9%89-%D8%A7%D9%84%D8%B9%D9%85%D8%A7%D9%84%D9%8A%D8%A9.aspx (last accessed: 24 January 2019) (emphasis added).

329 The UAE instead cites Article 6 of Federal Decree Law No. 8 of 1980, which merely permits the filing of claims concerning rights "under this law", but is in no way proof that "this law" would actually afford an effective substantive remedy with respect to the challenged measures. *See* United Arab Emirates, *Federal Decree Law No. 8 of 1980, Labour Law and its Amendments*, *available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/11956/69376/F417089305/ARE11956.pdf* (last accessed: 24 January 2019), Art. 6.

330 *See* United Arab Emirates, *Federal Decree Law No. 8 of 1980, Labour Law and its Amendments*, *available at* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/11956/69376/F417089305/ARE11956.pdf (last accessed: 24 January 2019), Art. 6. The UAE's claim that disputes that are not settled can then be referred

159. *Finally*, the UAE argues that Qataris have not exhausted remedies purportedly available with respect to "alleged infringement of the right to property"[331]. In particular, it asserts that "disputes between landlords and tenants may be addressed by the Rental Disputes Center of the Government of Dubai, with the option of appeal to the Appellate Division of the Center", and that "complaints relating to an individual's assets or accounts" can be handled by the Central Bank of the UAE "through fax, online or in person through various Central Bank locations"[332].

160. The UAE is grasping at straws. Even if private landlord-tenant disputes before local dispute resolution centers were relevant for a small number of Qataris, the UAE has failed to indicate the substantive law to be applied by such bodies, let alone to prove that it would be capable of affording an effective remedy with respect to the federal measures in question. The same considerations apply to the "Customer Complaints and Enquiries" webpage of the Central Bank of the UAE. Setting aside questions of the Bank's independence from the executive, the UAE has proffered no evidence that the Bank even has *competence* to hear complaints related to the measures, much less that such complaints might prove effective[333].

161. Since the UAE has not identified any other so-called "complaints procedures", it has failed to meet its burden of proving the existence of any reasonably available and effective remedies that have not been exhausted[334].

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to certain courts does not change this, for as Qatar has already explained, the UAE's purported court remedies are neither reasonably available nor effective. The same holds true for every other purported "remedy" for which the UAE claims (often without any proof whatsoever) that appeals to the courts are possible. *See, e.g.,* 15 January Submission, paras. 58, 59. *See also id*., para. 62 ("The UAE judiciary is also naturally available to all Qataris with grievances related to property matters.").

331 15 January Submission, para. 62.

332 15 January Submission, para. 62.

333 Qatar notes that the UAE has again proffered no indication of the substantive law—if any—to be applied by the Bank in handling "Customer Complaints and Enquiries" (details of which are limited to 1,000 characters, or approximately 150 words). *See* Central Bank of the UAE, *Consume Complaints and Enquiries*, *available at* https://centralbank.ae/en/form/complaints (last accessed: 8 February 2019).

334 Qatar submits that the UAE should not be permitted to continue invoking newfound "remedies" in each new submission it makes, and reserves the right to respond should the UAE nonetheless make a fourth attempt to manufacture such "remedies", or should it introduce new evidence with respect to "remedies" it has already invoked.

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162. Qatar has shown that the local remedies rule does not apply to its claims under the "general principles of international law" that Article 11(3) expressly requires this Committee to apply. But even if the local remedies rule *were* applicable to Qatar's claims, the UAE has failed to prove that any reasonably available and effective local remedies exist. It cannot do so: as the evidence set out above demonstrates, there are no such remedies. Its invocation of Article 11(3) must therefore be rejected.

B. The Existence of Concurrent Proceedings before this Committee and the ICJ Does Not Render Qatar's Communication Inadmissible

163. In its 4 December and 15 January Submissions, the UAE argues that the existence of concurrent proceedings before this Committee and the ICJ renders Qatar's Communication inadmissible[335]. Despite several attempts, the UAE still has difficulty articulating why this is the case; its position and legal theory have changed from one submission to the next.

164. First, in June 2018, the UAE argued before the ICJ that the existence of concurrent proceedings rendered Qatar's Application before the ICJ, *not* its Communication, inadmissible[336]. In fact, the UAE went so far as to say that "it seems perfectly clear that when a matter is referred to [the Committee], it must be allowed to fulfil its mission"[337]. That initial claim was consistent with the UAE's 7 August Submission, in which the

335 15 January Submission, Section IV; 4 December Submission, Section V.

336 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/13, p. 19, paras. 23-24 (Pellet). The UAE did not expressly employ the word "inadmissible", but it argued: "The way in which Qatar has proceeded is incompatible with both the *electa una via* principle and the *lis pendens* exception, since the same claim has been submitted in turn to two organs by the same applicant against the same respondent ... Perhaps Qatar can be considered to be estopped from seising this Court ...." *Ibid.* (translation by the ICJ).

337 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/13, p. 26, para. 21 (Pellet) (translation by the ICJ).

UAE did not challenge the admissibility of the Communication on the grounds of concurrent proceedings[338].

165. The UAE changed tack in the following months. In its 4 December Submission, the UAE argued that the existence of concurrent proceedings rendered Qatar's Communication inadmissible because "Qatar … has abandoned the Article 11 process"[339]. It was not clear how Qatar could have been considered to have "abandoned" the Article 11 process when it had, just one month prior, exercised its right under Article 11(2) of the CERD to refer the matter again to this Committee[340].

166. In any event, the UAE appears now to have abandoned this legal theory in favour of still another one. In its 15 January Submission, the UAE argues that the existence of concurrent proceedings renders Qatar's Communication inadmissible because it "undermines the integrity of the dispute resolution provisions of the CERD and of the ICJ"[341]. As explained in more detail below, this argument is equally unconvincing.

167. The reason why the UAE has been unable to maintain a consistent line of argument is simple: it is entirely permissible to have concurrent proceedings before this Committee and the ICJ. This is because, contrary to what the UAE argues, Article 22 does not establish a "hierarchical and linear" process (**Section IV.B.1**); neither *lis pendens* nor *electa una via* applies here (**Section IV.B.2**); and concurrent proceedings would ensure the equality of the parties and uphold the integrity of the system (**Section IV.B.3**). Moreover, it should not be overlooked that the UAE's position with respect to concurrent proceedings would leave Qatar with no remedy at all (**Section IV.B.4**).

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338 *See* 7 August Submission, Section VII. Although the UAE objected to the existence of concurrent proceedings, it never challenged the admissibility of the Communication. Rather, the UAE merely stated that it "intends to lodge objections under which it will challenge the ICJ's jurisdiction to hear the case on the merits". *Ibid.*, para. 93; *see also ibid.*, para. 12.

339 4 December Submission, Section V.B.

340 *Letter* from Qatar to the CERD Committee (29 October 2018), p. 2.

341 15 January Submission, Section IV.A (some capitalization omitted).

1. Article 22 Does Not Establish a "Hierarchical and Linear" Process

168. The UAE's argument is premised on the view that Article 22 of the CERD establishes a "hierarchical and linear" process, with the CERD procedures first and the ICJ procedure second[342]. According to the UAE, "[i]t is clear from the ordinary meaning of the terms of [Article 22] that the CERD envisages that the treaty-specific dispute resolution mechanism it offers to its States Parties (*i.e.*, resort to the Committee under Article 11) should be explored and exhausted before escalating to an ICJ process"[343]. The UAE's interpretation of Article 22 is, however, incorrect. Article 22 does not suggest that "the procedures expressly provided for in this Convention" must be completely "explored and exhausted"[344] before referral to the ICJ. This is obvious from the ordinary meaning of the terms of Article 22, which provide:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[345]

169. The only ostensible authority that the UAE cites to support its interpretation is the ICJ's pronouncement that the "procedures expressly provided for in this Convention" and "negotiation" are "procedural preconditions to be met before the seisin of the Court"[346]. Nevertheless, what the UAE fails to mention is that the Court did *not* hold that *both* the negotiation requirement and the CERD procedures requirement must be met (i.e., that

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342 15 January Submission, para. 33; *see also* 4 December Submission, para. 77.

343 15 January Submission, para. 28 (emphasis omitted); *see also* 4 December Submission, para. 73.

344 15 January Submission, para. 28; 4 December Submission, para. 73.

345 CERD, Art. 22.

346 15 January Submission, para. 28 (quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, para. 29 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, para. 141)). In its 4 December Submission, the UAE provided no authority for its reading of Article 22. *See* 4 December Submission, para. 73.

they are "cumulative")[347]. Rather, the ICJ has repeatedly decided, on a *prima facie* basis, that for it to have jurisdiction under Article 22, it is sufficient that *only one* requirement be met before the seisin of the Court (i.e., that they are "alternative")[348]. As a result, a State Party may have recourse to the ICJ after negotiations without engaging the CERD procedures at all.

170. And while the ICJ has yet to definitively confirm that the two requirements are alternative rather than cumulative, no fewer than 13 Judges of the Court have already opined that they are alternative[349]. In fact, as far as Qatar is aware, not a single Judge has ever expressed the view that the two requirements are cumulative[350].

171. This is entirely unsurprising given the many reasons why the two requirements can only be read as alternative, some of which have already been pointed out by the aforementioned Judges of the Court.

172. *First*, as cogently explained by five ICJ Judges in a joint dissenting opinion, negotiation and the CERD procedures are "two different ways of doing the same thing, that is to say,

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347 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, paras. 39-40; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, para. 183.

348 *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, paras. 39-40; *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, paras. 60-61; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order, ICJ Reports 2008, paras. 116-117.

349 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, paras. 39-47; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Dissenting Opinion of Judge Cançado Trindade, ICJ Reports 2011, para. 116; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, ICJ Reports 2008, para. 17 (referring to the CERD procedures requirement as an "*alternative* precondition" (emphasis added)). Although these views were all expressed in dissenting opinions, none of these Judges were dissenting on the issue of whether the requirements are alternative or cumulative.

350 Indeed, at the provisional measures stage of the ICJ proceedings between Qatar and the UAE, although there were seven dissenting Judges, none of them opined in their opinions and declarations that the two requirements are cumulative.

seeking an agreement premised on the parties' ability to reconcile their positions"[351]. Considering them to be cumulative requirements would be, in the words of those Judges, "illogical"[352], "senseless"[353], "highly unreasonable"[354], and "inconsistent with the spirit of the text" of the CERD[355].

173. *Second*, if the requirements were deemed cumulative, the negotiation requirement would be rendered redundant and deprived of any *effet utile*. This is because, as this Committee is fully aware, negotiation constitutes an element of the CERD procedures. In particular, Article 11(2) provides that, after the initial communication and response have been exchanged, "[i]f the matter is not adjusted to the satisfaction of both parties, either *by bilateral negotiations* or by any other procedure open to them, … either State shall have the right to refer the matter again to the Committee"[356]. If the two requirements were cumulative, there would be no reason to have an additional negotiation requirement in Article 22 on top of the negotiation requirement already stated in Article 11(2).

174. *Third*, if the requirements were cumulative, then it would lead to the unreasonable result that some disputes subject to Article 22 could *never* be referred to the ICJ. This is because there are some disputes "with respect to the interpretation or application of

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351 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 44. Note that the judges dissented on a separate issue; this issue of cumulative versus alternative was not decided by the majority. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, para. 183.

352 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 43.

353 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 43.

354 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 44.

355 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 43.

356 CERD, Art. 11(2) (emphasis added).

[CERD]"[357] that could not possibly be subject to the CERD procedures because they are not situations where "a State Party considers that another State Party is not giving effect to the provisions of this Convention"[358] (the only matters that may be submitted to this Committee under Article 11(1)). For example, there could be a dispute between two States concerning whether a State Party's reservation to the CERD is "incompatible with the object and purpose of [the] Convention" under Article 20, or a dispute concerning whether a State Party properly denounced the CERD under Article 21. Such disputes are not situations where "a State Party considers that another State Party is not giving effect to the provisions of this Convention". It would thus be absurd to insist that State Parties must go through the CERD procedures as a precondition to going to the ICJ.

175. When States enter into international legal obligations under a multilateral treaty, the principles of *pacta sunt servanda* and good faith require that the terms of that treaty have a *single consistent* meaning. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the nature of the "dispute … with respect to the interpretation or application of th[e] Convention". Only a reading of the two requirements as "alternative" can ensure consistency of meaning and thereby protect the Parties' expectations.

176. *Fourth*, the fact that the two requirements are alternative is supported by the *travaux préparatoires* of the CERD. Article 22 had originally included only the negotiation requirement, not the CERD procedures requirement[359]. Just three weeks before the adoption of the CERD, the so-called "three-Power amendment" to Article 22 was introduced, adding the CERD procedures requirement[360]. When this amendment was put

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357 CERD, Art. 22.

358 CERD, Art. 11(1).

359 In proposing the "final clauses" for the CERD, the Officers of the Third Committee for the General Assembly proposed Clause VIII to read: "Any dispute between two or more Contracting States over the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any of the parties to the dispute be referred to the International Court of Justice ...." UN General Assembly, Third Committee, Twentieth Session, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Suggestions for final clauses submitted by the Officers of the Third Committee*, UN Doc. A/C.3/L.1237 (15 October 1965), p. 4.

360 UN General Assembly, Third Committee, Twentieth Session, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Ghana, Mauritania and Philippines: amendments to*

up for consideration before the Third Committee of the UN General Assembly, there was virtually no debate over it, showing that the Third Committee did not consider the amendment to introduce any significant changes to the limits on the Court's jurisdiction[361]. This stood in stark contrast to another proposed amendment considered at the same time that would have limited the Court's jurisdiction;[362] this amendment was heavily opposed[363] and ultimately defeated[364].

177. After reviewing the relevant *travaux préparatoires*, five Judges of the Court concluded: "The clear impression … emerges that the three powers' intent in proposing their amendment was not to impose a further condition resulting in more limited access to the Court than under the earlier text."[365]

178. The only plausible conclusion is thus that the two requirements of negotiation and the CERD procedures are *alternative*, not cumulative. As a result, a State Party may refer a dispute to the Court without any recourse to this Committee. Article 22 does not create the "hierarchical and linear"[366] process that the UAE claims, but rather offers a prospectus of alternatives. The CERD procedures can thus be engaged independently of ICJ proceedings.

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the suggestions for final clauses submitted by the officers of the Third Committee (A/C.3/L.1237), UN Doc. A/C.3/L.1313 (30 November 1965).

361 *See* UN General Assembly, Third Committee, Twentieth Session, 1367th Meeting, UN Doc. A/C.3/SR.1367 (7 December 1965), pp. 453-455.

362 Poland had proposed that the phrase "at the request of any of the parties" be changed to "at the request of all of the parties". UN General Assembly, Third Committee, Twentieth Session, *Draft International Convention on the Elimination of All Forms of Racial Discrimination: Poland: amendments to the suggestions for final clauses submitted by the Officers of the Third Committee (A/C.3/L.1237)*, UN Doc. A/C.3/L.1272 (1 November 1965).

363 *See, e.g.*, UN General Assembly, Twentieth Session, Third Committee, 1367th Meeting, UN Doc. A/C.3/SR.1367 (7 December 1965), p. 453, paras. 24-25, 28 (Canada), p. 453, para. 31 (Colombia), pp. 453-454, para. 32 (USA), p. 454, para. 38 (France), p. 454, para. 39 (Italy).

364 UN General Assembly, Twentieth Session, Third Committee, 1367th Meeting, UN Doc. A/C.3/SR.1367 (7 December 1965), p. 455.

365 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections, Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, ICJ Reports 2011, para. 47.

366 15 January Submission, para. 33; 4 December Submission, para. 77.

2. Neither *Lis Pendens* nor *Electa Una Via* Applies Here

179. The UAE tries to support its argument by arguing that "Qatar has created a *lis pendens* situation"[367]. In certain national legal systems, the doctrine of *lis pendens* provides that an action may not be brought simultaneously in two different fora. But the doctrine does not apply to inter-State proceedings, absent express language to that effect.

180. Judge Crawford has written: "Whether there is any international equivalent to the national law doctrine[] of *lis alibi pendens* … is controversial."[368] This puts it mildly: neither the ICJ nor its predecessor the Permanent Court of International Justice ("***PCIJ***") has *ever* found a claim inadmissible due to *lis pendens*[369]. This perhaps explains why the UAE, in its 4 December and 15 January Submissions, studiously avoids claiming that *lis pendens* is a "doctrine", "principle", or "rule" applicable in international law, and instead merely refers to the alleged "*lis pendens* situation"[370] or "situations of *lis pendens*"[371].

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367 15 January Submission, para. 31; 4 December Submission, para. 74.

368 *See* James Crawford, *Brownlie's Principles of Public International Law* (8th Edition, 2012), p. 701.

369 In fact, the ICJ and the PCIJ regularly entertain cases where the parties are simultaneously pursuing other means for consensual settlement of the dispute. *See, e.g.*, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order, ICJ Reports 1991, para. 35 ("[P]ending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed ...."); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, para. 68 ("Whatever their nature, the existence of procedures for regional negotiation cannot prevent the Court from exercising the functions conferred upon it by the Charter and the Statute."); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, para. 108 ("[T]he Court is unable to accept ... that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application."); *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports 1980, para. 43 ("The establishment of the Commission by the Secretary-General ... cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court."); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, Judgment, ICJ Reports 1978, para. 29 ("[T]he fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function."); *Case of the Free Zones of Upper Savoy and the District of Gex (France/Switzerland)*, Order, PCIJ Series A, No. 22, 1929, p. 13 ("[T]he judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement ....").

370 15 January Submission, para. 31; 4 December Submission, para. 74.

371 15 January Submission, para. 34.

181. In its 15 January Submission, the UAE cites various authorities in support of its *lis pendens* argument, but only to show the "dangers and disadvantages"[372] and "risk"[373] of concurrent proceedings. As explained in detail below, none of these authorities actually posit that the doctrine of *lis pendens* applies to inter-State proceedings in the absence of express language so providing.

182. In fact, the first two authorities cited by the UAE themselves expressly question whether the doctrine of *lis pendens* applies to inter-State proceedings. The UAE first cites the *Polish Upper Silesia* case[374], but in the very same sentence from which the UAE quotes, the PCIJ held: "It is a much disputed question ... whether the doctrine of *litispendance* … can be invoked in international relations …."[375] The UAE next cites a book by Professor Yuval Shany[376], but just a few pages after the pages from which the UAE quotes, Professor Shany states that "it is far from clear whether the general principle of *lis alibi pendens* applicable to intra-systematic cases should govern the relations between international fora"[377]. Later in the book, he similarly concludes: "In sum, it looks as if existing case-law on the question of *lis alibi pendens* is also too scarce and non-definitive to establish the existence of such a general rule or principle in international law …."[378]

183. The third authority invoked by the UAE—a course by Professor Campbell McLachlan at The Hague Academy of International Law—similarly does not support the applicability of *lis pendens* to inter-State proceedings. The UAE first quotes Professor McLachlan for his statement that "there is widespread acceptance that duplicative litigation within the

372 15 January Submission, para. 31.

373 15 January Submission, para. 34.

374 15 January Submission, para. 31 (quoting *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20).

375 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20.

376 15 January Submission, para. 31 (quoting Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), pp. 155-156); 4 December Submission, para. 74 (quoting Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), pp. 155-156).

377 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 162.

378 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 244.

same legal system is not permitted"[379]. This statement, however, is taken out of context[380]. When Professor MacLachlan discusses inter-State dispute settlement bodies, he has no difficulty pointing out that:

> "Evidence of [lis pendens'] adoption by international courts and tribunals is thus far limited to the stay orders issued by the UNCLOS Tribunal in MOX Plant, and the developing practice of investment arbitral tribunals. The principle does not even merit a mention in Cheng's classic 1953 study [on "General Principles of Law as Applied by International Courts and Tribunals"], or in Sir Hersch Lauterpacht's earlier work on private law sources."[381]

184. The reason why the *MOX Plant* case is not relevant is discussed below, and investment arbitral tribunals are not inter-State tribunals. They therefore do not provide any support for the proposition that the doctrine of *lis pendens* should apply to inter-State proceedings.

185. The UAE then quotes Professor McLachlan's reference to the 2003 Resolution of the Institut de Droit International[382], but that resolution concerned transnational litigation before national courts, not inter-State litigation before international bodies[383].

186. The fourth and final authority that the UAE relies on is the *MOX Plant* case before an arbitral tribunal constituted under Annex VII of the UN Convention on the Law of the

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379 15 January Submission, para. 31 (quoting Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), p. 461).

380 The entire sentence reads: "The detailed analysis in these lectures has shown, in the first place, that there is widespread acceptance that duplicative litigation within the same legal system is not permitted, as being contrary to due process and the Rule of Law." Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), p. 461. The phrase "[t]he detailed analysis in these lectures has shown" suggests that he is referring to detailed analysis that he already provided, which, by that point in time in his course, could only refer to his examination of *lis pendens* in private international litigation (Chapter II) and non-public international arbitration (Chapter III), not public international litigation (Chapter IV).

381 Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), p. 460.

382 15 January Submission, para. 31 (quoting Campbell McLachlan, "Lis Pendens in International Litigation", *Collected Courses of The Hague Academy of International Law*, Vol. 336 (2009), pp. 461-462).

383 *See* Institut de Droit International, *Second Commission: The principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate*, Resolution (9 February 2003), *available at* http://www.idi-iil.org/app/uploads/2017/06/2003_bru_01_en.pdf (last accessed: 2 September 2019).

Sea ("***UNCLOS***")[384]. That case, however, was one where there was express language in two treaties prohibiting concurrent proceedings: Article 282 of UNCLOS[385] and Article 344 of the Treaty on the Functioning of the European Union[386]. Indeed, the *MOX Plant* tribunal relied on these two provisions in deciding to suspend its own proceedings[387]. Qatar does not deny that if there were similar provisions in the CERD, then they would apply. But in the absence of such express language, the doctrine of *lis pendens* does not apply.

187. In addition, even if the doctrine of *lis pendens* were applicable to inter-State proceedings, its requirements would not be met in this case. In the *Polish Upper Silesia* case, the PCIJ made clear that, even if the doctrine were to apply, the objects of the two claims would have to be the same and the bodies hearing the two claims would have to be "of the same character"[388]. The Court in that case found that neither of these two requirements were satisfied[389]. The objects of the two claims were different (restitution vs. interpretation), and the bodies hearing the two claims were of different characters (the Germano-Polish Mixed Arbitral Tribunal vs. the PCIJ)[390].

188. Here, the objects of Qatar's claims in the two proceedings are also different: non-binding recommendations from a Conciliation Commission[391] and a binding decision from the

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384 15 January Submission, para. 34.

385 UNCLOS, Art. 282 ("If the States Parties … have agreed, through a general, regional or bilateral agreement or otherwise, that [the] dispute shall … be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the [UNCLOS] procedures.").

386 *Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal of the European Union C 326 (26 October 2012), Art. 344 ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.").

387 *See MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Procedural Order No. 3 (24 June 2003), paras. 20(v), 21, 22.

388 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20.

389 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20.

390 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20.

391 CERD, Art. 13(2).

ICJ[392]. Moreover, the Committee, the Conciliation Commission, and the ICJ are not bodies "of the same character"[393]. The Committee is an expert monitoring body[394] and, as the UAE itself puts it, the Conciliation Commission "is not a judicial body but a fact-finding body"[395]. The ICJ, in contrast, is the "principal judicial organ of the United Nations"[396].

189. This latter difference is another reason why the UAE's invocation of the *MOX Plant* case is inapposite: the two competing bodies in that case were both international judicial bodies tasked with rendering binding decisions (the Annex VII arbitral tribunal and the European Court of Justice). That is not the case in the present proceedings. In *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, the ICJ made clear that it can adjudicate a dispute even when there is a concurrent fact-finding commission:

> "The Commission … was established to undertake a … fact-finding mission …. [The Secretary-General] created the Commission … as an organ or instrument for mediation, conciliation or negotiation …. The establishment of the Commission by the Secretary-General … cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as a means for the peaceful settlement of disputes."[397]

190. The UAE finally tries to support its argument about the impermissibility of concurrent proceedings by invoking "the principle of *electa una via*"[398], which generally provides

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392 UN Charter, Art. 94(1).

393 *Certain German Interests in Polish Upper Silesia (Germany v. Poland),* Preliminary Objections, Judgment, PCIJ Series A, No. 6, 1925, p. 20.

394 *See* OHCHR, *Committee on the Elimination of Racial Discrimination*, *available at* https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx (last accessed: 8 February 2019).

395 15 January Submission, para. 43.

396 ICJ Statute, Art. 1.

397 *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports 1980, para. 43 (emphasis added).

398 15 January Submission, para. 32; 4 December Submission, para. 75.

that the election of one avenue of legal action amounts to a renunciation of other avenues. Like *lis pendens*, however, *electa una via* applies only where there is express language providing for its application. The UAE ignores this critical point. It relies solely on a passage from the book by Professor Shany to support its argument about *electa una via*[399]. Yet in the passage quoted, Professor Shany was merely noting how *electa una via* would operate *if it were applicable*[400]. Just two sentences before the quoted passage, Professor Shany states that *electa una via*, absent express language, is "the least widely accepted" when compared to *res judicata* and *lis pendens*[401]. Professor Shany also later in the book states that "*electa una via* ... does not find any meaningful support in the international jurisprudence (in the absence of explicit treaty language)"[402].

191. It should also be emphasized that this Committee has already made clear that it may entertain communications that are also being considered elsewhere, unless there is express language (e.g., in a State Party's declaration) stating otherwise. In *Koptova v. Slovak Republic*, for example, the Slovak Republic argued that the communication was inadmissible because the petitioner had filed a similar case with the European Court of Human Rights[403]. This Committee rejected this argument, declaring that "neither the Convention nor the rules of procedure prevent[] the Committee from examining a case that [is] also being considered by another international body"[404]. Although this case was an individual rather than an inter-State communication, this Committee did not limit its pronouncement to only individual communications[405].

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399 15 January Submission, para. 32; 4 December Submission, para. 75.

400 *See* Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 23.

401 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 23.

402 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 229.

403 CERD Committee, *Koptova v. Slovak Republic*, Communication No. 13/1998, Opinion (1 November 2000), UN Doc. CERD/C/57/D/13/1998, para. 6.3.

404 CERD Committee, *Koptova v. Slovak Republic*, Communication No. 13/1998, Opinion (1 November 2000), UN Doc. CERD/C/57/D/13/1998, para. 6.3.

405 Indeed, there is no reason why individual communications should be treated any differently from inter-State communications with respect to the issue of concurrent proceedings. In the context of individual communications, Rule 84(1)(g) of the CERD Committee Rules of Procedure provides that the UN Secretary-General may request clarification on "[t]he extent to which the same matter is being examined under another procedure of international investigation or settlement", impliedly recognizing the

192. Other human rights bodies take the same approach. For example, the European Court of Human Rights and the European Commission of Human Rights have considered the admissibility of applications subject to concurrent proceedings before other fora[406], but only because Article 35(2)(b) of the European Convention on Human Rights expressly provides as such[407]. (No such provision of course exists in the CERD.) Similarly, the Human Rights Committee has considered the admissibility of communications subject to other concurrent proceedings[408], but only where the relevant State has made a reservation, understanding, or declaration to that effect to the Optional Protocol to the International Covenant on Civil and Political Rights[409].

193. It is true that many States have made declarations to the CERD removing matters subject to concurrent proceedings elsewhere from this Committee's competence[410], but Qatar and the UAE are not among them. Indeed, the very fact that States have made such declarations confirms that the CERD permits concurrent proceedings.

194. The intention of the drafters of the CERD is thus clear: the Article 22 dispute settlement procedures in the CERD cannot prejudice the States Parties' recourse to other procedures for the pacific settlement of disputes.

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permissibility of concurrent proceedings. CERD Committee Rules of Procedure, Rule 84(1)(g). Moreover, Rule 91, which lists the grounds for inadmissibility of communications, does not include the existence of concurrent proceedings as one of the grounds. CERD Committee Rules of Procedure, Rule 91.

406 *See, e.g.*, ECtHR, *Peraldi v. France*, Application No. 2096/05, Decision on Admissibility (7 April 2009); ECtHR, *Pace v. Italy*, Application No. 22728/03, Decision on Admissibility (17 July 2008), paras. 22-29; ECtHR, *Pauger v. Austria*, Application No. 24872/94, Decision on Admissibility (9 January 1995).

407 European Convention on Human Rights, Art. 35(2)(b) ("The Court shall not deal with any application submitted under Article 34 that ... is substantially the same as a matter that ... has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.").

408 *See, e.g.*, Human Rights Committee, *Casanovas v. France*, Communication No. 441/1990, Views (26 July 1994), UN Doc. CCPR/C/51/D/441/1990, para. 5.1.

409 *See*, for example, reservations, understandings, and declarations by Austria, Croatia, France, Italy, Luxembourg, Malta, Russian Federation, Slovenia, Spain, Sri Lanka, Sweden, and Turkey.

410 *See*, for example, declarations by Andorra, Denmark, Estonia, Finland, Germany, Iceland, Ireland, Italy, Liechtenstein, Malta, Norway, Moldova, and Slovenia.

3. Concurrent Proceedings Would Ensure the Equality of the Parties and Uphold the Integrity of the System

195. Perhaps aware of the weakness of its legal arguments, the UAE resorts to vague statements about how the continuation of proceedings before the Committee and the ICJ would "compromise[]" the "architecture of the CERD system for the settlement of disputes";[411] "jeopardise the integrity of the system";[412] "wreak irreparable harm on the procedural rights of the UAE, which would be required to simultaneously defend itself against the same allegations in two overlapping and parallel procedures";[413] "be in contradiction with the principle of the equality of the parties"[414] since "Qatar has unilaterally taken for itself two opportunities to litigate against the UAE in overlapping and parallel proceedings";[415] "force[]" the UAE to "choose between forsaking its rights to mount a full defence in the present CERD communication procedure or sacrificing its right to procedural equality in the ICJ case";[416] and grant Qatar the "opportunity to foresee and undermine the UAE's litigation strategy"[417].

196. These arguments are baseless. As explained above, the continuation of both proceedings is fully consistent with the dispute settlement mechanisms the CERD creates. There would be no harm to procedural rights. It is true that the UAE has to litigate two cases, but Qatar has to as well. Furthermore, there is no inequality of the Parties. Qatar and the UAE have equal procedural rights before both the Committee and the ICJ. The UAE does not have to forsake any rights: it, just like Qatar, simply has to present its arguments before two bodies, both of which are eminently qualified in their own spheres.

411 15 January Submission, para. 35; *see also* 15 January Submission, para. 40.

412 15 January Submission, para. 36; *see also* 15 January Submission, para. 40.

413 15 January Submission, para. 36.

414 15 January Submission, para. 37.

415 15 January Submission, para. 38.

416 15 January Submission, para. 39.

417 15 January Submission, para. 39.

4. The UAE's Position with Respect to Concurrent Proceedings Would Leave Qatar with No Remedy at All

197. If anything, if this Committee dismisses the proceedings before it, then there would be a risk of harm to Qatar's procedural rights, not the UAE's. This is because the UAE is simultaneously trying to convince the ICJ to dismiss the proceedings before it[418], which would then lead to the result that Qatar has no remedy whatsoever—neither before this Committee nor the ICJ. This denial of justice would wreak far greater havoc on the "architecture of the CERD system for the settlement of disputes" and "the integrity of the system".

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198. In conclusion, the existence of concurrent proceedings before this Committee and the ICJ is entirely permissible. And dismissing these proceedings would run a serious risk of leaving Qatar with no remedy whatsoever with respect to the human rights violations in question.

C. Qatar's Communication Is Not an Abuse of Rights and Process

199. The UAE also argues that Qatar's Communication constitutes an abuse of rights and process[419]. This is not a serious argument. Qatar's claims are fully grounded in both fact and law, as explained in Qatar's Communication[420].

200. In its 4 December Submission, the UAE argues that "Qatar has failed, despite many opportunities to do so, to present even a shred of evidence of any ongoing discrimination

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418 At the provisional measures stage of the ICJ proceedings, the UAE argued that *lis pendens* and *electa una via* rendered the claims before the Court inadmissible. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Verbatim Record, CR 2018/13, p. 19, para. 23 (Pellet). Indeed, in its 7 August Submission, the UAE stated: "The UAE maintains that Qatar should not be permitted to advance a complaint under Article 11 while simultaneously initiating proceedings in relation to the same issues before the ICJ. The UAE intends to lodge jurisdictional objections with the ICJ on this basis." 7 August Submission, para. 12. And in its 4 December and 15 January Submissions, the UAE affirmed its view that Qatar's Application to the Court is "improper and extra-jurisdictional". 15 January Submission, para. 40; 4 December Submission, para. 77.

419 15 January Submission, Section IV.C; 4 December Submission, Section V.B.

420 *See* Qatar's Communication, pp. 19-23, paras. 41-51. *See also* **DCL-004**; **DCL-030**; **DCL-048**; **DCL-073**; **DCL-079**; **DCL-093**; **DCL-108**; **DCL-113**; **DCL-125**; **DCL-135**; **DCL-136**; **DCL-146**; **DCL-147**; **DCL-152**.

against Qatari nationals—still less, any discrimination actually falling within the scope of the CERD"[421]. It is not clear what "opportunities" the UAE is referring to. If the UAE is referring to the CERD procedures, then Qatar need only point out that Article 11 of the CERD does not require Qatar to provide any evidence: Articles 11(1) and 11(2) only state that Qatar may "bring the matter to the attention of the Committee"[422] and "refer the matter again to the Committee"[423], and Article 11(4) provides that "the Committee may call upon the States Parties concerned to supply any other relevant information"[424]. To date, the OHCHR has only invited Qatar to provide its observations on the UAE's submissions with regard to jurisdiction and admissibility[425]. If, on the other hand, the UAE is referring to the ICJ proceedings, Qatar need only note that Qatar did indeed furnish numerous third-party reports during the oral hearings before the ICJ documenting the discrimination committed by the UAE. Qatar would, of course, be willing to present even more evidence—whether before this Committee, a Conciliation Commission constituted under Article 12 of the CERD, or the ICJ—at the appropriate stage.

201. Moreover, the ICJ has already held that "some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention"[426], and has even taken the extraordinary step of indicating provisional measures preserving such rights[427]. For the UAE to now say that Qatar's claims are "completely without merit on fact and law"[428] is not only inaccurate, but also displays unseemly disrespect towards the principal judicial organ of the United Nations.

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421 4 December Submission, para. 80; *see also* 15 January Submission, para. 42 ("Qatar has failed, despite many opportunities to do so, to present probative evidence of any ongoing discrimination by the UAE against Qatari nationals – still less, any discrimination actually falling within the scope of the CERD.").

422 CERD, Art. 11(1).

423 CERD, Art. 11(2).

424 CERD, Art. 11(4); *see also* CERD Committee Rules of Procedure, Rule 70.

425 Letter from OHCHR to Qatar (14 December 2018), para. 2.

426 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, para. 54.

427 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, para. 79.

428 15 January Submission, para. 43; 4 December Submission, para. 81.

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202. In light of the above, there is no question that the UAE's attempts to have Qatar's Communication dismissed on grounds of inadmissibility are entirely futile. Article 11(3)'s exhaustion requirement does not bar Qatar's claims, the existence of concurrent proceedings before this Committee and the ICJ is perfectly permissible, and the Communication is not an abuse of rights and process.

V. THIS COMMITTEE'S CONSIDERATION OF QATAR'S COMMUNICATION WOULD NOT BE *ULTRA VIRES*

203. The UAE's 4 December and 15 January Submissions close with a poorly veiled threat against this Committee: the UAE argues that "any action taken by the Committee to further Qatar's complaint would be *ultra vires*"[429]. Qatar considers this argument an affront to this Committee, which is perfectly competent to decide for itself what it can and cannot do.

204. In any case, the UAE's argument here assumes its own conclusions. It relies entirely on the UAE's assertions that Qatar is engaging in an "abuse of process" and has "abandoned" the CERD procedures[430]. As explained above, these assertions are false and unsustainable. There can therefore be no question that the consideration of Qatar's Communication is well within the powers of this Committee.

VI. CONCLUSION

205. For the reasons stated above, the UAE's various objections to the Committee's ability to consider Qatar's claims have no merit. Qatar accordingly reiterates its request that the Committee determine that it has jurisdiction over the Communication, find the Communication admissible, and proceed with the formation of an *ad hoc* Conciliation Commission to consider this matter.

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[429] 15 January Submission, para. 69. The UAE's 4 December Submission employs slightly different language: "Any action of the Committee to entertain further or progress Qatar's Article 11 Communication would be *ultra vires*." 4 December Submission, Section VI (some capitalization omitted).

[430] 4 December Submission, para. 86.

Annex 122

State of Qatar v. United Arab Emirates,
ICERD-ISC-2018/2, Comments on Qatar's Response on
Issues of Jurisdiction and Admissibility (19 March 2019)

MISSION PERMANENTE DES
EMIRATES ARABES UNIS
GENÈVE

البعثة الدائمة
للإمارات العربية المتحدة
جنيف

Ref: 2/3/32-109
Date: 19 March 2019

The Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Secretariat of the Office of the High Commissioner for Human Rights and with reference to its letter ICERD-ISC 2018/2 AP/VL/mg dated 19/02/2019, transmitting the submission of the State of Qatar dated 14 February 2019, has the honor to forward the observations from the United Arab Emirates as received from the competent authorities in the United Arab Emirates.

The Permanent Mission of the United Arab Emirates to the United Nations Office and Other International Organizations in Geneva avails itself of this opportunity to renew to the Secretariat of the Office of the High Commissioner for Human Rights, the assurances of its highest consideration.

Received on
19/03/2019

Secretariat of the Office of the High Commissioner for Human Rights

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Annex 122

In a matter before the
Committee on the Elimination of Racial Discrimination

ICERD-ISC-2018/2

COMMENTS ON QATAR'S RESPONSE ON ISSUES OF JURISDICTION AND ADMISSIBILITY

of the United Arab Emirates pursuant to the Decision adopted by the Committee on the Elimination of All Forms of Racial Discrimination during its 97th Session (26 November – 14 December 2018)

to the request made by the State of Qatar pursuant to Article 11 of the International Convention on the Elimination of all Forms of Racial Discrimination

submitted to the Office of the High Commissioner for Human Rights, United Nations Office, Geneva, Switzerland on

19 March 2019

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1. The Permanent Mission of the United Arab Emirates (the "**UAE**") to the United Nations Office and Other International Organizations in Geneva presents its compliments to the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) (the "**Secretariat**") and refers to the Office of the High Commissioner's Note of 14 December 2018 (ICERD-ISC 2018/2) in which the Office of the High Commissioner transmits a decision taken by the Committee on the Elimination of All Forms of Racial Discrimination (the "**Committee**" or the "**CERD Committee**") at its 97th Session (the "**Decision**") concerning the Communication under Article 11 of the Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**" or the "**Convention**"), submitted by the State of Qatar ("**Qatar**") to the Committee on 8 March 2018, and transmitted to the Permanent Mission of the UAE on 7 May 2018 (the "**Article 11 Communication**").

2. Pursuant to the *Note Verbale* from the Secretariat to the Permanent Mission of the UAE dated 19 February 2019, transmitting the Response of the State of Qatar of 14 February 2019 (the "**19 February Response**"), the UAE submits its comments on Qatar's 19 February Response. As directed by the Secretariat in its *Note Verbale*, the UAE will restrict its comments to issues raised in the 19 February Response.

I. INTRODUCTION

A. The CERD Should not be Used by Qatar to Pursue Political Ends

3. During the preparatory work of the Convention, and specifically in the discussion of the provisions related to measures of implementation, one of the delegates of the Third Committee of the General Assembly expressed concern that establishing "some machinery" within the Convention allowing one State to lodge a complaint against another State could lead some States to "resort to that organ less in order to succour the oppressed than to pursue political ends."[1] Another delegate feared that "[s]ome

[1] Third Committee, 1346th meeting, 17 November 1965, doc. A/C.3/SR.1346, p. 331.

Governments would no doubt find it impossible to resist the temptation of using the international machinery for political ends".[2]

4. Over the period of nearly 50 years since the Convention entered into force, however, not a single State found it "impossible to resist the temptation" of using the CERD Committee to pursue political ends. That restraint ended abruptly on 8 March 2018 with the submission of Qatar's Article 11 Communication, the first-ever communication filed by any State pursuant to the dispute resolution provisions of Article 11 of the CERD. And one year on since filing its communication, Qatar has made it more than obvious that far from having the purpose of giving "succour to the oppressed", its purpose in submitting the Article 11 Communication was indeed to "pursue political ends". In this case, the political ends Qatar appears to have in mind involve finding ways to attack the UAE for having exercised its sovereign right to break diplomatic relations with Qatar in June 2017 and impose economic sanctions against it in connection with the political dispute between the two countries over the UAE's (and many other States') contentions that Qatar has engaged in a practice of supporting, financing, tolerating and giving safe harbor to extremist and terrorist groups and individuals, threatening lives and regional stability.

5. There can be no other explanation for Qatar's repeated lack of candour, theatrics and manoeuvring in presenting its case before this Committee, and the International Court of Justice (the "**ICJ**" or the "**Court**"), than that it perceives the CERD Article 11 procedures as a tool to be used to achieve these political objectives. Moreover, its unrestrained willingness to assert false or exaggerated factual claims, to conceal other relevant facts from the Committee and to rely on ever-changing, and often far-fetched or inapplicable, legal arguments to support its case, demonstrates an unfortunate tendency to say or do anything to present and progress its case to the next stage of proceedings at all costs.

6. For the same reasons that the drafters of the Convention cautioned against establishing a dispute resolution system which one State could use for "political ends", as well as the other jurisdictional and admissibility grounds set forth in this submission, the Committee

[2] Third Committee, 1347th meeting, 18 November 1965, doc. A/C.3/SR.1347, p. 338.

is respectfully urged to use its authority to put an end to Qatar's cynical abuse of the Article 11 procedures in this case and cease to entertain the matter referred to it by Qatar through its Article 11 Communication.

B. Qatar's Procedural Antics are Politically-Motivated and Should not be Tolerated

7. Qatar's tactical manoeuvring in presenting and progressing its case furthermore highlights that it is guided not by concern for the human rights of its citizens but geopolitical goals. The Committee will have full appreciation for the procedural tactics, or antics, Qatar has used to launch and pursue its case. It initially filed the Article 11 Communication before this Committee on 8 March 2018 and its complaint was communicated to the UAE on 7 May 2018. Shortly thereafter (and before the Committee process had begun in earnest) on 11 June 2018 Qatar instituted proceedings before the ICJ on the same issues and complaints, along with a simultaneous application requesting provisional measures, resulting in a 27-29 June 2018 hearing and a decision by the ICJ issued on 23 July 2018. A few months later, on 29 October 2018, and before filing its memorial in the proceedings before the ICJ, Qatar confusingly renewed its request to the Committee to take up the dispute "again" pursuant to its procedures under Article 11. It thus asked the Committee to continue considering the same issues that were now also put before the ICJ.

8. It is revealing that Qatar has not so much as sought to explain the underlying reasons for reverting once again to the Article 11 procedures, whose recommendations are non-binding, after placing its dispute squarely before the ICJ (recognized as the "last resort" in the system of implementation of the CERD by its drafters[3]), whose decisions are binding, much less what benefit it seeks to achieve through the non-binding Article 11 procedures for those Qataris whose interests it purports to be protecting that it could not achieve through a binding decision of the ICJ. To justify its recommencement of the Article 11 procedures, Qatar limits itself to word games, in effect saying that the two pre-conditions for submitting a dispute to the ICJ under Article 22 of the CERD (bilateral negotiations and the procedures under Article 11) are alternative, not cumulative, and that

[3] Third Committee, 1344th meeting, 16 November 1965, doc. A/C.3/SR.1344, p. 319.

therefore "[t]he CERD procedures can thus be engaged independently of ICJ proceedings."[4] That is the entirety of its explanation.

9. This is of course incorrect. As further explained below, the two preconditions are cumulative, not alternative,[5] and both should have been complied with before Qatar made its application to the ICJ. But Qatar's argument also fails for other reasons.

10. Most obviously, it completely misses the point because even if (*quod non*) the two preconditions are alternative, and each precondition could therefore independently serve as a gateway to the ICJ, that doesn't alter the role of the ICJ within the broader measures of implementation of the CERD as the forum of "last resort". Not only does the text of the Convention lend itself to the self-evident conclusion that the procedures under Article 11 were meant to be used prior to, and only prior to, submitting a dispute to the ICJ, but the Convention's *travaux préparatoires* make it crystal clear that those drafting the Convention were under no misunderstanding that the CERD Committee procedures were designed to be used before reverting to the ICJ, not after having done so.

11. This conclusion clearly emerges from the *travaux préparatoires* of the Third Committee of the General Assembly, the final working group which discussed and debated the Convention, including its articles on measures of implementation, immediately prior to its adoption.[6]

12. Having in the first instance submitted its complaint to the Committee, and then having abruptly abandoned trust in the Committee as the starting point of its dispute with the UAE by prematurely bringing its case to the ICJ before the Committee could begin to exercise or exhaust the procedures under Article 11, Qatar cannot now go back to the Committee and request that it perform its functions under Article 11 anyway. This would not only be illogical and inconsistent in relation to the dispute resolution system established under CERD in which it was clearly envisioned that referral of a dispute to the ICJ would occur only as a "last resort", it would also engage the CERD Committee

[4] 19 February Response, para. 178.

[5] *See infra* paras. 158-171.

[6] *See infra* para. 185.

and any Conciliation Commission which might be established to deal with the dispute in a wasteful, time-consuming and costly exercise whose non-binding findings would in any case be made redundant and of no purpose since the ICJ has already been seized of the same issues. Qatar's tactics thus cynically dishonor the Committee and abuse its processes.

13. Apart from these considerations, it must again be emphasized that what is most telling about Qatar's submissions in defense of its two-track litigation tactics is that in arguing its position Qatar, incredibly, does not even attempt to justify it as somehow of benefit to the Qataris whose human rights it says it seeks to protect. The fact is, those persons' rights do not appear to be foremost in Qatar's calculations. Its bringing the Article 11 procedures once again before the Committee after already bringing its dispute before the ICJ can only be seen as a cynical and heavy-handed litigation tactic, designed to create legal confusion and put the UAE on the defensive in two fora simultaneously while giving Qatar continuing and multiple public relations opportunities.

14. Whatever its intentions, the concocted legal reasoning Qatar asserts for justifying the pursuit of its claims against the UAE before the ICJ and this Committee simultaneously[7] cannot mask the self-evident conclusion that these two-track tactics make no reasonable or logical sense, whether as a matter of coherent procedure and dispute resolution or as an effective method for investigating the allegations Qatar has made, and can have no other apparent purpose than to harass its opponent or provide public relations opportunities for Qatar as it attempts to achieve its political objectives.

15. Qatar's other arguments in favor of its two-track tactics are frivolous and reflect, if anything, its desperation that its case is unwinding. Most clearly in this category is the cynical appeal to the Committee not to dismiss these proceedings because if it does so, and if the ICJ also dismisses the proceedings before it, then Qatar would be left with "no remedy whatsoever".[8] It should not be forgotten that Qatar chose to pursue its two-track

[7] *See infra* Section IV "The Existence of Concurrent Proceedings Before the CERD Committee and the ICJ Renders Qatar's Communication Inadmissible".

[8] 19 February Response, para. 197.

litigation strategy, and any resulting legal confusion which has arisen is therefore of its own making. The UAE has consistently maintained –in addition to its primary position that Qatar's claims are outside the scope *ratione materiae* of the CERD– that the claims brought by Qatar should not be subject to proceedings before both the ICJ and the CERD Committee simultaneously. Indeed, the UAE would go further and say that, in fact, the CERD Committee proceedings should have been exhausted before instituting proceedings before the ICJ. But Qatar has chosen to bring ICJ proceedings before exhausting the Article 11 procedures, and the ICJ is now seised of the case. Under those circumstances, and for the reasons articulated in this submission, it would be wholly inappropriate for the CERD Committee to proceed to entertain the case.

16. Finally, it should be noted that if the ICJ dismisses the case Qatar has brought before it – substantially the same case that Qatar has brought before this Committee – then it will be established by the highest judicial body of the United Nations that Qatar's case has no merit. Under those circumstances, a dismissal of these proceedings, leaving Qatar with no remedy under CERD for the disingenuous claims it has brought, would be entirely appropriate.

C. Qatar's Persistent Lack of Candour, Including About the Underlying Facts of the Dispute and the Availability of Remedies for its Nationals, Reveal its Disingenuous Intentions

17. The foundation of Qatar's Article 11 Communication is that in June 2017 the UAE "expelled all Qataris within its borders, without exception"[9] and banned entry of all Qataris to the UAE, "measures that remain in effect to this day."[10] In its relentless campaign of misinformation, Qatar never tires of repeating these lies, including by its

[9] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings, 11 June 2018, para. 3.

[10] *Id.*

Agent before the International Court of Justice.[11] Indeed, its own head of state, His Highness Sheikh Tamim Bin Hamad Al-Thani, the Emir of Qatar, lowered himself to repeat this nonsense in a widely-broadcast television interview,[12] and not to be outdone, Qatar's submissions to the Court and to this Committee are peppered throughout with this and other outrageous falsehoods.[13]

18. The UAE has submitted to this Committee documentary evidence establishing that thousands of Qataris (more than 11,000 and counting) have, uninterruptedly since June 2017, entered and exited the UAE,[14] and that more than 700 Qataris who continue to reside in the UAE hold UAE identification documents,[15] and that the number of Qataris

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[11] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of the Public Sitting of 27 June 2018, at 10:00 a.m. (CR 2018/12), para. 4 ("The UAE expelled all Qataris within its territory, giving them only 14 days to leave and ordered Emiratis to leave Qatar or face civil and criminal sanctions. The UAE continues to prohibit Qataris from entering the UAE.") (emphasis added); *id.*, para. 8 ("The UAE's collective expulsion of Qataris and ban on their travel to the UAE has had and continues to have a devastating impact on Qataris and their families.") (emphasis added).

[12] All Qataris in the UAE "were ordered home", "patients were kicked out from hospitals". Interview of Emir Sheikh Tamim Bin Hamad Al-Thani by Charlie Rose, 29 October 2017, available at: https://www.cbsnews.com/news/qatars-emir-stands-defiant-in-face-of-blockade.

[13] "In particular, UAE has expelled all Qatari residents and visitors within its borders". Qatar's Article 11 Communication, 8 March 2018, para. 4 (emphasis added). "The UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin-measures that remain in effect to this day. In particular, on 5 June 2017 and the days that followed, the UAE: expelled all Qataris within its borders, without exception, giving them just two weeks to leave". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings, 11 June 2018, para. 3 (emphasis added). "For the past twelve months, the UAE has enacted and enforced measures that, *inter alia*, collectively expelled Qataris from the UAE and prevented their re-entry into the UAE". Request for the Indication of Provisional Measures of Protection, 11 June 2018, para. 2 (emphasis added). "As a result, the UAE's sudden collective expulsion of Qataris-done arbitrarily and without any consideration of individual characteristics or the provision of even basic due process-and simultaneous imposition of discriminatory travel and entry restrictions on Qataris to prevent their return and entry-again without affording even basic due process". 19 February Response, para. 37 (emphasis added).

[14] UAE's Response of 7 August 2018, Annex 2 (Immigration - ID & Citizenship Authority Cover Letter Re Excel Immigration Status) (indicating that as of June 2018 the number of Qatari nationals in the UAE amounted to 2,194) and Annex 5 (Annex 5 - Immigration - Complete Entry-Exit Records) (showing movement of Qatari nationals entering and exiting the UAE in over 8,000 occasions). UAE's Supplemental Response of 14 January 2019, Annex 1 (Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics), Annex 1.1 (Excel Redacted] Entrance and Exit for Qatari Nationals from 1 June 2018 until 31 December 2018) (showing that the actual registered entries and exits of Qatari nationals into and out of the UAE from 1 June through 31 December 2018 amounted to 2,876)

[15] UAE's Supplemental Response of 14 January 2019, Annex 1 (Letter from the Federal Authority for Identity and Citizenship, dated 10 January 2019, summarizing statistics and attaching detailed records in tables in Excel files regarding those statistics), Annex 1.3, ([Excel Redacted] Holders of UAE Resident Permits).

residing in or visiting the UAE is not substantially different than the number of Qataris who were present in the country prior to June 2017.[16]

19. The Committee is asked to take note that Qatar has not directly challenged that evidence with any credible rebuttal evidence, because it cannot. Instead, it now weakly questions details about the statistics reflected in the evidence. For example, rather than dispute the fact that thousands of Qataris have entered and exited the UAE since June 2017, it says that the cross-border movements of thousands of Qataris into and out of the UAE "appear" to show "a very large number, if not the majority" exiting rather than entering the country.[17] Given that, as Qatar itself has repeatedly pointed out, many Qataris routinely visit the UAE for business, family or shopping excursions, this revelation should not be surprising.[18]

20. It then complains that the UAE has not provided a "comparative set of data on the movements of Qataris during the period before the crisis" so as to determine whether following June 2017 Qatari visitors to the UAE may have declined.[19] As the allegation Qatar has insidiously thrown about is that there is a ban on all Qataris entering the UAE, this response, allowing that there are indeed large movements of Qatari nationals into and out of the UAE, does nothing to support Qatar's extreme, and false, contention, and in fact it directly contradicts it.

21. And with regard to the evidence the UAE has provided showing that, as of January 2019, over 700 Qatari nationals reside in the UAE and hold UAE identification documents,[20] Qatar attempts to question it by speculating that some of those Qatari nationals had travelled out of the country and not returned, and that "even accepting the UAE's submissions as true — and Qatar does not — there would apparently be a three-fold

[16] *See, Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 28 June 2018, at 10:00 a.m.(CR 2018/13), p. 13, para. 14 (Alnowais).

[17] 19 February Response, para. 119, fn. 218.

[18] *See, e.g.*, 19 February Response, para. 36.

[19] 19 February Response, para. 121.

[20] UAE'S Supplemental Response of 14 January 2019, para. 10.

decrease in the number of Qataris residing in the UAE."[21] But, as Qatar well knows, this supposed "three-fold decrease" is another fabrication because it compares the number of Qatari nationals currently "residing" in the UAE with the number of Qatari nationals (residents and visitors) who were physically present in the UAE in June 2018.[22]

22. Qatar's statistical gymnastics cannot hide the obvious truth that after cutting away all of the rhetorical verbiage about "collective expulsions" and "entry bans", even Qatar cannot sustain the extreme falsehoods set out in its own submissions. Having effectively admitted the untruth of its essential allegations — that the UAE expelled Qataris from the UAE and banned their re-entry to the country — the credibility of Qatar's case evaporates.

23. Qatar's response to other important allegations are equally empty and evasive. Most importantly for the Committee's determination of whether Qatar's complaint should be dealt with any further pursuant to Article 11(3) of the CERD, the Committee should take note that in reply to the documentary evidence submitted by the UAE showing that, contrary to Qatar's allegations, Qatari nationals have continued to enjoy access to UAE courts and have appeared in judicial proceedings as plaintiffs or defendants in hundreds cases since June 2017,[23] all that Qatar can muster as a response is that this is not a relevant consideration as "the UAE has presented no cases in which Qataris have challenged the measures that form the subject of Qatar's Communication."[24] This response, and Qatar's other remarks concerning the access Qataris have to UAE courts and the corresponding availability of domestic remedies, requires a number of points to be made.

24. First, it must be noted that while it references the lack of challenges by Qataris to "the measures that form the subject of Qatar's Communication", Qatar does not indicate what specific measures it is referring to. The reason is both obvious and significant. It is so

[21] 19 February Response, para. 124, fn. 232.

[22] UAE's Supplemental Response of 14 January 2019, para. 10 ("As of June 2018, the number of Qataris in the UAE amounted to 2,194.").

[23] UAE's Supplemental Response of 14 January 2019, para. 12 a.

[24] 19 February Response, para. 137.

because once the fabricated "collective expulsion" and "ban on entry" allegations are stripped away, there are in fact no "measures" to point to which have allegedly targeted Qatari nationals or deprived them of any rights. Far from imposing a ban, establishing ordinary entry requirements is the UAE's sovereign right and conforms with common state practice. Certainly Qatar does not point to any specific "measure" other than the procedures through the "hotline" established in June 2017 (available through a dedicated website since October 2018[25]) which Qatari nationals must follow in order to obtain a permit to enter the country. Qatar has made a sustained effort to portray these entry requirements as "discriminatory" and in violation of the CERD, but this is nonsense, and an affront to the human suffering which led the international community to create the CERD.[26] Indeed, Qatar should be ashamed to equate itself with those who have suffered such indignities, and to have done so for manifestly political ends.

25. Second, and once again, the Committee should note that Qatar does not actually challenge the evidence submitted by the UAE proving that, contrary to its persistent and fraudulent allegations ("As they cannot enter the UAE, Qataris are prevented from physical access to UAE courts and institutions"[27]), Qataris are parties in hundreds of ongoing cases before UAE courts (in many of which they are the claimants), and that Qatari nationals are not now, and have not ever been, impeded from accessing UAE courts or any judicial or administrative procedures available in the country.

26. Finally, Qatar's response reveals one of the more deceptive aspects of its claim before the Committee that Qataris have no access to judicial or other remedies. This relates to the so-called Compensation Claims Committee (the "**CCC**") established by the Qatari government just a few weeks after the break in relations between the UAE and Qatar. The members of the CCC are high Qatari government officials, including the Secretary General of the Qatari Ministry of Foreign Affairs and the Qatari Attorney General,

[25] *See infra* para. 134.

[26] Further elaboration of the reasons why preferences based on current nationality do not constitute racial discrimination are set out in paras. 55-98, *infra*.

[27] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Application Instituting Proceedings, 11 June 2018, para. 46.

among others.[28] As described by the Secretary-General of the Qatari foreign ministry, the CCC receives the complaints which have been lodged with the National Human Rights Committee (the "**NHRC**") so that they can be "sorted and referred to the competent local and international courts", adding that "the compensation committee was divided into three sections: the first to examine citizens' complaints about violations of human rights or individual damage; the second for traders who were affected by the closure of land, sea and air borders; and the third for government institutions affected by the blockade such as the Ministry of Economy and Qatari Aviation."[29] He also confirmed that "the State is responsible for the cases fees and lawyers' fees" and that claims against Saudi or Emirati defendants are being brought in diverse tribunals, including in "the courts of their countries."[30]

27. A report published by the NHRC has confirmed that it refers all complaints it has received to the CCC, meaning that all of the complaints which Qatar has cited as the basis of its claims against the UAE under CERD are subject to the intervention and assistance of the CCC.[31] As the description published by the NHRC makes clear, the Qatari government established and designed the CCC so as to be in a position to control and orchestrate all legal claims of its citizens arising out of its dispute with the UAE. As noted by the NHRC:

> That Committee [the CCC] has been tasked with the following:
>
> 1. To receive complaints and claims for compensation from individuals, private organizations, and the public sector;
>
> 2. To investigate complaints from a legal point of view to ascertain whether it was the blockade that caused harm to the injured parties;

[28] Information Office, Ministry of Foreign Affairs, Doha, Qatar, Foreign Ministry Secretary General: "Compensation Claims Committee Receives 2,945 Individual Cases from NHRC", 25 July 2017, available at: https://mofa.gov.qa/en/all-mofa-news/details/2017/07/25/foreign-ministry-secretary-general-compensation-claims-committee-receives-2-945-individual-cases-from-nhrc.

[29] *Id.*

[30] *Id.* (emphasis added).

[31] National Human Rights Committee, Doha, Qatar, *6 Months of Violations*, The Fourth General Report on the Violations of Human Rights Arising from the Blockade, December 5, 2017 (Annex 9 to 19 February Response).

> 3. To instruct international law firms to investigate the possibility of initiating law suits against the blockading states to obtain compensation for the injured parties;
>
> 4. To supervise and coordinate among state authorities, the private sector, individuals, and law firms in order to ensure that they are furnished with the documentation they need; and
>
> 5. To closely monitor the claim filed by the State of Qatar to the World Trade Organization and provide the requirements thereof.
>
> A cooperative relationship exists between the NHRC and the Compensation Claim Committee, to which the NHRC refers all of the complaints it receives. Numerous meetings continue to be held with it in order to categorize the victims in order to redress injuries in accordance with the relevant international and regional treaties.[32]

28. The existence and role of the CCC shines a spotlight on Qatar's claims in various respects. Most crucially, it reveals that Qatar has all along been in a position to orchestrate and determine the nature, scope and forum of the legal remedies pursued (or which could be pursued) by its nationals in their alleged claims arising out of the break in relations between the UAE and Qatar, whether in UAE or other courts, through investment treaties or at a higher international level, including the Qatari citizens whose complaints against the UAE are noted in Qatar's submissions before the CERD Committee. It is a reasonable assumption, indeed an established fact (see paragraph 30, *infra*) that it has been doing just that.

29. Moreover, the fact that Qatar has not disclosed its direct handling, supervision and funding of its nationals' legal cases to the Committee, particularly as the availability of local remedies is a key element in the Committee's determination of whether to entertain a matter referred to it, is revealing, and speaks volumes about its disingenuous intentions in launching this CERD Committee proceeding. Indeed, its behaviour can only suggest that it all along intended to mislead the Committee into believing a false narrative in which Qatar's nationals have been left on their own, helpless, with no avenues to seek

[32] *Id.*, p. 4 (emphasis added).

redress for their grievances. Qatar clearly knows otherwise. The Committee will appreciate that this disingenuous behavior is entirely unacceptable.

30. That Qatar has in fact orchestrated the legal claims of its nationals is established without doubt by the 200 or more notices of dispute, supported by the Qatari government, which have been filed by Qatari nationals under the *Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference* (the "**OIC Investment Agreement**"),[33] claiming damages against the UAE arising out of the break in relations between the two countries. These claims, which pursuant to the OIC Investment Agreement may be brought in UAE national courts or through a process of agreed conciliation and then arbitration, demonstrate not only that the Qatari government is funding and controlling the filing of claims by its nationals, but as each of these claims purports to seek a remedy through arbitration rather than through the UAE courts, they also reveal that the Qatari government is instructing its nationals to purposefully forego the pursuit of redress through UAE courts.

31. Thus, Qatar's claims that its nationals are unable to access UAE courts or lack remedies in those courts lack credibility on various counts. The evidence demonstrates that numerous Qatari nationals are in fact proceeding to seek remedies before UAE courts. And what's more, Qatar's conduct in supporting claims under the OIC Investment Agreement demonstrates that even where UAE courts are specifically designated as the forum of choice, Qatar has instructed its nationals not to proceed before those courts and instead to pursue arbitration.

32. In light of these considerations, and in view of the domestic remedies the UAE has identified in its previous submissions,[34] it would be highly unreasonable to conclude that

[33] The UAE has received notices of dispute from these alleged claimants in four batches. The first batch of 13 notices is dated 5 April 2018, and a second notice signed by 80 alleged investors is dated 16 April 2018. All of these claimants are represented by the law firms of Debevoise & Plimpton, and DLA Piper. A third notice signed by 105 alleged investors is dated 26 September 2018, and these claimants are represented by the law firms of Debevoise & Plimpton, and Carter-Ruck. Finally, on 19 December 2018, the UAE Ministry of Justice received a notice of dispute from Qatar Airways.

[34] UAE's Supplemental Response of 14 January 2019, paras. 52–62; UAE's Supplemental Response of 29 November 2018, paras. 65–70; UAE's Response of 7 August 2018, para. 85.

"all available domestic remedies have been invoked and exhausted in the case", a requirement for the CERD Committee to deal with a matter referred to it pursuant to Article 11 of the Convention. That the Qatari government has, for almost two years now, undertaken a process of categorizing, investigating, supervising and coordinating the claims of its nationals against the UAE or other parties arising out of the break in relations between the two states, and in certain cases supporting the initiation of proceedings, makes it abundantly clear that Qatar itself is fully aware of the availability of these remedies and of the judicial fora in which they may be pursued. Its claims to the contrary are simply not to be believed.

D. Qatar's Conspicuously Misleading Discussion Concerning its Support for Extremists and Terrorists Reveals its True Colors

33. In the 19 February Response, Qatar calls the allegations connecting it to extremist and terrorist groups as "wild and incorrect". Qatar says that such allegations are "pretextual" and an "attempt to cloak the UAE's true motivation" for breaking diplomatic relations with Qatar and taking the other measures it has taken in relation to Qatar, including establishing the entry requirements for Qatari nationals which are at the heart of Qatar's CERD complaint. The "true motivation" for having taken such actions is, according to Qatar, "to coerce Qatar into relinquishing sovereign control of its internal and external affairs."[35] Qatar's Emir, Sheikh Tamim Bin Hamad Al-Thani, echoes this narrative. When asked "why are they [the Quartet] doing it, for what purpose?", he replied "[t]hey don't like our independence, the way how we are thinking, our vision for the region. We want freedom of speech for the people of the region. And they're not happy with that. And so they think that this is a threat to them."[36] On the matter of "freedom of speech", Qatar claims that far from being a "spokespiece" for extremists as the UAE alleges,

[35] 19 February Response, para. 16.

[36] Interview of Emir Sheikh Tamim Bin Hamad Al-Thani by Charlie Rose, 29 October 2017, available at: https://www.cbsnews.com/news/qatars-emir-stands-defiant-in-face-of-blockade.

Qatar's state-owned broadcaster Al Jazeera is "a beacon of rigorous independent reporting".[37]

34. These remarks are ironic. As noted by *Reporters Without Borders*, Qatar has an "oppressive legislative arsenal and … draconian system of censorship. The government, the royal family, and Islam are off limits to reporters."[38] Thus, while Qatar claims to want "freedom of speech", it prohibits that within its own borders. Moreover, "when their coverage is deemed impermissible, non-Qataris face much tougher punishments, including 'termination, deportation, and imprisonment.'"[39] A recent report noted that "[e]ven professionals in compliance with the rules can be harassed, arrested, or denied entry into Qatar."[40]

35. As for Al Jazeera, and in particular its Arabic language channel, to refer to it as a "beacon of rigorous independent reporting" is perverse. Indeed, in an obvious attempt to mislead, the accounts of the professionalism of Al Jazeera which Qatar has cited in the 19 February Response all relate exclusively to its English language channel, not its Arabic language sister channel, which is the source of most of the objectionable broadcasts in support of extremist groups which the UAE and others have complained about.[41] The Arabic language channels of Al Jazeera would not be mistaken as a beacon of anything except possibly outrageous intolerance. For example, one of its most prominent journalists has openly expressed enthusiastic support for Al-Qaeda's ideology in a television broadcast, and an extended interview on Al Jazeera with the Al Nusra Front leader Muhammad Al-Jolani was reported as having been so favorable that it has been described as Qatar's "infomercial" for the terrorist group.[42] It is perhaps not surprising

[37] 19 February Response, para. 16.

[38] Reporters Without Borders, "Qatar", available at: https://rsf.org/en/qatar.

[39] Freedom House, "Freedom of the Press 2017: Qatar", quoted in Ilan Berman (ed.), *Digital Dictators, Media, Authoritarianism, and America's New Challenge* (Rowan & Littlefield, 2018), p. 82.

[40] *Id.*

[41] 19 February Response, para. 16.

[42] Mohamed Fahmy, "The Price of Aljazeera's Politics", THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY, 26 June 2015, available at: https://www.washingtoninstitute.org/policy-analysis/view/the-price-of-aljazeeras-politics.

that an on-air poll of Al Jazeera viewers revealed that over 81% of them support ISIS.[43] Al Jazeera has also regularly broadcast the sermons of Yusuf al-Qaradawi, the spiritual leader of the Muslim Brotherhood and someone who has referred to the holocaust as "divine punishment" of the Jews and has called on Muslims to become suicide bombers in Palestine and Iraq as a "legitimate right" and a "duty", among other outrages.[44]

36. As Mohamed Fahmy, former journalist of the channel who was imprisoned in Egypt in connection with his work for Al Jazeera, states in relation to his experiences in Egypt covering the *Arab Spring*:

> The more the channel was in coordination and got guidance from the Qatari government, the more it became a megaphone for Qatari intelligence. There are many biased satellite channels, but this is beyond bias. Al-Jazeera has already turned into the voice of high-risk terrorists.
>
> . . .
>
> When I started meeting with some members of the Muslim Brotherhood and their sympathizers, they told me specifically that that they were filming the fake protests and selling them to Al-Jazeera for broadcasting, and dealing seamlessly with the Al-Jazeera network and some Egyptian production companies related to the Qatari channel.[45]

37. Fahmy's account of Al Jazeera's policies in Egypt, and in support of the Muslim Brotherhood, is revealing. He says that "[m]y bosses also neglected to tell me that they had commissioned Muslim Brotherhood members to cover the Brotherhood's own antigovernment protests and sell the footage to the banned Arabic arms of the Aljazeera network." He later talked to some of the "activists" who "openly acknowledged receiving cameras and broadcast equipment from Aljazeera."[46]

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[43] AlJazeera, "Voting", available at http://www.aljazeera.net/votes/pages?voteid=5270.

[44] Antony Barnett, "Suicide Bombs are a Duty, says Islamic Scholar", THE GUARDIAN, 28 August 2005, available at: https://www.theguardian.com/politics/2005/aug/28/uk.terrorism.

[45] Elie Leik, "Al-Jazeera and the Muslim Brotherhood", ASHARQ AL-AWSAT, 25 June 2017, available at: https://aawsat.com/print/959986.

[46] Mohamed Fahmy, "The Price of Aljazeera's Politics", THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY, 26 June 2015, available at: https://www.washingtoninstitute.org/policy-analysis/view/the-price-of-aljazeeras-politics.

38. Fahmy says that "[i]t is clear that Qatar uses Aljazeera as a tool of influence to advance the cause of the Muslim Brotherhood" and that "[c]urrent and former Aljazeera employees have repeatedly argued that the broadcasting network lacks impartiality and promotes a pro-Islamist narrative": "The network's slogan, 'The opinion and the other opinion,' represents a mirage, as the coverage fails to give voice to Qatar's opposition, which calls for the right to protest and form political parties and labor unions . . . Sadly, its leadership has instead manipulated the truth and has revealed itself as a mouthpiece for extremism."[47]

39. The false narrative promoted by Qatar that claims that its association with extremism and terrorism, including its support for such groups through its state-owned media networks, most prominently Al Jazeera, is "pretextual" is more or less repeated in every submission Qatar has made to the Committee and to the ICJ in connection with the dispute between it and its neighbors, including the UAE. This narrative is deceptive. But for purposes of the communication which is now before the Committee, it is important to focus on just a few fundamental points of relevance which emerge from the allegations which have been made against Qatar in this regard.

40. First, and in complete contradiction to the disingenuous utterances of Qatar's Emir when asked if he saw the Quartet's break in relations with Qatar coming (". . . it was a shock. It was a shock because a few weeks before that, we were meeting, all of us together, in one room, including President Trump. And we were discussing terrorism, financing terrorism. And nobody brought any concern from those countries. Nobody told me anything."[48]), the concerns about Qatar's support for extremists and terrorists, financial and otherwise, have been widely known and reported upon for many years.

41. Qatar, of course, denies its links to or support for such groups, but what it cannot deny is that it is a widely-held view the world over that these links and support exist, and that the UAE, along with other States of the Gulf Cooperation Council (the "**GCC**"), share this

[47] *Id.*

[48] Interview of Emir Sheikh Tamim Bin Hamad Al-Thani by Charlie Rose, 29 October 2017, available at: https://www.cbsnews.com/news/qatars-emir-stands-defiant-in-face-of-blockade.

view and consider it a serious threat. The most obvious evidence of this reality, and of the alarm felt by the UAE and those other GCC States, are the efforts which were made by them over a number of years to persuade Qatar to cut its links with and cease its support for such groups. Thus, the UAE, along with the other States comprising the GCC, including most importantly Qatar, entered into a series of agreements, duly registered at the United Nations,[49] in 2013 and 2014 (the "**Riyadh Agreements**") in which Qatar undertook, among other commitments: not to interfere "in the internal affairs of the [other] GCC States, whether directly or indirectly"; not to support deviant/extremist groups, "antagonistic media" or "the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the [GCC] States";[50] "not to support the Muslim Brotherhood with money or via media in the GCC Countries or outside" and to "approve the exit of Muslim Brotherhood figures [from Qatar], who are not citizens, within a time limit to be agreed upon"; not to support groups in Yemen, Syria or any destabilized area "which pose a threat to the security and stability of GCC Countries"[51]; to "support the Arab Republic of Egypt, and contribute to its security, stability and its financial support"; and "to cease all media activity directed against the Arab Republic of Egypt in all media platforms, whether directly or indirectly, including all the offenses broadcast on Al-Jazeera, Al-Jazeera Mubashir Masr, and to work to stop all offenses in Egyptian media."[52]

42. Importantly, the Riyadh Agreements also contain a crucial provision stating that "If any country of the GCC Countries failed to comply with this mechanism, the other GCC

[49] First Riyadh Agreement, 23 and 24 November 2013, United Nations Registration Number 55378 ("First Riyadh Agreement"); Mechanism Implementing the Riyadh Agreement, 17 April 2014, United Nations Registration Number 55378 ("Mechanism Implementing the Riyadh Agreement"); Supplementary Riyadh Agreement, 16 November 2014, United Nations Registration Number 55378 ("Supplementary Riyadh Agreement"). The Parties to the Riyadh Agreements are: the UAE, Qatar, Bahrain, Kuwait, Oman and Saudi Arabia. The text of the Riyadh Agreements appears in: *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Joint Application, Annexes 2-4, available at: https://www.icj-cij.org/files/case-related/173/173-20180704-APP-01-01-EN.pdf.

[50] First Riyadh Agreement, November 2013.

[51] Mechanism Implementing the Riyadh Agreement, 23 November 2013.

[52] The Supplementary Riyadh Agreement, 16 November 2014.

Countries shall have the right to take any appropriate action to protect their security and stability."[53] This provision may be seen as a type of pre-agreed consent for the aggrieved State to take counter-measures.

43. The minutes of a number of the meetings held in implementation of the Riyadh Agreements provide a clear view of the difficulties the UAE and other GCC States had with Qatar, in particular its support for and harboring of extremist groups, including the Muslim Brotherhood, and the broadcasts of its state-owned "antagonistic media", most specifically Al Jazeera. The minutes also reflect the frustration felt with Qatar's failure to adequately comply with its obligations under the Riyadh Agreements. For instance, in a meeting in July 2014, the UAE representative complained that the "State of Qatar did not implement the basic provisions of the Riyadh Agreement . . . whereas the Muslim Brotherhood has not been deported, in fact they are being received, honored and provided with financial and moral support".[54]

44. The minutes from a subsequent meeting held a month and a half later following a successful round of diplomacy in which Qatar agreed to mend its ways confirmed the nature of the very core issues in dispute between Qatar and its GCC neighbors and that it was hoped that, unlike in previous occasions when Qatar's commitments were not implemented, Qatar would this time abide by its promises. Thus, as related by the Foreign Minister of Saudi Arabia:

> We presented during our meeting *with* His Highness Shaikh Tamim bin Hamad Al Thani all the points in conflict, such as the support for Islamists, Muslim Brotherhood, political policy, Libya and the issue of the media as well as the groups that work against the GCC and the consequential dangers that affect us all. We discussed this in detail and we found an acceptance by His Highness and that he is exerting efforts in resolving this problem, particularly that he ascended to the throne a year ago and that he is the first and last person responsible for all that happens in Qatar. He gave his promise to the Custodian of the Two Holy Mosques

[53] Mechanism Implementing the Riyadh Agreement, p. 3 ("Thirdly: Compliance Procedures, 3. With regards to the internal security of the GCC Countries").

[54] **Annex 1**, Fourth Report of the Follow-up Committee on the Implementation of the Riyadh Agreement Mechanism, 15 July 2014 (Arabic original, English translation).

> and that he was committed to this promise. His Highness requested finding indisputable evidence for the implementation and said that he was prepared to cooperate in 'all that you want', adding that there is no problem without a solution.
>
> We informed *His* Highness that we would like him to stand by Egypt and not with the Muslim Brotherhood or encourage extremists. His Highness agreed to stop the media treatment against us, and, as you know, the media is part of the political policy of any country. His Highness said the media would be committed and will not taunt Egypt, but instead will stand by Egypt and support its efforts, adding that Qatar will not have a hand in supporting extremists or encouraging them, and that this is the policy that we want.
>
> . . .
>
> Proof is in implementation, and there are prior commitments that have not been implemented and we call for their implementation.[55]

45. It is plain that the Riyadh Agreements, and the minutes of just a few of the meetings held in connection with their implementation, show the existence of a serious disagreement between the UAE (and other GCC member States) and Qatar over its financial and other support for extremist and terrorist groups, with their "consequential dangers that affect us all", as well as with its politicized and antagonistic state media. Indeed, these documents reveal an outright admission by Qatar, and its head of state, that it was engaged in such practices and had promised to stop them.

46. However, since undertaking the commitments set out in the Riyadh Agreements reports too numerous to mention, from a wide array of sources: continue to link Qatar with support for Al-Qaeda,[56] the Al-Nusra Front,[57] ISIS,[58] the Muslim Brotherhood,[59] various

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[55] **Annex 2**, Summary of Discussions in the Sixth Meeting of their Highnesses and Excellencies the Ministers of Foreign Affairs, Jeddah, 30 August 2014 (Arabic original, English translation).

[56] United Nations, Security Council, Press Release, "Individuals Associated with Al-Qaida -- Khalifa Muhammad Turki Al-Subaiy", available at: https://www.un.org/press/en/2015/sc11790.doc.htm.

[57] U.S. Department of the Treasury, "Remarks of Under Secretary for Terrorism and Financial Intelligence David Cohen before the Center for a New American Security on 'Confronting New Threats in Terrorist Financing'", 4 March 2014, available at: https://www.treasury.gov/press-center/press-releases/pages/jl2308.aspx ("But a number of fundraisers operating in more permissive jurisdictions – particularly in Kuwait and Qatar – are soliciting donations to fund extremist insurgents, not to meet legitimate humanitarian needs. The recipients of these funds are often terrorist groups, including al-Qa'ida's Syrian affiliate, al-Nusrah Front, and the Islamic State of Iraq and the Levant (ISIL), the group formerly known as al-Qa'ida in Iraq (AQI)." (emphasis added)).

Iranian-backed militias[60] and extremist groups operating in Syria, Libya, Egypt and other States;[61] reveal that Qatar has continued to give sanctuary to dangerous extremists listed on U.N. and other terrorist sanctions lists;[62] allege the distribution to extremist groups of millions of dollars raised by Qatar-located "charities";[63] and confirm the payment by Qatar of millions of dollars, possibly as much as a billion dollars, to terrorist and extremist groups as "ransom" (whether genuine or concocted) for the release of hostages.[64]

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[58] *Id.*

[59] Eric Trager, "The Muslim Brotherhood Is the Root of the Qatar Crisis", THE ATLANTIC, 2 July 2017, available at: https://www.theatlantic.com/international/archive/2017/07/muslim-brotherhood-qatar/532380/ ("The emir was infamously close with Egyptian-born cleric Yusuf al-Qaradawi, the de facto Brotherhood spiritual guide who had lived in Qatar since 1961, and Al Jazeera had long provided a platform for Qaradawi and other Brotherhood figures to promote the group's theocratic ideology.").

[60] Con Coughlin, "White House calls on Qatar to stop funding pro-Iranian militias", THE TELEGRAPH, 12 May 2018, available at: https://www.telegraph.co.uk/news/2018/05/12/white-house-calls-qatar-stop-funding-pro-iranian-militias/ ("senior members of the Qatari government are on friendly terms with key figures in Iran's Revolutionary Guard").

[61] "Egypt: Qatar is the Main Funder of Terrorism in Libya", ASHARQ AL-AWSAT, 28 July 2017, available at: https://aawsat.com/print/962246 (Original in Arabic, free translation: "Tarek al-Qouni, Egyptian ambassador and assisting the Egyptian Foreign Minister on Arab States Affairs affirmed that Qatar is the main funder to terrorist groups and organisations in Libya in addition to other countries that he did not name."); "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", 24 August 2017, ASHARQ AL-AWSAT, available at: https://aawsat.com/print/1006966 (Original in Arabic, free translation: "The Libyan non-government organisation "Justice or Not" based in Cairo held Qatar accused in a report the State of Qatar for harbouring terrorism financially and logistically"); Khaled Mahmood, " National Libyan Army's Spokesperson: Qatar and Turkey Try to Change the Demographic Composition of Libya", ASHARQ AL-AWSAT, 27 July 2018, available at: https://aawsat.com/print/1344606https://aawsat.com/print/1344606 (Original in Arabic, free translation: "[The National Army's spokesperson] affirmed that the Army has evidence in the form of tapes and documents proving the support of Turkey and Qatar to extremist and terrorist groups in Benghazi, [Libya] ... The Libyan National Army accused yesterday, Qatar and Turkey, once again, of trying to change the demographic composition of the Libyan State.)

[62] "'Wanted Terrorist' finished second in Qatar triathlon", 28 March 2018, THE WEEK, available at: https://www.theweek.co.uk/odd-news/92582/wanted-terrorist-finishes-second-in-qatar-triathlon; United Nations, Security Council, Press Release, "Individuals Associated with Al-Qaida – Khalifa Muhammad Turki Al-Subaiy", available at: https://www.un.org/press/en/2015/sc11790.doc.htm.

[63] Zoltan Pall, "Kuwaiti Salafism and Its Growing Influence in the Levant", CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, 7 May 2014, available at: https://carnegieendowment.org/2014/05/07/kuwaiti-salafism-and-its-growing-influence-in-levant-pub-55514.

[64] Erika Solomon, "The $1bn hostage deal that enraged Qatar's Gulf rivals", THE FINANCIAL TIMES, 5 June 2017, available at: https://www.ft.com/content/dd033082-49e9-11e7-a3f4-c742b9791d43?mhq5j=e2; Christian Chesnot, Georges Malbrunot, NOS TRES CHERS EMIRS, 2016, at pp.141-143 (Original in French, free translation: "For a decade, in around ten cases of hostages, Qatar settled the bill at the benefit of the hostage takers. The total amount of money hence transferred to al-Nosra may be around $ 150 million." (emphasis added)).

47. Its support for extremist groups in Libya have been repeatedly pointed out by various sources including an Egyptian diplomat[65], local NGOs[66] and by parts of the Libyan army[67]. The latter even went further as it found evidence of Qatar's policy of harbouring terrorists resulting in a "change in the demographic composition of the State of Libya".[68] Likewise, Qatar has been repeatedly criticized – in particular by the United States – for funding and supporting extremist Iran-backed militias in the MENA region.[69] In Syria, Qatar's support for a range of extremist and terrorist groups, including ISIS and the Al-Nusra Front,[70] were all but acknowledged by Qatar's foreign minister as early as 2012 when he noted that "I am very much against excluding anyone at this stage, or bracketing

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[65] "Egypt: Qatar is the Main Funder of Terrorism in Libya", ASHARQ AL-AWSAT, 28 July 2017, available at: https://aawsat.com/print/962246 (Original in Arabic, free translation: "Tarek al-Qouni, Egyptian ambassador and assisting the Egyptian Foreign Minister on Arab States Affairs affirmed that Qatar is the main funder to terrorist groups and organisations in Libya in addition to other countries that he did not name.").

[66] "New Human Rights Report Accuses Qatar of 'Harbouring Terrorism in Libya'", ASHARQ AL-AWSAT, 24 August 2017, available at: https://aawsat.com/print/1006966 (Original in Arabic, free translation: "The Libyan non-government organisation "Justice or Not" based in Cairo held Qatar accused in a report the State of Qatar for harbouring terrorism financially and logistically").

[67] Khaled Mahmood, " National Libyan Army's Spokesperson: Qatar and Turkey Try to Change the Demographic Composition of Libya", ASHARQ AL-AWSAT, 27 July 2018, available at: https://aawsat.com/print/1344606 (Original in Arabic, free translation: "[The National Army's spokesperson] affirmed that the Army has evidence in the form of tapes and documents proving the support of Turkey and Qatar to extremist and terrorist groups in Benghazi, [Libya]).

[68] *Id.*, (Original in Arabic, free translation: "The Libyan National Army accused yesterday, Qatar and Turkey, once again, of trying to change the demographic composition of the Libyan State.").

[69] "The White House Invites Qatar to Stop Funding Militias", ASHARQ AL-AWSAT, 13 May 2018, available at: https://aawsat.com/print/1266656 (Original in Arabic, free translation: "After 13 days upon The Washington Post's revelations on secret exchanges demonstrating that Doha contributed $ 1 billion to extremist militias in Syria and Iraq, The Telegraph made yesterday public that the American Administration invited Doha to refrain from funding militias directly linked to Iran."); *See also*, "The Telegraph: The White House Asks Qatar to Stop Funding Iran-Backed Militias", ASHARQ AL-AWSAT, 12 May 2018, available at: https://aawsat.com/print/1266391 (Original in Arabic, free translation: The American President Administration urged Qatar to stop funding Iran-backed militias, and this after revelations regarding ties between Doha and terrorist organisations in the Middle East. American security expressed voiced their concerns regarding such ties, especially as they include links with militias backed by Iran that Washington deems as terrorists organisations and groups. The British newspaper *The Telegraph* affirmed the demands Washington made to Doha as regards refraining from supporting and funding terrorists groups came after the discovery of various e-mails sent by Qatari high-ranked officials to leaders from Hezbollah, a militia backed by Iran and based in South Lebanon, as well as to leaders of the Iranian Revolution (…) Many high officials in the State of Qatar enjoy firm relationships with high-profile Iran Revolution leaders such as Qasem Soleimani who is in charge of the Quds Force [a unit primarily responsible for extraterritorial military activities and clandestine operations] and Hassan Nasrallah, leader of Hezbollah.").

[70] "Al-Nosra, the Qatari Terrorist Arm in Syria", SKY NEWS ARABIA, 17 June 2017, available at https://www.skynewsarabia.com/video/957485.

them as terrorists, or bracketing them as Al Qaeda given Qatar's necessity of removing [Bashar] Al Assad at all costs."[71]

48. As certain as it is, based on the history surrounding the Riyadh Agreements and the overwhelming weight of reporting by both media and governmental sources since they were concluded, that the allegations of Qatar's continuing support for extremism and terrorism in the Middle East and North Africa are true, the UAE does not ask the Committee to reach a judgment on that question. Rather, the UAE has briefly recounted these matters in order to provide the Committee with "relevant information", in accordance with Article 11(4) of the CERD. This information is relevant for a number of reasons.

49. First, it frames for the Committee the circumstances in which the UAE and the other members of the Quartet severed diplomatic relations with Qatar and took the other measures in question, including the establishment of entry requirements for Qatari nationals wishing to visit the UAE, the only measure which Qatar (incorrectly) has in fact pointed to as an alleged violation of the CERD. Contrary to the misrepresentations of Qatar, the rupture in relations between the UAE and Qatar was not part of some attempt to subjugate Qatar and deprive it of its independence, a proposition for which Qatar provides absolutely no evidence or reasoning. Rather, it was due to the UAE's determination that Qatar had, notwithstanding its obligations under the Riyadh Agreements, continued to support extremism in the region, conduct which its neighbours, including the UAE, view as a grave and serious threat to stability. The brief and documented history recounted above should make this clear.

50. Second, the facts about the circumstances in which the UAE and other Quartet members severed relations with Qatar is relevant for the Committee because it may assist it in making determinations about the credibility of other factual and contrary allegations made by the parties in their submissions. The unfortunate truth is that Qatar has engaged in a pattern of misrepresentation in this case, for instance repeatedly claiming (although it

[71] Elizabeth Dickinson, "The Case Against Qatar", FOREIGN POLICY, available at: https://foreignpolicy.com/2014/09/30/the-case-against-qatar/.

knew it was untrue) that Qataris had been collectively expelled from the UAE and that Qataris have been banned from entering the country. The further piece of Qatar's narrative – that its neighbors sought to isolate it after it refused to succumb to a loss of independence and sovereignty – is simply another fabrication whose purpose is to avoid acknowledging the obvious reality that it was its continuing support for extremism and terrorism which brought about its isolation. When considering other factual disagreements between the parties, the Committee is asked to keep these examples, and Qatar's demonstrated lack of credibility, in mind.

II. LACK OF JURISDICTION: QATAR'S ARTICLE 11 COMMUNICATION FALLS OUTSIDE THE SCOPE *RATIONE MATERIAE* OF THE CERD

51. While Qatar repeatedly insists that the alleged acts of the UAE constitute discrimination on the basis of "national origin", it is clear that Qatar's Article 11 Communication goes only to differentiated treatment on the basis of nationality, a matter falling wholly outside the scope *ratione materiae* of the CERD.[72] Indeed, in the 19 February Response, Qatar once again reiterates, accompanied by a lengthy analysis, that Qatar's position is that the CERD prohibits "nationality-based discrimination" as a form of racial discrimination proscribed by the Convention.[73]

52. Contrary to the claims of Qatar, the CERD does not prohibit a State from treating individuals differently based on their current nationality. Article 1(1) of the CERD does not contain nationality as a prohibited ground of discrimination. The inclusion of "national . . . origin" within the definition of "racial discrimination" in Article 1(1) does not extend the notion of racial discrimination to differences of treatment based solely on present nationality.

53. The Qatari claims are based on a misrepresentation of the ordinary meaning of the words of Article 1(1) of the CERD and on a misleading recitation of the *travaux préparatoires*.

[72] In its first submission before this Committee Qatar expressly stated that "In imposing the Coercive Measures, UAE has unlawfully targeted Qatari citizens solely on the basis of nationality" Qatar's Article 11 Communication, 8 March 2018, para. 58.

[73] *See, e.g.*, 19 February Response, para. 22.

As detailed below, the ordinary meaning of the words "national origin" in the CERD read in their context and in light of the object and purpose of the Convention make it plain that current nationality is not a basis of discrimination under the CERD. Furthermore, the *travaux préparatoires*, when not distorted, confirm the unequivocal intention of its drafters that the CERD should not cover differentiation based on current nationality. Accordingly, the acts alleged by Qatar do not fall within the provisions of the CERD nor the jurisdiction of the Committee (**Section A**).

54. Qatar's new argument that the UAE's measures would fall within the scope of the CERD irrespective of whether "national origin" in Article 1(1) encompassed current nationality because the measures "have an unjustifiable negative impact on persons who are of Qatari national origin in the historical-cultural sense . . . : on the basis of characteristics such as 'heritage' or their ability to 'trace' their origin to Qatar",[74] a last-minute attempt to overcome the obvious flaws of its primary argument, also fails (**Section B**).

A. The CERD Does Not Prohibit Differentiated Treatment Based on Current Nationality

55. Under the customary international law rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties (the "VCLT"), treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to their terms in their context and in light of the their object and purpose.[75] The interpretation of the CERD follows the same rules. In accordance with these rules, the CERD cannot apply to the acts which form the basis of Qatar's claims, namely, discrimination on the basis of current nationality.

56. Article 1(1) of the CERD provides:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or

[74] 19 February Response, para. 55.

[75] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 UNITED NATIONS TREATY SERIES 331 (1980), Article 31(1).

> exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[76]

57. The ordinary meaning of "national . . . origin", read in its context and in light of the object and purpose of the Convention does not equate with an individual's current nationality. This is confirmed by the *travaux préparatoires* of the CERD. The CERD does not prohibit the alleged discrimination of individuals of which Qatar complains, since such differentiation, as Qatar admits, is based on current nationality.

1. The Ordinary Meaning of "National Origin" Does Not Encompass Current Nationality

58. As expressed by the International Law Commission when codifying the customary international law rules on treaty interpretation, "the text [of the Treaty] must be presumed to be the authentic expression of the intentions of the parties; and . . . in consequence, the starting point of interpretation is the elucidation of the meaning of the text".[77]

59. Qatar resorts to the dictionary definitions of "origin" and "national" but draws the wrong conclusions as to what the phrase "national . . . origin" means in Article 1(1). The UAE agrees that the dictionary definition of "origin" concerns "a person's social background or ancestry",[78] even "the country from which [a] person comes"[79]. With respect to "national", it is used in its adjectival form of nation, which is defined as "the people living in, belonging to, and together forming, a single state" or "a race of people of common descent, history, language or culture, etc, but not necessarily bound by defined

[76] CERD, Article 1(1) (emphasis added).

[77] *ILC Yearbook* 1966, vol. II, p. 220.

[78] 19 February Response, para. 24, citing to definition of "origin" in *Oxford Dictionaries*, available at: https://en.oxforddictionaries.com/definition/origin.

[79] 19 February Response, para. 24, citing to definition of "origin" in *Cambridge Dictionary*, available at: https://dictionary.cambridge.org/us/dictionary/english/origin.

territorial limits of a state."[80] When taken with "origin", the second sense of "nation" is the most appropriate.

60. "National origin", then, in its ordinary meaning, cannot be equated to nationality.[81] Nationality is a legal relationship between an individual and a state.[82] An individual can acquire a nationality or lose it; he can even hold more than one nationality at once. But one's origin is immutable and inherent to the individual. Whilst one might migrate to another State and be naturalized there, that cannot rewrite the history of the individual and cannot be said to have any effect on the individual's origin. Although a person's nationality may coincide with his national origin, it is just that: a coincidence.[83] Thus,

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[80] *The Chambers Dictionary*, definition of "nation," available at: https://chambers.co.uk. (emphasis added). In one of the dictionary definitions of "nation" that Qatar refers to, that of the Cambridge Dictionary, Qatar conveniently omits reference to the second sense of "nation" therein defined as: "a large group of people of the same race who share the same language, traditions, and history, but who might not all live in one area." *Cambridge Dictionary*, definition of "Nation," available at: https://dictionary.cambridge.org/dictionary/english/nation (emphasis added).

[81] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, Joint Declaration of Judges Tomka, Gaja and Gevorgian, para. 4 ("When the Convention considers 'national origin' as one of the prohibited bases for discrimination, it does not refer to nationality"); *id.*, Dissenting Opinion of Judge Salam, para. 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"); *See also id.*, Dissenting Opinion of Judge Crawford, para. 1 ("Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (equated to racial discrimination and prohibited *per se*) and differentiation on grounds of nationality (not prohibited as such)").

[82] Karin de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Hart Publishing 2013), p. 304 ("From a legal perspective the distinction made above [between nationality as "a politico-legal term, denoting membership of a state" and as a "historico-biological term, denoting membership of a nation"] is significant because, as is submitted here, nationality as a legal status is not included in the definition of 'racial discrimination' provided in Article 1(1) of the CERD. While this definition mentions 'national origin', this term does not refer to the legal bond between a person and a state. Instead, it follows from the *travaux préparatoires* of the Convention that the term 'national origin' should be understood in conjunction with 'descent' and 'ethnic origin' to indicate nationality in the ethnographical sense.") (emphasis added). The 1955 *Oppenheim's International Law*, current at the time of the drafting the CERD, provides this definition: "'Nationality' in the sense of citizenship of a certain state must not be confused with 'nationality' as meaning membership of a certain nation in the sense of race. Thus, according to international law, Englishmen and Scotsmen are, despite their different nationality as regards race, all of British nationality as regards their citizenship. Thus further, although all Polish individuals are of Polish nationality qua race, for many generations there were no Poles qua citizenship." Lassa Oppenheim, *International Law*, (8th ed., Longmans, Green & Co. 1955), p. 645.

[83] For example, a person born in Canada to Canadian parents would be considered as having a Canadian national origin. His nationality may also incidentally be Canadian. If he later migrates to Brazil and lives there for some time, Brazil may grant him Brazilian nationality. But this in no way affects his national origin. He would be a national of Brazil with Canadian national origin.

national origin and nationality are distinct concepts,[84] and the ordinary meanings of the words do not permit the interpretation on which Qatar relies.

2. Taken in Context, "National Origin" Cannot Encompass Current Nationality

61. The ordinary meaning of a treaty term "is not to be determined in the abstract but in the context of the treaty."[85] The immediate "context" includes the remaining terms of the provision, the entire article, the preamble of the treaty and any annexes.[86]

62. The context of the term "national . . . origin" in the CERD confirms that it cannot mean nationality. The ordinary meaning of "national . . . origin" is necessarily informed by the link with the concept of "ethnic origin" in Article 1(1) and immediately follows the other bases of racial discrimination under the CERD, which are race, colour and descent. These three characteristics, together with ethnic origin are all immutable. "National . . . origin," read in this context, is no different. Thus, the CERD prohibits discrimination based on those characteristics which, like one's national origin, are inherent and unchanging. Nationality, by contrast, is not an inherent quality but can change over time. The context of Article 1 precludes national origin meaning nationality.

63. Furthermore, if it did mean nationality, the drafters could easily have used that word. Elsewhere in the CERD, and in the same Article even, "nationality" is used.[87] That the drafters did not use the term "nationality" in Article 1(1) thus suggests a deliberate choice. "National origin", not nationality, was *le mot juste* to define the prohibited grounds of discrimination in a convention concluded with the aim of eliminating "all forms of racial discrimination" (emphasis added).

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[84] Other examples that show the two concepts are different include: a person could have Zulu national origin but South African nationality, or Aymaran national origin but nationality of the Plurinational State of Bolivia, or Inuit national origin but Canadian, Danish or American nationality.

[85] *ILC Yearbook* 1966, vol. II, p. 221.

[86] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 UNITED NATIONS TREATY SERIES 331 (1980), Article 31(2).

[87] CERD, Article 1(3).

64. Other provisions of the CERD confirm this delimitation of Article 1(1) to national origin as indicating immutable qualities. Article 1(2), which forms part of the immediate context of Article 1(1) 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". This provision therefore in fact permits differential treatment on the basis of nationality. Similarly, Article 1(3) expressly uses the word "nationality" when providing that the CERD may not be interpreted "as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalizations, provided that such provisions do not discriminate against any particular nationality."[88]

65. The conclusion that nationality does not fall within the scope of discrimination on the basis of "national origin" in Article 1(1) is also confirmed by Article 5. This provision enumerates protected rights, amongst them the right to vote and stand for election, and requires States Parties to guarantee equality before the law in the enjoyment of those rights "without distinction as to race, colour, or national or ethnic origin." It would be absurd to interpret "national origin" as meaning "nationality" in that context. On Qatar's interpretation of "national origin", a State that conferred on nationals of certain States the right to vote or the right to be a public servant would be obliged to confer such rights on nationals of *all* States. This cannot be the meaning of the CERD.

66. The other rights protected in Article 5 confirm that "national origin" cannot mean nationality. The rights include the right to own property, the right to work, the right to public health, medical care, social security and social services, and the right to education. These are just the kind of rights for which States Parties to the CERD customarily differentiate between nationals and non-nationals, as further elaborated below.[89] If Qatar is correct, then such widely accepted practice would be in breach of Article 5. Against this background, the only tenable interpretation is that "national origin" does not mean "nationality".

[88] CERD, Article 1(3).

[89] *See infra* paras. 89-93.

3. The Object and Purpose of the CERD Confirms That "National Origin" Does Not Encompass Current Nationality

67. The conclusion that current nationality does not fall within the scope of the grounds of prohibited discrimination in Article 1(1) is confirmed by the object and purpose of the CERD. In the absence of a clause specifically stating the purpose of a treaty, the title of that treaty may provide helpful guidance.[90] Similarly, "the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement."[91] As the name of the Convention indicates, its object and purpose is to eliminate *racial* discrimination. The Preamble reinforces this aim in the following terms:

> Reaffirming 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.
>
> . . .
>
> Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.[92]

68. Other parts of the Preamble equally reinforce the overall aim of putting an end to racial discrimination with no indication of any intention to prohibit discrimination on the basis

[90] Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media 2011), p. 546.

[91] *Id.*

[92] CERD, Preamble (emphasis added).

of present nationality.[93] The substantive provisions also reveal the overarching object and purpose of the Convention.[94]

69. Thus, taking the ordinary meaning of "national origin" in its context, and in light of the object and purpose of the CERD to stamp out racial discrimination, "national origin" is an individual's permanent association with a particular nation of people. It does not equate to nationality. Whereas a "national origin" is perpetual and links the individual to a nation of people, nationality is a legal relationship with a State, a relationship which can come or go. The two concepts are not the same; and whilst the CERD prohibits discrimination on the basis of national origin, it does not prohibit it on the basis of present nationality.

4. The Ordinary Meaning of "National Origin" Is Confirmed By the *Travaux Préparatoires*

70. The *travaux préparatoires* confirm the interpretation arrived at by applying the "general rule of interpretation" codified in Article 31(1) of the VCLT, *i.e.*, that the inclusion of "national . . . origin" in Article 1(1) does not extend the definition of racial discrimination to include differences of treatment based on present nationality.[95] The drafters of the Convention had in mind two distinct concepts.[96]

71. The drafting of the CERD took place in three stages: in the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the "**Sub-Commission**"), then

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[93] CERD, Preamble ("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") (emphasis added); *id.* ("Convinced that the existence of racial barriers is repugnant to the ideals of any human society") (emphasis added); *id.* ("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.") (emphasis added).

[94] *See, e.g.*, CERD, Article 2(1) (obligation to pursue a "policy of eliminating racial discrimination in all its forms and promoting understanding among all races"); *id.*, Article 4 (condemning and obliging States to eradicate "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin").

[95] Recourse may be had to the preparatory works of a treaty to confirm its meaning. Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 UNITED NATIONS TREATY SERIES 331 (1980), Article 32.

[96] *See, e.g.*, the Chairman at the 411th meeting of the Sub-Commission. *See infra* para. 78.

the Commission on Human Rights, and finally the Third Committee of the General Assembly. Once this process was complete, the General Assembly passed a resolution approving the final text of the CERD and opening it for signature and ratification.[97] At all three stages of drafting, the delegates were aware of the distinction between "national origin" and "nationality" and were keen to avoid any overlap between the two terms.

72. In the 19 February Response, Qatar quotes and cites selectively from the *travaux préparatoires* to support its conclusion that the CERD applies to discrimination on the basis of present nationality. This is not tenable. Looking at the *travaux préparatoires* more broadly it is clear that, whilst some delegates recognised "national origin" might encompass present nationality, they were eager to avoid that interpretation.

73. The *travaux préparatoires* confirm what is apparent from the ordinary meaning of the words, their context and the purpose of the CERD. "National origin" does not encompass present nationality. Subsequent practice of States Parties to the CERD confirm that it cannot be otherwise.[98]

[97] International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

[98] *See infra* paras. 90-92.

a) The Travaux Within the Sub-Commission on Prevention of Discrimination and Protection of Minorities

74. Three working drafts were initially prepared in the Sub-Commission. In two of those three drafts, the definition of "racial discrimination" included discrimination based on an individual's "national origin".[99]

75. The Sub-Commission never intended "national origin" to mean nationality. This is made clear in the debates within the Sub-Commission about proposals to remove "national origin" from the draft convention or whether to include the word "nationality" in Article 1. The consensus was that the latter term would overstep the remit of a convention on racial discrimination and that "national origin" as a basis of prohibited racial discrimination should be retained, on the grounds that it was clear that "national origin" did not mean nationality.[100] This view was expressed by the representative for Finland, Mr Saario, who commented that:

> [E]veryone understood what was meant by the term "national origin", and he would not object to its use in the definition. . . .
>
> [T]he difference between the terms "nationality" and "national origin" was clear. In international law, the term "nationality" was

[99] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft International Convention on the Elimination of All Forms of Racial Discrimination by Messrs Ivanov and Ketrzynski, 15 January 1964, doc. E/CN.4/Sub.2/L.314, Article 1(1) ("the term 'racial discrimination' shall mean any differentiation, ban on access, exclusion, preference or limitation based on race, colour, national or ethnic origin"); Sub-Commission on Prevention of Discrimination and Protection of Minorities, Suggested Draft for United Nations Convention on the Elimination of All Forms of Racial Discrimination by Mr Abram, 13 January 1964, doc. E/CN.4/Sub.2/L.308, Articles 1 ("the term racial discrimination includes 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") and 2(1) ("No State Party shall make any discrimination whatsoever against persons, groups of persons or institutions on the grounds of race, colour, or ethnic origin, or where applicable, on the basis of 'nationality' or national origin."). The third draft, submitted by Mr Calvocoressi, omitted any reference to "national origin", prohibiting only racial discrimination based on "race, colour, or ethnic origin". Sub-Commission on Prevention of Discrimination and Protection of Minorities, Draft Convention on the Elimination of All Forms of Racial Discrimination by Mr Calvocoressi, 13 January 1964, doc. E/CN.4/Sub.2/L.309, p. 1 (Article 1).

[100] A minority of members opposed the use of "national origin" due to concerns that it might be misinterpreted to mean nationality, whereas that was not the intention. *See, e.g.*, Mr Capotorti, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting, 16 January 1964, doc. E/CN.4/Sub.2/SR.411, pp. 5-6.

> frequently used to mean "citizenship" ... the use of the term "national origin" would avoid ambiguity".[101]

76. Accordingly, the Sub-Commission did not consider it necessary to adopt an amendment proposed by Mr Krishnaswami, the delegate from India, which included "nationality", but only in quotation marks and only in a special sense explained in an important footnote:

> "Nationality" as the term is used in this convention, is different from the meaning of the term in public international law where it indicates a recognized link between an individual and a State to which he owes allegiance and which has an international responsibility for him. It is for that reason that this term is within quotation marks. Its meaning in the present context is that which it has in the case of States composed of groups of different origin.[102]

77. The delegate from India went on to explain that: "With that explanatory footnote, the article could not be interpreted as denying to a State its right to make special provisions regarding aliens within its territory."[103] The rejection of the inclusion of this amendment and the explanation of delegates for doing so shows that in order to avoid using "nationality" in a special sense, the term "national origin" was preferable.[104]

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[101] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting, 16 January 1964, doc. E/CN.4/Sub.2/SR.411, pp. 6, 12.

[102] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting, 16 January 1964, doc. E/CN.4/Sub.2/SR.411, p. 4.

[103] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting, 16 January 1964, doc. E/CN.4/Sub.2/SR.411, p. 4.

[104] Mr Cuevas Cancino, the delegate from Mexico, was opposed to the *use* of a special meaning of "nationality" and the use of a footnote to explain that meaning. He was not opposed to the meaning *itself*, or to the content of the footnote, which excluded current nationality as a basis of discrimination. Furthermore, to avoid using "nationality" in a special sense, he preferred "national origin" to the exclusion of "nationality" as a basis of discrimination. *See*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 411th meeting, 16 January 1964, doc. E/CN.4/Sub.2/SR.411, pp. 9-10. The Chairman speaking in his personal capacity took the position of Mr Cuevas Cancino and "agreed that the term 'national origin' was preferable to 'nationality', and he would certainly not be in favour putting that word in quotation marks or using a footnote. Such a procedure would not make for clarity, a primary requirement in the convention." *Id.*, p. 10. One lone voice in this meeting of the Sub-Commission would have preferred "nationality" as a base of discrimination over "national origin." Mr Calvocoressi said that he "had some doubts about the use of the term 'national origin' and preferred the term 'nationality'." *Id.* Without knowing his misgivings, however, and in the face of the overwhelming consensus for excluding the term "nationality", such a statement is of little weight.

78. This tension between a special meaning of "nationality" and "national origin" continued in the discussions in the Sub-Commission. In fact, the draft text of Article 1 eventually adopted unanimously by the Sub-Commission and proposed to the Commission on Human Rights defined "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin (and in the case of States composed of different nationalities discrimination based on such difference)".[105] However, this was accompanied by an interpretative article, Article 8, which clarified that the term "nationalities" was being used in this draft Article 1 with a special meaning.[106] The Chairman of the Sub-Commission explained that this interpretive article was intended to indicate that the draft convention "did not change the *status quo ante* with respect to the political rights of non-nationals".[107] The representative of the United States of America considered that the text of Article 8 served "to prevent anything from being read into the term 'nationality' in article 1 which that term was not intended to mean".[108] The delegate for Sudan, Mr Mudawi, also expressed his opinion in a similar way by indicating that the text of Article 8 would prevent a "misinterpretation" between "national origin" and "nationality" and would clarify that "nationality" did not refer to an individual's legal relationship to a State.[109]

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[105] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 414th meeting, 17 January 1964, doc. E/CN.4/Sub.2/SR.414, p. 10; Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 11 February 1964, doc. E/CN.4/873, p. 46.

[106] "Nothing in the present convention may be interpreted as implicitly recognizing or denying political or other rights to non-nationals nor to groups of persons of a common race, colour, ethnic or national origin which exist or may exist as distinct groups within a State Party." Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 11 February 1964, doc. E/CN.4/873, p. 49 (emphasis added).

[107] *See*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting, 28 January 1964, doc. E/CN.4/Sub.2/SR.427, p. 5.

[108] *See*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting, 28 January 1964, doc. E/CN.4/Sub.2/SR.427, p. 5.

[109] Sub-Commission on Prevention of Discrimination and Protection of Minorities, 427th meeting, 28 January 1964, doc. E/CN.4/Sub.2/SR.427, p. 3 ("[T]he object of [Draft Article 8] was to remove the difficulty arising from the terms 'nationality' and 'national origin' in article 1 as adopted (E/CN.4/Sub.2/L.322). The terms 'nationality', as used in the draft convention, referred to membership in a group within a nation. Because, however, in public international law that term referred to the relationship between a citizen and his country, the provisions of the draft convention might be interpreted as implying that nationals and non-nationals must be put on the same footing.").

79. Draft Article 8 therefore also confirms that Article 1 of the Sub-Commission's draft convention was not intended to include present nationality as a basis of racial discrimination.

b) The Travaux Within the Commission of Human Rights

80. Discussions in the Commission tell the same story, *i.e.*, that the members of the Commission agreed that racial discrimination should not include differentiation on the basis of nationality. Qatar cites the Summary Record of the 809th Meeting of the Commission to support the proposition that delegates felt "national origin" could be interpreted as inclusive of nationality.[110] This is not the complete picture. Some delegates were indeed concerned that "national origin" could be construed to mean present nationality, but that is not to say that the Commission actually intended that meaning. On the contrary, delegates at that meeting desired the Convention to exclude current nationality as a basis of racial discrimination.[111]

81. This debate over the risk of misinterpretation of "national origin" surfaced in the Commission after the Commission decided to delete the text included in parenthesis in Article 1 of the Sub-Commission's draft[112] (which read "in the case of States composed of different nationalities, discrimination based on such difference"[113]) and to delete draft Article 8 of the Sub-Commission's draft, which had been designed to indicate that

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[110] 19 February Response, para. 46, citing to Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809.

[111] For example, the delegate from France, worried that "national origin" might mean "current nationality", certainly did not desire that meaning, nor did he desire "current nationality" to be a base for discrimination; and therefore the delegate voted to retain draft article 8 which precluded that meaning. Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809, p. 4. The delegate from the USSR agreed that current nationality should not be a base of discrimination. He argued that "it was sufficiently clear from the context of article I that the reference to national origin, which was a key element of the definition of racial discrimination, bore no relation to questions of citizenship." *Id.*, p. 4. The delegate from the United Kingdom, despite the ambiguity of "national origin", was convinced that the term "could not be equated with nationality because in that event, States would be prohibited from distinguishing between nationals and non-nationals in the matter of political rights." *Id.*, p. 5 ("If it meant the country of origin of nationals further ambiguities arose which would make it impossible for some States to undertake the obligations inherent in the convention.").

[112] Commission on Human Rights, 786th meeting, 26 February 1964, doc. E/CN.4/SR.786, p. 3 (indicating that the deletion of the phrase in parenthesis was adopted by 14 votes to 2 with 5 abstentions). *See supra* para. 78.

[113] Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 11 February 1964, doc. E/CN.4/873, p. 46.

"national origin" was not the same as "nationality".[114] Without Article 8 to qualify the term "national origin", the delegate from France believed the draft convention was no longer acceptable and so proposed deleting the word "national" before "or ethnic origin."[115] He believed "it was unnecessary to refer to nationality in a convention on the elimination of racial discrimination."[116]

82. The responses of the delegate from the USSR and from India are both revealing. In spite of the USSR delegate's grave discomfort with "national origin", he felt that to delete the word in the Russian text "would mean that discrimination was tolerated when the victim belonged to a different national group."[117] It is telling that he was concerned for victims of different "national groups" — not different nationalities. More explicitly, the delegate from India was in favour of keeping the phrase "since the Sub-Commission had in mind the plight of persons of Indian and Pakistani origin in the Republic of South Africa".[118] The nationality, in a strict legal sense, of victims is irrelevant.

83. The meeting which followed reflects this conclusion. The Danish delegate proposed a compromise amendment to Article 1 which included the word "national" in square brackets and part of what had been draft article 8 in the Sub-Commission to be added at the end of the definition of racial discrimination, also in square brackets.[119] This proposal read as follows:

> In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public

[114] Commission on Human Rights, 808th meeting, 12 March 1964, doc. E/CN.4/SR.808, p. 17 (indicating that article 8 was deleted by 12 votes to 2, with 7 abstentions).

[115] Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809, pp. 4, 6, 7.

[116] Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809, p. 8 (emphasis added).

[117] Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809, p. 7.

[118] Commission on Human Rights, 809th meeting, 13 March 1964, doc. E/CN.4/SR.809, (emphasis added) p. 8.

[119] Commission on Human Rights, 810th meeting, 15 May 1964, doc. E/CN.4/SR.810, p. 5.

> field. [In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]"[120]

84. The Commission adopted this wording unanimously[121] and this was the text that was elevated to the Third Committee of the General Assembly,[122] with this phrase in square brackets that indicated that "national origin" did not cover "nationality".

c) The Travaux Within the Third Committee of the General Assembly

85. Qatar also mischaracterizes the *travaux préparatoires* of the Third Committee of the General Assembly by claiming that "the delegates expressed the view that the term 'national origin' could be interpreted in a number of different ways, including to encompass nationality in the sense of citizenship as well as in the sense of an individual's historical-cultural connections to a State."[123] Qatar cites the delegate of France as one who saw "national origin" as encompassing the above two meanings.[124] Qatar passes over, however, that the delegate of France, with the United States, suggested an amendment precisely to avoid that double meaning. The amendment suggested read:

> In this Convention the expression 'national origin' does not mean 'nationality' or 'citizenship', and the Convention shall therefore not be applicable to distinctions, exclusions, restrictions or preferences based on differences of nationality or citizenship.[125]

86. Other delegates, whilst recognising the potential ambiguity of "national origin", also intended the phrase to exclude current nationality. These include the following:

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[120] Report of the Commission on Human Rights on the Twentieth Session (1964), in *Official Records of the Economic and Social Council, Thirty-seventh session*, Supplement No. 8, doc. E/CN.4/874, p. 111 (emphasis added).

[121] Commission on Human Rights, 810th meeting, 15 May 1964, doc. E/CN.4/SR.810, p. 6.

[122] Report of the Commission on Human Rights on the Twentieth Session (1964), in *Official Records of the Economic and Social Council, Thirty-seventh session*, Supplement No. 8, doc. E/CN.4/874, pp. 108-114.

[123] 19 February Response, para. 44.

[124] 19 February Response, para. 44, citing to Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, p. 84.

[125] Report of the Third Committee – Draft International Convention on the Elimination of All Forms of Racial Discrimination, doc. A/6181, para. 32.

- The delegate from Poland believed the phrase "national origin" was to capture those situations "in which a politically organised nation was included within a different State and continued to exist 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."[126]

- The delegate from Austria, seeing no ambiguity in "national origin", was keen to see it stay. It was clear to him what the phrase aimed to eliminate: "For half a century the terms 'national origin' and 'nationality' had been widely used in literature and in international instruments as relating, not to persons who were citizens of or held passports issued by a given State, but to those having a certain culture, language and traditional way of life peculiar to a nation but who lived within another State."[127]

- A delegate whom Qatar quotes, Mr Gueye of Senegal, also used the phrase "national origin" as a concept distinct from current nationality. Noting the potential ambiguity, he believed that the "expression should nevertheless be retained, since it would offer protection to persons of foreign birth who had become nationals of their country of residence and who in some cases suffered from discrimination, as well as foreign minorities within a State which might also be subjected to persecution".[128]

- The delegate from Hungary had the same concern when he raised the "need to find a clear formulation prohibiting discrimination against persons who were full citizens of a State but had a different nationality, in the sense of another mother tongue, different cultural traditions, and so forth".[129] Again, there can be no discrimination of such citizens based on their current nationality (in the legal sense). The CERD, the delegate hoped, would rather eliminate discrimination based on their national origin, a social-cultural concept.

- The delegate from the United States of America said: "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

[126] Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, para. 5 (emphasis added).

[127] Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, para. 13.

[128] Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, para. 16 (emphasis added).

[129] Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, para. 21 (emphasis added).

> status. The use of the former term in the Convention would make it clear that persons were protected against discrimination regardless of where they or their ancestors had come from. National origin differed from citizenship in that it related to non-citizens as well as to citizens".[130]

87. Admittedly, as Qatar points out, the U.S. and France did withdraw their amendment which clarified in specific terms that current nationality was not a basis of discrimination prohibited by the Convention.[131] However, they withdrew it in favour of a compromise amendment by nine States which ultimately became the provisions of Article 1 of the CERD.[132] When withdrawing the U.S-France amendment, France's representative explained that the nine-State amendment was "entirely acceptable to his delegation and to that of the United States of America which therefore withdrew their own amendments".[133] France and the United State of America would only have so proceeded if it was without doubt that "national origin" did not include current nationality.

88. Therefore, this fairly detailed description of the *travaux préparatoires* at the various stages of drafting confirm what derives from the ordinary meaning of the words "national origin" read in good faith in their context and in light of the object and purpose of the Convention, *i.e.*, that the term "national origin" in Article 1(1) is not to be read as encompassing present "nationality."

5. Subsequent Practice of States Parties to the CERD

89. Subsequent practice of States Parties to the CERD confirms that differentiation based on nationality in the exercise of several of the rights recognized in the CERD does not constitute "racial discrimination" prohibited by the CERD. In accordance with

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[130] Third Committee, 1304th meeting, 14 October 1965, doc. A/C.3/SR.1304, para. 23.

[131] 19 February Response, para. 49, citing to Report of the Third Committee – Draft International Convention on the Elimination of All Forms of Racial Discrimination, doc. A/6181, para. 32, containing the text of the U.S.-France amendment: "In this Convention the expression 'national origin' does not mean 'nationality' or 'citizenship', and the Convention shall therefore not be applicable to distinctions, exclusions, restrictions or preferences based on differences of nationality or citizenship." Text of the amendment cited also *supra* at para. 85.

[132] This amendment was proposed jointly by Ghana, India, Lebanon, Mauritania, Morocco, Nigeria, Poland, Senegal and Kuwait. Report of the Third Committee – Draft International Convention on the Elimination of All Forms of Racial Discrimination, doc. A/6181, para. 37.

[133] Third Committee, 1307th meeting, 18 October 1965, doc. A/C.3/SR.1307, para. 8 (emphasis added).

Article 31(3)(b) of the VCLT, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" "shall be taken into account, together with the context" in the interpretation of a treaty.[134] As explained by an authoritative commentary on the VCLT:

> Subsequent practice may also serve as a means to determine the scope of application of a treaty, and then even to establish that the latter does not apply. Thus, under lit b, the interpreter may just as well consider the practice of parties in the "non-application of the treaty", i.e. draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought to be applicable.[135]

90. States Parties to the CERD often favour nationals of one State over nationals of another and have enacted legislation differentially treating nationals of different foreign Sates in respect of the specific rights listed in Article 5 of the CERD. This has never been considered by those States Parties to the CERD — Qatar and the UAE included — as "racial discrimination" in breach of the CERD.

91. By way of example, States Parties to the CERD do not grant equal enjoyment of the following rights listed in Article 5 of the CERD:

- Freedom of movement, Article 5(d)(i): Australia requires nationals of other States to obtain a visa to enter Australia — apart from nationals of New Zealand who may enter without one.[136]
- Political rights, Article 5(c): The United Kingdom grants voting rights to nationals of the Republic of Ireland and of some Commonwealth States but not to other nationalities.[137]
- Right to education and training, Article 5(e)(v): members of the South African Development Community treat nationals of other

[134] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 UNITED NATIONS TREATY SERIES 331 (1980), Article 31(3)(b).

[135] Oliver Dörr & Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer Science & Business Media 2011), p. 557 (emphasis added).

[136] Migration Act (Cth), s 42.

[137] Representation of the Peoples Act 2000, ss 1-2.

members as home students for the purposes of fees and accommodation.[138]

- Right to work, Article 5(e)(i): Jamaica does not require nationals of other CARICOM States to possess a permit to work in the country — a permit which nationals of other States do need.[139]

92. Qatar, no less, under its domestic legislation treats nationals of different foreign States differently. This practice would be inconsistent with the interpretation of "national origin" on which Qatar relies. Either "national origin" does not include current nationality, or Qatar itself falls foul of the CERD:

- Nationals of only some States may enter Qatar without a visa.[140]
- Nationals of Gulf Cooperation Council members enjoy greater rights in land ownership,[141] access to medicine,[142] ability to practise certain professions,[143] and admission and fees in higher education than nationals of other States.[144]
- Jobs in government agencies are given in priority to Qatari nationals and their offspring and next to "the nationals of the Gulf Cooperation Council, nationals of the Arab World and then to nationals of other countries."[145]

93. Qatar's actions are not consistent with the interpretation of "national origin" which it presents in these proceedings. That interpretation, which is in any case farfetched,

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[138] Protocol on education and training in the Southern African Development Community, Article 7(A)5.

[139] Foreign Nationals and Commonwealth Citizens (Employment) Act, s 3.

[140] State of Qatar, Ministry of Interior, "Qatar Visas", available at: https://portal.moi.gov.qa/qatarvisas/index.html; Qatar Airways, "Qatar Waives Entry Requirements for Citizens of 80 Countries", 9 August 2017, available at: https://www.qatarairways.com/en/press-releases/2017/Aug/qatar-waives-entry-visa-requirements-for--citizens-of-80-countri.html.

[141] Law No. 17 of 2004 Regarding Organization and Ownership and Use of Real Estate and Residential Units by non-Qataris, Articles 2-4.

[142] Law No. 7 of 1996 Organizing Medical Treatment & Health Services within the State, Article 2; Law No. 8 of 1989 Concerning the Treatment as Qatari Citizens of Citizens of the Gulf Cooperation Council (GCC) States at Health Centres, Clinics and Public Hospitals, Article 1.

[143] Law No. 23 of 2006 regarding Enacting Code of Law Practice, Article 13; Law No. 6 of 1983 on the Commencement of the Steps to Implement the Unified Economic Agreement between the States of the Cooperation Council for the Arab States of the Gulf CCASG, Article 2.

[144] Law No. 11 of 1988 on the Equality of Students of the States of the Cooperation Council for the Arab States of the Gulf (GCC) in the Institutions of Higher Education, Articles 1 and 2.

[145] Law No. 8 of 2009 on Human Resources Management 8/2009, Article 14.

evidently is a desperate fabrication, aimed at bringing the present complaints within the jurisdiction of the Committee. Qatar's own practice, however, and the widespread practice of other States Parties to the CERD (of which the above examples were only illustrative[146]), reveal the real meaning of the phrase as a prohibited ground of discrimination in the CERD. The acts Qatar complains of, as differentiation based on current nationality, do not fall within the jurisdiction of the Committee.

6. General Recommendation XXX

94. In the 19 February Response, Qatar also relies on General Recommendation XXX (2004) of the CERD Committee to support its argument that nationality-based discrimination does not fall outside the ambit of the Convention.[147] The Recommendation does no such thing. Furthermore, such recommendations are not binding and do not constitute subsequent practice or agreement of the States Parties to the CERD regarding the interpretation of the Convention.[148]

95. Qatar relies on paragraph 4 of General Recommendation XXX, which reads:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory.[149]

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[146] *See*, Oliver Dörr & Kirsten Schmalenbach (eds.), VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Springer Science & Business Media 2011), p. 557 ("Even though lit b requires the practice to establish the agreement of 'the parties', meaning all the parties, that does not mean that every party must have individually engaged in practice. The ILC omitted the word 'all', which had been contained in an earlier draft, from this phrase precisely in order to avoid the misconception that the practice must be actively performed by all the parties.").

[147] 19 February Response, paras. 29-33.

[148] Vienna Convention on the Law of Treaties, concluded on 23 May 1969, entered into force 27 January 1980, 1155 UNITED NATIONS TREATY SERIES 331 (1980), Article 31(3)(b). *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, Dissenting Opinion of Judge Salam, para. 8.

[149] *Official Records of the General Assembly, Fifty-ninth session*, Supplement No. 18, doc. A/59/18, pp. 93-97 (emphasis added).

96. On the basis of this paragraph, Qatar argues that "even to the extent that States *may* differentiate between particular nationalities in implementing visa or immigration policies, the CERD does not allow for differential treatment that disproportionately negatively impacts the individual concerned, for example where it results in the denial of *fundamental human rights* to non-citizens."[150]

97. In making this assertion, Qatar omits any reference to the part of paragraph 4 underlined above, *i.e.*, the fact that differential treatment must be scrutinized "judged in the light of the objectives and purposes of the Convention". 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(2), but with widespread State practice, for instance, in denying or restricting entry of the citizens or nationals of specific States. The Committee's aim was 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. The UAE, however, did not hide behind non-citizenship in order to racially discriminate (as defined in the CERD) against Qataris. The Recommendation has no bearing on the present case.

98. Thus on all counts the CERD does not cover differential treatment based on nationality. The words themselves, their context, and the object and purpose of the CERD all reflect the discussions which went into the making of the Convention and which reveal the clear intention of the drafters to exclude current nationality as a basis of racial discrimination. Since ratification, the practice of States, amongst them Qatar, has (rightly) assumed that interpretation. Current nationality is not a basis of racial discrimination as defined in the CERD; and the acts Qatar complain of do not, therefore, fall within the jurisdiction of the Committee.

[150] 19 February Response, para. 33 (emphasis in original).

B. Qatar's New Argument that the UAE's Measures Would Fall Within the Scope of the CERD Irrespective of Whether "National Origin" in Article 1(1) Encompassed Current Nationality Fails

99. Qatar's new argument, obviously concocted when it realized that its "present nationality" argument was bound to fail, is that measures taken by the UAE would fall within the scope of the CERD irrespective of whether "national origin" in Article 1(1) encompassed current nationality because such measures "have an unjustifiable negative impact on persons who are of Qatari national origin in the historical-cultural sense . . . : on the basis of characteristics such as 'heritage' or their ability to 'trace' their origin to Qatar".[151]

100. This argument, presented without a shred of evidence and on the basis of a somewhat amateurish understanding of Gulf history and sociology, appears to maintain that (i) "Qatari" denotes a distinct "historical-cultural community" identifiable based on characteristics such as their "dialect and dress",[152] (ii) such identifying characteristics are evident in persons who do not have Qatari nationality, including certain individuals holding UAE nationality but one of whose parents or ancestors came from Qatar, and (iii) by taking measures which affect persons of Qatari nationality (e.g., establishing entry requirements), the UAE may have also impacted non-Qatari individuals of Qatari heritage,[153] thus violating CERD by "discriminating" against persons of Qatari national origin. Qatar goes as far as saying that "the punitive nature of the UAE's actions . . . suggests that these effects are also by design"[154] and that such actions "have in fact had a severe impact on the historical-cultural community of Qataris."[155]

101. There are a number of obvious problems with this argument. First, it is, simply as a factual matter, difficult to associate the scenario envisioned by the argument with any plausible reality. The one example provided by Qatar where it maintains that such "discriminatory effects" might occur – where the Emirati children of a mixed Emirati-

[151] 19 February Response, para. 55.

[152] 19 February Response, para. 57.

[153] 19 February Response, para. 62.

[154] 19 February Response, para. 63.

[155] 19 February Response, para. 62.

Qatari family living in the UAE who, it is presumed, identify themselves as "Qatari" in the "historical-cultural sense", are somehow adversely affected by the entry requirements on Qatari nationals – have been shown not to be a plausible occurrence in light of the virtually automatic access to the UAE which is afforded to the members of any mixed Emirati-Qatari family. The hypothetical situation Qatar has in mind is untenable.

102. Second, Qatar's attempt at defining "Qatari national origin in the historical-cultural sense" is artificial and does not engage the basis of discrimination "national . . . origin" in the CERD, which necessarily entails discrimination on the basis of "race", an immutable concept, as explained above.[156] Given the geographical proximity, the common cultural and social background, common language and the close ties and interconnectedness of the populations of Qatar and the UAE,[157] any allegation that they belong to two different "races" would be unsustainable.

103. Finally, if this argument were accepted, it would mean that all measures associated with any break of diplomatic relations would engage the CERD if those measures impacted on one or more national or ethnic groups living in the country with which diplomatic relations have been severed. In fact, if one were to follow Qatar's argument to its ultimate logic, Qatar should also be alleging that the measures taken by the UAE on the basis of Qatari nationality also impact or have effect on Qatari citizens of other national or ethnic origins. It is not doing so nor could it. Article 1(1) reads:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[158]

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[156] *See supra* paras. 58 *et seq.*

[157] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 27 June 2018, at 10:00 a.m. (CR 2018/12), p. 15, para. 2 (Al-Khulaifi).

[158] CERD, Article 1(1) (emphasis added).

104. From this text, it is clear that "effect" under Article 1(1) refers to the consequence of the measure in question, not with the definition of "racial discrimination". Therefore, the fact that a measure has an "effect" on persons of one or more national or ethnic origin is insufficient to bring the measure within the scope of the CERD if there is no discrimination "based on" national or ethnic origin.

III. THE COMMITTEE MUST DECLINE TO HEAR QATAR'S ARTICLE 11 COMMUNICATION BECAUSE QATAR HAS FAILED TO ESTABLISH THAT LOCAL REMEDIES HAVE BEEN INVOKED OR EXHAUSTED UNDER ARTICLE 11(3) OF THE CERD

105. In accordance with the clear text of Article 11(3) of the CERD, the exhaustion of domestic remedies is a necessary precondition for consideration by the Committee of a matter referred to it in accordance with Article 11(2). The requirement of exhaustion of domestic remedies seeks to ensure that, before a claim is brought on the international plane, "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[159] This principle requires that each injured person first seeks relief from the damage or harm alleged to have been incurred as a result of the State conduct in violation of the CERD pursuant to the legal remedies available from judicial or administrative courts or bodies, including administrative remedies.[160]

106. The UAE has demonstrated in its previous submissions that Qatar has failed to establish that any Qatari nationals who have allegedly been aggrieved by some action of the UAE in violation of the CERD have invoked, let alone exhausted, any available and effective domestic remedies in the UAE as required under Article 11(3) of the CERD.[161] As a

[159] *Interhandel* (Switzerland v. United States of America), I.C.J. Reports 1959, p. 6, at p. 27; *see also*, *Ambatielos* (Greece v. United Kingdom), (1956), RIAA, vol. XII, p. 83 at p. 120: "[i] is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane."

[160] Articles on Diplomatic Protection, Article 14(2). Articles on Diplomatic Protection, Commentary to draft Article 14, para. 5, *ILC Yearbook 2006*, vol. II(2), p. 45. *See also*, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, I.C.J. Reports 2007, p. 582, at p. 601, para. 47 (the remedies which must be exhausted "include all remedies of a legal nature, judicial redress as well as redress before administrative bodies").

[161] UAE's Supplemental Response of 14 January 2019, paras. 47-67; UAE's Supplemental Response of 29 November 2018, paras. 56-71; UAE's Response of 7 August 2018, paras. 81-85.

consequence, the Committee should declare inadmissible Qatar's Article 11 Communication.

107. Despite this admissibility hurdle as evidenced from the clear language of Article 11(3), confirmed in the *travaux préparatoires* of the Convention and expressly recognized by Qatar as applicable under the inter-state procedure of Articles 11-13,[162] in its 19 February Response, Qatar argues that the "[e]xhaustion requirement does not bar Qatar's claims."[163] Qatar is wrong. First, none of the arguments relied upon by Qatar bar the application of the rule of exhaustion of domestic remedies to Qatar's Article 11 Communication (**Section A**). Second, the UAE has discharged its burden to indicate the existence of effective and reasonably available remedies that have not been exhausted (**Section B**).

A. None of the Grounds Relied upon by Qatar Bar the Application of the Rule of Exhaustion of Domestic Remedies to Qatar's Claims

108. Qatar first argues that reading Article 11(3) "in conformity with the generally recognized principles of international law" should lead the Committee to the conclusion that "the rule does not apply to claims of the kind before this Committee" and that "[t]he UAE's objection must therefore be dismissed."[164]

109. Qatar asserts that the phrase "generally recognized principles of international law" in Article 11(3) should be read as incorporating a series of principles, such as that "the local remedies rule does not apply in cases of widespread or generalized State policies and practices."[165] To the contrary, the phrase "in conformity with the generally recognized principles of international law" was discussed during the *travaux préparatoires* of the

[162] Qatar has recognized that the rule of exhaustion of local remedies applies both under the inter-state procedure of Articles 11-13 and under the individual communication procedure under Article 14 of the Convention. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Response on behalf of the State of Qatar to the questions posed by Judge Cançado Trindade on Friday, 29 June 2018, 3 July 2018, para. 8.

[163] 19 February Response, Part IV.A.

[164] 19 February Response, para. 77.

[165] 19 February Response, para. 79. Besides, the assertion that the CERD must be interpreted taking into account the circumstances of a contemporary society does not affect the interpretation of the local remedies rule in Article 11(3).

Convention to encompass the two exceptions to the rule of exhaustion of domestic remedies. As explained by the delegate for the Netherlands:

> [T]he words "in conformity with the generally recognized principles of international law" in paragraph 3 [of what is now Article 11] were meant to refer to the two exceptions to the rule that available remedies must be exhausted before a case was taken to the international level. The exceptions in question were cases where numerous precedents showed that no redress was to be expected from the available remedies or where ... application of the remedies was unreasonably prolonged.[166]

110. Qatar argues that in no other case before the ICJ "has the local remedies rule been applied in circumstances involving widespread and systematic harms like those before this Committee".[167] This argument is misguided and unavailing. In the cases concerning the CERD before the ICJ that Qatar cites, Article 11(3) of the CERD was not engaged because the applicant States in those proceedings had not resorted to the CERD Committee.[168] In another of the cases that Qatar relies on as establishing such a principle under the CERD (*Armed Activities, Congo v Rwanda*), not only did the States concerned not submit an Article 11 communication to the CERD Committee, but in addition the Court manifestly lacked jurisdiction under the CERD because Rwanda had made a reservation to Article 22 concerning the Court's jurisdiction.[169] Since the Court had no jurisdiction to entertain the application in that case, it was not required to rule on issues of admissibility such as the exhaustion of local remedies.

111. Therefore, these cases are distinguishable from Qatar's Article 11 Communication, and indeed they are inapplicable. Qatar cannot escape the fact that it did choose to submit its Article 11 Communication to the CERD Committee and that one of the consequences of

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[166] Third Committee, 1353rd meeting, 24 November 1965, doc. A/C.3/SR. 1353, para. 42.

[167] 19 February Response, para. 81.

[168] *See, Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011; *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.

[169] *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, paras. 74-79.

resorting to that procedure is that it is subject to the express requirement of exhaustion of local remedies.

112. With respect to Qatar's argument that human rights treaty bodies, notwithstanding the fact that the underlying treaty provisions require exhaustion of local remedies, "attach different consequences to systematic breaches", including the "non applicability of the rule of exhaustion of local remedies"[170], as the Committee will clearly appreciate, based on all the facts before it, that it is preposterous to assert that the UAE measures constitute a "generalized State polic[y] and practice[]".[171] Neither of the two constituent elements of such a practice, on the basis of the legal authorities relied upon by Qatar, are present in this case.[172]

113. As to the first element (the "repetition of acts"), in addition to the fact that the measures taken by the UAE were based on its legitimate right to impose immigration restrictions, Qatar merely presents a small number of unconfirmed and anonymous accounts of alleged harm suffered by Qatari nationals, some or many of which appear to be traceable to the failure of the persons involved to comply with certain objective requirements for the exercise of those rights.[173] When compared to the overwhelming general statistics reflected in the evidence the UAE has submitted (showing that Qatari nationals continue to enter and exit the UAE in their thousands, to access the UAE courts, have received or are receiving medical treatment at UAE medical facilities, continue to be enrolled at UAE

[170] 19 February Response, para. 86.

[171] 19 February Response, para. 80.

[172] European Court of Human Rights, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Merits Judgment (3 July 2014), paras. 122-124 (defining an administrative practice as "compris[ing] two elements: the 'repetition of acts' and 'official tolerance'").

[173] *See, e.g., infra* para. 152 discussing how Qatari students claiming they had not been provided with their educational records were shown to have been given such records, and the case of a Qatari student who was not allowed to re-enroll in university because he had failing grades. Similarly, allegations that two Qatari nationals were prevented from boarding aircraft inbound to the UAE despite allegedly having obtained authorization to travel to the UAE through the hotline do not constitute or prove a generalized State policy or practice as the commercial decisions of a private company are as a general principle not attributable to the State. DCL-004, para. 19; DCL-125, paras. 12-13. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Yearbook 2001*, vol. II, Part Two, p. 47 (para. 1 of Commentary to Article 8), p. 52 (para. 2 of Commentary to Article 11). Moreover, as explained below at para. 125, there are certain legitimate reasons why airlines may refuse passage to a paying customer, including when, at the carrier's discretion, there are doubts that they meet the necessary entry requirements of countries in transit or their final destination.

educational institutions, own or are engaged in operating licensed businesses in the UAE and continue to enjoy their right to property in the UAE[174]), it is absurd to regard the evidence of Qatar as meeting the high threshold of a "repetition of acts".

114. Regarding the second element ("official tolerance" by the UAE of any practice alleged to be in violation of the CERD),[175] it should be noted that, faced with allegations that Qatari nationals had been expelled from the UAE and were being prevented from exercising rights under the CERD, the UAE Ministry of Foreign Affairs[176] and other UAE authorities issued clarifying announcements that expressly disavowed any such practice. Thus, for example, there was official confirmation that Qatari nationals who were resident in the UAE could freely remain living in the country and that Qatari nationals who were part of a mixed Qatari-Emirati family could enter and exit the UAE. A further example is with respect to access to education, where all UAE educational institutions were instructed to establish contact with any Qatari students who had interrupted their studies to advise them that they were welcome to return to the UAE.[177] The high number of Qatari students (over 700) that are now enrolled in UAE universities[178] strongly

[174] UAE's Supplemental Response of 14 January, para. 12 (and evidence cited therein).

[175] European Court of Human Rights, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Merits Judgment (3 July 2014), para. 124 (defining "official tolerance" as meaning that "illegal acts are tolerated in that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that a higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied.").

[176] "An Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation", 5 July 2018, available at: https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx ("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.").

[177] *See*, UAE's Response of 7 August 2018, Annex 10 (Education – Undersecretary of Academic Affairs E mail) (showing that 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.").

[178] *See*, UAE's 14 January 2019 Submission, para. 12.c, citing to Annex 3 (Letter from the Ministry of Education to the Ministry of Foreign Affairs and International Cooperation, dated 3 January 2019). *See also*, UAE's Response of 7 August 2018, para. 51, citing to Annex 11 (Immigration - Student Entry Records) and Annex 12 (Qatari Student Records).UAE's Response of 7 August 2018, Annex 10.

suggests that the "educational" cases referred to by Qatar in the 19 February Response are either isolated cases or simply inaccurate, and that there is absolutely no "official tolerance" by the UAE of some alleged practice to obstruct access to UAE educational institutions by Qatari students. To the contrary, the Committee should recall that it was Qatari authorities who asked Qatari students to leave the UAE.[179] The experience that the UAE has with respect to spurious claims by Qatari students before UNESCO also goes to show that in each of the instances where Qatari nationals have complained that they have been prevented from continuing their studies in the UAE or from obtaining copies of their transcripts, this was due to these students not complying with certain objective criteria required of any student (Emirati, Qatari or of any other nationality).[180] It had nothing to do with the fact that the student was Qatari.

115. Qatar's assertion that the present case is analogous to the case of *Georgia v. Russia* before the European Court of Human Rights is baseless.[181] As the passage highlighted by Qatar makes clear, the European Court in that case was dealing with a situation of a "coordinated policy of arresting, detaining and expelling Georgian nationals [which] was put in place in the Russian Federation."[182] In fact, as the Russian authorities acknowledged in that case, there had been over 4,000 "administrative expulsion orders . . . issued against Georgian nationals", with over 2,300 of those nationals "detained and forcibly expelled."[183] In the present case, Qatar has not cited a single

[179] *See, e.g.*, **Annex 4**, Communications from Several UAE Universities, p. 1 (containing a letter from Zayed University to the Office of the Undersecretary for Academic Affairs of Higher Education, dated 15 March 2018, informing the Office of the Undersecretary that the Qatari students attending Zayed University were suspended from studying at the request of the Qatari embassy in UAE).

[180] *See infra*, para. 152, discussing the case of the three Qatari students who submitted communications to UNESCO alleging that the UAE had failed to comply with its obligations regarding their rights to education and the UAE's response showing that two of those students were terminated because their grades were lower than those required by the university, and that the third student recently graduated from the UAE university where the student was registered.

[181] 19 February Response, para. 89.

[182] European Court of Human Rights, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Merits Judgment (3 July 2014), para. 159.

[183] European Court of Human Rights, *Case of Georgia v. Russia (I)*, Application No. 13255/07, Merits Judgment (3 July 2014), paras. 130-135 (referring to the statistical data provided by both parties and assessed by the European Court of Human Rights).

arrest, detention or expulsion of a Qatari national. Far from the circumstances present in the *Georgia v. Russia* case, Qatari citizens are able to enter and reside in the UAE upon prior application and they enjoy the same rights within the UAE as other foreign nationals. Qatar's entire case before this Committee plainly ignores the fact that the UAE did not take any steps to deport Qatari citizens and that the Ministry of Interior, which is the UAE government entity charged with regulating and altering the residence status of non-citizens, did not issue any orders deporting Qatari citizens, let alone arrest or detain them. Qatar's submissions before this Committee also conveniently ignore that the Qatari government itself issued instructions for its citizens to leave the UAE after the UAE made the 5 June 2017 announcement.[184]

116. Finally, the UAE notes that if Qatar genuinely believed or was concerned that the UAE measures constituted "a serious, massive or persistent pattern of racial discrimination"[185], it could have resorted to other mechanisms in the practice of the CERD that are more adequately tailored to those situations and that do not require the exhaustion of local remedies.[186] Similarly, Qatar has not raised in its most recent report to the Committee under Article 9 (submitted on 6 October 2017) any effects on its nationals of the alleged

[184] "Qatar Asks Citizens to Leave UAE Within 14 Days: Embassy", REUTERS, 5 June 2017, available at: https://www.reuters.com/ article/us-gulf-qatar-citizens-emirates-idUSKBN18W1FT?il=0. This was also the case for Qatari students, as evidenced in the letter from Zayed University reporting that the Qatari Embassy had requested the suspension of Qatari students. **Annex 4**, Communications from Several UAE Universities, pp. 1 ("please be aware that Qatari students' suspension from study and their departure to Qatar was at the request of the Qatari Embassy in the United Arab Emirates"), 21 (some students citing the Qatari Embassy's request as a reason for interrupting their studies).

[185] *Official Records of the General Assembly, Forty-eighth session,* Supplement No. 18, 15 September 1993, doc. A/48/18, Annex 3, para. 9 (a).

[186] *Id.*, Annex 3, paras. 9(a) and (b) (establishing an early warning and urgent mechanism instituted to prevent "a serious, massive or persistent pattern of racial discrimination" and indicating that "early warning concerns could include some of the following criteria: (i) The lack of an adequate legislative basis for defining and criminalizing all forms of racial discrimination, as provided for in the Convention; (ii) Inadequate implementation or enforcement mechanisms, including the lack of recourse procedures; (iii) The presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials.").

breach of the Convention by the UAE, another avenue that Qatar had opened for which the requirement to demonstrate exhaustion of local remedies did not apply.[187]

117. Qatar's alternative argument as to why the local remedies rule would not apply in this case, *i.e.*, that it is asserting a direct injury to its own interests and that "such claims for direct injury are both interdependent with, and preponderant over, the claims Qatar has brought on behalf of its nationals"[188] also fails.

118. Contrary to Qatar's claims, as the Committee will appreciate from the evidence before it, it is clear that the preponderant objective and the true substance of Qatar's Article 11 Communication is not to vindicate a direct injury to the State, but rather to vindicate the alleged harm caused to Qatari individuals, and that its claim would not have been brought were it not for the claims of its nationals.[189] This is evident from Qatar's Article 11 Communication before this Committee[190] and was made absolutely clear in the speech of the Qatari Agent before the ICJ in Qatar's request for provisional measures when he stated that the "severe, lasting and continuing harms to Qataris are the reason Qatar

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[187] CERD, Article 9. *See*, Committee on the Elimination of Racial Discrimination, Combined seventeenth to twenty-first periodic reports submitted by Qatar under article 9 of the Convention, due in 2015, 6 October 2017, doc. CERD/C/QAT/17-21. With respect to the reports to be submitted under Article 9 of the CERD and the Committee's Concluding Observations, it also bears noting that the CERD Committee in its September 2017 Concluding Observations on the UAE's periodic report did not make any reference at all to any possible impact of the 5 June 2017 measures taken by the UAE on the rights under the Convention. This evinces that the Committee did not think that the 5 June 2017 measures implicated any rights under the Convention. CERD Committee, Concluding Observations on the combined eighteenth to twenty-first periodic reports of the United Arab Emirates, 13 September 2017, doc. CERD/C/ARE/CO/18-21.

[188] 19 February Response, paras. 92-103.

[189] Draft Articles Diplomatic Protection with Commentaries (2006), *ILC Yearbook 2006*, vol. II(2), p. 46 ("Closely related to the preponderance test is the *sine qua non* or 'but for' test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the 'but for' test. If a claim is preponderantly based on injury to a national, this is evidence of the fact that the claim would not have been brought but for the injury to the national. . . . [L]ocal remedies are to be exhausted not only in respect of an international claim, but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national.") (emphasis added). In its 19 February Response Qatar tried to extend its original claim on the basis of Qatari nationality to individuals of Qatari origin who are not presently Qatari nationals and refers to this argument as a reason reinforcing the preponderant nature of Qatar's direct injury claim: 19 February Response, para. 101. For the reasons outlined *supra* at paras. 99-104, this new attempt of Qatar to place its claim under the scope *ratione materiae* of the CERD fails.

[190] Qatar's Article 11 Communication, para. 58 ("In imposing the Coercive Measures, the UAE has unlawfully targeted Qatari citizens solely on the basis of their nationality.").

determined it had no choice but to institute proceedings in this Court".[191] Moreover, in its response to questions posed by the ICJ in those same proceedings, Qatar recognized that the fact that the inter-state procedure under Articles 11 to 13 of the CERD "contain[ed] a local remedies requirement" (and Article 22 of the CERD did not[192]), was "consistent with the general proposition that the local remedies rule does not apply in cases involving a direct injury to the claimant State"[193], thus implying that the procedure under Articles 11 to 13 of the CERD does not concern a direct injury to the State.[194] In fact, the filing by Qatar of witness statements in these proceedings is a further confirmation that Qatar's claim is an indirect one and that, therefore, local remedies must be exhausted.

119. The preparatory work of Article 11(3) of the CERD shows that there was an overall consensus that domestic remedies should be exhausted before a case is taken to the international level. A proposal by the Tanzanian delegation to do away with the requirement of exhaustion of local remedies was emphatically opposed[195] and voted

[191] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures: Verbatim Record of Public Sitting of 27 June 2018, at 10:00 a.m. (CR 2018/12), p. 16, para. 5 (Al-Khulaifi).

[192] The UAE maintains that Qatar is wrong with respect to its reading of Article 22 of the CERD and the exhaustion of local remedies but for the purposes of the present proceedings before the Committee, it is not necessary for the UAE to engage with this argument.

[193] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), International Court of Justice, Response on behalf of the State of Qatar to the questions posed by Judge Cançado Trindade on Friday, 29 June 2018, 3 July 2018, para. 8.

[194] Qatar equally recognized that the fact that human rights treaties may give rise to obligations *erga omnes* character was relevant for the proceedings before the ICJ under Article 22 and not to proceedings under Articles 11 to 13 or Article 14 of the CERD, to which "the local remedies requirement does apply." *Id.*

[195] Third Committee, 1353rd meeting, 24 November 1965, doc. 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";

against.[196] The *travaux préparatoires* also show that the implementation mechanism of inter-State communications under Article 11, modelled on the International Covenant on Civil and Political Rights,[197] was being conceived as a mechanism for the State to protect individuals and not to assert a direct injury to the State.[198]

120. Qatar's argument that its claims for harm of its own interests as a State Party to the CERD are interdependent with the violation of the rights of Qataris and that such interdependence precludes the applicability of the local remedies rule must also be rejected by the Committee.[199] While the CERD as a human rights convention has special characteristics that distinguishes it from other treaties, the special characteristics of the CERD do not allow it to be equated with the Vienna Convention on Consular Relations,

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[196] *See*, Third Committee, 1353rd meeting, 24 November 1965, doc. A/C.3/SR.1353, para. 57 ("[t]he Tanzanian proposal to delete paragraph 3 was rejected by 70 votes to 2, with 12 abstentions"). *See also, id.*, 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."; *id.*, para. 48 (Senegal), indicating that the requirement to exhaust local remedies would "prevent a proliferation of complaints at the international level". The comment by the Argentinean representative quoted by Qatar in its 19 February Response about the types of disputes that could be brought by States before the CERD Committee was an isolated comment, not shared by any of the other delegations and in any case would not be applicable to the claim brought by Qatar as Qatar's claim does not concern "failure to comply with certain provisions of the Convention which could be rectified by the adoption of new legislation." *See*, Third Committee, 1353rd meeting, 24 November 1965, doc. A/C.3/SR.1353, para. 54.

[197] *See*, Third Committee, 1353rd meeting, 24 November 1965, doc. A/C.3/SR.1353, paras. 20, 30 (indicating that the formula in Article 11 of the CERD was taken from the International Covenant on Civil and Political Rights and suggesting that the same wording in the latter should be borrowed for CERD).

[198] *See*, Third Committee, 1344th meeting, 16 November 1965, doc. A/C.3/SR.1344, para. 63 ("However useful that system might be, it was not entirely satisfactory, for intervention by states to redress violations of human rights was usually of a political nature, and its value and effectiveness suffered accordingly. "); Third Committee, 1346th meeting, 17 November 1965, doc. A/C.3/SR.1346, para. 13 ("The middle course that had been contemplated did not entitle individuals or organizations to address petitions direct to the permanent executive organ. It had the advantage of eliminating groundless complaints but at the same time it set a serious limitation. It left it to the State to deal with complaints, and left the rights of the individual a matter for high level political negotiation."). *Id.*, p. 331 ("His delegation was not opposed in principle to the establishment of some machinery to deal with disputes between States. It was to be feared, however, that States might resort to that organ less in order to succour the oppressed than to pursue political ends."); The preparatory works of Article 41(1)(c), the equivalent provision of the International Covenant on Civil and Political Rights, show that the inter-state communication procedure was conceived as a mechanism to protect individuals and not seen as causing "immediate and direct injury" to the State. United Nations General Assembly, Tenth Session, Draft International Covenants on Human Rights. Annotation prepared by the Secretary-General, 1 July 1955, doc. A/2929, 1 July 1955, pp. 237-238.

[199] 19 February Response, paras. 96-98.

the specific treaty to which the ICJ has applied the doctrine of the interdependence of the rights of the State and of individual rights.[200]

121. It is clear, therefore, that none of the arguments relied upon by Qatar bar the application of the rule of exhaustion of local remedies, mandated by Article 11(3) of the CERD, to Qatar's Article 11 Communication.

B. There are Effective and Reasonably Available Remedies in the UAE that Have Not Been Exhausted

122. Qatar argues that even if the rule on exhaustion of local remedies applies to Qatar's Article 11 Communication, it would still not bar Qatar's claims because "the UAE has failed to prove the existence of any effective and reasonably available remedies that have not been exhausted."[201] Qatar misrepresents the position of the UAE on the allocation of the burden of proof with respect to the exhaustion of local remedies.[202] By reference to the customary international law position as reflected in the Draft Articles on Diplomatic Protection and the decision of the ICJ in the *Diallo* case, the UAE has explained that, in the words of the Court, "it is incumbent on the applicant [Qatar] to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. . . It is for the respondent [UAE] to convince the Court

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[200] *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 36, para. 40 (holding that the duty to exhaust local remedies did not apply to the Mexican claim that it had suffered "directly and through its nationals" injury as a result of the United State's failure to grant consular access to its nationals under Article 36(1) of the Vienna Convention on Consular Relations because of the "special circumstances of interdependence of the rights of the State and of individual rights"). In *LaGrand* (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 492, para. 74, the Court described the system of Article 36 of the Vienna Convention on Consular Relations as an "interrelated regime designed to facilitate the implementation of the system of consular protection." In order to achieve that aim, Article 36(1) of the Vienna Convention on Consular Relations provides for consular officers, who are representatives of the sending State in the receiving State, the freedom "to communicate with nationals of the sending State and to have access to them" as well as for the right of consular officers "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention on Consular Relations, concluded 24 April 1963, entered into force 19 March 1967, 596 UNITED NATIONS TREATY SERIES 261, Article 36(1).

[201] 19 February Response, para. 104.

[202] 19 February Response, para. 105.

that there were effective remedies in its domestic legal system that were not exhausted."[203]

123. The Committee itself has clarified in respect of individual communications that mere doubts on the part of the petitioner as to the effectiveness of domestic remedies do not absolve a petitioner from pursuing them.[204] Even Qatar agrees that a petitioner should pursue local remedies regardless of whatever doubts may exist as to their effectiveness.[205]

124. As the UAE has already explained, and further details below, the remedies available to aggrieved Qataris are both available and effective. Effectiveness does not mean, however, that the outcome must be the desired outcome, nor that every single case is perfectly decided, but rather that the remedy available is accessible and capable of providing adequate redress.[206]

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[203] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, para. 44. UAE's Supplemental Response of 29 November 2018, para. 62; UAE's Supplemental Response of 14 January 2019, para. 65.

[204] Communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, Inadmissibility Decision of 10 August 2001, doc. CERD/C/59/D/19/2000, para. 7.4; Communication No. 21/2001, D.S v. Sweden, Inadmissibility Decision of 10 August 2001, doc. CERD/C/59/D/21/2001, paras. 4.2, 4.3; Communication No. 47/2010, *Kenneth Moylan v. Australia*, Inadmissibility Decision of 27 August 2013, doc. CERD/C/83/D/47/2010, para. 6.5 ("The Committee recalls that mere doubts about the effectiveness of domestic remedies, or the belief that the resort to them may incur costs, do not absolve a petitioner from pursuing them. In the light of the information before it, the Committee considers that the petitioner has not advanced sufficient arguments that no avenues exist in Australia to claim that a given piece of legislation has discriminatory effects on a person based on race. Notwithstanding the reservations that the petitioner may have on the effectiveness of the mechanism under section 10 of the Racial Discrimination Act in his particular case, it was incumbent upon him to pursue the remedies available, including a complaint before the High Court. Only after attempting to do so could the petitioner conclude that such a remedy was indeed ineffective or unavailable.") (emphasis added).

[205] 19 February Response, fn. 176, citing to the *Sarwar Seliman Mostafa v. Denmark* inadmissibility decision by the CERD Committee (cited *supra* at n. 204). Qatar qualifies this by saying that this is so only if there is a "'reasonable possibility' of success". *Id.* However, when declaring inadmissible the communication in the *Mostafa* case (or in the other cases cited *supra* at n. 204, the CERD Committee did not make that distinction.

[206] Draft Articles Diplomatic Protection with Commentaries (2006), *ILC Yearbook 2006*, vol. II(2), pp. 46-48 ("Article 15. Exceptions to the local remedies rule. Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.... *Commentary*... In order to meet the requirements of paragraph (a), it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible, but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted.") (emphasis added).

125. Before going into Qatar's specific complaints about domestic remedies in the UAE, it bears noting that all of Qatar's allegations of CERD violations are premised on Qatar's flawed case that Qatari nationals have been the subject of a "collective expulsion" and that a travel ban for Qatari nationals was implemented. As demonstrated by the UAE, this is clearly not the case. There were no expulsion or deportation orders of Qatari nationals, nor was the Ministry of Foreign Affair's 5 June 2017 announcement ever interpreted as a mandate to remove Qataris from the UAE. All the UAE required of Qatari nationals after this statement was for them to request permission to enter the UAE through the hotline.

126. Qatar complains that the hotline's decisions are discretionary and ineffective and that, therefore, the hotline cannot constitute an effective remedy in the UAE. However, the fact that some Qatari nationals may be denied an entry permit does not mean the hotline is discretionary or ineffective. Rather, this is the normal ordinary consequence of measures of this type, as is the case for the many visa or entry permit applications that are denied by many other countries the world over. The UAE, as any other State, has the right to control the entry of non-nationals to its territory. One of the mechanisms used by the UAE to exercise that right is the hotline, which is available to Qataris that want to travel to the UAE.

127. Second, Qatar alleges that UAE courts are neither "reasonably available" nor "effective" — but fails to explain why in the face of overwhelming evidence submitted by the UAE that Qatari nationals do resort to UAE courts and do obtain favourable judgments. The UAE submits that the volume of cases that have been initiated by Qatari nationals since mid-2017 is evidence enough that Qatar's allegations in this respect are false.

128. Third, Qatar further alleges that other complaint procedures described by the UAE are also neither "reasonably available" nor "effective" for Qatari nationals because they could only "*conceivably* concern narrow subsets of activity implicated by Qatar's Communication."[207] However, the catalogue of procedures available for Qataris that was described by the UAE was merely illustrative of certain rights. The "substantial

[207] 19 February Response, para. 151 (emphasis in original).

grievance"[208] of Qatari nationals can be presented to the local courts in the forms available there for protection of various rights, including the right to property, the right to education, and the right to work.

1. The Hotline Is a Readily Available Remedy for Qatari Nationals That Want to Travel to the UAE and Is Consistent With International Practice

129. Qatar alleges that the UAE's hotline, which receives applications for entry permits from Qataris, is "not a legal remedy",[209] but rather "a 'police security channel'",[210] "ineffective"[211] and "only available for family-related matters".[212] Qatar concludes that therefore, there is no need for Qatari nationals to apply to the hotline for entry permits before it can submit its communication before the CERD Committee alleging that the establishment of entry requirements constitutes a violation of the CERD.

130. Qatar's argument effectively means that States have an international obligation to allow entry of all foreigners, that the process to issue entry visas or permits should exclude any police involvement, and implausibly, that if not all visas or permits are granted, the system is "ineffective". Qatar is mistaken on these three points, including its allegation that the hotline is only available for family-related matters.

131. From the outset, the UAE respectfully notes that "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory."[213] Indeed, as the UN Human Rights Committee itself has stressed, "[i]t is in principle a matter for the State to decide who it will admit to

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[208] James R. Crawford & Thomas D. Grant, *Exhaustion of Local Remedies*, *Max Planck Encyclopedia of Public International Law* (2007), para. 11. *See infra* para. 139.

[209] 19 February Response, para 115.

[210] 19 February Response, para 116.

[211] 19 February Response, para 118.

[212] 19 February Response, para 126.

[213] European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985), Series A No. 94, para. 67.

its territory."[214] That is, States universally agree that barring the existence of a prohibitive rule to the contrary, it is fully within the prerogative of each member of the international community to regulate access to their territories.[215] In light of this, States only rarely object to each other's visa or entry requirements.[216]

132. States frequently require visas, entry permits, or some type of pre-clearance — like the UAE's hotline requirement for Qataris — prior to admitting foreign nationals into their territory. For example, the United States of America, the European Union, the Russian Federation and the People's Republic of China, all require visas or permits for nationals of foreign States, except when their State of nationality has entered into a visa waiver agreement.

133. Even States that have agreed to visa waivers for each other's nationals routinely require travel authorizations or pre-clearance. The United States of America is a good example.

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[214] UN Human Rights Committee, General Comment No. 15, The position of aliens under the Covenant, 11 April 1986, doc.1.HRI/GEN/1/Rev.9 (Vol. I), para. 5. *See also*, *Nishimura Ekiu v. United States* 142 US 651 (1892), 659 ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *Attorney-General for Canada v. Cain* [1906] AC 542, 546 ("One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace order, and good government, or to its social or material interest."); *European Roma Rights Centre and others v. Immigration Officer at Prague Airport* [2004] UKHL 55, Lord Bingham of Cornhill, para. 11 ("The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign State"); Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) p. 826 ("It is . . . unquestioned that a state may legitimately refuse to admit aliens or may accept them subject to certain conditions being fulfilled."); *Oppenheim's International Law* (8th ed. 1992), p. 897 ("By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of alien is a matter of discretion."); James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed., 2012), p. 608 ("[A] state may choose not to admit aliens or may impose conditions on their admission.").

[215] Human Rights Council, Resolution 35/17, (adopted on 22 June 2017 at its Thirty-fifth session 6–23 June 2017) Protection of the human rights of migrants: the global compact for safe, orderly and regular migration, doc. A/HRC/RES/35/17 (6 July 2017), p. 3 ("Recalling that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations"), para. 10 ("while States have the sovereign right to enact and implement migration and border security measures, they have a duty to comply with their obligations under relevant international law, including international human rights law and refugee law").

[216] Objections are raised, for example, when visas are denied contrary to a state's international obligations. *See, e.g.*, *Official Records of the General Assembly, Sixtieth session*, Supplement No. 26, Report of the Committee on Relations with the Host Country, 2005, doc. A/60/26, pp. 8-13 (documenting instances of representatives of several States objecting to the obstacles imposed by the US in granting entry visas for travel to the UN Headquarters in New York, contravening the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed at Lake Success, on 26 June 1947).

Although nationals of countries with a visa waiver agreement with the U.S. — for example, Germany or France — do not require a visa to enter the U.S., they do need to obtain travel authorization through the U.S.'s Electronic System for Travel Authorization ("**ESTA**") before being allowed to travel to the U.S.[217] As a consequence, although German or French nationals are able to travel to the U.S. without a visa, they do need to apply for an ESTA authorization before traveling there, an application which is filed online.[218] Needless to say, no allegations have been raised that the ESTA program is in breach of CERD.

134. The UAE's hotline is similar to the U.S.'s ESTA. The hotline, established on 11 June 2017, is the UAE's travel authorization program for Qatari nationals that want to travel to the UAE. The UAE Ministry of Interior — and not the Abu Dhabi police as misleadingly alleged by Qatar —[219] operates the hotline and conducts any applicable security screenings with respect to the applications — much like ESTA is operated by U.S. Customs and Border Protection, a federal law enforcement agency of the U.S. Department of Homeland Security. Originally established as a telephone number one needed to call, operators would provide callers with information regarding the UAE travel requirements and provide them with a number to a WhatsApp account. The applicants would then need to forward the necessary documents to that WhatsApp account based on which a decision would be made whether to issue the required entry permit. In the second part of 2018, a dedicated website was added to the hotline, which continues to operate, for ordinary Qatari citizens' convenience. Contrary to Qatar's assertions, the hotline has never been limited to those traveling for family reasons but

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[217] *See*, U.S. Customs and Border Protection, "Official ESTA Application Website", available at: https://esta.cbp.dhs.gov/esta/.

[218] *See*, U.S. Department of State, "Visa Waiver Program", available at: https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html.

[219] In fact, the same Annex to which Qatar cites expressly provides that "the Ministry of Interior has set up a toll-free hotline". UAE's Response of 7 August 2018, Annex 4, p. 1 (emphasis added).

instead is available to "all Qatari citizens" seeking permission to travel to the UAE, as the UAE expressly confirmed on 5 July 2018.[220]

135. If an applicant is granted authorization to travel to the UAE, then the applicant is issued a letter of authorization permitting entry.[221] A copy of the letter should be presented upon request by the applicant when traveling to the UAE.

136. If an application is not granted, there is nothing impeding the aggrieved party from submitting another application, as several of the very witnesses presented by Qatar in fact did.[222] This is also consistent with international practice: for example, if an application for a U.S. visa is refused by a consular officer, the affected traveler may, if desired, try again. To the extent that any Qatari nationals claim to have been affected by not being allowed to travel to the UAE, then they should have availed themselves of remedies, in particular that offered through the hotline, otherwise they cannot be said to have exhausted local remedies.

137. Notwithstanding any of the foregoing, as explained above, in principle, there is no international obligation binding on the UAE — or on any other State for that matter — requiring a State to allow the entry of foreign nationals into its territory.[223] The substance of Qatar's real issue with this refusal is that Qataris were discriminated against in that

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[220] "An Official Statement by the UAE Ministry of Foreign Affairs and International Cooperation", 5 July 2018, available at: https://www.mofa.gov.ae/EN/MediaCenter/News/Pages/05-07-2018-UAE-Statement-of-MoFAIC.aspx. *See also*, **Annex 3**, Federal Authority for Identity and Citizenship, Federal Authority for Identity and Citizenship, Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 31 December 2018. A prior version of this Annex in smaller format was submitted with UAE's Response of 14 January 2019, para. 8 as Annex 1.2. The revised version accompanied herewith as Annex 1 is a larger format version and the English translation has been revised for completeness. This document contains illustrative examples of entry/exit data processed through the hotline that did not involve family reunification and include entries for "business", "treatment", "ownership of a property", "business/work", "study" and "others". The UAE notes that although the table submitted in this Annex was prepared for purposes of these proceedings, the statistics themselves were extracted from the database maintained by the Ministry of the Interior and other than for formatting purposes, they were not otherwise altered by the UAE.

[221] UAE's Response of 7 August 2018, Annex 4, Part 1 Report of Abu Dhabi police on Hotline, Real Estate, Funds, Licenses and Immigration, p. 6.

[222] 19 February Response, DCL-004, paras. 19-20; *id.*, DCL-135, paras. 7-8, 16, 18-19.

[223] *Supra* para. 131, and notes 213-215.

they were not allowed entry to the UAE, but the UAE had no obligation to permit them to enter.

138. Regardless, entry and exit records which have been provided to the Committee show that between 5 June 2017 and 31 December 2018, approximately 11,000 movements by Qatari citizens across UAE borders took place, all of which were facilitated by the work of the hotline.[224] This shows that the hotline was effective in that Qatari nationals were in fact allowed to enter the UAE.

2. Other Available and Effective Remedies in the UAE Which Have Not Been Exhausted

139. The UAE gave examples in its previous submissions of a significant number of instances in which Qatari nationals have resorted to the UAE courts after the break in diplomatic relations between Qatar and the UAE. Other than the fact that, as demonstrated above, there are no specific discriminatory measures that Qataris could complain about as there has been no expulsion or travel ban imposed on Qataris, there is no specific form of local remedy that the UAE would need to provide for Qataris to present their complaints for violation of the CERD before the UAE authorities and courts. The "substantial grievance" of Qatari nationals can be presented to the local courts in the forms available there for protection of various rights[225], including amongst others, the right to property, the right to education, and the right to work.[226] However, as demonstrated further below, the Qatari nationals who claim that their CERD rights have been affected by the UAE did not even need to resort to any of these remedies or deliberately chose to ignore any possible redress to be obtained in the UAE and have resorted directly to international *fora*.

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[224] UAE's Supplemental Response of 14 January 2019, para. 8, and Annex 1.2. The UAE is accompanying a revised version of this Annex for the Committee's ease of reference. The tables have been printed in larger format and we have revised the English translation for completeness. Annex 1.

[225] James R. Crawford & Thomas D. Grant, *Exhaustion of Local Remedies, Max Planck Encyclopedia of Public International Law* (2007), para. 11.

[226] *See, e.g.*, UAE's Response of 7 August 2018, para. 85; UAE's Supplemental Response of 29 November 2018, paras. 61-71; and UAE's Supplemental Response of 14 January 2019, paras. 53-62.

140. Qatar further alleges that the ICJ has expressly found that Qataris appear to have been denied equal access to tribunals and other judicial organs in the UAE.[227] But Qatar cites misleadingly to the ICJ's Order on Provisional Measures, suggesting that the ICJ made final findings of fact[228] when instead, the ICJ was careful to point out that "at this stage of the proceedings relating to a request for the indication of provisional measures, the issue of exhaustion of local remedies need not be addressed by the Court",[229] and that "[t]he Court is not called upon, for the purposes of its decision on the request for the indication of provisional measures, to establish the existence of breaches of CERD . . . It cannot at this stage make definitive findings of facts".[230] For this reason alone, Qatar's arguments premised on the ICJ making "findings" of fact[231] are not credible.

a) There are Local Remedies Available Against the Alleged Actions of Emirates Airlines and Etihad Airways

141. Qatar also suggests that the UAE is responsible for breaches of the CERD as a result of the refusal by Emirates Airlines ("**Emirates**") and Etihad Airways ("**Etihad**") to fly certain passengers of Qatari nationality to the UAE. Qatar's argument, however, again fails for multiple reasons. First, effective local remedies exist in the applicable jurisdictions. Second, the actions of both airlines were consistent with international practice, and in fact, seem fully in accordance with their contracts of carriage. Third, Qatar must show that the actions of Emirates and Etihad are attributable to the UAE.

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[227] 19 February Response, para. 129.

[228] 19 February Response, para. 71.

[229] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order, para. 42.

[230] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order, para. 62. *See also*, *id.*, Dissenting Opinion of Judge Crawford, para. 14 ("[T]he Court fails to identify any evidence to support the further statement that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain vulnerable with regard to their rights under Article 5 of the CERD. Most importantly, the UAE's Statement of 5 July 2018 is not mentioned. The UAE's recent Statement clarifies the legal position of Qataris living in the UAE, namely that they "need not apply for permission to continue residence in the UAE". The Statement further clarifies that Qataris can apply for entry clearance to the UAE via a hotline.").

[231] 19 February Response, paras. 129-130.

142. Qatar identifies two individuals who allege to have been refused boarding, one by Emirates,[232] the other by Etihad.[233] Qatar glosses over the fact that these individuals were refused boarding outside of the UAE and that under the contracts of carriage and applicable conflict of laws rules, the remedies that should have been exhausted by those individuals were not limited to UAE courts. Rather, they could have resorted to the courts of the place where they were denied boarding. One of the Qatari nationals was in Muscat when he was refused boarding.[234] To the extent that the city of origin was Muscat, under applicable conflict of laws rules, such individual had remedies available in Oman as he could have requested restitution or compensation from an Omani Court. Qatar has overzealously redacted the statement of the second witness who was allegedly refused boarding by Etihad,[235] and so the UAE cannot comment on the specifics but it follows that the individual was neither in Qatar nor the UAE when the incident occurred. Thus, it would be reasonable to presume that the conflict of law rules applicable in such third state would also permit that individual to bring a claim against Etihad before local courts.

143. For this reason alone, the Committee should consider these allegations inadmissible: Qatar needs to first identify the correct jurisdiction, *i.e.*, in what country should the local remedies exist, and then prove that they are unavailable or are ineffective.

144. Moreover, an airline's discretion to refuse to transport an individual who lacks the necessary documentation for travel is neither discriminatory nor a breach of international law. Qatar fails to mention that the contracts of carriage entered into by the individuals with Emirates and Etihad expressly permit the carriers to refuse boarding to any individual when "[they] appear, in [the carrier's] exclusive opinion, not to meet requisite

[232] 19 February Response, DCL-125, para 12.

[233] 19 February Response, DCL-004, para 19.

[234] 19 February Response, DCL-004, para 19.

[235] 19 February Response, DCL-125, para 12.

visa requirements or not to have valid or lawfully acquired travel documents".[236] While Qatar may take issue with this practice, this is a standard practice followed by international carriers — including Qatar Airways[237] — and a reality of international travel. Upon check-in, passengers are requested to show their travel documents and airlines determine whether they may carry the passenger with such documents. In fact, the media often reports incidents of passengers who are not allowed to travel — rightfully or wrongly — as a result of these types of unpopular decisions by the carriers.[238] However, there are means of redress available to such aggrieved passengers. But in these proceedings, Qatar's argument is not that these passengers have been discriminated against as they were unable to claim compensation — it is a baseless argument — but that the refusal by Emirates and Etihad is tantamount to a breach of the CERD. For the foregoing reasons, this is mistaken.

145. The UAE notes further that Qatar cites two examples of Qatari nationals who, although faced with difficulties with private airline companies, were in fact allowed to fly into the UAE.[239] Their complaint is that in one of their multiple trips to the UAE, they were denied boarding, and they were questioned by airline personnel and immigration

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[236] Emirates Airlines, "Conditions of Carriage for Passengers and Baggage", 15 May 2006, available at: https://cdn.ek.aero/en/english/images/coc-eng%202006_tcm27-141072_tcm322-247811.pdf, Article 7.1.12. *See also*, Etihad Airways, "Conditions of Carriage", available at: https://www.etihad.com/en-ae/legal/conditions-of-carriage/, Article 7.1.2 and 7.1.2.7 ("We may also refuse to carry you or your Baggage (without any obligation to give you prior notice) on any flight (even if you hold a valid Ticket and have a boarding pass) if one or more of the following have occurred or we reasonably believe may occur: ... you do not appear to have valid or lawfully acquired travel documents or you appear in our opinion not to meet requisite visa requirements").

[237] Qatar Airways, "Conditions of carriage", available at: https://www.qatarairways.com/en/legal/conditions-of-carriage.html, Article 8.1.6 ("We may refuse carriage of a Passenger or a Passenger's Baggage for reasons of safety or if, in the exercise of our reasonable discretion, we determine that: ... You do not appear to be properly documented") (emphasis added).

[238] Anna Tims, "BA staff humiliated me by refusing to let me fly", THE GUARDIAN, 16 January 2019, available at: https://www.theguardian.com/money/2019/jan/16/humiliated-by-british-airways-staff-border-checks; Simon Calder, "easyJet kicks couple off Turkey holiday flight for not printing visas", INDEPENDENT, 2 April 2018, available at: https://www.independent.co.uk/travel/news-and-advice/easyjet-kick-couple-off-visas-denied-boarding-stansted-airport-turkey-london-a8284951.html; Simon Calder, "Qantas bans British couple from flight for not having visa they didn't need", INDEPENDENT, 4 April 2018, available at: https://www.independent.co.uk/travel/news-and-advice/qantas-british-couple-visa-flight-ban-wrong-australia-china-compensation-beijing-a8287991.html.

[239] 19 February Response, DCL-004, and DCL-125.

authorities.[240] But this is also not uncommon when visas or additional entry requirements exist in the destination. In fact, carriers flying into the U.S., Russia, China, the European Union, Canada, and other States, are invariably required to verify that passengers meet the applicable entry requirements, and when airline personnel have doubts, further questioning is undertaken. It would also not be uncommon for airlines to request signed waivers from passengers releasing the airline of any liability in case they are refused entry into their destination,[241] as happened in the case misleadingly cited by Qatar.[242] This is not discriminatory, but rather standard commercial practice by international airlines that would otherwise incur fines or potential expenses.

146. Finally, Qatar needs to explain how and why the denial of boarding by these commercial companies is attributable to the UAE, not just why this action was contrary to the CERD.[243] The customary international law rules codified in the Articles on State Responsibility adopted by the International Law Commission make clear that "the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.*, as agents of the State."[244] "As a general principle, the conduct of private persons or entities is not attributable to the State."[245] However, Qatar does not explain in any way whatsoever under which test should the actions of Emirates and Etihad be attributed to the UAE.

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[240] 19 February Response, DCL-004 (explaining that he was impeded from boarding an Etihad flight once, but indicating he had taken multiple trips to the UAE), and DCL-125 (noting the single incident when he was impeded from boarding an Emirates flight).

[241] The International Air Transport Association (IATA), which represents some 290 airlines, estimated in 2016 that fines averaged USD 3,500 per passenger transported with improper documentation, and that without the additional cost of returning the incorrectly documented passenger back to their country of origin. Airlines IATA, "Document Verification Travel Trouble", 13 October 2016, available at: https://airlines.iata.org/analysis/document-verification-travel-trouble.

[242] 19 February Response, DCL-125, para. 14 (statement of a banker explaining he was required to sign a waiver releasing the airline of any liability in case he were not admitted into the UAE).

[243] 19 February Response, para. 119 and fn. 222.

[244] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Yearbook 2001*, vol. II, Part Two, p. 38.

[245] *Id.*, p. 47.

147. For the foregoing reasons, Qatar's allegations that the actions by the two private carriers are demonstrable breaches of CERD lacks any credibility.

b) Qatari Students Who Have Not Continued Their Studies in the UAE Did So On Their Own Choice and Have Complained to International Organizations Instead of Addressing Their Complaint to the Educational Institutions Concerned

148. Qatar has alleged that Qatari students have been unable to continue their studies in the UAE or that they have not been provided with academic records as a result of discrimination by the UAE authorities and takes issue with the fact that the UAE has pointed to local remedies available within an Emirate (Abu Dhabi) rather than measures available at the federal level.

149. Qatar continues to make broad generalizations, that Qatari students were not allowed to continue their studies or that they were not provided with their educational records.

150. Qatar did finally identify two students who were allegedly refused reenrolment in UAE universities, or refused copies of their transcripts. The first example cited by Qatar is a student who was enrolled in the Emirates Aviation University and who continued his studies in Coventry University in the UK.[246] There is no clear evidence on record as to why he chose not to continue his studies in the UAE, but in any case the academic records of this student were clearly available as he was able to continue his studies in Coventry University with credits for courses already completed in the UAE.[247]

151. Regarding the second student, Qatar has chosen to redact both the University and the student's name, and so the UAE is unable to meaningfully address these specific allegations.

152. However, if the conduct of other Qatari students is considered, then the Committee will see a pattern. Three Qatari students submitted communications to UNESCO alleging that the UAE had failed to comply with its obligations regarding their rights to education. But

[246] 19 February Response, DCL-073.

[247] *See, e.g.*, 19 February Response, DCL-073, Exhibit J at 1 (where Coventry University is fully aware that this student "and [his] fellow independent Qatari students have already completed 3 of the modules with EAU").

in that proceeding, the UAE has submitted documentation which shows that two of the students were terminated because their grades were lower than those required by the university. Both were placed on academic probation three times. One of them was given one extraordinary chance to bring his grades up, whereas the second was given two extraordinary chances.[248] Regardless, in the case of the second student, the university considered certain extenuating medical circumstances and gave that student a sixth opportunity, and the registration department contacted the student on 26 September 2018, to provide the online registration link for the following studies.[249] The case of the third student is perplexing as that student was attending classes at the university on the dates when the UNESCO proceeding was ongoing[250] and the UAE understands from the university that the student recently graduated after successfully obtaining the degree.

153. None of those students had the need to go to UAE courts, as Qatar seems to suggest. Addressing their problems to their university was enough. To the extent that Qatar alleges that local remedies should have been available, the Committee should be mindful of the fact that the students could have resorted to UAE courts, but they opted not to. On the one hand, the Qatari Embassy itself requested the withdrawal of Qatari students.[251] On the other hand, students were contacted by the universities and reminded they could return.[252] Finally, the students that did seek remedies sought them directly at the international level, effectively waiving any claim they did not have access to local remedies. The burden is on Qatar to show that there was a deficiency in the UAE courts to the point that any attempt to resort to local remedies was futile.

[248] **Annex 5**, Communication from the UAE in Response to the UNESCO Proceedings Initiated by Three Qatari Students, p. 1.

[249] **Annex 5**, Communication from the UAE in Response to the UNESCO Proceedings Initiated by Three Qatari Students, pp. 2-3.

[250] **Annex 5**, Communication from the UAE in Response to the UNESCO Proceedings Initiated by Three Qatari Students, p. 3.

[251] **Annex 4**, Communications from Several UAE Universities, p. 1 ("please be aware that Qatari students' suspension from study and their departure to Qatar was at the request of the Qatari Embassy in the United Arab Emirates").

[252] **Annex 4**, Communications from Several UAE Universities (reporting the different communications between each university and their Qatari students and the responses received from such students).

c) ***Qatari Property Owners Have Resorted to Arbitration under the OIC Investment Agreement***

154. Qatar complains that Qatari nationals have been prevented from enjoying their right to property as a consequence of the 5 June 2017 measures by the UAE. Qatar in its 19 February Response has submitted no less than ten witness statements that relate in some form or another with economic harm arising from the alleged impossibility of Qatari nationals to manage their property or investments in the UAE.[253]

155. However, not only have Qatari nationals been able to travel to the UAE specifically to manage their property there,[254] but also Qatar has deliberately orchestrated the submission of hundreds of claims against the UAE under the OIC Investment Agreement, purposely foregoing the pursuit of redress through the UAE courts.[255]

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156. There can be no doubt that Qatar has failed to overcome the admissibility hurdle in Article 11(3) of the CERD. Because available domestic remedies have neither been invoked nor exhausted, Qatar has failed to meet the requirements of that provision.

157. For that reason alone the Committee must dismiss Qatar's Article 11 Communication and discontinue any further procedure addressing that communication.

IV. THE EXISTENCE OF CONCURRENT PROCEEDINGS BEFORE THE CERD COMMITTEE AND THE ICJ RENDERS QATAR'S COMMUNICATION INADMISSIBLE

158. Qatar's 19 February Response opposes the UAE's objection to the admissibility of Qatar's claim based on the existence of parallel proceedings before the ICJ arguing that,

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[253] *See, e.g.*, 19 February Response, DCL-108, *id.*, DCL-113.

[254] **Annex 3**, Federal Authority for Identity and Citizenship, Federal Authority for Identity and Citizenship, Requests for Entry or Exit of Qatari Nationals from 9 July 2018 until 31 December 2018. A prior version of this Annex in smaller format was submitted with UAE's Response of 14 January 2019, para. 8 as Annex 1.2. The revised version accompanied herewith as Annex 1 is a larger format version and the English translation has been revised for completeness. This document contains illustrative examples of entry/exit data processed through the hotline that did not involve family reunification and include entries for "business", "treatment", "ownership of a property", "business/work", "study" and "others".

[255] *See supra* para. 30.

contrary to the UAE's view, Article 22 of the CERD "does not establish a 'hierarchical and linear' process" and that "neither *lis pendens* nor *electa una via* applies".[256]

A. The Consistency of the UAE's Arguments

159. In Qatar's view, the UAE has been inconsistent in its arguments.[257] To the contrary, the UAE has consistently argued that the CERD and the ICJ proceedings cannot be pursued in parallel. In its Response of 7 August 2018, the UAE stated: "Qatar should not be permitted to simultaneously initiate proceedings in relation to the same issues in the ICJ."[258] In its 29 November 2018 Supplemental Response the UAE consistently held that the fact that Qatar had seized the ICJ could not mean anything but that Qatar had abandoned the CERD proceedings because the continuation of two parallel proceedings "would jeopardise the systemic integrity of the system and risk resulting in fragmented jurisprudence"[259]. Again consistently, in its 14 January 2019 Supplemental Response the UAE argued that the existence of parallel proceedings would undermine the integrity of the dispute resolution provisions of the CERD and of the ICJ.[260]

160. Qatar wonders how could the UAE consider that Qatar had abandoned the CERD proceedings, when, invoking Article 11(2) of the CERD, it had referred the matter again to the Committee.[261] As a matter of fact, the invocation of Article 11(2) of the CERD Convention came as a surprise because, after Qatar had submitted the matter to the attention of the Committee and the UAE had sent its response under Article 11(1) of the CERD Convention, no attempt to "adjust" the situation by negotiation or by other procedures as envisaged by Article 11(2) had been made by Qatar. Moreover, Qatar had

[256] 19 February Response, para. 167.

[257] 19 February Response, paras. 163-167.

[258] UAE's Response of 7 August 2018, para. 93.

[259] UAE's Supplemental Response of 29 November 2018, para. 79.

[260] UAE's Supplemental Response of 14 January 2019, paras. 27-41.

[261] 19 February Response, para. 165 referring to the *Note Verbale* from Qatar to the CERD Committee, 29 October 2018, p. 2.

submitted the matter to the ICJ. The UAE was thus justified in assuming the abandonment of the CERD proceedings.

B. Qatar's Re-Submission to the CERD Committee Is Inadmissible

161. In any case, Qatar's "re-submission" of the matter to the Committee with its *Note Verbale* of 29 October 2018 is defective.

162. In its *Note Verbale* Qatar assumes that under Article 11(2) a State has the right to re-submit a matter to the Committee simply because the six-months time-limit has elapsed and just claiming that the matter has not been adjusted to its satisfaction.[262] Qatar's re-submission completely ignores the reference contained in Article 11(2) to bilateral negotiations or other procedures.

163. This reference, as all treaty provisions, must, however, have a meaning, an *effet utile*. If the reference simply meant, as Qatar assumes, that, as matter of fact, within the six months time limit no adjustment has been reached by negotiation or other procedures, it would add nothing to the simple requirement that six months must have elapsed.

164. To be meaningful, the provision requires that the claiming State has sought to engage in bilateral negotiations or in other procedures. In the present case, as mentioned, Qatar has made no attempt to engage in bilateral negotiations or other procedures. Referring to the UAE Response of 7 August 2018, it has simply assumed "that the United Arab Emirates is unwilling to engage constructively with the State of Qatar to settle the matter amicably".[263] It seems preposterous to look for the indication of a will to negotiate in a document in which the UAE, within a tight time limit, had to respond to a broad range of allegations.

165. It must be added that, if the seizure of the ICJ by Qatar were to be seen as resort to a procedure open to the parties, it would become absurd, and disrespectful to the Court, to consider the matter not adjusted before the ICJ procedure has run its full course.

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[262] *Note Verbale*, from Qatar to the CERD Committee, 29 October 2018, p. 3.

[263] *Note Verbale*, from Qatar to the CERD Committee, 29 October 2018, p. 2.

166. Consequently, Qatar has abandoned the CERD Committee proceedings by seizing the ICJ, and not validly resumed them with its letter of 29 October 2018.

167. In light of the above, the UAE respectfully invites the Committee to find that the re-submission of the matter as set out in Qatar's letter of 29 October 2018 is inadmissible.

1. Qatar's Submission Is Inadmissible Because It Is Incompatible With The Hierarchical and Linear Dispute-Settlement System of the CERD

168. The submission of Qatar is, however, inadmissible also for other reasons set out in previous defences of the UAE[264] and to which Qatar responds in Chapter IV B of its 19 February Response.

169. The UAE objection to admissibility here considered is based on the contention that the CERD Committee proceedings cannot be pursued while proceedings between the same parties and concerning the same dispute are pending before the ICJ. The CERD Committee is duty bound to interpret and apply the Convention in such a way as to prevent a situation in which the system set out in Article 22 of the CERD Convention would be disrupted.

170. As indicated in the UAE's previous submissions, this system is "hierarchical and linear".[265] With these terms the UAE means that the CERD Committee proceedings have priority over those before the ICJ (hierarchical) and that no parallel competing proceedings are admitted (linear). Qatar disagrees, holding that Article 22 "offers a prospectus of alternatives".[266]

171. The hierarchical and linear character of the system emerges by considering Article 22 from the two different points of view of the ICJ and of the Committee.

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[264] *See*, UAE's Supplemental Response of 14 January 2019, paras. 27-41.

[265] UAE's Supplemental Response of 14 January 2019, para. 33; UAE's Supplemental Response of 29 November 2018, para. 72.

[266] 19 February Response, para. 178.

a) The Hierarchical Character of the System

172. From the point of view of the ICJ, Article 22 is a compromissory clause.[267] It entitles States Parties to the CERD to submit unilaterally to the Court disputes concerning the interpretation or application of the Convention. It does not exclude recourse to other procedures "for settling disputes or complaints" applicable as between the parties.[268]

173. This compromissory clause can be resorted to provided that the dispute "is not settled by negotiation or by the procedures expressly provided for" in the Convention. After a detailed analysis, in its Judgment of 1 April 2011, the ICJ stated that with these terms the Convention establishes "preconditions to be fulfilled before the seisin of the Court"[269]. The Court later specified, in its Order of 23 July 2018, that these preconditions are "procedural".[270] The hierarchical character of the relationship between the procedures set out in Articles 11 to 13 and the proceedings before the Court is thus clearly established.

174. From the point of view of the CERD Committee and of the proceedings before it, Article 22 provides that seizing the ICJ is a "last resort", as it was argued by the Russian Federation and accepted by five dissenting judges in the *Georgia v. Russian Federation* case.[271] "Last resort" requires that the procedures set out in Article 11 have not succeeded in achieving a settlement of the dispute.

175. The hierarchical character of the Convention's system and the role of the ICJ as a "last resort" are confirmed by the *travaux préparatoires* at all the stages of drafting of the Convention. Recourse to the ICJ was considered as both an implementing measure and a

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[267] As stated by the ICJ in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p.121, para. 118.

[268] CERD, Article 16.

[269] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 128, para.141.

[270] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order, para. 29.

[271] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 129, para. 144; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011, p. 156, para. 43.

final clause. In each case, the delegates anticipated that the mechanism would only be available once the CERD Committee proceedings had been exhausted.[272]

176. In its 19 February Response Qatar does not challenge the hierarchical character of the CERD Convention's system as it, grudgingly, acknowledges the ICJ's statement that "the procedures expressly provided for in this Convention" and "negotiation" are "procedural preconditions" to the seisin of the Court.[273] In so doing it accepts the hierarchical structure of the Convention's system.

b) The Linear Character of the System

177. Qatar's argument focuses on denying the "linear" character of the system. Such character would require that the two preconditions set out in Article 22 (negotiations and procedures provided for in the Convention) be cumulative, while in Qatar's view they are alternative. In Qatar's view, the consequences of such alleged alternative character would be that "a State Party may refer a dispute to the Court without any recourse to this

[272] At the stage of the Sub-Commission of Human Rights, Article 17 of the Proposed Measures of Implementation stated expressly that the ICJ will only be available when no solution has been reached under the inter-state communication procedure before the CERD Committee and the *ad hoc* conciliation commission. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Proposed Measures of Implementation by Mr Ingles, 17 January 1964, doc. E/CN.4/Sub.2/L.321, p. 6 (Article 17). When these suggestions reached the Commission of Human Rights, they were met with general approval. *See e.g.*, Commission on Human Rights, 810th meeting, 15 May 1964, doc. E/CN.4/SR.810, p. 7 (recourse to the ICJ was in effect seen as a right "to appeal" after no solution could be reached at the committee). The General Assembly proposed its own measures of implementation. The clauses themselves and the discussion on them confirm that committee proceedings had to be attempted and had to fail before the ICJ was open to disputing parties. Third Committee, Articles relating to measures of implementation to be added to the provisions of the draft International Convention on the Elimination of All Forms of Racial Discrimination adopted by the Commission on Human Rights by the Philippines, 11 October 1965, doc. A/C.3/L.1221, Article 18; Third Committee, 1344th meeting, 16 November 1965, doc. A/C.3/SR.1344, para. 69 ("Under that system, the case might be referred to the International Court of Justice as a last resort."). As a final clause, the ICJ, again, was only available after committee proceedings had not provided a solution. Third Committee, Amendments to the suggestions for final clauses submitted by officers of the Third Committee (A/C.3/L.1237) by Ghana, Mauritania and the Philippines, 30 November 1965, doc. A/C.3/L.1313. The Ghanaian delegate makes that plain when explaining the so-called "three power amendment" (*i.e.*, the amendment by Ghana, Mauritania and Philippines introducing the phrase "or the procedures provided for in the Convention" in what later became Article 22) which was adopted unanimously: "[T]he three-Power amendment was self-explanatory. Provision had been made in the draft Convention for machinery which should be used in the settlement of disputes before recourse was had to the International Court of Justice. The amendment simply referred to the procedures provided for in the Convention." Third Committee, 1367th meeting, 7 December 1965, doc. A/C.3/SR.1367, paras. 29, 41.

[273] 19 February Response, para. 169.

Committee" and that "[t]he CERD procedures can thus be engaged independently of ICJ proceedings".[274]

178. The second consequence of the alleged alternative character of the preconditions in Article 22 is that the article states the obvious and goes nowhere. As regards the first consequence, it is based on the idea that, if the dispute is not settled by negotiation, it may be submitted to the ICJ without involving the Committee. But this idea is wrong because the reasons invoked by Qatar in favor of the alternative character of the two procedural conditions are unconvincing, as will be illustrated below.

179. Qatar starts its argument boldly bystating that the alternative character of the preconditions set out in Article 22 is a matter already decided by the ICJ:

> [T]he ICJ has repeatedly decided, on a *prima facie* basis, that for it to have jurisdiction under Article 22, it is sufficient that *only one* requirement is met before the seisin of the Court (i.e. that they are "alternative"). As a result, a State Party may have recourse to the ICJ after negotiations without engaging the CERD procedures at all.[275]

180. The first statement quoted is in stark contrast with the clear statements of the Court in the two most recent cases relied upon by Qatar, that "it need not make a pronouncement on the issue at this stage of the proceedings"[276].

181. The second statement is incompatible with the nature of *prima facie* findings in provisional measures cases. As the Court has stated repeatedly, and most recently:

> The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself

[274] 19 February Response, para. 178.

[275] 19 February Response, para. 169 (emphasis in original).

[276] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order, para. 39, referring to *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, para. 60, I.C.J. Reports, 2017, pp. 125-126, para. 60.

> in a definitive manner that it has jurisdiction as regards the merits of the case.[277]

182. Qatar then recognizes that "the ICJ has yet to definitively confirm that the two requirements are alternative rather than cumulative" but argues that "13 Judges of the Court have already opined that they are alternative".[278] The dissenting opinions referred to endorse with different nuances the thesis that the preconditions are "alternative". But the manner in which the point is made is misleading: many of these opinions do not come from judges presently sitting in the Court. Of the 13 Judges mentioned eight are not present members of the Court. Whatever the views expressed in some cases by judges (only a few of whom are still members of the Court), these opinions were included in dissents and in no case was a majority reached on the cumulative or alternative character of the preconditions set out in Article 22.

183. Qatar further argues that if the preconditions were cumulative this "would lead to the unreasonable result that some disputes subject to Article 22 could *never* be referred to the ICJ".[279] These would be disputes concerning the interpretation or application of provisions of the Convention different from those concerning situations in which one "State Party considers that another State Party is not giving effect to provisions of this Convention", such as disputes about the validity of a reservation or of a denunciation.[280] This argument is far from convincing for two alternative reasons. Firstly, such disputes, although concerning a "final clause", may still be held to be disputes about whether a State has given effect to a provision of the Convention. Secondly, and alternatively, it may be argued that Article 22 opens a "last resort" remedy only available for disputes having gone through negotiations and the procedures which are set out in the Convention but which are not available for other disputes for which access to the ICJ would depend on the existence of an agreement between the parties different from the compromissory

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[277] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran v. United States of America), Provisional Measures, Order, para. 24, referring "for example", to *Jadhav* (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 236, para. 15.

[278] 19 February Response, para. 170.

[279] 19 February Response, para. 174 (emphasis in original).

[280] 19 February Response, para. 174.

clause of Article 22. There is no need to make a choice here between these two possible arguments, all of which could be reasonably made. The mere possibility of making them shows that, even when holding that the preconditions are cumulative, there would be no "unreasonable" consequences for disputes concerning the interpretation and application of provisions of the Convention different from those concerning the claim that one State Party is not giving effect to provisions of the Convention.

184. Qatar also argues that the *travaux préparatoires* support the view that the preconditions are alternative. It mostly relies on the assessment of the *travaux préparatoires* made in the Joint Dissenting Opinion of five judges to the 2011 *Georgia v. Russian Federation* preliminary objections judgment.[281] The Joint Dissenting Opinion recalls that the mention in what was to become Article 22 of the "procedures expressly provided for in this Convention" was introduced by a "Three Power Amendment" rather late in the negotiation and was unanimously approved with some States making brief statements in favour. After remarking that "[n]one of these statements is fully illuminating", the Joint Dissenting Opinion states that

> The clear impression nevertheless emerges that the three Powers' intent in proposing their amendment was not to impose a further condition resulting in more limited access to the Court than under the earlier text. There is nothing to indicate that the amendment was aimed at making resort to the special procedures under Part II mandatory where direct negotiations had failed. More likely, the amendment was intended to make clear that recourse to these special procedures figured among the possible avenues for negotiated settlement. That is why it was regarded by the delegates as merely a "useful addition or clarification" and was easily adopted, not as a change in the text to make it more restrictive but as a natural, and almost self-evident, clarification.[282]

[281] 19 February Response, para. 176.

[282] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011, p. 157, para. 47.

185. These remarks are far from firm. They are based on an "impression" and on an assessment of a "likely" intention.[283] Moreover, looking at the *travaux*, one does not come to the same conclusion. When the drafters in the Sub-Commission first contemplated recourse to the ICJ, they expressly proposed to make it available only after Committee proceedings had been engaged and had failed.[284] The Commission agreed.[285] When the Third Committee proposed its own measures of implementation, the ICJ again was only available when the dispute could not be resolved by other means.[286] When the submission of disputes to the ICJ was considered as a final clause in the Third Committee of the General Assembly, the delegates were clear that the jurisdiction of the ICJ was only triggered when the dispute machinery of the Convention had failed to resolve the dispute.[287] Thus, the so-called "three power amendment" (*i.e.*, the amendment by Ghana, Mauritania and Philippines introducing the phrase "or the procedures provided for in the Convention" in what later became Article 22) which was adopted unanimously, was explained by the Ghanaian delegate as follows:

> [T]he three-Power amendment was self-explanatory. Provision had been made in the draft Convention for machinery which should be used in the settlement of disputes before recourse was had to the

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[283] In any case, the Court in its judgment in the same case "leaves aside" the "question of whether the two modes of peaceful resolution are alternative or cumulative". *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 125, para. 133.

[284] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Proposed Measures of Implementation by Mr Ingles, 17 January 1964, doc. E/CN.4/Sub.2/L.321, p. 6 (Article 17).

[285] Commission on Human Rights, 810th meeting, 15 May 1964, doc. E/CN.4/SR.810, p. 7 ("A State party which considered that another State party was not giving effect to the provisions of the convention would be able to bring the matter to the attention of that State by written communication. If after six months the matter was not adjusted to the satisfaction of both States, either State would have the right to refer the matter to the committee. In the event of no solution being reached, the States would be free to appeal to the International Court of Justice. He stressed the usefulness of that machinery" (emphasis added)).

[286] Third Committee, Articles relating to measures of implementation to be added to the provisions of the draft International Convention on the Elimination of All Forms of Racial Discrimination adopted by the Commission on Human Rights by the Philippines, 11 October 1965, doc. A/C.3/L.1221, p. 6 (Article 18).

[287] Third Committee, 1367th Meeting, 7 December 1965, doc. A/C.3/SR.1367, paras. 26, 29, 31, 38, 39, 40, 41. The Third Committee was concerned first and foremost with the question of whether all parties had to consent to bring the dispute before the ICJ; the members were less concerned with the question of whether the dispute machinery must first have failed to reach a solution. Members almost took that latter point as a given. *See, e.g., id.*, para. 40 ("[Mr Cochaux] would support the three-Power amendment, which introduced a useful clarification."). The Three-Power Amendment was adopted unanimously.

> International Court of Justice. The amendment simply referred to the procedures provided for in the Convention.[288]

186. But the Court also remarked in the *Georgia v. Russia* judgment that:

> at the time when CERD was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States . . . [I]t is reasonable to assume that additional limitations to resort to judicial settlement in the form of prior negotiations and other settlement procedures without fixed time-limits were provided for with a view to facilitating wider acceptance of CERD by States.[289]

187. These considerations make it easy to assume that the addition of the procedures expressly provided for in what was to become Article 22 was intended to make the Convention more acceptable to the then numerous States not favourable to compulsory judicial settlement of disputes. It can also be considered likely that the intent was not only "to make clear that recourse to these special procedures figured among the possible avenues for negotiated settlement"[290] but also to strengthen the role of these newly established procedures.

188. Qatar also argues that "[i]f the requirements were deemed cumulative, the negotiation requirement would be rendered redundant and deprived of any *effet utile*". This would be, in Qatar's view, the consequence of the fact that "negotiation constitutes an element of the CERD procedures" because "bilateral negotiations" are mentioned in Article 11(2). From this it would follow that, according to Qatar, "[i]f the two requirements were cumulative, there would be no reason to have an additional negotiation requirement in Article 22 on top of the negotiation requirement already stated in Article 11(2)".[291]

189. This argument is ill-conceived. The "negotiation[s]" mentioned in Article 22 are the very "bilateral negotiations" mentioned in Article 11(2).

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[288] Third Committee, 1367th meeting, 7 December 1965, doc. A/C.3/SR.1367, para. 29.

[289] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 129, para. 147.

[290] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja, I.C.J. Reports 2011, p. 157, para. 47.

[291] 19 February Response, para. 173.

190. In the CERD system, as provided by Article 11(2), negotiation is a precondition to resort to the engagement of the Committee. The engagement of the Committee can be obtained only if negotiations have been held and have failed. Thus, in the CERD system there is only one procedure which starts with negotiations, and in case negotiations fail, continues with the engagement of the Committee. Article 22 must be read in light of Article 11 and of the role negotiations have in it. Negotiation and the other procedures are two steps of the same procedure. This procedure can stop if negotiations are successful but, before the "last resort" of seizing the ICJ can be utilized, it must be pursued up to an unsuccessful conclusion. In this sense, the preconditions are cumulative.

c) Lack of Negotiations Renders the Re-Submission Inadmissible

191. In the present case the discussion concerning the interpretation of Article 22 is, however, not as relevant as it is in cases before the ICJ. In those cases the issue is whether for the Court to have jurisdiction it is necessary that only one or both of the procedural preconditions is satisfied. In the present case the question is whether the dispute is validly before the CERD Committee. As there have been no negotiations, and not even an attempt by Qatar to set these negotiations in motion, the condition set out in Article 11(2) is not satisfied. Consequently the request of Qatar remains inadmissible.

192. Referring to the compromissory clause of Article 22 of the CERD Convention, in its 2011 Judgment on Preliminary Objections in the *Georgia v. Russian Federation* case, the ICJ clarified that:

> . . . to meet the precondition of negotiation in the compromissory clause of a treaty . . . negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.[292]

193. In the present case there was no attempt by Qatar to engage in negotiation. Even less so in negotiations dealing with a dispute concerning alleged racial discrimination.

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

2. The Risk of *Lis Pendens* and *Electa Una Via* Cannot Be Ignored

194. Qatar rejects the argument put forward by the UAE that Qatar's seizure of the ICJ creates a situation of *lis pendens* and that it contradicts the principle of *electa una via.* It criticizes the UAE for referring to a "situation" of *lis pendens* and not to a "doctrine" or principle" or "rule" of *lis pendens.*[293]

195. But this was the intention of the UAE. The UAE is fully aware that certain strict prerequisites – namely that the two disputes are between the same parties, have the same *causa petendi* and the same *petitum* – are sometimes required in order to deny the jurisdiction of a court based on *lis pendens*. It is also fully aware that different courts, tribunals and other dispute-settlement bodies are based on different treaties and that each of them is competent to decide on its jurisdiction. The UAE is, moreover, fully aware that the ICJ has declined to take a stand on this matter. In its Order of 23 July 2018 the Court stated that it did not "consider it necessary, for the present purposes, to decide whether any *electa una via* principle or *lis pendens* exception are applicable in the present situation".[294]

196. But the negative effects of a "situation" of *lis pendens*, in which the same parties and the same allegations based on the same facts are involved, or of a situation in which a party, while engaged in a dispute-settlement procedure, moves to another such procedure without abandoning the former, remain. These negative effects consist basically in the risk of conflicting decisions on the same issues of fact or law or both.

197. In the case of the procedures before the CERD Committee, as illustrated in previous submissions by the UAE,[295] which should be considered repeated here, there is the specific additional risk of creating the conditions for a clash between the Committee and the ICJ. Namely, between a respected specialized expert body competent for certain State-to-State disputes and the principal judicial organ of the United Nations.

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[293] 19 February Response, para. 180.

[294] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order, para. 39.

[295] *See*, UAE's Supplemental Response of 14 January 2019, para. 31.

198. Contrary to what Qatar holds, the *MOX Plant* tribunal, notably did not rely on UNCLOS Articles 281 and 282 which, under strict conditions, deny the jurisdiction of UNCLOS dispute settlement bodies when the dispute is submitted to other procedures applicable between the parties.[296] It preferred to rely on two considerations based on the integrity of the judicial function.[297]

199. These are: (i) the "considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States"; and (ii) that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties".[298]

200. It is to be noted that the Tribunal relied on "mutual respect and comity" as regards the *potential,* not actual, submission of the dispute (or of a dispute similar to the one pending before it) to another court. Moreover, the court deserving respect and comity was a regional court (the European Court of Justice), while the *MOX Plant* Arbitral Tribunal was instituted on the basis of an open multilateral treaty binding more than three quarters of the existing States.

201. In the present case, Qatar's submission of the dispute to the ICJ has created a real and concrete possibility of conflict of decisions and of a clash between the Committee and the principal judicial organ of the United Nations. Considerations of mutual respect and comity should apply in this case even more. As illustrated in previous submissions by the UAE, the procedure before the Committee also disrupts the exercise of the procedural rights of the parties by compelling them either to restrain their arguments in one

[296] 19 February Response, para. 186. *MOX Plant Case* (Ireland v. United Kingdom), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, available at in www.pca-cpa.org, mentions Article 281 and 282 of UNCLOS in paras. 18 and 23 but not for the purpose of justifying its decision to suspend proceedings.

[297] *MOX Plant Case* (Ireland v. United Kingdom), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, available at in www.pca-cpa.org, para. 28.

[298] *MOX Plant Case* (Ireland v. United Kingdom), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003, available at in www.pca-cpa.org, para. 28.

procedure or to "show their hand" for later pleadings before the other dispute-settlement body.[299]

202. It is humbly submitted that, before allowing Qatar to continue the procedure before it, the Committee should consider the dangerous implications just illustrated. These dangerous implications should encourage the Committee to rely on the legal arguments for declaring Qatar's re-submission inadmissible, which have been illustrated above.

203. In a final attempt to dismiss the UAE's arguments, Qatar states that, if the Committee were to declare its submission inadmissible and if the ICJ were to decide that it has no jurisdiction, this "would then lead to the result that Qatar has no remedy whatsoever – neither before this Committee nor the ICJ".[300] The question of jurisdiction and the admissibility of a claim is for each dispute-settlement body to decide. If in our case both the Committee and the ICJ were to decline entertaining Qatar's case, it would mean that in both cases the requirements set out in the relevant international law instrument are not satisfied.

V. CONCLUSION

204. For the reasons set out herein and in the UAE's 7 August 2018 Response, the 29 November 2018 Submission and the 14 January 2019 Supplementary Submission, the UAE respectfully urges the Committee to dismiss Qatar's Article 11 Communication for lack for jurisdiction and/or lack of admissibility.

205. The UAE once again takes this opportunity to reaffirm its unwavering commitment to eliminating racial discrimination in all of its forms and to combating hate speech.

[299] *See*, UAE's Supplemental Response of 14 January 2019, paras. 36-39.

[300] 19 February Response, para. 197.

Annex 123

IACtHR, *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador)*, Advisory Opinion OC-22/16 (26 February 2016)

CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CORTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

[Organization of American States]

[INTER-AMERICAN COURT OF HUMAN RIGHTS]

INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-22/16
OF FEBRUARY 26, 2016
REQUESTED BY THE GOVERNMENT OF PANAMA

ENTITLEMENT OF LEGAL ENTITIES TO HOLD RIGHTS UNDER THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (INTERPRETATION AND SCOPE OF ARTICLE 1.2, IN RELATION TO ARTICLES 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 AND 62.3 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, AS WELL AS OF ARTICLE 8.1.A AND B OF THE PROTOCOL OF SAN SALVADOR)

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal"), composed of the following Judges[1]:

Roberto F. Caldas, President;
Eduardo Ferrer Mac-Gregor Poisot, Vice President;
Manuel E. Ventura Robles, Judge;
Diego García-Sayán, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge; and
Humberto Antonio Sierra Porto, Judge;

Also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Article 64.1 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), issues the following Advisory Opinion structured as follows:

[1] This Advisory Opinion is being issued during the 113th Ordinary Period of Sessions of the Court. In accordance with Article 54.3 of the American Convention on Human Rights, Art. 5.3 of the Court's Statute and Art. 17.1 of its Rules of Procedure, the judges who complete their mandates will continue to hear cases that they have already heard and which are in the sentencing phase. Therefore, Judges Manuel E. Ventura Robles, Diego García-Sayán and Alberto Pérez Pérez participated in the deliberations and signing of this Advisory Opinion.

[…]

I
PRESENTATION OF THE REQUEST

1. On April 28, 2014, the Republic of Panama (hereafter "Panama"), based on Article 64.1 of the American Convention[2] and in accordance with that established in Article 70.1 and 70.2 of the Rules of Procedure[3], submitted a request for an

[2] Article 64.1 of the Convention: "The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."
[3] Article 70.1 and 70.2 of the Rules of Procedure of the Inter-American Court: "1. Requests for an advisory opinion under Article 64.1 of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought.

Advisory Opinion on the interpretation and scope of Article 1.2, in relation to Articles 1.1[4], 8[5], 11.2[6], 13, 16[7], 21, 24[8], 25[9], 29, 30[10], 4[11], 6[12] and 62.3[13] of the American Convention on Human Rights, as well as of Article 8.1.a and b of the Protocol of San Salvador (hereafter "the request"

2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates."

[4] Article 1.1 of the Convention: "Obligation to Respect Rights. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[5] Article 8 of the Convention: "Right to a Fair Trial. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
b) prior notification in detail to the accused of the charges against him;
c) adequate time and means for the preparation of his defense;
d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
g) the right not to be compelled to be a witness against himself or to plead guilty; and
h) the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

[6] Article 11.2 of the Convention: "Protection of Honor and Dignity. […] 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

[7] Article 16 of the Convention: "Freedom of Association. 1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police."

[8] Article 24 of the Convention: "Right to Equal Protection. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[9] Article 25 of the Convention: "Right to Judicial Protection. 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
b) to develop the possibilities of judicial remedy; and
c) to ensure that the competent authorities shall enforce such remedies when granted."

[10] Article 30 of the Convention: "Scope of Restrictions. The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."

[11] Article 44 of the Convention: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

[12] Article 46 of the Convention: "1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and
d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.
2. The provisions of paragraphs 1.a. and 1.b. of this article shall not be applicable when:
a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

[13] Article 62.3 of the Convention: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

or "the query"). Specifically, Panama asked the Court to address the following questions[14]:

a) in relation to Article 1.2 of the American Convention on "the scope and protection of physical persons through legal entities or 'legally recognized non-governmental entities', both for exhausting the procedures of domestic jurisdiction as well as for filing complaints of human rights violations with the Inter-American Commission on Human Rights", and "the scope and protection of the rights of legal entities or 'legally recognized non-governmental entities' as such, as instruments of physical persons to achieve their legitimate missions";
b) "whether or not Article 16 of the Convention, which recognizes the right of human beings to associate, is limited by the restrictions on the protection of associations freely formed by physical persons as 'legally recognized non-governmental entities,' to protect their rights as expressed and developed through the legal entities that are formed under the right of association";
c) the interpretation of Article 1.2 in the light of Articles 29 and 30 of the Convention, and
d) "the protection of the human rights of physical persons by means of non-governmental organizations or legal entities, of the […] rights [to] judicial protection and due process of Article 8 of the Convention; [to the] freedom of expression of Article 13 of the Convention; [to] private property as recognized by Article 21 of the Convention; [to] equality and non-discrimination pursuant to Articles 1.1 and 24 of the Convention; [to] the right to strike and form federations and confederations as in Article 8 of the Protocol of San Salvador to the American Convention on Human Rights."

[…]

[14] The full text of the request can be found at the following link on the Court's website: http://www.corteidh.or.cr/solicitudoc/solicitud_14_11_14_esp.pdf.

[…]

A. Literal meaning of the terms "person" and "human being" – literal interpretation

37. The Court reiterates that it has already found that Article 1.2 of the Convention establishes that the rights recognized in said instrument correspond to people, that is, to human beings.[46] In particular, it should be noted that the American Convention did not leave open for interpretation the way in which the term "person" should be understood, as Article 1.2 specifically seeks to establish a definition of the term, which demonstrates that the parties' intent was to give the term a special meaning within the context of the treaty, as set forth in Article 31.4 of the Vienna Convention. Therefore, this Court has held that the two terms appearing in Article 1.2 of the Convention should be understood as synonyms.[47]

[…]

[46] *Usón Ramirez v. Venezuela*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2009. Series C No. 207, para. 45, and *Granier et al (Radio Caracas Televisión) v. Venezuela*. *Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 22, 2015. Series C No. 293, para. 19.

[47] *Artavia Murillo et al (in vitro fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 28, 2012. Series C No. 257, para. 219. Article 1.2 has been studied by the Court in cases in which violations of the rights of legal entities have been claimed, which the Court has rejected because they have not been recognized as entitled to the rights enshrined in the American Convention. Cfr. *Cantos v. Argentina. Preliminary Objections*. Judgment of September 7, 2001. Series C No. 85, para. 29 and *Perozo et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195, para. 398.

[…]

D. Other human rights protection systems and comparative law – evolutionary interpretation

49. This Court has indicated on other occasions[66] that human rights treaties are living instruments, whose interpretation has to accompany the evolution of time and current conditions of life. This evolutionary interpretation is consistent with the general rules of interpretation established in Article 29 of the American Convention,

[66] *Cfr.* Advisory Opinion OC-16/99, para. 114; *Atala Riffo and girls v. Chile*. *Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 83; *Artavia Murillo et al (in vitro fertilization) v. Costa Rica*, para. 245, and Advisory Opinion OC-21/54, para. 55. Similarly, the Preamble to the American Declaration of the Rights and Duties of Man states: "The international protection of the rights of man should be the principal guide of an evolving American law."

as well as in the Vienna Convention on the Law of Treaties.[67] Furthermore, the third paragraph of Article 31 of the Vienna Convention authorizes the use, for purposes of interpretation of such means as agreements or practice[68] or relevant rules of international law[69] that the States have issued in relation to the subject matter of the treaty, which are some of the methods that are associated with an evolutionary approach to interpreting the treaty. Taking this into account, the Court will proceed to analyze: i) the protection given to legal entities in other courts or international human rights bodies, and ii) the protections afforded to legal entities in the domestic legislation of the States Parties.

i) International courts and bodies

50. On this point, the Court believes it is relevant in the context of an evolutionary interpretation, to analyze the way in which the ownership of rights and access of legal entities to the main international human rights courts and institutions, in order to determine whether there is a common practice among them. In fact, this Court has considered it useful, on other occasions,[70] to study other human rights systems in order to discover their similarities or differences with the Inter-American system, which can help determine the scope or meaning that others have given to a similar provision or detect the particularities of the treaty. This Court will now proceed to examine: a) the European system, b) the African system, and c) the universal system.

a) European system

51. This Court notes that the European Convention does not contain a definition of the term "person", unlike the American Convention. The European Convention limits itself in all of its articles to the use of the expression "all persons", without specifying whether it is referring to human persons or legal persons/entities. Similarly, the Preamble to the Convention only mentions the value of human rights as a means to ensuring justice and peace in Europe.[71] In fact, the only articles which directly refer to legal entities are Article 34 of the European Convention and Article 1 of Additional Protocol No. 1. In this respect, the Court observes that Article 34 provides:

> ARTICLE 34 Individual applications: The Court may receive applications from **any person, nongovernmental organisation or group of individuals** claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. *(emphasis added)*

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[67] *Cfr.* Advisory Opinion OC-16/99, para. 114, and Advisory Opinion OC-21/14, para. 55.

[68] *Artavia Murillo et al (in vitro fertilization) v. Costa Rica*, para. 245. *Cfr.* TEDH, *Rasmussen v. Denmark* (No. 8777/79), Judgment of November 28, 1984, para. 41; *Inze v. Austria* (No. 8695/79), Judgment of October 28, 1987, para. 42, and *Toth v. Austria* (No. 11894/85), Judgment of November 25, 1991, para. 77.

[69] *Artavia Murillo et al (in vitro fertilization) v. Costa Rica*, para. 245. *Cfr.* TEDH, *Golder v. United Kingdom* (No. 4451/70), Judgment of December 12, 1975, para. 35.

[70] For example, in the Advisory Opinion regarding the Obligatory Association of Journalists, the Court compared Article 13 of the American Convention regarding the right to free expression, with analogous articles in the European Convention (Article 10) and the International Covenant on Civil and Political Rights (Article 19). *The Compulsory Membership of Journalists in an Association (Arts. 13 and 29 of the American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 45-50. Similarly, the *Atala Riffo* case looked at the differences between the scopes of Articles 11.2 and 17.1 of the American Convention and Article 8 of the European Convention; *Atala Riffo and girls v. Chile*, para. 175.

[71] The Preamble to the European Convention states: Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.

52. Meanwhile, Article 1 of Additional Protocol No. 1 indicates that:

> ARTICLE 1 – Protection of property: **Every natural or legal person** is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. (Emphasis added)

53. In this sense, Article 34 of the Convention specifies who can file a petition with the European Court, namely: i) any individual person; ii) any non-governmental organization, and iii) any group of individuals. The European Court's jurisprudence has allowed, within the concept of non-governmental organization, various types of legal entities to submit petitions thereto. In particular, the European Court has heard cases related to: i) private legal entities, of any nature, for-profit[72] (civil and commercial) and not-for-profit[73] (associations and foundations), or ii) public entities, provided they do not exercise governmental powers, which were not created for purposes related to public administration and are independent of the State.[74] The interpretation of Article 34 of the Convention has led to the European Court not only hearing cases of legal entities related to property rights, which is expressly permitted by Article 1 of Protocol No. 1 to the European Convention, but it has also analyzed cases related to rights such as the freedom of expression[75] (Article 10 of the European Convention), the prohibition of discriminatior[76] (Article 14 of the Convention), the right to a fair trial[77] (Article 6 of the Convention), to freedom of assembly and association[78] (Article 11 of the Convention), freedom of thought, conscience and religion[79] (Article 9 of the Convention), or the right to respect for private and family life[80] (Article 8 of the Convention).

[…]

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[72] On this point, see TEDH, *SCI Boumois v. France*, (No. 55007/00), Judgment of June 17, 2003; TEDH, *SCP Huglo, Lepage & Associates, Consejo* v. France, (No. 59477/00), Judgment of February 1, 2005; TEDH, *Klithropiia Ipirou Evva Hellas A.E. v. Greece*, (No. 27620/08), Judgment of January 13, 2011; TEDH, *Sociedade Agricola Do Ameixial v. Portugal*, (No. 10143/07), Judgment January 11, 2011; TEDH, *Nieruchomosci SP. Z O.O. v. Poland*, (No. 32740/06), Judgment of February 2, 2010; TEDH, *Ge.Im.A SAS v. Italy*, (No. 52984/99), Judgment of February 12, 2002; TEDH, *Studio Tecnico Amu S.A.S. v. Italy*, (No. 45056/98), Judgment of October 17, 2000; TEDH, *Lilly France v. France* [n° 2], (No. 20429/07), Judgment of November 25, 2010; TEDH, *Filippos Mavropoulos- Pam. Zisis O.E. v. Greece*, (No. 27906/04), Judgment of May 4, 2006; TEDH, *S. A. GE.MA SNC v. Italy*, (No. 40184/98), Judgment of April 27, 2000; TEDH, *Sordelli y C. SNC v. Italy*, (No. 51670/99), Judgment of December 11, 2001, and TEDH, *National & Provincial Building Society, The Leeds Permanent Building Society & The York Shire Building Society v. United Kingdom*, (No. 117/1996/736/933–935), Judgment of October 23, 1997.

[73] See: TEDH, *Apeh Üldozötteinck Szövetsege et al. v. Hungary*, (No. 32367/96), Judgment of October 5, 2000; TEDH, *Boychev et al., including the Unification Church Association v. Bulgaria*, (No. 77185/01), Judgment of January 27, 2011; TEDH, *Cha'Are Shalom and Tsedek v. France*, (No. 27417/95), Judgment of June 27, 2000; TEDH, *Clube de Futebol Uniao de Coimbra v. Portugal*, (No.27295/95), Judgment of July 30, 1998; TEDH, *Tüketici Bilincini Geliştirme Derneği v. Turkey*, (No. 38891/03), Judgment of February 27, 2007; TEDH, *Association Avenir d'Alet v. France*, (No. 13324/04), Judgment of February 14, 2008.

[74] TEDH, *Islamic Republic of Iran Shipping Lines v. Turkey*, (No. 40998/98), Judgment of December 13, 2007, para. 80, and TEDH, *Holy Monasteries v. Greece*, (No. 13092/87), Judgment of December 9, 1994, para. 49.

[75] TEDH, *Autronic AG v. Switzerland* [Full Bench, Series A], (No. 178), Judgment of May 22, 1990, para. 47.

[76] TEDH, *Religionsgemeinschaft der Zeugen Jehovas et al. v. Austria*, (No. 40825/98), Judgment of July 31, 2008, paras. 87 to 99.

[77] TEDH*, Ern Makina Sanayi and Ticaret AS v. Turkey*, (No. 70830/01), Judgement of May 3, 2007, paras. 28-30, and TEDH, *Stoeterij Zangersheide N.V. et al v. Belgium*, (No. 47295/99), Judgment of December 22, 2004, para. 36.

[78] TEDH, *Syndicat Nationale Des Professionnels Des Procédures Collectives v. France*, (No. 70387/01), Judgment of June 21, 2006.

[79] TEDH*, Church of Scientology v. Sweden* [D y R], (No. 16), Judgment of May 5, 1979, para. 68.

[80] TEDH, *Colas Est et al. v. France*, (No. 37971/97), Judgment of April 16, 2002, paras. 40-41, and TEDH, *Ernst et al. v. Belgium*, (No. 33400/96), Judgment of June 15, 2003, para. 109.

[…]

57. Regarding the African Charter on Human and Peoples' Rights (hereinafter "the African Charter"), the Court observes that it does not offer a definition of the term "person". Neither has the Court found an official interpretation offered by its judicial

bodies as to whether the term "peoples"[83] which appears in the Charter could apply to legal persons. Therefore, it is not possible to determine conclusively whether or not the legal entities are holders of rights in the African system and whether they could be considered direct victims.

58. As in the Inter-American system, the African Charter gives legal entities the ability to send communications to the African Commission; that it, they can report violations of the human rights contained in the African Charter[84] on behalf of third parties. It reflects, therefore, an *actio popularis* approach, according to which the author of the communication does not have to know nor have any connection to the victim of the alleged violation[85] , as long as the communication complies with the formal requirements established in Article 56 of the African Charter.

c) Universal system

59. The Court verifies that the human rights contained in the International Covenant on Civil and Political Rights (hereafter, the "ICCPR") do not extend to legal persons. The official interpretation of this instrument clearly establishes that individuals alone can file a complaint with the Human Rights Committee (hereinafter the "HRC" or "Human Rights Committee"). In this respect, the HRC has established that, according to Article 1 of the Optional Protocol to the ICCPR, individuals alone may submit complaints to the Committee.[86] Similarly, General Comment No. 31 of the HRC provides that "[t]he beneficiaries of the rights recognized by the Covenant are the individuals."[87] Furthermore, in various resolutions, the Human Rights Committee has insisted that "regardless of whether its allegations appear to raise issues under the Covenant,"[88] legal entities have no standing with the Committee. In addition, the Human Rights Committee requires that the person who brings the complaint must also be the victim whose rights were allegedly violated.[89]

60. The situation is different under the light of the International Convention on the Elimination of All Forms of Racial Discrimination, which expressly prohibits discrimination against groups or organizations.[90] As a result, the Committee

[83] The African Charter includes "peoples" as titleholders to rights. For example, they are entitled to the right to equality (Article 19), to existence and self-determination (Article 20), to the free disposal of their wealth and natural resources (Article 21), to development (Article 22), to peace and security (Article 23) as well as to a general satisfactory environment that is conducive to their development (Article 24).

[84] Section 4, Rule 93(1) of the Rules of Procedure of the African Commission, 2010. This rule states: "A Communication submitted under Article 55 of the African Charter may be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person."

[85] African Commission on Human and Peoples' Rights, *Article 19 v. the Government of Eritrea*, No. 275/03. Communication dated May 30, 2007, para. 65.

[86] CDH, *V.S. v. Belarus*, No. 1749/2008. October 31, 2011, para. 7.3. ("Given the fact that under article 1 of the Optional Protocol only individuals may submit a communication to the Committee, it considers that the author, by claiming violations of the rights of the Religious Union, which are not protected by the Covenant, has no standing under article 1 of the Optional Protocol").

[87] CDH, *General Comment No. 31*. May 26, 2004, para. 9..

[88] CDH, *A newspaper publishing Company v. Trinidad and Tobago*, No. 360/1989. July 14, 1989, para. 3.2. ("A company incorporated under the laws of a State party to the Optional Protocol, as such, has no standing under article 1, regardless of whether its allegations appear to raise issues under the Covenant."); *A publication Company and A printing Company v. Trinidad and Tobago*, No. 361/1989. July 14, 1989, and *J.R.T. and the W.G. Party v. Canada*, No. 104/1981. April 6, 1983.

[89] CDH, *A Group of Association For the Defence of The Rights of Disabled and Handicapped Persons in Italy v. Italy*, No. 163/1984. April 10, 1984, para. 6.2.

[90] For example, Article 2.1.a of the Convention states that: "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

for the Elimination of Racial discrimination (hereinafter, "CERD") has established that legal persons can denounce violations affecting their rights, provided they have suffered harm and can be considered victims in the case.[91] In this sense, the CERD has recognized the standing of legal persons to file complaints claiming violations of their own rights, as well as violations of the rights of its members, shareholders and owners, both individually and collectively.[92]

[…]

62. After completing the above review, the Court notes that in the majority of the systems analyzed, legal entities are not recognized as having rights, except for the European systems (para. 53 above) and within the framework of the CERD (para. 60 above). This Court also notes that the human rights treaties that it has studied do not contain any provisions defining how the term "person" is to be defined, and therefore Article 1.2 of the American Convention is unique to the Inter-American system. Taking this into account, the Court determines that at this time, in international human rights law, there is no clear trend toward granting rights to legal entities or toward allowing them to access - as victims - the individual petition processes established in the treaties.

ii) Recognition of the rights of legal entities in domestic legislation

63. When practicing an evolutionary interpretation, the Court has granted special relevance to comparative law, and for this reason, it has used domestic legislation[95] or case law from

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[91] CERD, *The Documentation and Advisory Centre on Racial Discrimination (DACRD) v. Denmark,* No. 28/2003. Declared inadmissible on August 26, 2003, para. 6.4, and CERD, *The Jewish Community of Oslo et al. v. Norway,* No. 30/2003. August 15, 2005, para. 7.4.

[92] CERD, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, No. 48/2010. February 26, 2013, paras. 11.2 and 11.3.

[…]

[95] *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, para. 245. Also see on this topic: *Kawas Fernández v. Honduras. Merits, Reparations and Costs.* Judgment of April 3, 2009. Series C No. 196, para. 148.

domestic courts[96] when studying specific disputes in contentious cases. In turn, the European Court[97] has used comparative law as a mechanism to identify the subsequent practice of the States; that is, to specify the context of a certain treaty. In order to verify the practice of States Parties to the American Convention, we will discuss below the countries where fundamental rights have been granted to legal persons.

64. In this regard, the Court has found that in all of the countries which have ratified the Court's jurisdiction, legal entities themselves are recognized as having fundamental rights, which can coincide with those enshrined in the American Convention. According to the information analyzed by this Court, the rights which are commonly[98] recognized to legal entities are property rights,[99] freedom of expression,[100] petition,[101] and association.[102] The Court also observes that these rights are not necessarily guaranteed for all types of

[96] *Artavia Murillo et al ("In Vitro Fertilization") v. Costa Rica*, para. 245. In the *Heliodoro Portugal v. Panama* (para. 111) and *Tiu Tojín v. Guatemala (para. 87)* cases, the Court took into account decisions by the domestic courts of Bolivia, Colombia, Mexico, Panama, Peru, and Venezuela regarding the absence of a statute of limitations for permanent crimes such as forced disappearances. In addition, in *Anzualdo Castro v. Peru (paras. 100-101)*, the Court used judgments from the constitutional courts of American countries to support its delimitation of the concept of forced disappearance. Other examples are *Atala Riffo and Girls v. Chile (by way of example see para. 92)* and the *Kichwa Indigenous People of Sarayaku v. Ecuador* (see, for example, paras. 159-164).

[97] *Caso Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, para. 245. For example in the TV Vest As & Rogoland Pensionistparti v. Norway case, the European Court took into account a document by the "European Platform of Regulatory Authorities" which it used to make a comparison of 31 countries in the region, in order to determine which countries permitted paid or unpaid political advertising, and in which countries this type of advertising was free. Also, in Hirst v. United Kingdom, the Court relied on the "Member States' standards and practices" in order to determine in which countries could the right to vote be denied to someone who had been convicted of a crime, for which it studied the legislation of 48 European countries.

[98] Other rights that the Court verified are given to legal entities in the region are, among others: judicial safeguards, due process, legality, the right to a hearing, to legal security, to public information, to gather, to request a correction, update, inclusion or suppression of personal information, to legal status, to the free development of personality, the freedom to teach, to freedom of religion or belief, freedom to hire, freedom to work, freedom to form a business and engage in commerce and industry, the right to free competition, to found media, to found educational centers, to equality, to a good name, to honor, and to habeas data.

[99] In this regard, see: Article 16 Constitution of Barbados; Articles 14, 56, and 315.I of the Political Constitution of the Plurinational State of Bolivia; Judgment No. T-396/93 of the Constitutional Court of Colombia, September 16, 1993; Decision: 00128 Case: 98-000128-0004-CI, First Division of the Supreme Court of Costa Rica, December 16, 1998 ; Article 2 of the Constitution of El Salvador and Judgment of March 9, 2011, Constitutional Chamber of the Supreme Court of Justice, Amparo Proceeding 948-2008; Article 39 of the Political Constitution of the Republic of Guatemala; Article 36 of the Constitution of the Republic of Haiti; Supreme Court of Justice of the Nation of Mexico, Contradiction of Precedent 360/2013, Date of Ruling: session of April 21, 2014; Articles 103 of the Political Constitution of the Republic of Nicaragua; Case no. 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. and Persolar S.A.C. Judgment of the Constitutional Court of Peru; Article 47 of the Political Constitution of the Republic of Panama, Article 34 of the Constitution of Surinam, and Decision TC/0242/13, Constitutional Court of the Dominican Republic, November 29, 2013.

[100] See also: Article 35 of the Political Constitution of the Republic of Guatemala; Decision No. T-396/93, Constitutional Court of Colombia, September 16, 1993; Case No. 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. and Persolar S.A.C. Judgment of the Constitutional Court of Peru, and Article 26 of the National Constitution of Paraguay.

[101] On this point see: Decision No. T-396/93, Constitutional Court of Colombia, September 16, 1993; Sentence of November 7, 2008, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Amparo Proceeding 103-2006; Article 80 of the Constitution of Honduras; Supreme Court of Justice of the Nation of Mexico, Contradiction of Precedent 360/2013, Date of ruling: session of April 21, 2014; Case. no. 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. and Persolar S.A.C. Judgment of the Constitutional Court of Peru; Article 41 of the Political Constitution of the Republic of Panama, and Article 40 of the National Constitution of Paraguay.

[102] Article 34 of the Political Constitution of the Republic of Guatemala; Decision No. T-396/93, Constitutional Court of Colombia, September 16, 1993; Sentence on Case Number: 08-007986-0007-CO, Constitutional Division of the Supreme Court of Justice of Costa Rica, September 8, 2009; Constitutional Chamber of the Supreme Court of Justice of El Salvador, Constitutional Proceeding 23-R-96, Ramírez & Marcelino v. Municipal Council of San Juan Opico, sentence of October 8, 1998; Article 31 and 31.1 of the Constitution of the Republic of Haiti; Supreme Court of Justice of the Nation of Mexico, Contradiction of Precedent 360/2013, Date of Ruling: session of April 21, 2014, and Case n.° 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. and Persolar S.A.C. Judgment of Constitutional Court of Peru.

legal entities, given that some of them are aimed at protecting certain types of entities, as in the case of some rights that are bestowed only on unions[103], political parties[104], indigenous peoples[105], Afro-descendant communities[106] or specific groups or institutions[107].

65. The Court also notes that in a large number of countries in the region, legal entities are given the right to file appeals for *amparo* protection or similar remedies in defense of the rights granted to them[108].

[…]

[103] Bolivia (Article 51 of the Political Constitution); Brazil (Articles 8, 74.IV. § 2, and 103 IX of the Political Constitution); Honduras (Article 128.14 of the Political Constitution); Nicaragua (Article 87 Political Constitution); Panama (Articles 68 and 69 of the Political Constitution); Paraguay (Articles 96-98 National Constitution); Peru (Articles 28 & 42 of the Political Constitution), and Surinam (Article 32 of the Constitution).

[104] Argentina (Article 38 of the National Constitution); Brazil (Articles 17, 74.IV. § 2, and 103.VIII of the Political Constitution); Colombia (Articles 107 and 108 of the Political Constitution); Haiti (Article 31.1 of the Constitution); Honduras (Article 47 of the Political Constitution), Nicaragua (Articles 55, 173.7, 173.11, 173.12, 173.13 of the Political Constitution); Panama (Article 140 of the Political Constitution); Paraguay (Articles 124-126 of the National Constitution), and Peru (Article 35 of the Political Constitution).

[105] Bolivia (Articles 30 & 32 among others of the Political Constitution); Brazil (Articles 231-232 of the Political Constitution); Colombia (Article 329 of the Political Constitution); Nicaragua (Articles 121 and 103 of the Political Constitution); Panama (Articles 124 and 127 of the Political Constitution), and Paraguay (Articles 62-67 of the National Constitution)

[106] Bolivia (Articles 32,100.I and 395.I of the Political Constitution), and Nicaragua (Articles 89, 90 and 121 of the Political Constitution).

[107] Peru, for example, recognizes the right to exemption of all taxes on the assets, activities, or own services in the case of universities, institutes, and other educational institutions (Article 19 of the Political Constitution). In Chile, churches, religious confessions and institutions have the right to their property which is recognized by current laws (Article 19.6 of the Political Constitution). In Nicaragua, private religious schools have the right to teach religion as an extracurricular course, and universities and secondary technical education institutions enjoy academic, financial, organic and administrative autonomy, as well as tax exemption. The assets and revenues of the universities and technical institutes promote and protect the free creation, research, and dissemination of science, technology, arts and letters, and guarantee and protect intellectual property (Articles 124 and 125 of the Political Constitution); also in Nicaragua, there are tax exemptions in place for certain imports brought in by social communication media and it is prohibited to censor them (Article 68 of the Political Constitution); also in Nicaragua the right is given to farmers and other productive sectors" to participate through their own organizations in defining agricultural reform policy (Articles 108 and 111 of the Political Constitution). In Panama, rights are given to the Official University of Panama (Articles 103 and 104 of the Political Constitution).

[108] Argentina (Article 43 of the National Constitution. Also see Law No. 16.986 or the Amparo Action Regulatory Law, Article 5); Bolivia (Article 128 and 129 of the Political Constitution. See also Decision 0763/2011 R, Constitutional Court of Bolivia, May 20, 2011); Brazil (Article 5, LXX of the Political Constitution); Chile Article 20 of the Political Constitution); Colombia (Decision T-411/92, Constitutional Court of Colombia, June 17, 1992); Costa Rica (Article 48 of the Political Constitution and Articles 57 and 58 of the Constitutional Jurisdiction Act, Law No. 7135); Ecuador (Articles 86 and 88 of the Political Constitution, Article 9 of the Organic Law of Jurisdictional Guarantees and Constitutional Oversight. See also Decision No. 001-14-PJO-CC, Case No. 0067-11-JD, Constitutional Court of Ecuador, April 23, 2014); El Salvador (Article 247 of the Constitution. See the Decision of March 9, 2011, Constitutional Chamber of the Supreme Court of Justice, Amparo Proceeding 948-2008); Honduras (Article 183 of the Political Constitution and Article 44 of the Constitutional Justice Act); Mexico (Articles 8 and 9 of the Amparo Law. See also: Supreme Court of Justice of the Nation of Mexico, Contradiction of Precedent 360/2013, Date of Ruling: session of April 21, 2014); Nicaragua (Article 45 of the Constitution and Article 23 of the Amparo Law, Law No. 49); Paraguay (Article 134 of the National Constitution and Articles 4 and 5 of Law No. 340/71 which regulates Amparo); Peru (Article 200 of the Political Constitution and Article 26 of the Habeus Corpus and Amparo Act, Law No. 23506); Dominican Republic (Article 72 of the Dominican Constitution, Article 2 of Law No. 437-06 which establishes the Amparo appeal and Article 67 of Law No. 137-11 of the Constitutional Court and Court of Constitutional Procedure); and Uruguay (Article 1 of Law 16011, Regulating provisions related to Amparo actions).

[…]

F. Conclusion regarding the interpretation

70. Having employed simultaneously and in conjunction the various hermeneutical criteria established in Articles 31 and 32 of the Vienna Convention, the Court concludes that based on an interpretation of Article 1.2 of the American Convention, done in good faith, according to the natural meaning of the terms employed in the Convention (paras. 37-39 above) and taking into account the context (paras. 44-67) and the object and purpose of the Convention (paras. 40-43), it is clear that legal entities are not entitled to conventional rights, and therefore they cannot be considered alleged victims in the context of adversarial proceedings brought before the Inter-American system.

[…]

[…]

105. By virtue of the foregoing, the Court has concluded that unions, federations, and confederations are entitled to the rights established in Article 8.1.a of the Protocol, which allows them to resort directly before the Inter-American system to defend their own rights. Now then, on this point, the Court believes it is relevant to recall that pursuant to Article 44 of the American Convention, unions, federations and confederations that are legally recognized by one or more States Parties to the Convention, whether or not they are parties to the Protocol of San Salvador, may file individual petitions with the Inter-American Commission on behalf of their members, in the event of an alleged violation of the rights of their members by a State Party to the American Convention.

[…]

107. As indicated previously, this Court has reiterated that while the status of legal entities was not expressly recognized by the American Convention, this does not restrict the possibility that, under certain conditions, an individual may exercise their rights through such entities in order to resort to the Inter-American system to enforce their fundamental rights, even when these

rights are covered by a legal category or legal fiction created by the same judicial system.[153]

[…]

[153] *Cfr. Cantos vs. Argentina,* para. 29, and *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 146.

[…]

111. Based on the foregoing considerations, the Court feels it is necessary to make a distinction for the purposes of establishing which situations can be examined by this Court within the framework of the American Convention,[158] when there are cases alleging that the right has been exercised through a legal entity. In general, the Court has found that in many situations, "the rights and obligations ascribed to legal entities are resolved in terms of the rights and obligations of the individuals who comprise them or who are acting on their behalf or as their representative"[159]. Thus, the rights that legal entities enjoy domestically within the States Parties to the American Convention (see para. 64 above), in some cases, are not exclusive to them. On the contrary, the recognition of the rights of legal entities may directly or indirectly imply the protection of the human rights of the individual persons associated with those entities.

[…]

[158] *Cfr. Cantos vs. Argentina. Preliminary Objections,* para. 29, and *Granier et al. (Radio Caracas Televisión) vs. Venezuela*, para. 146.

[159] *Cantos vs. Argentina. Preliminary Objections,* para. 27, and *Granier et al. (Radio Caracas Televisión) vs. Venezuela*, para. 54.

[…]

115. Similarly, in recent case law, this Court has analyzed the right to freedom of expression[169] and its materialization through a legal entity. In *Granier et al. (Radio Caracas Televisión) vs. Venezuela*, the Court found that media outlets are, in general, associations of people who have joined together to exercise their freedom of expression in a sustained manner, and therefore it is unusual today for a media organization not to be established as a legal entity, since the production and distribution of information requires an organizational and financial structure that can fulfill the demand for information.[170] Likewise, just as unions constitute instruments for the exercise of workers' right to freedom of association, and political parties are vehicles for the

[169] Article 13 of the American Convention: "Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
a) respect for the rights or reputations of others; or
b) the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[170] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 148.

exercise of the political rights of citizens, media outlets are mechanisms that serve the exercise of the right to the free expression of those who use them as a means for disseminating their ideas or information.[171]

116. Furthermore, this Court also found that the editorial position of a television channel can be considered a reflection of the political opinions of its directors and employees to the extent that they are involved in and determine the content of the information being broadcasted.[172] Thus, it can be understood that the critical posture of a TV channel or network is a reflection of the critical attitude held by its directors and staff involved in determining the type of information that is transmitted. This is due to the fact that, as indicated previously, in many cases the media are the mechanisms through which people exercise their right to freedom of expression, which can imply the expression of content such as political opinions or positions.[173]

117. Consequently, this Court indicated that restrictions on the freedom of expression often materialize through the actions of government or private actors that not only affect the legal entity which constitutes a medium or channel of communication, but also the collective group of natural persons, such as its shareholders or the journalists who work there, who engage in the act of communication through that entity and whose rights may also be violated.[174] In the case cited above, the Court established that in order to determine whether or not the effects on the legal entity (the medium of communication in this case) had generated a certain and substantial adverse impact on the freedom of expression of individual persons, it is necessary to analyze the role that the alleged victims exercised within the respective communication medium, and, in particular, the way in which they contributed to the communicational mission of the channel.[175]

[…]

[171] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 148.
[172] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 224.
[173] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 224.
[174] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 151.
[175] *Granier et al.(Radio Caracas Televisión) vs. Venezuela*, para. 151.

120. Taking the foregoing into account, the Court finds that due to the multiple forms that legal entities can take, such as commercial companies or corporations, political parties, religious associations or non-governmental organizations, it is not feasible to establish a single formula that can be used to recognize the existence of the exercise of the rights of natural persons through their participation in a legal entity, as has been done with the right to property and to freedom of expression. Therefore, the Court will determine the way to prove the relationship when it analyzes the alleged violation of one of the rights that has supposedly been violated in a concrete contentious case.

[…]

[…]

IX

OPINION

For the foregoing reasons, in interpretation of Article 1.2 of the American Convention on Human Rights in relation to Articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62.3 of the same instrument, as well as Article 8.1.a and b of the Protocol of San Salvador,

[…]

CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CORTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

CORTE INTERAMERICANA DE DERECHOS HUMANOS

OPINIÓN CONSULTIVA OC-22/16
DE 26 DE FEBRERO DE 2016
SOLICITADA POR LA REPÚBLICA DE PANAMÁ

TITULARIDAD DE DERECHOS DE LAS PERSONAS JURÍDICAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS (INTERPRETACIÓN Y ALCANCE DEL ARTÍCULO 1.2, EN RELACIÓN CON LOS ARTÍCULOS 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 Y 62.3 DE LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, ASÍ COMO DEL ARTÍCULO 8.1.A Y B DEL PROTOCOLO DE SAN SALVADOR)

la Corte Interamericana de Derechos Humanos (en adelante "la Corte Interamericana", "la Corte" o "el Tribunal"), integrada por los siguientes Jueces[1]:

Roberto F. Caldas, Presidente;
Eduardo Ferrer Mac-Gregor Poisot, Vicepresidente;
Manuel E. Ventura Robles, Juez;
Diego García-Sayán, Juez;
Alberto Pérez Pérez, Juez;
Eduardo Vio Grossi, Juez; y
Humberto Antonio Sierra Porto, Juez;

presentes, además,

Pablo Saavedra Alessandri, Secretario, y
Emilia Segares Rodríguez, Secretaria Adjunta,

de conformidad con el artículo 64.1 de la Convención Americana sobre Derechos Humanos (en adelante "la Convención Americana" o "la Convención") y con los artículos 70 a 75 del Reglamento de la Corte (en adelante "el Reglamento"), emite la siguiente Opinión Consultiva, que se estructura en el siguiente orden:

[1] La presente Opinión Consultiva se dicta en el 113 Período Ordinario de Sesiones de la Corte. De conformidad con los artículos 54.3 de la Convención Americana sobre Derechos Humanos, 5.3 del Estatuto de la Corte y 17.1 de su Reglamento, los jueces que terminen sus mandatos seguirán conociendo de los casos que ya conocieren y que se encuentren en estado de sentencia. En razón de lo anterior, los Jueces Manuel E. Ventura Robles, Diego García-Sayán y Alberto Pérez Pérez participaron en la deliberación y firma de la presente Opinión Consultiva.

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I
PRESENTACIÓN DE LA CONSULTA

1. El 28 de abril de 2014 la República de Panamá (en adelante "Panamá"), con fundamento en el artículo 64.1 de la Convención Americana[2] y de conformidad con lo establecido en el artículo 70.1 y 70.2 del Reglamento[3], presentó una solicitud de Opinión

[2] Artículo 64.1 de la Convención "Los Estados miembros de la Organización podrán consultar a la Corte acerca de la interpretación de esta Convención o de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos. Asimismo, podrán consultarla, en lo que les compete, los órganos enumerados en el capítulo X de la Carta de la Organización de los Estados Americanos, reformada por el Protocolo de Buenos Aires".

[3] Artículo 70.1 y 70.2 del Reglamento de la Corte Interamericana "1. Las solicitudes de opinión consultiva previstas en el artículo 64.1 de la Convención deberán formular con precisión las preguntas específicas sobre las cuales se pretende obtener la opinión de la Corte.

Consultiva sobre la interpretación y alcance del artículo 1.2, en relación con los artículos 1.1[4], 8[5], 11.2[6], 13, 16[7], 21, 24[8], 25[9], 29, 30[10], 44[11], 46[12] y 62.3[13] de la Convención Americana

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2. Las solicitudes de opinión consultiva formuladas por un Estado miembro o por la Comisión, deberán indicar, además, las disposiciones cuya interpretación se pide, las consideraciones que originan la consulta y el nombre y dirección del Agente o de los Delegados".

[4] Artículo 1.1 de la Convención "Obligación de Respetar los Derechos .Los Estados Partes en esta Convención se comprometen a respetar los derechos y libertades reconocidos en ella y a garantizar su libre y pleno ejercicio a toda persona que esté sujeta a su jurisdicción, sin discriminación alguna por motivos de raza, color, sexo, idioma, religión, opiniones políticas o de cualquier otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social".

[5] Artículo 8 de la Convención "Garantías Judiciales. 1. Toda persona tiene derecho a ser oída, con las debidas garantías y dentro de un plazo razonable, por un juez o tribunal competente, independiente e imparcial, establecido con anterioridad por la ley, en la sustanciación de cualquier acusación penal formulada contra ella, o para la determinación de sus derechos y obligaciones de orden civil, laboral, fiscal o de cualquier otro carácter.
2. Toda persona inculpada de delito tiene derecho a que se presuma su inocencia mientras no se establezca legalmente su culpabilidad. Durante el proceso, toda persona tiene derecho, en plena igualdad, a las siguientes garantías mínimas:
a) derecho del inculpado de ser asistido gratuitamente por el traductor o intérprete, si no comprende o no habla el idioma del juzgado o tribunal;
b) comunicación previa y detallada al inculpado de la acusación formulada;
c) concesión al inculpado del tiempo y de los medios adecuados para la preparación de su defensa;
d) derecho del inculpado de defenderse personalmente o de ser asistido por un defensor de su elección y de comunicarse libre y privadamente con su defensor;
e) derecho irrenunciable de ser asistido por un defensor proporcionado por el Estado, remunerado o no según la legislación interna, si el inculpado no se defendiere por sí mismo ni nombrare defensor dentro del plazo establecido por la ley;
f) derecho de la defensa de interrogar a los testigos presentes en el tribunal y de obtener la comparecencia, como testigos o peritos, de otras personas que puedan arrojar luz sobre los hechos;
g) derecho a no ser obligado a declarar contra sí mismo ni a declararse culpable, y
h) derecho de recurrir del fallo ante juez o tribunal superior.
3. La confesión del inculpado solamente es válida si es hecha sin coacción de ninguna naturaleza.
4. El inculpado absuelto por una sentencia firme no podrá ser sometido a nuevo juicio por los mismos hechos.
5. El proceso penal debe ser público, salvo en lo que sea necesario para preservar los intereses de la justicia".

[6] Artículo 11.2 de la Convención "Protección de la Honra y de la Dignidad. […] 2. Nadie puede ser objeto de injerencias arbitrarias o abusivas en su vida privada, en la de su familia, en su domicilio o en su correspondencia, ni de ataques ilegales a su honra o reputación".

[7] Artículo 16 de la Convención "Libertad de Asociación. 1. Todas las personas tienen derecho a asociarse libremente con fines ideológicos, religiosos, políticos, económicos, laborales, sociales, culturales, deportivos o de cualquiera otra índole.
2. El ejercicio de tal derecho sólo puede estar sujeto a las restricciones previstas por la ley que sean necesarias en una sociedad democrática, en interés de la seguridad nacional, de la seguridad o del orden públicos, o para proteger la salud o la moral públicas o los derechos y libertades de los demás.
3. Lo dispuesto en este artículo no impide la imposición de restricciones legales, y aun la privación del ejercicio del derecho de asociación, a los miembros de las fuerzas armadas y de la policía".

[8] Artículo 24 de la Convención "Igualdad ante la Ley. Todas las personas son iguales ante la ley. En consecuencia, tienen derecho, sin discriminación, a igual protección de la ley".

[9] Artículo 25 de la Convención "Protección Judicial. 1. Toda persona tiene derecho a un recurso sencillo y rápido o a cualquier otro recurso efectivo ante los jueces o tribunales competentes, que la ampare contra actos que violen sus derechos fundamentales reconocidos por la Constitución, la ley o la presente Convención, aun cuando tal violación sea cometida por personas que actúen en ejercicio de sus funciones oficiales.
2. Los Estados Partes se comprometen:
a) a garantizar que la autoridad competente prevista por el sistema legal del Estado decidirá sobre los derechos de toda persona que interponga tal recurso;
b) a desarrollar las posibilidades de recurso judicial, y
c) a garantizar el cumplimiento, por las autoridades competentes, de toda decisión en que se haya estimado procedente el recurso".

[10] Artículo 30 de la Convención "Alcance de las Restricciones. Las restricciones permitidas, de acuerdo con esta Convención, al goce y ejercicio de los derechos y libertades reconocidas en la misma, no pueden ser aplicadas sino conforme a leyes que se dictaren por razones de interés general y con el propósito para el cual han sido establecidas".

[11] Artículo 44 de la Convención Cualquier persona o grupo de personas, o entidad no gubernamental legalmente reconocida en uno o más Estados miembros de la Organización, puede presentar a la Comisión peticiones que contengan denuncias o quejas de violación de esta Convención por un Estado parte".

[12] Artículo 46 de la Convención "1. Para que una petición o comunicación presentada conforme a los artículos 44 ó 45 sea admitida por la Comisión, se requerirá:
a) que se hayan interpuesto y agotado los recursos de jurisdicción interna, conforme a los principios del Derecho Internacional generalmente reconocidos;

sobre Derechos Humanos, así como del artículo 8.1.a y b del Protocolo de San Salvador (en adelante "la solicitud" o "la consulta"). En particular, Panamá solicitó que el Tribunal se pronuncie[14]:

a) en relación con el artículo 1.2 de la Convención Americana sobre "[e]l alcance y protección de las personas físicas por medio de las personas jurídicas o 'entidades no gubernamentales legalmente reconocidas', tanto para agotar los procedimientos de la jurisdicción interna como para plantear denuncias de violación [a] los derechos humanos ante la Comisión Interamericana de Derechos Humanos", y "[e]l alcance y la protección de los derechos de las personas jurídicas o 'entidades no gubernamentales legalmente reconocidas', como tales, en cuanto instrumentos de las personas físicas para lograr sus cometidos legítimos";
b) "si el artículo 16 de la Convención, que reconoce el derecho de los seres humanos a asociarse, se ve limitado o no por la restricción de protección de las asociaciones libremente formadas por las personas físicas como 'entidades no gubernamentales legalmente reconocidas', para proteger sus derechos expresados y desarrollados por medio de las personas jurídicas que se conforman al amparo del derecho de asociación";
c) la interpretación del artículo 1.2 a la luz de los artículos 29 y 30 de la Convención, y
d) "la protección de derechos humanos de las personas físicas por medio de organizaciones no gubernamentales o personas jurídicas, de los […] derechos [a] la protección judicial y al debido proceso del artículo 8 de la Convención; [a] la intimidad y vida privada del artículo 11 de la Convención; [a la] libertad de expresión del artículo 13 de la Convención; [a] la propiedad privada reconocida por el artículo 21 de la Convención; [a] la igualdad y no discriminación de los artículos 1.1 y 24 de la Convención; [al] derecho de huelga y de formar federaciones y confederaciones del artículo 8 del Protocolo de San Salvador de la Convención Americana sobre Derechos Humanos".

2. Panamá expuso las consideraciones que originaron la consulta y señaló que:

El Estado invoca la práctica de la Comisión Interamericana en cuanto a la interpretación del artículo 1.2 de la Convención y cita los dos pasajes siguientes, entre otros, extractados de los pronunciamientos de la Comisión:

> […] que el Preámbulo de la Convención Americana sobre Derechos Humanos así como las disposiciones del Artículo 1.2 proveen que 'para los propósitos de esta Convención, 'persona' significa todo ser humano', y que por consiguiente, el sistema de personas naturales y no incluye personas jurídicas [...] consecuentemente, en el sistema interamericano, el derecho a la propiedad es un derecho personal y la Comisión tiene atribuciones para proteger los derechos de un individuo cuya propiedad es confiscada, pero no tiene jurisdicción sobre los derechos de personas jurídicas, tales como compañías o, como en este caso, instituciones bancarias (Informe N° 10/91 del 22.II.1991, Banco de Lima – Perú considerandos 1 y 2).

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b) que sea presentada dentro del plazo de seis meses, a partir de la fecha en que el presunto lesionado en sus derechos haya sido notificado de la decisión definitiva;
c) que la materia de la petición o comunicación no esté pendiente de otro procedimiento de arreglo internacional, y
d) que en el caso del artículo 44 la petición contenga el nombre, la nacionalidad, la profesión, el domicilio y la firma de la persona o personas o del representante legal de la entidad que somete la petición.
2. Las disposiciones de los incisos 1.a. y 1.b. del presente artículo no se aplicarán cuando:
a) no exista en la legislación interna del Estado de que se trata el debido proceso legal para la protección del derecho o derechos que se alega han sido violados;
b) no se haya permitido al presunto lesionado en sus derechos el acceso a los recursos de la jurisdicción interna, o haya sido impedido de agotarlos, y
c) haya retardo injustificado en la decisión sobre los mencionados recursos".

[13] Artículo 62.3 de la Convención "La Corte tiene competencia para conocer de cualquier caso relativo a la interpretación y aplicación de las disposiciones de esta Convención que le sea sometido, siempre que los Estados Partes en el caso hayan reconocido o reconozcan dicha competencia, ora por declaración especial, como se indica en los incisos anteriores, ora por convención especial".

[14] El texto completo de la solicitud puede ser consultada en el siguiente enlace de la página *web* de la Corte: http://www.corteidh.or.cr/solicitudoc/solicitud_14_11_14_esp.pdf.

> […] de acuerdo al segundo párrafo de la norma transcrita, [artículo 1], la persona protegida por la Convención es 'todo ser humano' [....]. Por ello, la Comisión considera que la Convención otorga su protección a las personas físicas o naturales, excluyendo de su ámbito de aplicación a las personas jurídicas o ideales, por cuanto éstas son ficciones jurídicas sin existencia real en el orden material (Informe N° 39/99 del 11.III.1999, Mevopal, S.A.-Argentina, párr. 17).

Con estos dos párrafos parece entenderse que las personas jurídicas al ser ficciones jurídicas, por si mismas no son susceptibles de Derechos sino las personas miembros de las sociedades de la persona jurídica.

Dado que esto es un tema que ha generado inquietudes entre los Estados y que hasta ahora solo se hace referencia a la opinión de la Comisión, el Estado panameño considera oportuno consultar la posición de la Honorable Corte Interamericana de Derechos Humanos acerca de este tema.

3. Con base en lo anterior, Panamá presentó a la Corte las siguientes consultas específicas:

> 1. ¿El [a]rtículo 1, [p]árrafo [s]egundo, de la Convención Americana sobre Derechos Humanos, restringe la protección interamericana de los derechos humanos a las personas físicas y excluye del ámbito de protección de la Convención a las personas jurídicas?
>
> 2. ¿El [a]rtículo 1.2 de la Convención, puede proteger también los derechos de personas jurídicas como cooperativas, sindicatos, asociaciones, sociedades, en cuanto compuestos por personas físicas asociadas a esas entidades?
>
> 3. ¿Pueden las personas jurídicas acudir a los procedimientos de la jurisdicción interna y agotar los recursos de la jurisdicción interna en defensa de los derechos de las personas físicas titulares de esas personas jurídicas?
>
> 4. ¿Qué derechos humanos pueden serle reconocidos a las personas jurídicas o colectivas (no gubernamentales) en el marco de la Declaración Americana sobre Derechos y Deberes del Hombre, de la Convención Americana sobre Derechos Humanos y de sus Protocolos o instrumentos internacionales complementarios?
>
> 5. En el marco de la Convención Americana, además de las personas físicas, ¿tienen las personas jurídicas compuestas por seres humanos derechos a la libertad de asociación del Artículo 16, a la intimidad y vida privada del Artículo 11, a la libertad de expresión del [a]rtículo 13, a la propiedad privada del [a]rtículo 21, a las garantías judiciales, al debido proceso y a la protección de sus derechos de los [a]rtículos 8 y 25, a la igualdad y no discriminación de los [a]rtículos 1 y 24, todos de la Convención Americana?
>
> 6. ¿Puede una empresa o sociedad privada, cooperativa, sociedad civil o sociedad comercial, un sindicato (persona jurídica), un medio de comunicación (persona jurídica), una organización indígena (persona jurídica), en defensa de sus derechos y/o de sus miembros, agotar los recursos de la jurisdicción interna y acudir a la Comisión Interamericana de Derechos Humanos en nombre de sus miembros (personas físicas asociadas o dueñas de la empresa o sociedad), o debe hacerlo cada miembro o socio en su condición de persona física?
>
> 7. ¿Si una persona jurídica en defensa de sus derechos y de los derechos de sus miembros (personas físicas asociados o socios de la misma), acude a la jurisdicción interna y agota sus procedimientos jurisdiccionales, pueden sus miembros o asociados acudir directamente ante la jurisdicción internacional de la Comisión Interamericana en la defensa de sus derechos como personas físicas afectadas?
>
> 8. En el marco de la Convención Americana sobre Derechos Humanos, ¿las personas físicas deben agotar ellas mismas los recursos de la jurisdicción interna para acudir a la Comisión Interamericana de Derechos Humanos en defensa de sus derechos humanos, o pueden hacerlo las personas jurídicas en las que participan?

4. Panamá designó a la señora Farah Diva Urrutia, Directora General de Asuntos Jurídicos y Tratados del Ministerio de Relaciones Exteriores de Panamá, como agente.

II
PROCEDIMIENTO ANTE LA CORTE

5. Mediante notas de 17 de noviembre de 2014, la Secretaría de la Corte (en adelante "la Secretaría"), de conformidad con lo dispuesto en el artículo 73.1[15] del Reglamento, transmitió la consulta a los demás Estados Miembros de la Organización de los Estados Americanos (en adelante "la OEA"), al Secretario General de la OEA, al Presidente del Consejo Permanente de la OEA y a la Comisión Interamericana de Derechos Humanos (en adelante "la Comisión Interamericana" o "la Comisión"). En dichas comunicaciones, informó que el Presidente de la Corte, en consulta con el Tribunal, había fijado el 30 de enero de 2015 como fecha límite para la presentación de las observaciones escritas respecto de la solicitud mencionada. Igualmente, siguiendo instrucciones del Presidente y de acuerdo con lo establecido en el artículo 73.3[16] de dicho Reglamento, la Secretaría, mediante notas de 17 de noviembre, 3 y 4 de diciembre de 2014 invitó a diversas organizaciones internacionales y de la sociedad civil así como a medios de comunicación y partidos políticos, e instituciones académicas, religiosas, empresariales y sindicales de la región a remitir en el plazo anteriormente señalado su opinión escrita sobre los puntos sometidos a consulta. Finalmente, se realizó una invitación abierta a través del sitio *web* de la Corte Interamericana a todos los interesados a presentar su opinión escrita sobre los puntos sometidos a consulta. El plazo previamente establecido fue prorrogado hasta el 30 de marzo de 2015, por lo que contaron con aproximadamente cuatro meses para remitir sus presentaciones.

6. El plazo otorgado llegó a su vencimiento y se recibieron en la Secretaría los siguientes escritos de observaciones[17]:

Observaciones escritas presentadas por Estados de la OEA:

1) República Argentina (en adelante "Argentina");
2) República Plurinacional de Bolivia (en adelante "Bolivia")
3) República de Colombia (en adelante "Colombia");
4) República de El Salvador (en adelante "El Salvador");
5) República de Guatemala (en adelante "Guatemala");
6) República de Honduras (en adelante "Honduras");

Observaciones escritas presentadas por órganos de la OEA:

7) Comisión Interamericana de Derechos Humanos;

Observaciones escritas presentadas por organismos internacionales y estatales, asociaciones internacionales y nacionales, instituciones académicas, organizaciones no gubernamentales e individuos de la sociedad civil:

1) Alianza Regional por la Libre Expresión e Información;
2) Amnistía Internacional;
3) Ana Margarita Vijil;
4) Asociación Civil de Derechos Humanos "Ixtlamatque Ukari A.C" y Miguel Ángel Antemate Mendoza;

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[15] Artículo 73.1 de dicho Reglamento "Una vez recibida una solicitud de opinión consultiva, el Secretario transmitirá copia a todos los Estados miembros, a la Comisión, al Consejo Permanente a través de su Presidencia, al Secretario General y a los órganos de la OEA a cuya esfera de competencia se refiera el tema de la consulta, si fuere del caso".

[16] Artículo 73.3 de dicho Reglamento "La Presidencia podrá invitar o autorizar a cualquier persona interesada para que presente su opinión escrita sobre los puntos sometidos a consulta. Si la solicitud es de aquéllas a que se refiere el artículo 64.2 de la Convención, lo podrá hacer previa consulta con el agente".

[17] La solicitud de opinión consultiva presentada por Panamá, las observaciones escritas y orales de los Estados participantes, de la Comisión Interamericana, así como de organismos internacionales y estatales, asociaciones internacionales y nacionales, instituciones académicas, organizaciones no gubernamentales e individuos de la sociedad civil, pueden ser consultadas en el sitio *web* de la Corte. Disponibles en el siguiente enlace: http://www.corteidh.or.cr/index.php/es/observaciones-panama. Asimismo, figuran resumidas en el anexo a la presente opinión.

5) Carlos Rodríguez Mejía, Alberto León Gómez Zuluaga y Marcelo Ferreira;
6) Centro de Derechos Reproductivos;
7) Clínica de Derechos Humanos del Centro de Investigación y Educación en Derechos Humanos de la Universidad de Ottawa;
8) Clínica jurídica de la Universidad San Francisco de Quito;
9) Comisión de DDHH del Distrito Federal (CDHDF) México;
10) Comité Ejecutivo Nacional de la Confederación de Trabajadores de México, y
11) Confederación de Cámaras Industriales de los Estados Unidos Mexicanos;
12) Confederación de Cámaras Nacionales de Comercio, Servicios y Turismo de los Estados Unidos Mexicanos (CONCANACO);
13) Confederación Sindical Internacional y la Confederación Sindical de las Américas (International Trade Union Confederation (ITUC) and Trade Union Confederation of the Americas (TUCA);
14) Coordinadora de Centrales Sindicales del Cono Sur (CCSC);
15) David Andrés Murillo Cruz;
16) EarthRights International y Juan Pablo Calderón Meza;
17) Facultad de Derecho de la Pontificia Universidad Católica de Chile;
18) Facultad de Derecho de la Universidad Nacional Autónoma de México (UNAM);
19) Facultad de Derecho y Ciencias Políticas de la Universidad de San Buenaventura de Cali;
20) Semillero de Derecho Internacional Económico y Derecho Humanos adscrito a la Universidad EAFIT;
21) Grupo estudiantil de trabajo "Iván David Ortiz" de la Universidad Nacional de Colombia;
22) International Commission for Labor Rights;
23) Jorge Aguilera Suárez, Marcela Alejandra Cáceres Garza, Mario Castro Sánchez y Marion Eloisa Hidalgo García (estudiantes de la Especialidad en Derecho Internacional del Instituto Tecnológico Autónomo de México);
24) Jorge Alberto Pérez Tolentino;
25) Lucas Lixinski, Sumer Dayal, Ashna Taneja – Australian Human Rights Centre;
26) Luis Peraza Parga;
27) Martha María Guadalupe Orozco Reyes, Alejandra Isabel Plascencia López, Hermilo de Jesús Lares Contreras, José Benjamín González Mauricio, José Luis Castellón Sosa y Noel Velázquez Prudencio;
28) Miguel Ángel Barboza López;
29) Observatorio Amazónico de Derechos Humanos de la Universidad Federal de Amapá;
30) Observatorio de Derechos Humanos de la Subsecretaría de Derechos Humanos de Quilmes;
31) Pablo Martín Fernández Barrios;
32) Programa Universitario de Derechos Humanos de la Universidad Nacional Autónoma de México;
33) Rodolfo E. Piza de Rocafort;
34) Santiago Bertinat Gonnet;
35) Shirley Llain Arenilla, Cindy Hawkins Rada, Juan Miguel Cortés Quintero y Andrea Alejandra Ariza Lascarro – Universidad del Norte de Barranquilla;
36) Sostenibilidad Legal (SAS);
37) Selene Guevara Solís, Heberto Mejía García y Héctor Bravo Morráz - Universidad Centroamericana de Nicaragua, y
38) Universidad Centroamericana Jose Simeón Cañas.
39) Wagner Balera, profesor titular de Derechos Humanos de la Facultad de Derecho de la Pontificia Universidad Católica de San Paulo;

7. Una vez concluido el procedimiento escrito, el 21 de mayo de 2015 la Presidencia de la Corte, de conformidad con lo dispuesto en el artículo 73.4[18] del Reglamento, emitió una Resolución[19], mediante la cual convocó a una audiencia pública e invitó a los Estados Miembros de la OEA, a su Secretario General, al Presidente del Consejo Permanente de la OEA, a la Comisión Interamericana y a los integrantes de diversas organizaciones, sociedad civil, instituciones académicas y personas que remitieron observaciones escritas, con el propósito de presentar al Tribunal sus comentarios orales respecto de la consulta.

8. La audiencia pública se celebró el 25 de junio de 2015 en el marco del 109° Período Ordinario de Sesiones de la Corte Interamericana de Derechos Humanos.

9. Comparecieron ante la Corte las siguientes personas:

Por Argentina, el señor Javier Salgado, Director Contencioso Internacional en Derechos Humanos, y la señora Rosario Álvarez Garriga, Coordinadora de Asuntos Jurídicos Internacionales de la Secretaría de Derechos Humanos;
Por Chile, el señor Embajador Miguel Ángel González Morales;
Por Colombia, el señor Embajador Jesús Ignacio García Valencia y el señor Alberto Bula Bohórquez, consejero;
Por Guatemala, los señores Rodrigo José Villagrán Sandoval, agente, y Héctor Rolando Palacios Lima, Embajador de la República de Guatemala ante Costa Rica, y la señora Steffany Rebeda Vásquez Barillas, agente alterna;
Por Honduras, el señor Jorge Abilio Serrano, Subprocurador General;
Por los Estados Unidos Mexicanos, los señores Luis Manuel Jardón Piña, Director de Casos de la Dirección General de Derechos Humanos y Democracia; Sergio Huerta Patoni, Coordinador de Asesores del Consultorio Jurídico, y Óscar Francisco Holguín González, encargado de Asuntos Políticos y Jurídicos de la Embajada de México en Costa Rica;
Por la Comisión Interamericana, los señores y señoras José de Jesús Orozco Henríquez, Segundo Vicepresidente de la Comisión; Elizabeth Abi-Mershed, Secretaria Ejecutiva Adjunta; Edison Lanza, Relator Especial para la Libertad de Expresión; Silvia Serrano Guzmán, asesora, y Jorge H. Meza Flores, asesor;
Por la Alianza Regional por la Libre Expresión e Información, el señor Raúl Francisco Silesky Jiménez;
Por Amnistía Internacional, la señora Gabriela Quijano y los señores Tawanda Hondora y Daniel Joloy;
Por la Asociación Civil de Derechos Humanos "Ixtlamatque Ukari" y Miguel Ángel Antemate Mendoza, las señoras Marlen Rodríguez Atriano y Norma Celia Bautista Romero, y el señor Miguel Ángel Antemate Mendoza;
Los señores Carlos Rodríguez Mejía, Alberto León Gómez Zuluaga y Marcelo Ferreira;
Por la Universidad de Ottawa, el señor Salvador Herencia - Carrasco y la señora Penélope Simons;
Por el Centro de Derechos Reproductivos, la señora Mónica Arango Olaya y el señor Juan Sebastián Rodríguez Alarcón;
Por la Comisión de Derechos Humanos del Distrito Federal de México, las señoras Marisol Mendez Cruz y Christian Ibeth Huerta Dávila;
Por EarthRights International y Juan Pablo Calderón Meza, el señor Juan Pablo Calderón Meza;
Por el grupo de abogados y estudiantes de la Universidad del Norte de Colombia, la señora Shirley Llain Arenilla;
Por el Grupo Estudiantil de Trabajo "Iván David Ortiz" de la Facultad de Ciencias Políticas y Sociales de la Universidad Nacional de Colombia, la señora Yazmyn Ayseha Umaña Dajud;
Por la International Comission for Labor Rights, la señora Angela B. Cornell;
Por International Trade Union Confederation (ITUC), el señor Steven Barrett;
Las señoras y señores Martha María Guadalupe Orozco Reyes, Hermilo de Jesús Lares Contreras, Alejandra Isabel Plascencia López, José Benjamín González Mauricio e Irma Ramos Salcedo;
Por el Programa Universitario de Derechos Humanos de la Universidad Nacional Autónoma de México, las señoras María Esther Martínez López y Brenda Hernández Zavaleta;
El señor Rodolfo E. Piza Rocafort, quien se hizo acompañar por los señores Manuel José Berrocal Fábrega y Román Navarro Fallas;
El señor Santiago Bertinat Gonnet;
Por Sostenibilidad Legal, el señor Álvaro Francisco Amaya Villareal, y
Por el Semillero de Derecho Internacional Económico y de Derechos Humanos adscrito a la Universidad EAFIT de Medellín, la señora Sara Bustamante Blanco y los señores Federico Delgado Aguilar, Carlos Alberto Sarría Ocampo y José Alberto Toro Valencia.

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[18] Artículo 73.4 del Reglamento "Una vez concluido el procedimiento escrito, la Corte decidirá si considera conveniente la realización del procedimiento oral y fijará la audiencia, a menos que delegue este último cometido en la Presidencia. En el caso de lo previsto en el artículo 64.2 de la Convención se hará previa consulta con el Agente".

[19] Disponible en: www.corteidh.or.cr/docs/asuntos/solicitud_21_05_15_esp.pdf.

10. Con posterioridad a la audiencia, se recibieron escritos complementarios de: 1) Semillero de Derecho Internacional Económico y Derechos Humanos adscrito a la Universidad EAFIT; 2) Comisión de Derechos Humanos del Distrito Federal de México; 3) Comisión Interamericana de Derechos Humanos; 4) EarthRights International y Juan Pablo Calderón Meza; 5) Carlos Alberto Rodríguez Mejía, Alberto León Gómez Zuluaga y Marcelo Ferreira; 6) International Trade Union Confederation; 7) Martha María Guadalupe Orozco Reyes, Hermilo de Jesús Lares Contreras, Alejandra Isabel Plascencia López, José Benjamín González Mauricio e Irma Ramos Salcedo, y 8) Rodolfo E. Piza Rocafort.

11. La Corte deliberó sobre la presente Opinión Consultiva durante sus 112 y 113 Períodos Ordinarios de Sesiones, dando inicio a la deliberación en cada uno de dichos períodos los días 19 de noviembre de 2015 y 23 de febrero de 2016, respectivamente.

III
COMPETENCIA

12. El 22 de junio de 1978, Panamá depositó su instrumento de ratificación de la Convención y el 18 de febrero de 1993 lo hizo respecto del Protocolo de San Salvador.

IV
CONSIDERACIONES GENERALES

A. Sobre su competencia consultiva

13. Esta consulta ha sido sometida a la Corte por Panamá, en uso de la facultad que le otorga el artículo 64.1 de la Convención Americana. Panamá es Estado Miembro de la OEA y, por tanto, tiene el derecho de solicitar a la Corte Interamericana opiniones consultivas acerca de la interpretación de dicho tratado o de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos.

14. Asimismo, la Corte considera que, como órgano con funciones de carácter jurisdiccional y consultivo, tiene la facultad inherente a sus atribuciones de determinar el alcance de su propia competencia (*compétence de la compétence/Kompetenz-Kompetenz*), lo que, por lo dispuesto en el artículo 64.1 de la Convención, también tiene aplicación en lo referente al ejercicio de su función consultiva, al igual que ocurre en lo atinente a su competencia contenciosa[20]. Ello, en particular, dado que la sola circunstancia de recurrir a aquella presupone el reconocimiento, por parte del Estado o Estados que realizan la consulta, del derecho de la Corte a resolver sobre el alcance de su jurisdicción al respecto.

15. Panamá requirió una interpretación de algunos artículos de la Convención Americana, de su Protocolo Adicional en materia de Derechos Económicos, Sociales y Culturales "Protocolo de San Salvador" y de la Declaración Americana de los Derechos y Deberes del Hombre (en adelante "Declaración Americana" o "Declaración").

16. En cuanto a la Convención Americana, la función consultiva permite al Tribunal interpretar cualquier norma de la misma, sin que ninguna parte o aspecto de dicho instrumento esté excluido del ámbito de interpretación. En este sentido, es evidente que la Corte tiene, en virtud de ser "intérprete última de la Convención Americana"[21], competencia

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[20] *Cfr. Caso del Tribunal Constitucional Vs. Perú. Competencia.* Sentencia de 24 de septiembre de 1999. Serie C No. 55, párr. 33, y Derechos *y garantías de niñas y niños en el contexto de la migración y/o en necesidad de protección internacional.* Opinión Consultiva OC-21/14 de 19 de agosto de 2014. Serie A No. 21, párr. 17.

[21] *Caso Almonacid Arellano y otros Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 26 de septiembre de 2006. Serie C No. 154, párr. 124, y OC-21/14 de 19 de agosto de 2014, párr. 19.

para emitir, con plena autoridad, interpretaciones sobre todas las disposiciones de la Convención, incluso aquellas de carácter procesal[22].

17. Respecto al Protocolo de San Salvador, la Corte destaca que el Estado solicitante hizo referencia específicamente a la protección de los derechos de formar federaciones y confederaciones (artículo 8.a) y de huelga (artículo 8.b) "de las personas físicas por medio de organizaciones no gubernamentales o personas jurídicas". Este Tribunal reitera que, en virtud del artículo 64.1 de la Convención, su facultad para emitir una opinión sobre "otros tratados concernientes a la protección de los derechos humanos en los Estados americanos" es amplia y no restrictiva. En efecto, "la competencia consultiva de la Corte puede ejercerse, en general, sobre toda disposición, concerniente a la protección de los derechos humanos, de cualquier tratado internacional aplicable en los Estados americanos, con independencia de que sea bilateral o multilateral, de cuál sea su objeto principal o de que sean o puedan ser partes del mismo Estados ajenos al sistema interamericano"[23].

18. De acuerdo con lo anterior, el artículo 64.1 de la Convención Americana autoriza a la Corte para rendir opiniones consultivas sobre la interpretación del referido Protocolo y de la Declaración Americana, en el marco y dentro de los límites de su competencia en relación con la Carta de la OEA (en adelante "la Carta") y la Convención u otros tratados concernientes a la protección de los derechos humanos en los Estados americanos[24]. Por ende, al interpretar la Convención en el marco de su función consultiva, la Corte recurrirá a la Declaración Americana cuando corresponda y en los términos del artículo 29.d) de la Convención.

19. Al afirmar su competencia, el Tribunal recuerda el amplio alcance de su función consultiva, única en el derecho internacional contemporáneo, en virtud de la cual y a diferencia de lo dispuesto para otros tribunales internacionales, se encuentran legitimados para solicitar opiniones consultivas la totalidad de los órganos de la OEA enumerados en el Capítulo X de la Carta y los Estados Miembros de la OEA, aunque no fueran partes de la Convención[25]. Otra característica de la amplitud de esta función se relaciona con el objeto de la consulta, el cual no está limitado a la Convención Americana, sino que, como ya se mencionó, alcanza a otros tratados concernientes a la protección de los derechos humanos en los Estados americanos y, además, se concede a todos los Estados Miembros de la OEA la posibilidad de solicitar opiniones acerca de la compatibilidad entre cualquiera de sus leyes internas y los mencionados instrumentos internacionales[26].

20. Por otra parte, la Corte constata que la solicitud de Panamá cumple formalmente con las exigencias de lo dispuesto en los artículos 70 y 71[27] del Reglamento, según los cuales para que una solicitud sea considerada por la Corte las preguntas deben ser formuladas con precisión, especificar las disposiciones que deben ser interpretadas, indicar las consideraciones que la originan y suministrar el nombre y dirección del agente.

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22 *Cfr. Artículo 55 de la Convención Americana sobre Derechos Humanos.* Opinión Consultiva OC-20/09 de 29 de septiembre de 2009. Serie A No. 20, párr. 18, y Opinión Consultiva OC-21/14, párr. 19.

23 "*Otros Tratados" Objeto de la Función Consultiva de la Corte* (art. 64 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-1/82 del 24 de septiembre de 1982. Serie A No. 1, punto decisivo primero, y Opinión Consultiva OC-21/14, párr. 20.

24 *Cfr. Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el Marco del Artículo 64 de la Convención Americana sobre Derechos Humanos.* Opinión Consultiva OC-10/89 del 14 de julio de 1989. Serie A No. 10, punto decisivo primero y único, y Opinión Consultiva OC-21/14, párr. 22.

25 *Cfr.* Opinión Consultiva OC-1/82, párrs. 14 a 17, y Opinión Consultiva OC-21/14, párr. 23.

26 *Cfr.* Opinión Consultiva OC-1/82, párrs. 14 a 17, y Opinión Consultiva OC-21/14, párr. 23.

27 Artículo 71. Interpretación de otros tratados

1. Si la solicitud se refiere a la interpretación de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos prevista en el artículo 64.1 de la Convención, deberá ser identificado el tratado y las partes en él, las preguntas específicas sobre las cuales se pretende obtener la opinión de la Corte y las consideraciones que originan la consulta.

2. Si la solicitud emana de uno de los órganos de la OEA, se señalará la razón por la cual la consulta se refiere a su esfera de competencia.

21. En reiteradas oportunidades este Tribunal ha establecido que el cumplimiento de los requisitos reglamentarios para la formulación de una consulta no implica que esté obligado a responder a ella[28]. Así, la Corte recuerda que su competencia consultiva no debe, en principio, ejercerse mediante especulaciones abstractas, sin una previsible aplicación a situaciones concretas que justifiquen el interés de que se emita una opinión consultiva[29].

22. Al respecto, en la solicitud de opinión consultiva Panamá indicó que, a su entender, de la interpretación que la Comisión ha hecho del artículo 1.2 de la Convención, parece derivarse que "las personas jurídicas al ser ficciones jurídicas, por si mismas no son susceptibles de [d]erechos sino las personas miembros de las sociedades de la persona jurídica" y sostuvo que "esto es un tema que ha generado inquietudes entre los Estados".

23. Al recordar que la función consultiva constituye "un servicio que la Corte está en capacidad de prestar a todos los integrantes del sistema interamericano, con el propósito de coadyuvar al cumplimiento de sus compromisos internacionales" sobre derechos humanos[30], este Tribunal considera que, a partir de la interpretación de las normas relevantes, su respuesta a la consulta planteada prestará una utilidad concreta para aclarar si efectivamente las personas jurídicas podrían ser titulares de los derechos establecidos en la Convención Americana y los demás tratados en el marco del sistema interamericano.

24. Por ende, la Corte estima que no queda necesariamente constreñida a los términos literales de las consultas que se le formulan y, además, que en ejercicio de su competencia consultiva puede también sugerir, en tanto medidas de otro carácter que fueren necesarias para hacer efectivos los derechos humanos, la adopción de tratados u otro tipo de normas internacionales sobre las materias objeto de aquellas[31].

25. Dado el amplio alcance de la función consultiva de la Corte que, como ya se expuso, involucra no solo a los Estados Parte de la Convención Americana, lo que se señala en la presente Opinión Consultiva también tiene relevancia jurídica para todos los Estados Miembros de la OEA que han acordado la Declaración Americana, independientemente de que hayan o no ratificado la Convención Americana[32], así como para los órganos de la OEA cuya esfera de competencia se refiera al tema de la consulta.

26. La Corte recuerda, como lo ha hecho en otras oportunidades[33], que la labor interpretativa que debe cumplir en ejercicio de su función consultiva difiere de su competencia contenciosa en que no existen "partes" involucradas en el procedimiento consultivo, y no existe tampoco un litigio a resolver. El propósito central de la función consultiva es obtener una interpretación judicial sobre una o varias disposiciones de la Convención o de otros tratados concernientes a la protección de los derechos humanos en los Estados americanos[34]. En este orden de ideas, las Opiniones Consultivas cumplen, en alguna medida, la función propia de un control de convencionalidad preventivo.

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28 *Cfr. Informes de la Comisión Interamericana de Derechos Humanos (*Art. 51 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-15/97 del 14 de noviembre de 1997. Serie A No. 15, párr. 31, y Opinión Consultiva OC-21/14, párr. 25.

29 *Cfr. Garantías Judiciales en Estados de Emergencia* (arts. 27.2, 25 y 8 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-9/87 del 6 de octubre de 1987. Serie A No. 9, párr. 16, y Opinión Consultiva OC-21/14, párr. 25.

30 *Cfr.* "Opinión Consultiva OC-1/82, párr. 39, y Opinión Consultiva OC-21/14, párr. 28.

31 Opinión Consultiva OC-21/14, párr. 30.

32 *Cfr. Condición Jurídica y Derechos de los Migrantes Indocumentados.* Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A No. 18*,* párr. 60, y Opinión Consultiva OC-21/14, párr. 32.

33 *Cfr.* Opinión Consultiva OC-15/97, párrs. 25 y 26, y Opinión Consultiva OC-21/14, párr. 51.

34 *Cfr. Restricciones a la Pena de Muerte (arts. 4.2 y 4.4 Convención Americana sobre Derechos Humanos).* Opinión Consultiva OC-3/83 del 8 de septiembre de 1983. Serie A No. 3, párr. 22, y Opinión Consultiva OC-21/14, párr. 51.

B. Acerca de la presente Opinión Consultiva

27. Este Tribunal recuerda que es inherente a sus facultades la de estructurar sus pronunciamientos en la forma que estime más adecuada a los intereses del Derecho y a los efectos de una opinión consultiva. En la presente Opinión Consultiva, la Corte ha resuelto establecer, en primer término, el significado de los términos "persona jurídica" y "legitimación activa" con el fin de delimitar su alcance conceptual. En segundo lugar, procederá al análisis de los asuntos específicos sometidos a su consideración. Para dar respuesta adecuada a la solicitud presentada, la Corte ha decidido agrupar las preguntas presentadas por Panamá en cuatro temas principales, a saber: i) la consulta sobre la titularidad de derechos de las personas jurídicas en el sistema interamericano; ii) las comunidades indígenas y tribales y las organizaciones sindicales; iii) protección de derechos humanos de personas naturales en tanto miembros de personas jurídicas, y iv) agotamiento de recursos internos por personas jurídicas. De acuerdo a esta división, en el primer tema se dará respuesta a las preguntas 1 y 2 (*supra* párr. 3), en el segundo y tercero se contestarán las preguntas 4 y 5 (*supra* párr. 3) y, finalmente, en el cuarto se responderán las preguntas 3, 6, 7 y 8 (*supra* párr. 3).

28. De acuerdo a lo anterior, para efectos de la presente Opinión Consultiva, la Corte utilizará los siguientes términos con el significado señalado:

a) Persona jurídica Para definir persona jurídica, la Corte acude a lo dispuesto en la Convención Interamericana sobre Personalidad y Capacidad de Personas Jurídicas en el Derecho Internacional Privado[35], a saber: "toda entidad que tenga existencia y responsabilidad propias, distintas a las de sus miembros o fundadores, y que sea calificada como persona jurídica según la ley del lugar de su constitución".

Asimismo, la Corte corrobora que la definición a nivel doméstico en varios países de la región no difiere sustancialmente de la adoptada por la Convención Interamericana. En efecto, al estudiar diferentes códigos civiles de la región puede concluirse, en términos generales, que por personas jurídicas se entiende aquellos entes, distintos de sus miembros, con capacidad de contraer obligaciones y ejercer derechos, y cuya capacidad está restringida al objeto social para el que fueron creados[36].

Adicionalmente, a lo largo del texto se utilizará el término "persona jurídica" para efectos de generar uniformidad. Sin embargo, ello no obsta para que se entiendan también comprendidos otros términos que aludan al mismo concepto como lo serían, por ejemplo: personas morales, personas colectivas, personas de existencia ideal o personas ficticias[37].

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[35] Convención Interamericana sobre Personalidad y Capacidad de Personas Jurídicas en el Derecho Internacional Privado, fecha de adopción: 05/24/84, fecha de entrada en vigor: 08/09/92.

[36] *Cfr*. Artículos 141 y 143 del Código Civil de Argentina; artículo 54 del Código Civil de Bolivia; artículos 545 y 2053 del Código Civil de Chile; artículo 633 del Código Civil de Colombia y artículo 98 del Código de Comercio de Colombia; artículo 564 del Código Civil de Ecuador; artículo 52 del Código Civil de El Salvador; artículo 16 del Código Civil de Guatemala; artículo 1795 del Código Civil de Honduras; artículos 26 y 27 del Código Civil Federal de México; artículos 1 y 77 del Código Civil de Nicaragua; artículos 38 y 71 del Código Civil de Panamá; artículos 94 y 96 del Código Civil de Paraguay; artículo 78 del Código Civil del Perú; artículo 21 del Código Civil de Uruguay, y artículo 19 del Código Civil de Venezuela.

[37] La Corte resalta que la referencia que se haga en este texto al término "persona jurídica" no debe confundirse con el "Derecho al Reconocimiento de la Personalidad Jurídica" consagrado en el artículo 3 de la Convención Americana sobre Derechos Humanos. Dicho artículo establece: Artículo 3. Derecho al Reconocimiento de la Personalidad Jurídica. Toda persona tiene derecho al reconocimiento de su personalidad jurídica.

b) Legitimación activa

Por legitimación activa la Corte entiende la aptitud para ser parte en un proceso, de conformidad con lo previsto en la Ley.

A nivel del sistema interamericano la legitimación activa se refiere, en virtud de lo establecido por el artículo 44 de la Convención Americana, a la facultad de cualquier persona o grupo de personas, o entidad no gubernamental legalmente reconocida en uno o más Estados miembros de la Organización de presentar peticiones ante la Comisión Interamericana que contengan denuncias o quejas referentes a la presunta violación por un Estado Parte de alguno de los derechos humanos reconocidos a nivel interamericano[38]. Por otra parte, el artículo 61.1 de la Convención dispone que "[s]olo los Estados Partes y la Comisión tienen derecho a someter un caso a la decisión de la Corte"[39]. Asimismo, el artículo 50 del Reglamento de la Comisión indica que los Estados Parte en la Convención Americana gozan de legitimación activa para acceder al Sistema únicamente cuando hayan reconocido la competencia de la Comisión para recibir y examinar las comunicaciones en que un Estado Parte alegue que otro Estado Parte ha incurrido en violaciones de los derechos humanos establecidos en la Convención[40].

29. En suma, al dar respuesta a la presente consulta, la Corte actúa en su condición de tribunal de derechos humanos, guiada por las normas que gobiernan su competencia consultiva y procede al análisis estrictamente jurídico de las cuestiones planteadas ante ella, conforme al derecho internacional de los derechos humanos teniendo en cuenta las fuentes de derecho internacional relevantes[41]. Al respecto, corresponde precisar que el *corpus iuris* del derecho internacional de los derechos humanos se compone de una serie de reglas expresamente establecidas en tratados internacionales o recogidas en el derecho internacional consuetudinario como prueba de una práctica generalmente aceptada como derecho, así como de los principios generales de derecho y de un conjunto de normas de carácter general o de *soft law*, que sirven como guía de interpretación de las primeras, pues dotan de mayor precisión a los contenidos mínimos fijados convencionalmente[42].

30. Complementariamente, la Corte resalta la circunstancia de que, conforme lo dispone el artículo 1.1 de la Convención, "[l]os Estado Partes [de la] Convención se comprometen a respetar los derechos y libertades reconocidos en ella y a garantizar su libre y pleno ejercicio a toda persona que esté sujeta a su jurisdicción", para lo cual, de acuerdo al artículo 2 de la misma, en el evento de que "el ejercicio de los derechos y libertades mencionados en el artículo 1 no estuviere ya garantizado por disposiciones legislativas o de otro carácter, los Estados Partes se comprometen a adoptar, con arreglo a sus procedimientos constitucionales y a las disposiciones de [la] Convención, las medidas legislativas o de otro carácter que fueren necesarias para hacer efectivos tales derechos y libertades".

31. Tales obligaciones implican, en consecuencia, que los Estados, al adoptar medidas necesarias para hacer efectivos los derechos humanos, lo deben hacer también con respecto de personas jurídicas que se encuentren bajo su jurisdicción, a fin de evitar que eventuales acciones de ellas puedan comprometer su responsabilidad internacional en esta materia. De modo que las personas jurídicas están, en todo caso, obligadas a respetar, en el

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38 *Cfr*. Artículos 44 de la Convención Americana y 23 del Reglamento de la Comisión Interamericana.
39 *Cfr*. Artículo 61 de la Convención Americana.
40 *Cfr*. Artículo 61 de la Convención Americana.
41 Opinión Consultiva OC-21/14, párr. 60.
42 Opinión Consultiva OC-21/14, párr. 60.

correspondiente orden interno o nacional, los derechos humanos y, en el evento de que ello no acontezca, los pertinentes Estados pueden ver comprometida su responsabilidad internacional en la medida que no garanticen su libre y pleno ejercicio por toda persona natural sujeta a su jurisdicción. En similar sentido, el artículo 36 de la Carta de la OEA establece que "[l]as empresas transnacionales y la inversión privada extranjera están sometidas a la legislación y a la jurisdicción de los tribunales nacionales competentes de los países receptores y a los tratados y convenios internacionales en los cuales éstos sean Parte y, además, deben ajustarse a la política de desarrollo de los países receptores".

32. Acorde con lo requerido por Panamá, la presente Opinión Consultiva determina a continuación, de conformidad con las normas traídas a consulta, la interpretación y el alcance del artículo 1.2 de la Convención Americana en el marco de las preguntas planteadas por el Estado solicitante.

33. En virtud de todo lo expuesto, la Corte considera, en definitiva, que tiene competencia para pronunciarse sobre las preguntas planteadas por Panamá y no encuentra en la presente consulta razones para abstenerse de resolverla, por lo cual la admite y procede a pronunciarse sobre el particular.

V
LA CONSULTA SOBRE LA TITULARIDAD DE DERECHOS DE LAS PERSONAS JURÍDICAS EN EL SISTEMA INTERAMERICANO

34. La Corte estima que el principal problema jurídico que fue planteado en la solicitud de opinión consultiva es si las personas jurídicas pueden ser consideradas como titulares de los derechos establecidos en la Convención Americana y, por tanto, podrían acceder de forma directa al sistema interamericano como presuntas víctimas. Para dar respuesta a este interrogante es imperativo realizar una interpretación del artículo 1.2 de la Convención Americana, el cual establece que:

> "1.2. Para los efectos de esta Convención, persona es todo ser humano".

35. En particular, para emitir su opinión sobre la interpretación de las disposiciones jurídicas traídas a consulta, la Corte recurrirá a la Convención de Viena sobre el Derecho de los Tratados, la cual recoge la regla general y consuetudinaria de interpretación de los tratados internacionales[43], que implica la aplicación simultánea y conjunta de la buena fe, el sentido corriente de los términos empleados en el tratado de que se trate, el contexto de éstos y el objeto y fin de aquél. Por ello, la Corte hará uso de los métodos de interpretación estipulados en los artículos 31[44] y 32[45] de la Convención de Viena para llevar a cabo dicha interpretación.

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[43] *Cfr*. Corte Internacional de Justicia, *Caso relativo a la soberanía sobre Pulau Ligitan y Pulau Sipadan (Indonesia contra Malasia)*, Sentencia de 17 de diciembre de 2002, párr. 37, y Corte Internacional de Justicia, *Avena y otros nacionales mexicanos (México contra los Estados Unidos de América)*, Sentencia de 31 de marzo de 2004, párr. 83.

[44] Artículo 31. Regla general de interpretación. 1. Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin.
2. Para los efectos de la interpretación de un tratado, el contexto comprenderá, además del texto, incluidos su preámbulo y anexos:
a) todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado:
b) todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado;
3. Juntamente con el contexto, habrá de tenerse en cuenta:
a) todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones:
b) toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado:
c) toda norma pertinente de derecho internacional aplicable en las relaciones entre las partes.
4. Se dará a un término un sentido especial si consta que tal fue la intención de las partes.

36. A partir de lo anteriormente señalado, con la finalidad de dar respuesta a las preguntas 1 y 2 de la solicitud, la Corte procederá a analizar: a) sentido corriente del término y buena fe; b) objeto y fin del tratado; c) contexto interno del tratado, y d) interpretación evolutiva. Por último, con la finalidad de confirmar la interpretación a la que se arribe, se hará referencia a uno de los métodos complementarios establecidos en el artículo 32 de la Convención de Viena, es decir a los trabajos preparatorios de la Convención.

A. Sentido corriente de los términos "persona" y "ser humano" – interpretación literal

37. La Corte reitera que ya ha establecido que el artículo 1.2 de la Convención establece que los derechos reconocidos en dicho instrumento corresponden a personas, es decir, a seres humanos[46]. En particular, cabe resaltar que la Convención Americana no dejó abierta la interpretación sobre cómo debe entenderse el término "persona", por cuanto el artículo 1.2 precisamente busca establecer una definición al mismo, lo cual demuestra la intención de las partes en darle un sentido especial al término en el marco del tratado, como lo establece el artículo 31.4 de la Convención de Viena. De acuerdo a lo anterior, este Tribunal ha entendido que los dos términos del artículo 1.2 de la Convención deben entenderse como sinónimos[47].

38. Al respecto, la Corte observa que el diccionario de la Real Academia Española define "persona" en su primera acepción como "[i]ndividuo de la especie humana"[48]. Por su parte, dicho diccionario precisa el término "humano" o "humana" en una de sus acepciones como[49]: "1. adj. Dicho de un ser: Que tiene naturaleza de hombre (‖ ser racional)". En similar sentido, este Tribunal constata que las versiones en inglés[50], portugués[51] y francés[52] de la Convención Americana, las cuales son versiones auténticas del tratado, también hacen una remisión expresa al término "ser humano" como sinónimo de "persona". Además, al verificar el sentido corriente de los términos en cada uno de estos idiomas[53], éste es el mismo que se le da en

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Convención de Viena sobre el Derecho de los Tratados, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, suscrita en Viena el 23 de mayo de 1969, entró en vigencia el 27 de enero de 1980.

45 Artículo 32. Medios de interpretación complementarios. Se podrán acudir a medios de interpretación complementarios, en particular a los trabajos preparatorios del tratado y a las circunstancias de su celebración, para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación dada de conformidad con el artículo 31:

a) deje ambiguo u oscuro el sentido; o

b) conduzca a un resultado manifiestamente absurdo o irrazonable

Convención de Viena sobre el Derecho de los Tratados, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, suscrita en Viena el 23 de mayo de 1969, entró en vigencia el 27 de enero de 1980.

46 *Caso Usón Ramírez Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 20 de noviembre de 2009. Serie C No. 207, párr. 45, y *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 22 de junio de 2015. Serie C No. 293, párr. 19.

47 *Cfr. Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 noviembre de 2012 Serie C No. 257, párr. 219. El artículo 1.2 ha sido analizado por la Corte en casos en los que se ha solicitado la violación de derechos en perjuicio de personas jurídicas, lo cual ha sido rechazado por el Tribunal porque no han sido reconocidas como titulares de derechos consagrados en la Convención Americana. *Cfr. Caso Cantos Vs. Argentina. Excepciones Preliminares.* Sentencia de 7 de septiembre de 2001. Serie C No. 85, párr. 29 y *Caso Perozo y otros Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de enero de 2009. Serie C No. 195, párr. 398.

48 Diccionario de la lengua española de la Real Academia Española, 23.ª ed. Madrid: Espasa, 2014. Disponible en: http://dle.rae.es/?id=SjUIL8Z

49 Diccionario de la lengua española de la Real Academia Española, 23.ª ed. Madrid: Espasa, 2014. Disponible en: http://dle.rae.es/?id=KncKsrP

50 American Convention on Human Rights, Article 1.2 "For the purposes of this Convention, 'person' means every human being".

51 Convenção Americana sobre Direitos Humanos Para os efeitos desta Convenção, Artigo 1.2 "Para os efeitos desta Convenção, pessoa é todo ser humano".

52 Convention Americaine Relative aux Droits de L'homme, Article 1.2 "Aux effets de la présente Convention, tout être humain est une personne".

53 En inglés, el diccionario de la Universidad de Oxford define "human being" como: "A man, woman, or child of the species Homo sapiens, distinguished from other animals by superior mental development, power of articulate speech, and upright stance". Disponible en: http://www.oxforddictionaries.com/definition/english/human-

español. Teniendo en cuenta lo anterior, es claro que de la lectura literal del artículo 1.2 de la Convención se excluye a otros tipos de personas que no sean seres humanos de la protección brindada por dicho tratado. Lo anterior implica que las personas jurídicas en el marco de la Convención Americana no son titulares de los derechos establecidos en ésta y, por tanto, no pueden presentar peticiones o acceder directamente, en calidad de presuntas víctimas y haciendo valer derechos humanos como propios, ante el sistema interamericano.

39. En efecto, esta es la interpretación que la Corte Interamericana ha venido realizando desde el primer caso[54] en que se enfrentó al problema de definir si las personas jurídicas podrían ser objeto de protección en el sistema interamericano, postura respecto de la cual, en principio, no encuentra razones para apartarse. Sin embargo, en el marco de la presente consulta considera pertinente estudiar si el artículo 1.2 sería susceptible de otras interpretaciones a partir de los otros métodos de interpretación existentes. En efecto, esta Corte ha afirmado que la interpretación del "sentido corriente de los términos" del tratado no puede ser una regla por sí misma sino que, además de dicho criterio y de la buena fe, el ejercicio de interpretación debe involucrar el contexto y, en especial, dentro de su objeto y fin[55]. Todo ello para garantizar una interpretación armónica y actual de la disposición sujeta a consulta. Por ello, este Tribunal estima necesario hacer uso de todos los demás métodos de interpretación establecidos en los artículos 31 y 32 de la Convención de Viena.

B. Objeto y fin del tratado – interpretación teleológica

40. La Corte ha indicado que en una interpretación teleológica se analiza el propósito de las normas involucradas, para lo cual es pertinente analizar el objeto y fin del tratado mismo y, de ser pertinente, los propósitos del sistema regional de protección[56].

41. Al respecto, el Preámbulo de la Convención Americana hace varias referencias que permiten establecer el objeto y fin del tratado:

> Reafirmando su propósito de consolidar en este Continente, dentro del cuadro de las instituciones democráticas, un régimen de libertad personal y de justicia social, fundado en el respeto de los derechos esenciales del hombre;
> Reconociendo que los derechos esenciales del hombre no nacen del hecho de ser nacional de determinado Estado, sino que tienen como fundamento los atributos de la persona humana, razón por la cual justifican una protección internacional, de naturaleza convencional coadyuvante o complementaria de la que ofrece el derecho interno de los Estados americanos; […]
> Reiterando que, con arreglo a la Declaración Universal de los Derechos Humanos, sólo puede realizarse el ideal del ser humano libre, exento del temor y de la miseria, si se crean condiciones que permitan a cada persona gozar de sus derechos económicos, sociales y culturales, tanto como de sus derechos civiles y políticos. (Subrayado fuera del texto)

42. Teniendo en cuenta lo anterior, la Corte ha afirmado que en el caso de la Convención Americana, el objeto y fin del tratado es "la protección de los derechos fundamentales de los

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being?q=human+being. Asimismo, define "person" en su primera acepción como: "A human being regarded as an individual". Disponible en: http://www.oxforddictionaries.com/definition/english/person.
En portugués el diccionario "VOX" define el término "humano, na" como: "adj. humano, pertencente ao homem ou próprio dele; […] s. m. homem ou pessoa humana". Además, define "pessoa" en su primera acepción como: "individuo da espécie humana".
En francés el diccionario Larousse define "humain, humaine" en su primera acepción como: "Qui possède les caractéristiques spécifiques de l'homme en tant que représentant de son espèce; qui est composé d'hommes: Être humain. Les races humaines". Disponible en: http://www.larousse.fr/dictionnaires/francais/humain/40608?q=humain#40515. Además, define "personne" en su primera acepción como: "Être humain, sans distinction de sexe". Disponible en: http://www.larousse.fr/dictionnaires/francais/personne/59812?q=personne#59447.

54 *Caso Cantos Vs. Argentina. Excepciones Preliminares*. párr. 29.

55 *Cfr. Propuesta de Modificación a la Constitución Política de Costa Rica Relacionada con la Naturalización.* Opinión Consultiva OC-4/84 del 19 de enero de 1984. Serie A No. 4, párr. 23, y Opinión Consultiva OC-20/09, párr. 26.

56 *Caso González y otras ("Campo Algodonero") Vs. México*, párr. 59, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Ric*, párr. 257.

seres humanos"[57], a propósito de lo cual fue diseñada para proteger los derechos humanos de las personas independientemente de su nacionalidad, frente a su propio Estado o a cualquier otro[58]. En este sentido, la Convención Americana prevé expresamente determinadas pautas de interpretación en su artículo 29[59], entre las que alberga el principio *pro persona*, que implican que ninguna disposición de dicho tratado puede ser interpretada en el sentido de limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Parte o de acuerdo con otra convención en que sea parte uno de dichos Estados, o bien de excluir o limitar el efecto que puedan producir la Declaración Americana de los Derechos y Deberes del Hombre y otros instrumentos internacionales de la misma naturaleza.

43. Como se indicó el objeto y fin de tratado es "la protección de los derechos fundamentales de los seres humanos", lo cual demuestra que este fue creado con la intención de proteger exclusivamente a aquellos. De esta forma una interpretación teleológica de la norma sería conforme con la conclusión a la cual se arribó por medio de la interpretación literal, en el sentido que las personas jurídicas están excluidas de la protección otorgada por la Convención Americana.

C. Contexto interno – interpretación sistemática

44. La Corte resalta que, según el criterio sistemático, las normas deben ser interpretadas como parte de un todo cuyo significado y alcance deben fijarse en función del sistema jurídico al cual pertenecen[60]. En este sentido, el Tribunal ha considerado que al dar interpretación a un tratado no sólo se toman en cuenta los acuerdos e instrumentos formalmente relacionados con éste (inciso segundo del artículo 31 de la Convención de Viena), sino también el sistema dentro del cual se inscribe (inciso tercero del artículo 31)[61], esto es, el sistema interamericano de protección de los derechos humanos.

45. En el marco de una interpretación sistemática de la Convención se deben tener en cuenta todas las disposiciones que la integran y los acuerdos e instrumentos formalmente relacionados con ella, como por ejemplo, la Declaración Americana de los Derechos y Deberes del Hombre, por cuanto permiten verificar si la interpretación dada a una norma o término en concreto es coherente con el sentido de las demás disposiciones. Concretamente, las normas que se analizarán en este capítulo muestran la utilización de la palabra "persona" en el contexto del tratado y de la Declaración Americana.

46. Al respecto, la primera parte de la Declaración Americana se refiere a:

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[57] *El Efecto de las Reservas sobre la Entrada en Vigencia de la Convención Americana sobre Derechos Humanos.* Opinión Consultiva OC-2/82 del 24 de septiembre de 1982. Serie A No. 2, párr. 29, y Opinión Consultiva OC-21/14, párr. 53.

[58] *Cfr.* Opinión Consultiva OC-2/82, párr. 29, y Opinión Consultiva OC-21/14, párr. 53.

[59] Artículo 29. Normas de Interpretación
Ninguna disposición de la presente Convención puede ser interpretada en el sentido de:
a) permitir a alguno de los Estados Partes, grupo o persona, suprimir el goce y ejercicio de los derechos y libertades reconocidos en la Convención o limitarlos en mayor medida que la prevista en ella;
b) limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Partes o de acuerdo con otra convención en que sea parte uno de dichos Estados;
c) excluir otros derechos y garantías que son inherentes al ser humano o que se derivan de la forma democrática representativa de gobierno, y
d) excluir o limitar el efecto que puedan producir la Declaración Americana de Derechos y Deberes del Hombre y otros actos internacionales de la misma naturaleza.

[60] *Cfr Caso González y otras ("Campo Algodonero") Vs. México*, párr. 43, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 191.

[61] *Cfr. El Derecho a la Información sobre la Asistencia Consular en el marco de las Garantías del Debido Proceso Legal*. Opinión Consultiva OC-16/99 de 1 de octubre de 1999. Serie A No. 16, párr. 113, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 191.

> Que los pueblos americanos han dignificado la persona humana y que sus constituciones nacionales reconocen que las instituciones jurídicas y políticas, rectoras de la vida en sociedad, tienen como fin principal la protección de los derechos esenciales del hombre y la creación de circunstancias que le permitan progresar espiritual y materialmente y alcanzar la felicidad;
> Que, en repetidas ocasiones, los Estados americanos han reconocido que los derechos esenciales del hombre no nacen del hecho de ser nacional de determinado Estado sino que tienen como fundamento los atributos de la persona humana;
> Que la protección internacional de los derechos del hombre debe ser guía principalísima del derecho americano en evolución;
> Que la consagración americana de los derechos esenciales del hombre unida a las garantías ofrecidas por el régimen interno de los Estados, establece el sistema inicial de protección que los Estados americanos consideran adecuado a las actuales circunstancias sociales y jurídicas, no sin reconocer que deberán fortalecerlo cada vez más en el campo internacional, a medida que esas circunstancias vayan siendo más propicias. (Subrayado fuera del texto)

47. La Corte considera que el Preámbulo de la Convención Americana (*supra* párr. 41), así como las primeras consideraciones de la Declaración Americana, muestran que estos instrumentos fueron creados con la intención de centrar la protección y titularidad de los derechos en el ser humano. Lo anterior se infiere de la constante referencia a palabras tales como "hombre"[62] o "persona humana", los cuales denotan que no se estaba teniendo en cuenta la figura de las personas jurídicas a la hora de redactar dichos instrumentos. Sobre la Declaración Americana, el Consejo Interamericano de Jurisconsultos sobre la Conferencia de Bogotá manifestó que "[e]s evidente que la Declaración de Bogotá no crea una obligación jurídica contractual, pero también lo es el hecho de que ella señala una orientación bien definida en el sentido de la protección internacional de los derechos fundamentales de la persona humana"[63].

48. Por otra parte, la expresión "toda persona" es utilizada en numerosos artículos de la Convención Americana[64] y de la Declaración Americana[65], siempre para hacer referencia a los derechos de los seres humanos. Como se analizará posteriormente (*infra* párr. 108), algunos de los derechos consagrados en estos artículos son inherentes a la condición de ser humano, como por ejemplo los derechos a la vida, a la integridad personal o a la libertad personal, entre otros. Otros de estos derechos, como el de propiedad o la libertad de expresión, podrían llegar a ser ejercidos por personas naturales a través de personas jurídicas (*infra* párr. 109), como una empresa o un medio de comunicación, sin embargo, ninguno de los artículos mencionados anteriormente contienen alguna expresión que le conceda a las personas jurídicas titularidad de estos derechos o que permitan inferir una excepción a lo establecido en el artículo 1.2 de la Convención.

D. Otros sistemas de protección de los derechos humanos y derecho comparado - Interpretación evolutiva

49. Este Tribunal ha señalado en otras oportunidades[66] que los tratados de derechos humanos son instrumentos vivos, cuya interpretación tiene que acompañar la evolución de los tiempos y las condiciones de vida actuales. Tal interpretación evolutiva es consecuente con las reglas generales de interpretación establecidas en el artículo 29 de la Convención Americana,

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62 Al respecto, la Corte resalta que la utilización de la palabra "hombre" en la Declaración Americana y en la Convención Americana debe actualizarse y entenderse como incluyente de todas las formas de identidad de género.

63 Comité Jurídico Interamericano, Recomendaciones e informes, 1949-1953 (1955), p. 107.

64 *Cfr.* Al respecto, los artículos 1.1, 3, 4.1, 4.6, 5.1, 5.2, 7.1, 7.4, 7.5, 7.6, 8.1, 8.2, 10, 11.1, 11.3, 12.1, 13.1, 14.1, 16, 18, 20.1, 20.2, 21.1, 22.1, 22.2, 22.7, 24, 25.1 y 25.2 de la Convención Americana sobre Derechos Humanos.

65 *Cfr.* Al respecto, los artículos II, III, IV, V, VI, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVI y XXVII de la Declaración Americana de los Derechos y Deberes del Hombre.

66 *Cfr.* Opinión Consultiva OC-16/99, párr. 114; *Caso Atala Riffo y Niñas Vs. Chile. Fondo, Reparaciones y Costas*. Sentencia del 24 de febrero de 2012. Serie C No. 239, párr. 83; *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 245, y Opinión Consultiva OC-21/14, párr. 55. En similar sentido, el Preámbulo de la Declaración Americana de los Derechos y Deberes del Hombre indica: "[q]ue la protección internacional de los derechos del hombre debe ser guía principalísima del derecho americano en evolución".

así como en la Convención de Viena sobre el Derecho de los Tratados[67]. Además, el parágrafo tercero del artículo 31 de la Convención de Viena autoriza la utilización para la interpretación de medios tales como los acuerdos o la práctica[68] o reglas relevantes del derecho internacional[69] que los Estados hayan manifestado sobre la materia del tratado, los cuales son algunos de los métodos que se relacionan con una visión evolutiva de la interpretación del tratado. Teniendo en cuenta lo anterior, la Corte procederá a analizar: i) la protección a personas jurídicas en otros tribunales u organismos internacionales de derechos humanos, y ii) la protección a personas jurídicas en el derecho interno de los Estados Parte.

i) Tribunales y organismos internacionales

50. Sobre este punto, la Corte considera relevante analizar en el marco de una interpretación evolutiva la manera en que se regula la titularidad de derechos y el acceso de las personas jurídicas a los principales tribunales y organismos internacionales de derechos humanos, con la finalidad de determinar si existe una práctica recurrente en los mismos. En efecto, este Tribunal ha considerado útil, en otras oportunidades[70], estudiar los otros sistemas de derechos humanos con la finalidad de constatar sus similitudes o diferencias con el sistema interamericano, lo cual puede ayudar a determinar el alcance o sentido que se le ha dado a una norma similar o a detectar las particularidades del tratado. A continuación, este Tribunal procederá a estudiar: a) el sistema europeo; b) el sistema africano, y c) el sistema universal.

a) Sistema europeo

51. Este Tribunal denota que el Convenio Europeo no contiene una definición del término "persona" a diferencia de la Convención Americana. El Convenio Europeo se limita en todos sus artículos al uso de la expresión "toda persona", sin especificar si se trata de la persona humana o persona jurídica. Asimismo, el Preámbulo del Convenio hace énfasis solamente en el valor de los derechos humanos como un medio para asegurar la justicia y la paz en Europa[71]. En efecto, los únicos artículos en los cuales se hace alusión directamente a la persona jurídica son el 34 del Convenio Europeo y el 1 del Protocolo Adicional No. 1. Al respecto, la Corte observa que el artículo 34 establece que:

> ARTÍCULO 34 Demandas individuales: El Tribunal podrá conocer de una demanda presentada por **cualquier persona física, organización no gubernamental o grupo de particulares** que se considere víctima de una violación por una de las Altas Partes Contratantes de los derechos reconocidos en el Convenio o sus Protocolos. Las Altas Partes Contratantes se comprometen a no poner traba alguna al ejercicio eficaz de este derecho. (Resaltado fuera del texto)

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67 *Cfr.* Opinión Consultiva OC-16/99, párr. 114, y Opinión Consultiva OC-21/14, párr. 55.

68 *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 245. *Cfr.* TEDH, *Caso Rasmussen vs. Dinamarca*, (No. 8777/79), Sentencia de 28 de noviembre de 1984, párr. 41; *Caso Inze vs. Austria*, (No. 8695/79) Sentencia de 28 de octubre de 1987, párr. 42, y *Caso Toth vs. Austria*, (No. 11894/85), Sentencia de 25 noviembre de 1991, párr. 77.

69 *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 245**.** *Cfr.* TEDH, *Caso Golder vs. Reino Unido*, (No. 4451/70), Sentencia de 12 de diciembre de 1975, párr. 35.

70 Por ejemplo, en la opinión consultiva sobre La Colegiación Obligatoria de Periodistas, la Corte comparó el artículo 13 de la Convención Americana, referente al derecho a la libertad de expresión, con los artículos análogos del Convenio Europeo (artículo 10) y del Pacto Internacional de Derechos Civiles y Políticos (artículo 19). *La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 Convención Americana sobre Derechos Humanos).* Opinión Consultiva OC-5/85 del 13 de noviembre de 1985. Serie A No. 5, párrs. 45 a 50. En similar sentido, en el caso *Atala Riffo* se analizó la diferencia entre los alcances de los artículos 11.2 y 17.1 de la Convención Americana y del artículo 8 del Convenio Europeo. *Caso Atala Riffo y Niñas Vs. Chile*, párr. 175.

71 El Preámbulo del Convenio Europeo establece: Reafirmando su profunda adhesión a estas libertades fundamentales que constituyen las bases mismas de la justicia y de la paz en el mundo, y cuyo mantenimiento reposa esencialmente, de una parte, en un régimen político verdaderamente democrático, y, de otra, en una concepción y un respeto comunes de los derechos humanos de los cuales dependen;
Resueltos, en cuanto Gobiernos de Estados europeos animados por un mismo espíritu y en posesión de un patrimonio común de ideales y de tradiciones políticas, de respeto a la libertad y de primacía del Derecho, a tomar las primeras medidas adecuadas para asegurar la garantía colectiva de algunos de los derechos enunciados en la Declaración Universal.

52. Por su parte, el artículo 1 del Protocolo Adicional No. 1 indica que:

> ARTÍCULO 1 Protección de la propiedad: **Toda persona física o jurídica** tiene derecho al respeto de sus bienes. Nadie podrá ser privado de su propiedad sino por causa de utilidad pública y en las condiciones previstas por la ley y los principios generales del Derecho Internacional. Las disposiciones precedentes se entienden sin perjuicio del derecho que tienen los Estados de dictar las leyes que estimen necesarias para la reglamentación del uso de los bienes de acuerdo con el interés general o para garantizar el pago de los impuestos, de otras contribuciones o de las multas. (Resaltado fuera del texto)

53. En este sentido, en el artículo 34 del Convenio se indica quiénes podrán someter una demanda ante el Tribunal Europeo, a saber: i) cualquier persona física; ii) toda organización no gubernamental, y iii) todo grupo de particulares. La jurisprudencia del Tribunal Europeo ha dado cabida para que, dentro del concepto de organización no gubernamental, varias clases de personas jurídicas sometan una demanda ante el mismo. En particular, el Tribunal Europeo ha conocido casos relacionados con: i) personas jurídicas privadas, de cualquier naturaleza, con[72] (civiles y comerciales) o sin fin de lucro[73] (asociaciones y fundaciones), o ii) personas jurídicas públicas, siempre y cuando no ejerciten poderes gubernamentales, no hayan sido creadas para propósitos de administración pública y sean independiente del Estado[74]. La interpretación del artículo 34 del Convenio ha conllevado que el Tribunal Europeo no solo haya conocido casos de personas jurídicas relacionados con el derecho a la propiedad, lo cual expresamente lo permite el artículo 1 del Protocolo No. 1 del Convenio Europeo, sino que también ha analizado casos relacionados con derechos tales como a la libertad de expresión[75] (artículo 10 del Convenio Europeo), a la no discriminación[76] (artículo 14 del Convenio), a un proceso equitativo[77] (artículo 6 del Convenio), de libertad de reunión y asociación[78] (artículo 11 del Convenio), a libertad de pensamiento, conciencia y de religión[79] (artículo 9 del Convenio) o a la vida privada y familiar[80] (artículo 8 del Convenio).

54. Ahora bien, la Corte considera necesario hacer referencia en este punto al artículo 44 de la Convención Americana, dado que varias de las observaciones escritas presentadas

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[72] Al respecto, ver: TEDH, *SCI Boumois Vs. Francia*, (No. 55007/00), Sentencia de 17 de junio de 2003; TEDH, *Asunto SCP Huglo, Lepage y Asociados, Consejo* Vs. Francia, (No. 59477/00), Sentencia del 1ro de febrero de 2005; TEDH, *Klithropiia Ipirou Evva Hellas A.E. Vs. Grecia*, (No. 27620/08), Sentencia de 13 de enero de 2011; TEDH, *Sociedade Agricola Do Ameixial Vs. Portugal*, (No. 10143/07), Sentencia del 11 de enero de 2011; TEDH, *Nieruchomosci SP. Z O.O. Vs. Polonia*, (No. 32740/06), Sentencia de 2 de febrero de 2010; TEDH, *Ge.Im.A SAS Vs. Italia*, (No. 52984/99), Sentencia de 12 de febrero de 2002; TEDH, *Asunto Studio Tecnico Amu S.A.S. Vs. Italia*, (No. 45056/98), Sentencia de 17 de octubre de 2000; TEDH, *Lilly France Vs. Francia* [n° 2], (No. 20429/07), Sentencia de 25 de noviembre de 2010; TEDH, *Filippos Mavropoulos- Pam. Zisis O.E. Vs. Grecia*, (No. 27906/04), Sentencia de 4 de mayo de 2006; TEDH, *S. A. GE.MA SNC Vs. Italia*, (No. 40184/98), Sentencia de 27 de abril de 2000; TEDH, *Sordelli y C. SNC Vs. Italia*, (No. 51670/99), Sentencia de 11 de diciembre de 2001, y TEDH, *Asunto National & Provincial Building Society, The Leeds Permanent Building Society y The York Shire Building Society Vs. Reino Unido*, (No. 117/1996/736/933–935), Sentencia de 23 de octubre de 1997.

[73] Ver: TEDH, *Apeh Üldozötteinck Szövetsege y Otros Vs. Hungría*, (No. 32367/96), Sentencia de 5 de octubre de 2000; TEDH, *Boychev y Otros, entre ellos la Asociación de la Iglesia de la Unificación Vs. Bulgaria*, (No. 77185/01), Sentencia de 27 de enero de 2011; TEDH, *Cha'Are Shalom y Tsedek Vs. Francia*, (No. 27417/95), Sentencia de 27 de junio de 2000; TEDH, *Clube de Futebol Uniao de Coimbra Vs. Portugal*, (No.27295/95), Sentencia de 30 de julio de 1998; TEDH, *Tüketici Bilincini Geliştirme Derneği Vs. Turquia*, (No. 38891/03), Sentencia de 27 de febrero de 2007; TEDH, *Association Avenir d'Alet Vs. Francia*, (No. 13324/04), Sentencia de 14 de febrero de 2008.

[74] TEDH, *Islamic Republic of Iran Shipping Lines Vs. Turquía*, (No. 40998/98), Sentencia de 13 de diciembre de 2007, párr. 80, y TEDH, *Holy Monasteries Vs. Grecia*, (No. 13092/87), Sentencia de 9 de diciembre de 1994, párr. 49.

[75] TEDH, *Autronic AG Vs. Suiza* [Corte Plena, Serie A], (No. 178), Sentencia de 22 de mayo de 1990, párr. 47.

[76] TEDH, *Religionsgemeinschaft der Zeugen Jehovas y Otros Vs. Austria*, (No. 40825/98), Sentencia de 31 de julio de 2008, párrs. 87 a 99.

[77] TEDH*, Ern Makina Sanayi y Ticaret AS Vs. Turquía*, (No. 70830/01), Sentenciad de 3 de mayo de 2007, párrs. 28-30, y TEDH, *Asunto Stoeterij Zangersheide N.V. y Otros Vs. Bélgica*, (No. 47295/99), Sentencia de 22 de diciembre de 2004, párr. 36.

[78] TEDH, *Asunto Syndicat Nationale Des Professionnels Des Procédures Collectives Vs. Francia*, (No. 70387/01), Sentencia de 21 de junio de 2006.

[79] TEDH*, Church of Scientology Vs. Suecia* [D y R], (No. 16), Sentencia de 5 mayo de 1979, párr. 68.

[80] TEDH, *Colas Est y Otros Vs. Francia*, (No. 37971/97), Sentencia de 16 de abril de 2002, párrs. 40 a 41, y TEDH, *Ernst y Otros Vs. Bélgica*, (No. 33400/96), Sentencia de 15 de junio de 2003, párr. 109.

hicieron notar que el artículo 34 del Convenio Europeo sería materialmente idéntico al artículo 44 de la Convención y que con base en dicho artículo, el sistema europeo ha concedido el acceso a las personas jurídicas. Por lo anterior, surge la pregunta sobre si sería posible hacer extensiva la protección a las personas jurídicas como se ha hecho en el sistema europeo. Al respecto, el artículo 44 de la Convención Americana dispone que:

> **Artículo 44: Cualquier persona o grupo de personas, o entidad no gubernamental** legalmente reconocida en uno o más Estados miembros de la Organización, puede presentar a la Comisión peticiones que contengan denuncias o quejas de violación de esta Convención por un Estado parte. (Resaltado fuera del texto)

55. La Corte considera que del tenor literal de los artículos 44 de la Convención y 34 del Convenio se podría llegar a afirmar que la redacción de las dos normas es sustancialmente similar. Sin embargo, la diferencia radica en que el artículo 34 del último añade un requisito al establecer que puede presentar una petición cualquier persona "que se considere víctima de una violación por una de las Altas Partes Contratantes de los derechos reconocidos en el Convenio o sus Protocolos". Esto implica que la persona que presenta la petición ante el Tribunal Europeo debe acreditar que es presunta víctima del caso, es decir, en el caso de las personas jurídicas, por ejemplo, estas tienen que encontrarse directamente afectadas en sus propios derechos por el acto o la omisión que se esté alegando y no podrían presentar peticiones respecto a presuntas violaciones a los derechos de sus miembros o de terceros.

56. Lo anterior constituye una diferencia sustancial entre los dos sistemas de protección, por cuanto en el sistema interamericano se ha diferenciado entre peticionario y presunta víctima. De manera que el artículo 44 de la Convención hace referencia exclusivamente a la legitimación activa, en el sentido que establece que se pueden presentar peticiones individuales tanto a nombre propio como en el de terceras personas, sin que necesariamente deban confluir en la misma persona las dos categorías. En efecto, la Corte ha manifestado que "es claro que el artículo 44 de la Convención permite que cualquier grupo de personas formule denuncias o quejas por violación de los derechos consagrados por la Convención. Esta amplia facultad de denuncia es un rasgo característico del sistema de protección [interamericano] de los derechos humanos"[81]. Por ello, la Corte estima, que de la referencia que hace el artículo 44 a "organización no gubernamental o grupo de particulares", no es posible inferir una autorización para que las personas jurídicas puedan ser presuntas víctimas, sino que se refiere a su legitimación activa, en el sentido de que las organizaciones no gubernamentales o grupo de particulares están facultados para presentar peticiones individuales ante Comisión Interamericana a favor de presuntas víctimas, incluso en casos en que no cuenten con el consentimiento de las mismas[82].

b) Sistema africano

57. Respecto a la Carta Africana sobre los Derechos Humanos y de los Pueblos (en adelante "la Carta Africana"), la Corte observa que ésta no ofrece una definición sobre el término "persona". Tampoco se encontró una interpretación oficial realizada por parte de sus órganos

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[81] *Caso Castillo Petruzzi y Otros Vs. Perú. Excepciones Preliminares.* Sentencia del 4 de septiembre de 1998. Serie C No.41, párr. 77.

[82] Al respecto, la Corte en el caso *Acevedo Jaramillo* manifestó que "la denuncia puede ser presentada por una persona distinta a la presunta víctima, así como también puede ser presentada por un 'grupo de personas'". *Caso Acevedo Jaramillo y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia del 7 de febrero de 2006. Serie C No. 144, párr. 137. Igualmente, en el caso *Saramaka* indicó que "[e]l artículo 44 de la Convención permite a todo grupo de personas presentar denuncias o quejas de violaciones de los derechos establecidos en la Convención. Esta amplia facultad para presentar una petición es una característica particular del sistema interamericano para la protección de los derechos humanos. Asimismo, toda persona o grupo de personas que no sean las presuntas víctimas pueden presentar una petición". *Caso del Pueblo Saramaka Vs. Surinam*. *Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia del 28 de noviembre de 2007. Serie C No. 172, párr. 22.

judiciales, sobre si el término "pueblos"[83], al que hace referencia la Carta, podría llegar a cobijar a personas jurídicas. Por ello, no es posible determinar de manera concluyente si las personas jurídicas en el sistema africano son titulares de derechos y pueden ser consideradas víctimas de manera directa.

58. Al igual que en el sistema interamericano, la Carta Africana confiere a las personas jurídicas la capacidad de presentar comunicaciones a la Comisión Africana, es decir, pueden denunciar violaciones de los derechos humanos contenidos en la Carta Africana[84] a nombre de terceros. Se trata, entonces, de un enfoque de *actio popularis*, de acuerdo con el cual el autor de la comunicación no debe conocer ni tener algún vínculo con la víctima de la violación que alega[85], siempre y cuando la comunicación cumpla con los requisitos de forma que exige el artículo 56 de la Carta Africana.

c) Sistema universal

59. La Corte constata que los derechos humanos contenidos en el Pacto Internacional de Derechos Civiles y Políticos (en adelante el "PIDCP") no son extensivos a las personas jurídicas. La interpretación oficial de este instrumento establece de manera clara que solamente los individuos pueden someter una denuncia ante el Comité de Derechos Humanos (en adelante "CDH" o el "Comité de Derechos Humanos"). Al respecto, el CDH ha establecido que, de acuerdo con lo dispuesto por el artículo 1 del Protocolo Facultativo del PICDP, solamente los individuos pueden presentar denuncias ante este órgano[86]. Asimismo, la Observación General número 31 del CDH establece que "[l]os beneficiarios de los derechos reconocidos por el Pacto son los individuos"[87]. Asimismo, en varias resoluciones, el Comité de Derechos Humanos, ha insistido en que, "independientemente de que pareciera que los alegatos tengan relación con cuestiones del Pacto"[88], las personas jurídicas no cuentan con capacidad procesal ante el órgano. Sumado a esto, el Comité de Derechos Humanos exige que, quien presente la denuncia, sea al mismo tiempo la víctima de los derechos presuntamente violados[89].

60. Distinta es la situación a la luz de la Convención Internacional sobre la Eliminación de todas las formas de Discriminación Racial, la cual hace referencia expresa la prohibición de discriminación en contra de grupos u organizaciones[90]. En desarrollo de lo anterior, el Comité

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[83] La Carta Africana incluye a los "pueblos" como los titulares del derecho. Por ejemplo, son titulares al derecho a la igualdad (artículo 19), a la existencia y autodeterminación (artículo 20), a la libre disposición de sus riquezas y recursos naturales (artículo 21), al desarrollo (artículo 22), a la paz y a la seguridad (artículo 23) así como a un entorno general satisfactorio favorable a su desarrollo (artículo 24).

[84] Sección 4, Regla 93(1) de las Reglas de Procedimiento de la Comisión Africana, 2010. Esta regla dice en lo conducente: "A Communication submitted under Article 55 of the African Charter may be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person."

[85] Comisión Africana de Derechos Humanos y de los Pueblos, *Caso Artículo 19 Vs. El Estado de Eritrea,* No. 275/03. Comunicación del 30 de Mayo de 2007, párr. 65.

[86] CDH, *V.S. Vs. Bielorrusia*, No. 1749/2008. 31 de Octubre de 2011, párr. 7.3. ("Given the fact that under article 1 of the Optional Protocol only individuals may submit a communication to the Committee, it considers that the author, by claiming violations of the rights of the Religious Union, which are not protected by the Covenant, has no standing under article 1 of the Optional Protocol") .

[87] CDH, *Observación General No. 31*. 26 de mayo de 2004, párr. 9..

[88] CDH, *A newspaper publishing Company Vs. Trinidad y Tobago*, No. 360/1989. 14 de julio de 1989, párr. 3.2. ("A company incorporated under the laws of a State party to the Optional Protocol, as such, has no standing under article 1, regardless of whether its allegations appear to raise issues under the Covenant."); *A publication Company and A printing Company Vs. Trinidad y Tobago*, No. 361/1989. 14 de julio de 1989, y *J.R.T. y el Partido W.G. Vs. Canadá*, No. 104/1981. 6 abril de 1983.

[89] CDH, *A Group of Association For the Defence of The Rights of Disabled and Handicapped Persons in Italy Vs. Italia*, No. 163/1984. 10 de Abril de 1984, párr. 6.2.

[90] Por ejemplo, el artículo 2.1.a de la Convención establece que: "1. Los Estados partes condenan la discriminación racial y se comprometen a seguir, por todos los medios apropiados y sin dilaciones, una política encaminada a eliminar la discriminación racial en todas sus formas y a promover el entendimiento entre todas las razas, y con tal objeto: a) Cada Estado parte se compromete a no incurrir en ningún acto o práctica de discriminación

para la Eliminación de la Discriminación Racial (en adelante CERD) ha establecido que las personas jurídicas pueden denunciar violaciones que afecten sus derechos, siempre y cuando éstas hayan sido perjudicadas y puedan considerarse víctimas del caso[91]. En este sentido, el CERD ha reconocido la capacidad de las personas jurídicas de presentar denuncias por concepto de violaciones a sus propios derechos y también por violaciones a los derechos de sus miembros, accionistas y propietarios, tanto de manera individual como colectiva[92].

61. En cuanto a otros instrumentos internacionales, como lo son el Pacto Internacional de Derechos Económicos, Sociales y Culturales (en adelante "PIDESC") y la Convención sobre la Eliminación de todas las formas de Discriminación contra la Mujer (en adelante "CEDAW"), este Tribunal constata que éstos no cuentan con artículos similares al artículo 1.2 de la Convención Americana o que otorguen derechos a otro tipo de personas. Además, la Corte corrobora que el Comité de Derechos Económicos, Sociales y Culturales no ha emitido jurisprudencia relevante para esta discusión, mientras que en el caso del Comité para la Eliminación de la Discriminación contra la Mujer no se han presentado hasta la fecha denuncias de parte de personas jurídicas. No obstante lo anterior, la Corte denota que tanto el artículo 2 del Protocolo Facultativo de la CEDAW[93], como el artículo 2 del Protocolo adicional al PIDESC[94] establecen que los "grupos de personas" sí pueden presentar denuncias en nombre de individuos o grupos de individuos, siempre y cuando estos individuos aleguen, a su vez, el estatus de víctima de una violación de los derechos otorgados por las Convenciones.

d) Conclusión sobre los tribunales y organismos internacionales

62. Una vez realizado el anterior recuento, la Corte nota que en la mayoría de los sistemas analizados no se les reconocen derechos a las personas jurídicas, salvo en el sistema europeo (*supra* párr. 53) y en el marco del CERD (*supra* párr. 60). Asimismo, este Tribunal resalta que los tratados de derechos humanos que han sido estudiados no cuentan con una norma que defina cómo se debe entender el término "persona", por lo que el artículo 1.2 de la Convención Americana es una particularidad del sistema interamericano. Teniendo en cuenta esto, la Corte estima que actualmente en el derecho internacional de los derechos humanos no existe una tendencia clara, interesada en otorgar derechos a las personas jurídicas o en permitirles acceder como víctimas a los procesos de peticiones individuales que establezcan los tratados.

ii) Reconocimiento de derechos a personas jurídicas en el derecho interno

63. Al efectuar una interpretación evolutiva, la Corte ha otorgado especial relevancia al derecho comparado, razón por la cual ha utilizado normativa nacional[95] o jurisprudencia de

racial contra personas, grupos de personas o instituciones y a velar por que todas las autoridades públicas e instituciones públicas, nacionales y locales, actúen en conformidad con esta obligación".

91 CERD, *The Documentation and Advisory Centre on Racial Discrimination (DACRD) Vs. Dinamarca*, No. 28/2003. Declarado inadmisible el 26 de agosto de 2003, párr.6.4, y CERD, *Caso La Comunidad Judía de Oslo y Otros Vs. Noruega,* No. 30/2003. 15 de agosto de 2005, párr. 7.4.

92 CERD, *TBB-Turkish Union in Berlin/Brandenburg Vs. Alemania*, No. 48/2010. 26 de fbrero de 2013, párrs. 11.2 y 11.3.

93 Artículo 2. "Las comunicaciones podrán ser presentadas por personas o grupos de personas que se hallen bajo la jurisdicción del Estado Parte y que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de los derechos enunciados en la Convención, o en nombre de esas personas o grupos de personas. Cuando se presente una comunicación en nombre de personas o grupos de personas, se requerirá su consentimiento, a menos que el autor pueda justificar el actuar en su nombre sin tal consentimiento".

94 Artículo 2. Comunicaciones: "Las comunicaciones podrán ser presentadas por personas o grupos de personas que se hallen bajo la jurisdicción de un Estado Parte y que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de los derechos económicos, sociales y culturales enunciados en el Pacto. Para presentar una comunicación en nombre de personas o grupos de personas se requerirá su consentimiento, a menos que el autor pueda justificar que actúa en su nombre sin tal consentimiento".

95 *Caso Artavia Murillo y Otros ("Fecundación In Vitro") Vs. Costa Rica*, párr. 245. Ver adicionalmente en la materia: *Caso Kawas Fernández Vs. Honduras. Fondo, Reparaciones y Costas.* Sentencia de 3 de Abril de 2009. Serie C No. 196, párr. 148.

tribunales internos[96] a la hora de analizar controversias específicas en los casos contenciosos. Por su parte, el Tribunal Europeo[97] ha utilizado el derecho comparado como un mecanismo para identificar la práctica posterior de los Estados, es decir, para especificar el contexto de un determinado tratado. Con la finalidad de verificar la práctica de los Estados Parte de la Convención Americana se expondrán a continuación los países en que se han reconocido derechos fundamentales a las personas jurídicas.

64. Al respecto, la Corte constata que en todos los países que han ratificado la jurisdicción de la Corte se reconocen directamente derechos fundamentales a las personas jurídicas, que pueden coincidir con aquellos consagrados en la Convención Americana. Según la información analizada por este Tribunal, los derechos que comúnmente[98] se le reconocen a las personas jurídicas son los de propiedad[99], libertad de expresión[100], petición[101] y asociación[102]. Asimismo, la Corte observa que estos derechos no necesariamente se garantizan para todo tipo de

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96 *Caso Artavia Murillo y Otros ("Fecundación In Vitro") Vs. Costa Rica*, párr. 245. En los casos *Heliodoro Portugal Vs. Panamá (párr. 111)* y *Tiu Tojín Vs. Guatemala (párr. 87)*, la Corte tuvo en cuenta sentencias de tribunales internos de Bolivia, Colombia, México, Panamá, Perú, y Venezuela sobre la imprescriptibilidad de delitos permanentes como la desaparición forzada. Además, en el Caso *Anzualdo Castro Vs. Perú (párrs. 100-101)*, la Corte utilizó pronunciamientos de tribunales constitucionales de países americanos para apoyar la delimitación que ha realizado al concepto de desaparición forzada. Otros ejemplos son los casos *Atala Riffo y Niñas Vs. Chile (a modo de ejemplo ver párr. 92)* y el *Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador* (ver por ejemplo párr. 159-164)

97 *Caso Artavia Murillo y Otros ("Fecundación In Vitro") Vs. Costa Rica*, párr. 245. Por ejemplo en el caso TV Vest As & Rogoland Pensionistparti contra Noruega, el Tribunal Europeo tuvo en cuenta un documento del "European Platform of Regulatory Authorities" en el cual se realizaba una comparación de 31 países en esa región, con el fin de determinar en cuáles de ellos se permitía la publicidad política pagada o no y en cuáles este tipo de publicidad era gratuita. De igual manera, en el caso Hirst v. Reino Unido dicho Tribunal tuvo en cuenta la "normatividad y práctica de los Estados Parte" con el fin de determinar en qué países se permite suprimir el sufragio activo a quien ha sido condenado por un delito, por lo que se estudió la legislación de 48 países europeos.

98 Otros derechos que la Corte constató que se le reconocen a personas jurídicas en la región son, *inter alia*: a las garantías judiciales, al debido proceso, a la legalidad, de audiencia, a la seguridad jurídica, a la información pública , de reunión, a la inviolabilidad de la correspondencia y demás formas de comunicación privada, a la inviolabilidad de domicilio, a solicitar la rectificación, actualización, inclusión o supresión de los datos personales que le corresponda, a la personalidad, al libre desarrollo de la personalidad, a la libertad de enseñanza , a la libertad religiosa o de creencias, a la libertad de contratación, a la libertad de trabajo, a libertad de empresa, comercio e industria, a la libre competencia, a fundar medios de comunicación, a fundar centros educativos, a la igualdad, al buen nombre, a la honra , y al habeas data.

99 Al respecto ver: Artículo 16 Constitución de Barbados; artículos 14, 56, y 315.I de la Constitución Política del Estado Plurinacional de Bolivia; Sentencia No. T-396/93 de la Corte Constitucional de Colombia, 16 de septiembre 1993; Sentencia: 00128 Expediente: 98-000128-0004-CI, Sala Primera de la Corte Suprema de Costa Rica, 16 de diciembre de 1998 ; artículo 2 de la Constitución de El Salvador y Sentencia de 9 de marzo de 2011, Sala de lo Constitucional de la Corte Suprema de Justicia, Proceso de Amparo 948-2008; artículo 39 de la Constitución Política de la República de Guatemala; artículo 36 de la Constitución de la República de Haití; Suprema Corte de Justicia de la Nación de México, Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21 de abril de 2014; artículos 103 de la Constitución Política de la República de Nicaragua; Exp. n.° 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. y Persolar S.A.C. Sentencia del Tribunal Constitucional del Perú; artículo 47 de la Constitución Política de la República de Panamá; artículo 34 de la Constitución de Surinam, y Sentencia TC/0242/13, Tribunal Constitucional de República Dominicana, 29 de noviembre de 2013.

100 Al respecto ver: Artículo 35 de la Constitución Política de la República de Guatemala; Sentencia No. T-396/93, Corte Constitucional de Colombia, 16 de septiembre 1993; Exp. n.° 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. y Persolar S.A.C. Sentencia del Tribunal Constitucional del Perú, y artículo 26 de la Constitución Nacional de Paraguay.

101 Al respecto ver: Sentencia No. T-396/93, Corte Constitucional de Colombia, 16 de septiembre 1993; sentencia de 7 de noviembre de 2008, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Proceso de amparo 103-2006; artículo 80 de la Constitución de Honduras; Suprema Corte de Justicia de la Nación de México Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21 de abril de 2014; Exp. n.° 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. y Persolar S.A.C. Sentencia del Tribunal Constitucional del Perú; artículo 41 de la Constitución Política de la República de Panamá, y artículo 40 de la Constitución Nacional de Paraguay.

102 Artículo 34 de la Constitución Política de la República de Guatemala; Sentencia No. T-396/93, Corte Constitucional de Colombia, 16 de septiembre 1993; Sentencia con número de Expediente: 08-007986-0007-CO, Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, 8 de septiembre de 2009; Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Proceso Constitucional 23-R-96, Ramírez y Marcelino vrs. Concejo Municipal de San Juan Opico, sentencia de 8 de octubre de 1998; artículo 31 y 31.1 de la Constitución de la República de Haití; Suprema Corte de Justicia de la Nación de México, Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21 de abril de 2014, y Exp. n.° 4972-2006-PA/TC, La Libertad, Corporación Meier S.A.C. y Persolar S.A.C. Sentencia del Tribunal Constitucional del Perú.

personas jurídicas, dado que algunos están orientados a proteger tipos especiales de las mismas, como es el caso de algunos derechos que les son otorgados únicamente a los sindicatos[103], a los partidos políticos[104], a los pueblos indígenas[105], a las comunidades afrodescendientes[106] o a instituciones o grupos específicos[107].

65. Asimismo, la Corte nota que en gran parte de los países de la región a las personas jurídicas se les otorga la posibilidad de interponer una acción de amparo o recursos análogos en defensa de los derechos que les son reconocidos[108].

66. Por otra parte, este Tribunal observa que de los seis Estados que presentaron observaciones escritas, tres de ellos - Argentina[109], Colombia[110] y Guatemala[111]- manifestaron

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[103] Bolivia (artículo 51 de la Constitución Política); Brasil (artículos 8, 74.IV. § 2º, y 103 IX de la Constitución Política); Honduras (artículo 128.14 de la Constitución Política); Nicaragua (artículo 87 Constitución Política); Panamá (artículos 68 y 69 de la Constitución Política); Paraguay (artículos 96-98 Constitución Nacional); Perú (artículos 28 y42 de la Constitución Política), y Surinam (artículo 32 de la Constitución).

[104] Argentina (artículo 38 de la Constitución Nacional); Brasil (artículos 17, 74.IV. § 2º, y 103.VIII de la Constitución Política); Colombia (artículos 107 y 108 de la Constitución Política); Haití (artículo 31.1 de la Constitución); Honduras (artículo 47 de la Constitución Política), Nicaragua (artículos 55, 173.7, 173.11, 173.12, 173.13 de la Constitución Política); Panamá (artículo 140 de la Constitución Política); Paraguay (artículos 124-126 de la Constitución Nacional), y Perú (artículo 35 de la Constitución Política).

[105] Bolivia (artículos 30 y 32 entre otros de la Constitución Política); Brasil (artículos 231, y 232 de la Constitución Política); Colombia (artículo 329 de la Constitución Política); Nicaragua (artículos 121 y 103 de la Constitución Política); Panamá (artículos 124 y 127 de la Constitución Política), y Paraguay (artículos 62-67 de la Constitución Nacional)

[106] Bolivia (artículos 32,100.I y 395.I de la Constitución Política), y Nicaragua (artículos 89, 90 y 121 de la Constitución Política).

[107] En Perú, por ejemplo, se reconoce el derecho a la inafectación de todo impuesto que afecte bienes, actividades o servicios propios en el caso de las universidades, institutos superiores y demás centros educativos (artículo 19 de la Constitución Política). En Chile, se le otorga derecho a las iglesias, confesiones e instituciones religiosas con respecto a los bienes que otorgan y reconocen las leyes en vigor (artículo 19.6 de la Constitución Política). En Nicaragua a los centros educativos privados de orientación religiosa a impartir religión como materia extracurricular, así como a las universidades y centros de educación técnica superior a gozar de autonomía académica, financiera, orgánica y administrativa, y exención de impuestos. Los bienes y rentas de las universidades y centros de educación técnica superior no pueden ser objeto de intervención, expropiación ni embargo, se garantiza la libertad de cátedra, el Estado promueve y protege la libre creación, investigación y difusión de las ciencias, la tecnología, las artes y las letras, y garantiza y protege la propiedad intelectual (artículos 124 y 125 de la Constitución Política); también en Nicaragua, se establece la exención de impuestos en relación con importaciones específicas que hagan los medios de comunicación social así como la prohibición de censurarlos previamente (artículo 68 de la Constitución Política); asimismo, en Nicaragua se otorga el derecho a "los campesinos y demás sectores productivos" a participar mediante sus propias organizaciones en la definición de políticas de transformación agraria (artículos 108 y 111 de la Constitución Política). En Panamá se le reconoce derechos a la Universidad Oficial de Panamá (artículos 103 y 104 de la Constitución Política).

[108] Argentina (Artículo 43 de la Constitución Nacional. Adicionalmente ver Ley N°16.986 o Ley Reglamentaria de la Acción de Amparo, artículo 5); Bolivia (artículo 128 y 129 de la Constitución Política. Ver también Sentencia 0763/2011 R, Tribunal Constitucional del Bolivia, 20 de mayo de 2011); Brasil (Artículo 5, LXX de la Constitución Política); Chile (artículo 20 de la Constitución Política); Colombia (Sentencia T-411/92, Corte Constitucional de Colombia, 17 de junio de 1992); Costa Rica (artículo 48 de la Constitución Política y artículos 57 y 58 de la Ley de la Jurisdicción Constitucional, Ley N°7135); Ecuador (artículos 86 y 88 de la Constitución Política, artículo 9 de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional. También ver sentencia N°001-14-PJO-CC, Caso N° 0067-11-JD, Corte Constitucional del Ecuador, 23 de abril de 2014); El Salvador (artículo 247 de la Constitución. En relación ver la sentencia de 9 de marzo de 2011, Sala de lo Constitucional de la Corte Suprema de Justicia, Proceso de Amparo 948-2008); Honduras (artículo 183 de la Constitución Política y artículo 44 de la Ley sobre Justicia Constitucional); México (artículos 8 y 9 de la Ley de Amparo. Ver al respecto: Suprema Corte de Justicia de la Nación de México, Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21 de abril de 2014); Nicaragua (artículo 45 de la Constitución y artículo 23 de la Ley de Amparo, Ley N°49); Paraguay (artículo 134 de la Constitución Nacional y artículos 4 y 5 de la Ley N°340/71 que reglamenta el Amparo); Perú (artículo 200 de la Constitución Política y artículo 26 de la Ley de Habeas Corpus y Amparo, Ley N°23506); República Dominicana (artículo 72 de la Constitución Dominicana, artículo 2 de la Ley N°437-06 que establece el Recurso de Amparo y artículo 67 de la Ley N°137-11 del Tribunal Constitucional y de los Procedimientos Constitucionales), y Uruguay (artículo 1 de la Ley 16011, Regulación de Disposiciones relativa a la Acción de Amparo).

[109] Al respecto, el Estado argentino manifestó que "el artículo 1 (2) excluye toda posibilidad de que una persona jurídica se presente como víctima ante los órganos de protección del Sistema Interamericano. Se trata de una disposición que ha sido concebida con el claro sentido de restringir el acceso al Sistema exclusivamente a las personas físicas". Observaciones escritas del Estado argentino (expediente de fondo, folio 1918).

expresamente su posición, según la cual el artículo 1.2 de la Convención no confiere titularidad de derechos a las personas jurídicas. Además, el Estado mexicano[112] se sumó a esta posición durante su participación en la audiencia pública de la presente solicitud.

67. Teniendo en cuenta lo anterior, la Corte considera que, a pesar de que pareciera que existe una disposición en los países de la región para reconocer la titularidad de derechos a las personas jurídicas y otorgarles recursos para hacerlos efectivos, lo cierto es que estos antecedentes no son suficientes, por cuanto no todos los Estados realizan el reconocimiento de la misma forma y el mismo grado. Adicionalmente, este Tribunal nota que ésta es la posición que los Estados ostentan en su derecho interno, razón por la cual no es posible modificar el alcance del artículo 1.2 de la Convención Americana a partir de este método interpretativo.

E. Métodos complementarios de interpretación

68. Según el artículo 32 de la Convención de Viena, los medios complementarios de interpretación, en especial los trabajos preparatorios del tratado, son utilizables, *inter alia,* para confirmar el sentido resultante de la interpretación realizada de conformidad con los métodos señalados en el artículo 31[113]. Lo anterior, implica que suelen ser utilizados sólo en forma subsidiaria[114].

69. Al respecto, la Corte estima que los trabajos preparatorios confirman el sentido en que se ha venido interpretando el artículo 1.2 de la Convención, dado que en ellos se utilizaron los términos "persona" y "ser humano" sin la intención de hacer una diferencia entre estas dos expresiones[115], por lo que deben ser consideradas sinónimos. En efecto, los trabajos preparatorios denotan que este inciso fue propuesto desde un inicio[116] y que no hubo mayor controversia entre los Estados para su aprobación[117].

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110 Colombia afirmó que "a la luz del derecho internacional vigente para la región americana, la idea de otorgarle derechos humanos a las personas jurídicas derivados de los instrumentos internacionales que componen el SIDH no es admisible por resultar contraria a los preceptos legales que rigen el Sistema mismo". Observaciones escritas del Estado colombiano (expediente de fondo, folio 1863).

111 El Estado guatemalteco indicó que "de ninguna manera pueden ser reconocidos derechos humanos a las personas jurídicas o colectivas dentro del Marco de la Declaración Americana sobre Derechos y Deberes del Hombre, de la Convención Americana […] y de sus Protocolos o instrumentos internacionales complementarios". Observaciones escritas del Estado guatemalteco (expediente de fondo, folio 1538).

112 Mexicó señaló que "el artículo 1.2 […] señala que para los efectos de la Convención Americana persona es todo ser humano, lo expresado literalmente en el artículo 1.2 tiene efectos que van mucho más allá del ejercicio de interpretación, ya que constituye una manifestación expresa de la voluntad de las partes signatarias a la Convención Americana para definir el término persona, única y exclusivamente podría significar todo ser humano". Observaciones orales del Estado mexicano en la audiencia pública de la presente opinión consultiva.

113 *Cfr.* Opinión Consultiva OC-3/83, párr. 49, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 193.

114 *Cfr. Caso González y otras (*"Campo *Algodonero") Vs. México*, párr. 68, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 193.

115 *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica*, párr. 219.

116 La propuesta inicial del artículo 1 establecía que: Artículo 1

1. Los Estados Partes en esta Convención se comprometen a respetar los derechos y libertades reconocidos en ella y a garantizar su libre y pleno ejercicio a toda persona que esté sujeta a su jurisdicción sin discriminación alguna por motivo de raza, color, sexo, idioma, religión, opiniones políticas o de cualquier otra índole, origen nacional o social, posición económica, nacimiento o cualquier otra condición social.

2. También se comprometen a adoptar con arreglo a sus procedimientos constitucionales y a las disposiciones de esta Convención, las medidas oportunas para dictar las disposiciones legislativas o de otro carácter que fueron necesarias para hacer efectivos esos derechos y que no estuviesen ya garantizados por disposiciones legislativas o de otra naturaleza.

3. Para los efectos de esta Convención, persona es todo ser humano.

Acta de la segunda sesión de la Comisión I, Doc. 36, 11 de noviembre de 1969, p. 156.

117 En los trabajos preparatorios consta lo siguiente:" El PRESIDENTE p[uso] a consideración el párrafo 3 del artículo 1, el cual, después de un breve cambio de opiniones, es aprobado por unanimidad, en la forma siguiente: 3. Para los efectos de esta Convención, persona es todo ser humano". Convención Acta de la segunda sesión de la Comisión I, Doc. 36, 11 de noviembre de 1969, p. 157.

F. Conclusión sobre la interpretación

70. Habiendo empleado en forma simultánea y conjunta los distintos criterios hermenéuticos establecidos en los artículos 31 y 32 de la Convención de Viena, la Corte concluye que de una interpretación del artículo 1.2 de la Convención Americana, de buena fe, acorde con el sentido natural de los términos empleados en la Convención (*supra* párrs. 37 a 39) y teniendo en cuenta el contexto (*supra* párrs. 44 a 67) y el objeto y fin de la misma (*supra* párrs. 40 a 43), se desprende con claridad que las personas jurídicas no son titulares de derechos convencionales, por lo que no pueden ser consideradas como presuntas víctimas en el marco de los procesos contenciosos ante el sistema interamericano.

VI
LAS COMUNIDADES INDÍGENAS Y TRIBALES Y LAS ORGANIZACIONES SINDICALES

71. La Corte ya ha establecido en esta Opinión Consultiva (*supra* párr. 70) que el artículo 1.2 de la Convención Americana no atribuye a las personas jurídicas la titularidad de derechos reconocidos en la Convención Americana, sin perjuicio de la denominación que estas reciban en el derecho interno de los Estados tales como cooperativas, sociedades o empresas. Sin embargo, en razón de las preguntas planteadas por el Estado de Panamá, varias de las observaciones escritas y orales que fueron presentadas a lo largo del proceso de la solicitud expresaron que sería posible realizar una interpretación amplia de otras disposiciones de la Convención y del Protocolo de San Salvador que le concedería titularidad de derechos a las comunidades indígenas y a las organizaciones sindicales. Con el fin de identificar si efectivamente las comunidades indígenas y las organizaciones sindicales podrían ser titulares de derechos protegidos por el sistema interamericano, la Corte hará referencia a la normatividad interamericana en la materia para luego realizar sus consideraciones al respecto.

i) Comunidades indígenas y tribales

72. A continuación, la Corte, como intérprete última de la Convención[118], reitera su jurisprudencia según la cual las comunidades indígenas son titulares de derechos protegidos por el sistema interamericano y pueden presentarse ante este en defensa de sus derechos y los de sus miembros. Para ello, se hará referencia a la jurisprudencia de la Corte sobre la materia, así como a las algunas de las fuentes de derecho internacional e interno en la materia que este Tribunal estima coadyuvan a su jurisprudencia.

73. En una primera etapa, al declarar violaciones de derechos humanos en los casos relacionados con comunidades indígenas o tribales, la Corte consideraba únicamente como sujetos de derecho a los miembros de las comunidades y no a estas últimas como tal[119]. Por ello, se declaraba como víctimas a las personas individuales y no la colectividad a la que pertenecían.

74. En el año 2012, en el Caso *Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador* por primera vez la Corte reconoció como titulares de derechos protegidos en la Convención no solo a los miembros de una comunidad indígena sino a ésta en sí misma[120]. En dicho caso, este

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118 Caso Artavia Murillo y Otros ("Fecundación In Vitro") Vs. Costa Rica, párr. 171.

119 *Cfr. Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas*. Sentencia de 31 de agosto de 2001. Serie C No. 79; *Caso de la Comunidad Moiwana Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia 15 de junio de 2005. Serie C No. 124; *Caso Comunidad Indígena Yakye Axa Vs. Paraguay*. *Fondo Reparaciones y Costas*. Sentencia de 17 de junio de 2005. Serie C No. 125; *Caso Comunidad Indígena Sawhoyamaxa Vs. Paraguay*. Fondo, Reparaciones y Costas. Sentencia de 29 de marzo de 2006. Serie C No. 146; *Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 de noviembre de 2007. Serie C No. 172, y *Caso Comunidad Indígena Xákmok Kásek. Vs. Paraguay. Fondo, Reparaciones y Costas*. Sentencia de 24 de agosto de 2010 Serie C No. 214.

120 *Cfr. Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador. Fondo y reparaciones*. Sentencia de 27 de junio de 2012. Serie C No. 245, puntos declarativos 2 a 4.

Tribunal consideró que se habían violado los derechos del pueblo indígena Kichwa de Sarayaku a la consulta, a la propiedad comunal indígena, a la identidad cultural, a las garantías judiciales y a la protección judicial. Asimismo, sostuvo que el Estado era responsable por haber puesto gravemente en riesgo los derechos a la vida e integridad personal de los miembros de la comunidad. En este sentido, la Corte manifestó que hay algunos derechos que los miembros de las comunidades indígenas gozan por sí mismos, mientras que hay otros derechos cuyo ejercicio se hace en forma colectiva a través de las comunidades.

75. Además, en el referido caso la Corte estableció que, "[e]n anteriores oportunidades, en casos relativos a comunidades o pueblos indígenas y tribales el Tribunal ha declarado violaciones en perjuicio de los integrantes o miembros de las comunidades y pueblos indígenas o tribales. Sin embargo, la normativa internacional relativa a pueblos y comunidades indígenas o tribales reconoce derechos a los pueblos como sujetos colectivos del Derecho Internacional y no únicamente a sus miembros. Puesto que los pueblos y comunidades indígenas o tribales, cohesionados por sus particulares formas de vida e identidad, ejercen algunos derechos reconocidos por la Convención desde una dimensión colectiva"[121]. Para concluir que las comunidades indígenas y tribales son reconocidas como sujetos de derechos, la Corte tuvo en cuenta que a nivel internacional se dio un desarrollo a través del cual diversos tratados y jurisprudencia de otros órganos internacionales han sostenido la titularidad de derechos por parte de las comunidades indígenas.

76. Este Tribunal ha reiterado desde entonces la titularidad de derechos por parte de las comunidades indígenas en sus recientes casos. Así por ejemplo, en el *Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá*, la Corte concluyó que el Estado había violado el derecho a la propiedad[122], el deber de adoptar disposiciones de derecho interno[123], y derecho al plazo razonable[124] de la Convención Americana en perjuicio de las comunidades Kuna de Madungandí y Emberá de Bayano y de sus miembros; y el derecho a un recurso judicial efectivo[125] en perjuicio de las comunidades indígenas Emberá y sus miembros. Recientemente, en los casos *Comunidad Garífuna Triunfo De La Cruz Y Sus Miembros*[126] *y Caso Comunidad Garífuna De Punta Piedra Y Sus Miembros*[127] *ambos Vs. Honduras*, la Corte declaró las violaciones a los derechos a la propiedad, a las garantías judiciales y a la protección judicial en perjuicio de las respectivas comunidades. Asimismo, en el *Caso de las Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) Vs. Colombia*, la Corte encontró que el Estado había violado los derechos de circulación y residencia, y a la integridad personal, en perjuicio de las comunidades afrodescendientes de la cuenca del río Cacarica[128].

77. Igualmente, es relevante indicar que la Corte ya ha establecido que las comunidades indígenas y los pueblos tribales comparten "características sociales, culturales y económicas

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121 *Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador*, párr. 231.

122 *Cfr. Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 14 de octubre de 2014. Serie C No. 284, punto resolutivo 4.

123 *Cfr. Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá*, punto resolutivo 5.

124 *Cfr. Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 14 de octubre de 2014. Serie C No. 284, punto resolutivo 6.

125 *Cfr. Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá*, párr. 173.

126 *Cfr. Caso Comunidad Garífuna Triunfo de la Cruz y sus Miembros Vs. Honduras. Fondo, Reparaciones y Costas*. Sentencia de 08 de octubre de 2015. Serie C No. 305.

127 *Cfr. Caso Comunidad Garífuna de Punta Piedra y sus Miembros Vs. Honduras. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 08 de octubre de 2015. Serie C No. 304.

128 *Cfr. Caso de las Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) Vs. Colombia. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 20 de noviembre de 2013. Serie C No. 270, punto resolutivo 4.

distintivas, incluyendo la relación especial con sus territorios ancestrales, que requiere medidas especiales conforme al derecho internacional de los derechos humanos a fin de garantizar la supervivencia física y cultural de dicho pueblo"[129]. En razón de las características comunes entre las comunidades indígenas y los pueblos tribales, la Corte considera que las conclusiones que se señalen en este capítulo respecto al acceso al sistema interamericano de protección de derechos humanos, aplican asimismo a los dos tipos de comunidades.

78. Además de la jurisprudencia indicada anteriormente, la Corte resalta que el Convenio No. 169 de la OIT[130] y la Declaración de las Naciones Unidas sobre Derechos de los Pueblos Indígenas[131] de 2007 reconocen la titularidad de derechos humanos tanto a las comunidades indígenas como a sus miembros.

79. Por otra parte, el artículo 1 común a los Pactos Internacionales de Derechos Civiles y Políticos y de Derechos Económicos, Sociales y Culturales, consagra el derecho a la libre determinación y señala que, en virtud del mismo, todos los pueblos "establecen libremente su condición política y proveen asimismo a su desarrollo económico, social y cultural". Para ello, "pueden disponer libremente de sus riquezas y recursos naturales, sin perjuicio de las obligaciones que derivan de la cooperación económica internacional […] así como del derecho internacional. En ningún caso podrá privarse a un pueblo de sus propios medios de subsistencia"[132]. El Comité que supervisa la implementación del Pacto Internacional de Derechos Económicos, Sociales y Culturales por los Estados Parte ha interpretado que el derecho a la libre determinación es aplicable a las comunidades indígenas[133].

80. El referido Comité, en relación con el artículo 15.1.a, indicó que la expresión "toda persona" "se refiere tanto al sujeto individual como al sujeto colectivo. En otras palabras, una persona puede ejercer los derechos culturales: a) individualmente; b) en asociación con otras; o c) dentro de una comunidad o un grupo"[134].

81. Ahora bien, además de los estándares de derecho internacional anteriormente citados, la Corte nota que la titularidad de derechos de las comunidades indígenas y tribales también es reconocida a nivel interno en varios países de la región a través de sus Constituciones, legislación o por vía jurisprudencial[135]. Dicha protección a nivel interno busca coadyuvar al cumplimiento de las obligaciones internacionales que los Estados han asumido en la materia.

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129 *Cfr. Caso del Pueblo Saramaka. Vs. Surinam*, párr. 86.

130 El artículo 3.1 del Convenio dispone que "[l]os pueblos indígenas y tribales deberán gozar plenamente de los derechos humanos y libertades fundamentales, sin obstáculos ni discriminación [y que l]as disposiciones de es[e] Convenio se aplicarán sin discriminación a los hombres y mujeres de esos pueblos". Convenio sobre pueblos indígenas y tribales en países independientes, N° 169 de 5 septiembre 1991.

131 El artículo 1 de la Declaración señala que "[l]os indígenas tienen derecho, como pueblos o como personas, al disfrute pleno de todos los derechos humanos y las libertades fundamentales reconocidos por la Carta de las Naciones Unidas, la Declaración Universal de Derechos Humanos y la normativa internacional de los derechos humanos". Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas. Resolución 61/295 aprobada por la Asamblea General en su 107a. sesión plenaria, 13 de septiembre de 2007.

132 Pacto Internacional de Derechos Civiles y Políticos, adoptado por la Asamblea General en su resolución 2200 A (XXI) de 16 de diciembre de 1966, entrada en vigor: 23 de marzo de 1976, y Pacto Internacional de Derechos Económicos, Sociales y Culturales, adoptado por la Asamblea General en su resolución 2200 A (XXI) de 16 de diciembre de 1966, entrada en vigor: 3 de enero de 1976.

133 *Cfr.* ONU, Comité de Derechos Económicos, Sociales y Culturales, *Consideración de Informes presentados por Estados Partes bajo los Artículos 16 y 17 del Pacto. Observaciones Finales sobre la Federación Rusa (trigésimo primera sesión). N.U. Doc.* E/C.12/1/Add.94, 12 de diciembre de 2003, párr. 11 y *Caso del Pueblo Saramaka. Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 de noviembre de 2007. Serie C No. 172, párr. 93.

134 Observación general Nº 21 de 2009, *Derecho de toda persona a participar en la vida cultural (artículo 15, párrafo 1 a), del Pacto Internacional de Derechos Económicos, Sociales y Culturas)*, párr. 9.

135 Un recuento no exhaustivo de dichos derechos se hace a continuación. El reconocimiento de la capacidad de las comunidades indígenas de contraer obligaciones y adquirir derechos como colectividades se consagra en países como Paraguay, Argentina, Colombia y Costa Rica. Tienen además en países como Paraguay, Bolivia, Colombia y Perú derecho a su identidad religiosa y cultural y, de esta manera, a su cosmovisión, lengua, prácticas, costumbres y tradiciones. El derecho a la propiedad colectiva de sus tierras es reconocido en varios países tales como Argentina,

82. Con base en lo expuesto anteriormente, la Corte reitera que ya ha reconocido a las comunidades indígenas y tribales como sujetos de derecho en razón de la actual evolución del derecho internacional en la materia (*supra* párr. 72). Asimismo, este Tribunal considera relevante hacer notar que a nivel interno dicha titularidad se refleja en varios países de la región. En este sentido, la titularidad de derechos humanos, en ambos ámbitos, no se ha dado únicamente a sus miembros en forma personal sino igualmente respecto a las comunidades en tanto colectividades. De dicha protección se desprende que en la medida en que el ejercicio de algunos de derechos de los miembros de las comunidades indígenas y tribales se realiza conjuntamente, la violación de dichos derechos tiene una dimensión colectiva[136] y no puede circunscribirse a una afectación individual. Las afectaciones aludidas acarrearán entonces consecuencias para todos los miembros de la comunidad y no únicamente para algunos determinados en una situación específica.

83. De acuerdo a lo anterior, la Corte concluye que, por disponerlo varios instrumentos jurídicos internacionales, de los que son partes los Estados del sistema interamericano, y algunas de sus legislaciones nacionales, las comunidades indígenas y tribales, por encontrarse en una situación particular, deben ser consideras como titulares de ciertos derechos humanos. Adicionalmente, ello se explica en atención a que, en el caso de los pueblos indígenas su identidad y ciertos derechos individuales, como por ejemplo el derecho a la propiedad o a su territorio, solo pueden ser ejercidos por medio de la colectividad a la que pertenecen.

84. Por consiguiente, la Corte reitera que las comunidades indígenas y tribales son titulares de algunos de los derechos protegidos en la Convención y, por tanto, pueden acceder ante el sistema interamericano. Por ello, la Corte no encuentra razones para apartarse de su criterio jurisprudencial en la materia y establece que las referidas comunidades pueden acceder de manera directa al sistema interamericano, como lo han venido haciendo en los últimos años, en la búsqueda de protección de sus derechos humanos y los de sus integrantes, no siendo necesario que cada uno de estos últimos se presente individualmente para tal fin.

Bolivia, Brasil, Colombia, Costa Rica, Nicaragua, Panamá, Paraguay y Perú. En países como Bolivia, Panamá y Paraguay tienen también el derecho a participar de manera económica, social y política en la vida de la nación. Su derecho a la educación intercultural está consagrado en países como Argentina, Bolivia, Nicaragua, Paraguay. En países como Bolivia, Colombia, Paraguay, Perú estas comunidades son titulares además del derecho a definir libremente sus sistemas organizativos e institucionales. Además, las comunidades indígenas son titulares de mecanismos que pueden ejercer en defensa de sus derechos en tanto colectividades en países como Brasil, Colombia, Ecuador. Asimismo, en países como Bolivia, Nicaragua y Colombia se reconocen derechos al pueblo afroboliviano, las comunidades de la Costa Caribe y la comunidad afrocolombia respectivamente. *Cfr. Caso Comunidad Indígena Xákmok Kásek. Vs. Paraguay*, párr. 14, y *Caso de las Comunidades Afrodescendientes Desplazadas de la Cuenca del Río Cacarica (Operación Génesis) Vs. Colombia*, párr. 347. Además consultar: artículos 62 y 63 de la Constitución Nacional de Paraguay; artículo 75.17 de la Constitución de Argentina; artículos 30 y 32 de la Constitución de Bolivia; artículo 9 de la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional; artículos 107 y 121 de la Constitución de Nicaragua; artículo 231 de la Constitución de Brasil; artículo 329 de la Constitución Política de Colombia; Sentencia C-463/14 de la Corte Constitucional de Colombia; Sentencia T-704/06 de la Corte Constitucional de Colombia; Sentencia de la Sala Primera del Tribunal Constitucional del Perú, *Ucayali Comunidad Nativa Sawawo Hito 40 representada por Juan García Campos*, EXP. N.° 04611-2007-PA/TC de 9 de abril de 2010, párrs. 8 y 9; artículos 124 y 127 de la Constitución de Panamá, y artículos 1 y 2 de la Ley Nº 6172 Ley indígena de la Asamblea Legislativa de la República de Costa Rica.

136 En relación con la dimensión colectiva de la vulneración, por ejemplo, el Decreto 4633 de 2011 de la Presidencia de la República de Colombia "Por medio del cual se dictan medidas de asistencia, atención, reparación integral y de restitución de derechos territoriales a las víctimas pertenecientes a los Pueblos y Comunidades indígenas", señala en su artículo 42 que, para efectos del Decreto, un daño colectivo se produce "cuando la acción viola la dimensión material e inmaterial, los derechos y bienes de los pueblos y comunidades indígenas como sujetos colectivos de derechos […], lo cual implica una mirada holística de los daños y afectaciones que estas violaciones ocasionen. La naturaleza colectiva del daño se verifica con independencia de la cantidad de personas individualmente afectadas. Se presentan daños colectivos, entre otros, cuando se vulneran sistemáticamente los derechos de los integrantes de la colectividad por el hecho de ser parte de la misma".

ii) Sindicatos, federaciones y confederaciones – Análisis del artículo 8 del Protocolo de San Salvador

85. El Protocolo de San Salvador fue adoptado el 17 de noviembre de 1988, entró en vigor el 16 de noviembre de 1999 y a la fecha ha sido ratificado por 16 Estados[137]. Los derechos sindicales están consagrados en el artículo 8 del Protocolo en los siguientes términos:

> 1. Los Estados partes garantizarán:
> a. el derecho de los trabajadores a organizar sindicatos y a afiliarse al de su elección, para la protección y promoción de sus intereses. Como proyección de este derecho, los Estados partes permitirán a los sindicatos formar federaciones y confederaciones nacionales y asociarse a las ya existentes, así como formar organizaciones sindicales internacionales y asociarse a la de su elección. Los Estados partes también permitirán que los sindicatos, federaciones y confederaciones funcionen libremente;
> b. el derecho a la huelga.
> 2. El ejercicio de los derechos enunciados precedentemente sólo puede estar sujeto a las limitaciones y restricciones previstas por la ley, siempre que éstos sean propios a una sociedad democrática, necesarios para salvaguardar el orden público, para proteger la salud o la moral públicas, así como los derechos y las libertades de los demás. Los miembros de las fuerzas armadas y de policía, al igual que los de otros servicios públicos esenciales, estarán sujetos a las limitaciones y restricciones que imponga la ley.
> 3. Nadie podrá ser obligado a pertenecer a un sindicato. (Subrayado fuera del texto)

86. Al respecto, la Corte reitera que tiene competencia para decidir sobre casos contenciosos en torno a los derechos contenidos en el artículo 8.1.a en virtud de lo dispuesto en el artículo 19.6 del Protocolo. En efecto, este último permite la aplicación del sistema de peticiones individuales regulado por los artículos 44 a 51 y 61 a 69 de la Convención Americana si los derechos sindicales o el derecho a la educación (artículo 13 del Protocolo) fueran violados por una acción u omisión imputable directamente a un Estado Parte del Protocolo[138].

87. Hasta el momento, la Corte no ha tenido la oportunidad para pronunciarse sobre alegadas violaciones de los referidos derechos sindicales. Sin embargo, en un caso relativo a un dirigente sindical, el Tribunal tuvo oportunidad de hacer referencia a "lo señalado en el Protocolo de San Salvador […] y en el Convenio No. 87 de la OIT relativo a la Libertad Sindical y a la Protección del Derecho de Sindicación […], los cuales en sus artículos 8.1.a y 11, respectivamente, comprenden la obligación del Estado de permitir que los sindicatos, federaciones y confederaciones funcionen libremente"[139].

88. Por otra parte, la Corte nota que la redacción del artículo 8.1.a del Protocolo es ambigua en tanto no queda claro si confiere o no titularidad de derechos a los sindicatos, las federaciones y las confederaciones. Para dar respuesta a este interrogante, el Tribunal considera relevante referirse a los métodos de interpretación mencionados anteriormente (*supra* párrs. 35 y 36). Así, la Corte procederá a analizar el alcance del artículo 8.1.a, respecto a los términos "como proyección de este derecho" y "permitir". Para ello, la Corte interpretará la referida disposición de buena fe, conforme al sentido corriente que haya de atribuirse a sus términos vistos en su contexto y teniendo en cuenta el objeto y fin del Protocolo de San Salvador (*supra* párrs. 35 y 36).

89. Respecto al sentido corriente de los términos (*supra* párr. 37), la Corte destaca que el referido artículo 8.1.a del Protocolo hace una aparente diferenciación entre los trabajadores, por un lado, y los sindicatos, las federaciones y las confederaciones, por el otro. Inicialmente, dicho artículo señala que debe "garantizarse" el derecho de los trabajadores a organizar

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137 Los Estados que han ratificado el Protocolo son: Argentina, Bolivia, Brasil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, Suriname y Uruguay (Departamento de Derecho Internacional de la OEA, Información General del Tratado).

138 *Cfr. Caso Gonzales Lluy y otros Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 01 de septiembre de 2015. Serie C No. 298, párr. 234.

139 *Caso Huilca Tecse Vs. Perú. Fondo, Reparaciones y Costas*. Sentencia de 03 de marzo de 2005. Serie C No. 121, párr. 74.

sindicatos y a afiliarse al de su elección y, con posterioridad a ello, indica que como proyección de este derecho, se les "permitirá" a los sindicatos, las federaciones y las confederaciones su libre funcionamiento y a los sindicatos, adicionalmente, asociarse.

90. La Corte pasará a determinar si el uso de los términos "proyectar" y "permitir" tiene un efecto determinante para negar el surgimiento de derechos subjetivos a favor de los sindicatos, las federaciones y las confederaciones. El Tribunal nota que, según el diccionario de la Real Academia de la Lengua, "permitir", "proyección" y "proyectar" tienen diferentes significados. Las acepciones de dichas palabras más cercanas al contenido del artículo 8.1.a serían: i) permitir: "[h]acer posible algo"[140]; ii) proyección: "[a]cción y efecto de proyectar [o r]esonancia o alcance de un hecho o de las cualidades de una persona"[141], y iii) proyectar: "[i]dear, trazar o proponer el plan y los medios para la ejecución de algo [o h]acer visible sobre un cuerpo o una superficie la figura o la sombra de otro"[142].

91. De acuerdo al sentido corriente de los términos, la Corte entiende entonces que cuando el artículo señala que los Estados "permitirán", lo que la norma busca es que los Estados hagan posible el libre funcionamiento de los sindicatos, las federaciones y confederaciones, así como que se asocien y formen federaciones y confederaciones nacionales, y organizaciones sindicales internacionales. Ese libre funcionamiento implica que estas organizaciones colectivas tienen la capacidad de, por ejemplo, crear sus propios estatutos, elegir a sus representantes o manejar sus finanzas. Asimismo, asociarse y formar otras organizaciones colectivas también supone que tienen la capacidad para llevar a cabo esos actos. La capacidad de obrar implica la existencia de la personalidad jurídica de los sindicatos, las federaciones y las confederaciones. Ello conlleva a la Corte a concluir que el uso del término "permitir" en el marco del artículo 8 del Protocolo presupone entonces que los sindicatos, las federaciones y las confederaciones constituyen personas jurídicas distintas a sus asociados con capacidad diferente a las de ellos para contraer obligaciones, y adquirir y ejercer derechos, tales como, al libre funcionamiento. Además, las organizaciones sindicales tendrían el derecho de asociarse y formar federaciones y confederaciones nacionales, y organizaciones sindicales internacionales.

92. Sumado a lo anterior, cuando el artículo 8.1.a indica que "como proyección" del derecho de los trabajadores, el Estado permitirá a los sindicatos, las federaciones y las confederaciones actuar libremente así como a los sindicatos asociarse y formar federaciones y confederaciones nacionales, y organizaciones sindicales internacionales, lo que la norma hace es darle un alcance al derecho de los trabajadores más amplio que el solo hecho de poder organizar sindicatos y afiliarse al de su elección. Esto lo logra especificando los medios mínimos a través de los cuales los Estados garantizarán el ejercicio de dicho derecho. En consecuencia, el derecho que la norma consagra a favor de los trabajadores constituye un marco a través del cual se generan derechos más específicos en cabeza de los sindicatos, las federaciones y confederaciones como sujetos de derechos autónomos, cuya finalidad es permitirles ser interlocutores de sus asociados, facilitando a través de esta función una protección más extensa y el goce efectivo del derecho de los trabajadores.

93. Con relación a una interpretación sistemática, la Corte nota que el encabezado del artículo 8 del Protocolo es "derechos sindicales". En este sentido, el ámbito de aplicación de dicha disposición hace referencia a los derechos relativos a la actividad sindical que nace de la voluntad de los individuos de asociarse y se materializa en la creación de sindicatos que, a su vez, pueden asociarse entre ellos y crear federaciones, confederaciones u organizaciones sindicales cuyo funcionamiento debe ser libre para ser efectivo. En este sentido, el encabezado

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[140] Real Academia de la Lengua, Diccionario de la lengua española, Edición del tricentenario http://dle.rae.es/?w=permitir&m=form&o=h.

[141] Real Academia de la Lengua, Diccionario de la lengua española, Edición del tricentenario http://dle.rae.es/?w=proyecci%C3%B3n&o=h.

[142] Real Academia de la Lengua, Diccionario de la lengua española, Edición del tricentenario http://dle.rae.es/?w=proyectar&m=form&o=h.

abarca los derechos reconocidos en la norma, a saber el de los trabajadores a organizar sindicatos y afiliarse al de su elección, así como el de los sindicatos a asociarse y el de los sindicatos, las federaciones y las confederaciones a funcionar libremente. Adicionalmente, si bien las demás versiones originales tienen el mismo encabezado[143], la Corte constata que la versión en inglés indica "Trade Union Rights" lo que podría entenderse en el sentido ya descrito en este párrafo pero igualmente como los derechos reconocidos a los sindicatos.

94. Adicionalmente, como se mencionó de manera previa (*supra* párr. 44), en el marco de la interpretación sistemática de una norma están comprendidos no solo el texto del tratado al que pertenece sino también el sistema dentro del cual se inscribe. En consecuencia, la Corte nota que el artículo 45.c de la Carta de la OEA[144] contiene el reconocimiento de la personalidad jurídica de las asociaciones de trabajadores y las de empleadores y consagra la protección de su libertad e independencia. Además, el 45.g del mismo instrumento hace un reconocimiento de la contribución de los sindicatos a la sociedad. En efecto, dicho artículo establece que:

> "Los Estados miembros, convencidos de que el hombre sólo puede alcanzar la plena realización de sus aspiraciones dentro de un orden social justo, acompañado de desarrollo económico y verdadera paz, convienen en dedicar sus máximos esfuerzos a la aplicación de los siguientes principios y mecanismos: […]
> c) Los empleadores y los trabajadores, tanto rurales como urbanos, tienen el derecho de asociarse libremente para la defensa y promoción de sus intereses, incluyendo el derecho de negociación colectiva y el de huelga por parte de los trabajadores, el reconocimiento de la personería jurídica de las asociaciones y la protección de su libertad e independencia, todo de conformidad con la legislación respectiva […]
> g) El reconocimiento de la importancia de la contribución de las organizaciones, tales como los sindicatos, las cooperativas y asociaciones culturales, profesionales, de negocios, vecinales y comunales, a la vida de la sociedad y al proceso de desarrollo". (Subrayado fuera del texto)

95. Por otra parte, la Corte reitera que el Protocolo de San Salvador es parte de la Convención Americana y el *principio pro persona* se encuentra contenido en la misma. En este orden de ideas, el Tribunal recuerda que de acuerdo a dicho principio, al interpretarse el artículo 8.1.a del Protocolo debe optarse por la interpretación que sea más garantista y que, por tanto, no excluya o limite el efecto que pueden tener otros instrumentos como la Carta de la OEA. De acuerdo a lo sostenido previamente, el artículo 45.c de este instrumento reconoce derechos a las asociaciones de empleadores y a las de trabajadores. Asimismo, el artículo 10 de la Carta Democrática[145] propende, a través de su remisión a la Declaración de la OIT[146], por el respeto de la libertad sindical, la cual abarca no solamente el derecho de los trabajadores a asociarse sino asimismo el derecho de las asociaciones por ellos constituidas de funcionar libremente.

96. Al respecto, la Corte reitera que "la libertad para asociarse y la persecución de ciertos fines colectivos son indivisibles, de modo que una restricción de las posibilidades de asociarse representa directamente, y en la misma medida, un límite al derecho de la colectividad de alcanzar los fines que se proponga. De ahí la importancia de la adecuación con la Convención

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143 La Corte constata que el encabezado es el mismo en las demás versiones auténticas del texto. En inglés: Trade Union Rights; en portugués: Direitos sindicais, y en francés: Droits syndicaux.

144 Carta de la Organización de los Estados Americanos. Adoptada en Bogotá, Colombia el 30 de abril de 1948. Entrada en vigor el trece de diciembre de 1951.

145 El artículo 10 de la Carta Democrática Interamericana establece que: "La promoción y el fortalecimiento de la democracia requieren el ejercicio pleno y eficaz de los derechos de los trabajadores y la aplicación de normas laborales básicas, tal como están consagradas en la Declaración de la Organización Internacional del Trabajo (OIT) relativa a los Principios y Derechos Fundamentales en el Trabajo y su Seguimiento, adoptada en 1998, así como en otras convenciones básicas afines de la OIT. La democracia se fortalece con el mejoramiento de las condiciones laborales y la calidad de vida de los trabajadores del Hemisferio". Carta Democrática Interamericana, Vigésimo octavo período extraordinario de sesiones 11 de septiembre de 2001, Lima, Perú.

146 La Declaración de la OIT establece que los miembros de dicha organización están comprometidos a respetar y promover los principios relativos a los siguientes derechos fundamentales: "libertad de asociación y la libertad sindical y el reconocimiento efectivo del derecho de negociación colectiva; la eliminación de todas las formas de trabajo forzoso u obligatorio; la abolición efectiva del trabajo infantil; y la eliminación de la discriminación en materia de empleo y ocupación". Declaración de la OIT relativa a los principios y derechos fundamentales en el trabajo y su seguimiento, Adoptada por la Conferencia Internacional del Trabajo en su octogésima sexta reunión, Ginebra, 18 de junio de 1998.

del régimen legal aplicable a los sindicatos y de las acciones del Estado, o que ocurran con tolerancia de éste, que pudieran hacer inoperante este derecho en la práctica"[147]. De acuerdo a lo anterior, el Tribunal entiende que la protección de los derechos de los sindicatos, las federaciones y las confederaciones es indispensable para salvaguardar el derecho de los trabajadores a organizar sindicatos y a afiliarse al de su elección. Por su naturaleza misma, dichos entes colectivos buscan ser interlocutores por medio de los cuales se protejan y promuevan los intereses de sus asociados, así que una desprotección de sus derechos se traduciría en un impacto de mayor intensidad en sus asociados ya que se generaría una afectación o limitación del goce efectivo de los trabajadores a organizarse colectivamente.

97. En consecuencia, la Corte considera que la interpretación más favorable del artículo 8.1.a conlleva entender que allí se consagran derechos a favor de los sindicatos, las federaciones y las confederaciones, dado que son interlocutores de sus asociados y buscan salvaguardar y velar por sus derechos e intereses. Llegar a una conclusión diferente implicaría excluir el efecto de la Carta de la OEA y, por ende, desfavorecer el goce efectivo de los derechos en ella reconocidos.

98. Respecto al objeto y fin del Protocolo de San Salvador, la Corte nota que el preámbulo de dicho instrumento señala que la finalidad de los protocolos a la Convención Americana es la "de incluir progresivamente en el régimen de protección de la misma otros derechos y libertades". Igualmente, resalta la importancia de reafirmar, desarrollar, perfeccionar y proteger los derechos económicos, sociales y culturales en función de la consolidación de la democracia en América, "así como el derecho de sus pueblos al desarrollo, a la libre determinación y a disponer libremente de sus riquezas y recursos naturales". El preámbulo afirma que el ideal del ser humano libre puede realizarse únicamente a través de la creación de "las condiciones que permitan a cada persona gozar de sus derechos económicos, sociales y culturales, tanto como de sus derechos civiles y políticos". Asimismo, sostiene que la vigencia de los derechos civiles y políticos y los derechos económicos, sociales y culturales tiene una estrecha relación y "las diferentes categorías de derechos constituyen un todo indisoluble que encuentra su base en el reconocimiento de la dignidad de la persona humana, por lo cual exigen una tutela y promoción permanente con el objeto de lograr su vigencia plena". De lo anterior, se deriva que la protección de los derechos económicos, sociales y culturales que se pretende alcanzar con el Protocolo de San Salvador busca salvaguardar no solo la dignidad humana sino también, y en igual medida, la democracia y los derechos de los pueblos del continente.

99. La Corte recuerda que el sentido corriente que se le atribuya a los términos debe ser interpretada con relación al contexto y el objeto y fin del Protocolo. Por consiguiente, teniendo presente lo expuesto en los párrafos precedentes, la Corte considera que una interpretación de buena fe del artículo 8.1.a implica concluir que éste otorga titularidad de los derechos establecidos en dicho artículo a las organizaciones sindicales. Esta interpretación implica además un mayor efecto útil del artículo 8.1.a, reforzando con ello la igual importancia que tiene para el sistema interamericano la vigencia de los derechos civiles y políticos y los derechos económicos, sociales y culturales.

100. Por otra parte, la Corte considera relevante hacer uso de los trabajos preparatorios del artículo 19 del Protocolo de San Salvador como medio complementario de interpretación para confirmar el sentido del artículo 8.1.a resultante de la interpretación que se acaba de hacer. Si bien el artículo 19.6 contempla los medios a través de los cuales se protegerán los derechos contenidos en el Protocolo y, por tanto, no puede desprenderse del mismo la titularidad de derechos de los sindicatos, las federaciones y las confederaciones, de sus trabajos preparatorios puede concluirse la intención de garantizar los derechos de las organizaciones

147 *Caso Huilca Tecse Vs. Perú*, párr. 70.

sindicales como derechos de exigibilidad inmediata a través del sistema interamericano[148]. Esto se constata en tanto los trabajos preparatorios señalan que se concertó que el sistema de peticiones se limitaría "solamente al derecho de asociaciones y libertad sindical y a la libertad de educación"[149], excluyéndose el derecho a la huelga. La referencia a "asociaciones" en lugar de a "asociación" implícitamente describe los dos tipos de asociaciones que surgen del artículo, a saber, las de los trabajadores y las de las organizaciones sindicales. Por otra parte, la mención a la "libertad sindical" para efectos del Protocolo de San Salvador cobija el derecho de las organizaciones de trabajadores a constituir federaciones y confederaciones, así como el derecho a afiliarse a las mismas, y el de toda organización, federación o confederación a afiliarse a organizaciones internacionales de trabajadores[150].

101. Adicionalmente, la Corte considera que la obligación general que tienen los Estados de garantizar los derechos sindicales contenidos en el artículo 8.1.a del Protocolo se traduce en las obligaciones positivas de permitir e incentivar la generación de las condiciones aptas para que tales derechos se puedan llevar a cabo efectivamente. En este sentido, la Corte acude al Convenio 87 de la OIT con el fin de mencionar ejemplos que ilustren las obligaciones positivas que surgen de la obligación general de garantizar los derechos reconocidos a los sindicatos, las federaciones y las confederaciones. En este sentido, la Corte nota que el artículo 3.1 del Convenio establece el derecho de las organizaciones de trabajadores a "redactar sus estatutos y reglamentos administrativos, el de elegir a sus representantes, el de organizar su administración y sus actividades y el de formular su programa de acción"[151].

102. En consonancia con lo anterior, la obligación general de los Estados de respetar los derechos implica las obligaciones negativas de abstener de crear barreras tales como legales o políticas tendientes a impedir a los sindicatos, las federaciones y las confederaciones la posibilidad de gozar de un libre funcionamiento y adicionalmente a los sindicatos la posibilidad de asociarse. En este sentido, la Corte nota que el referido artículo 3.2 del Convenio N° 87 establece que "[l]as autoridades públicas deberán abstenerse de toda intervención que tienda a limitar [los derechos reconocidos en el numeral 1 del artículo] o a entorpecer su ejercicio legal"[152].

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148 Los trabajos preparatorios del Protocolo evidencian que en la adopción de los medios de protección de los derechos consagrados en dicho instrumento, la propuesta de la Comisión Interamericana diferenciaba entre dos tipos de medios: el sistema de peticiones individuales para aquellos derechos denominados de exigibilidad inmediata y un sistema de informes para los demás derechos. La propuesta finalmente adoptada, y establecida en el artículo 19, "contiene estas dos ideas". Exposición hecha por la Presidenta del Grupo de Trabajo encargado de estudiar el proyecto de Protocolo Adicional, Anexo II al Informe de la Comisión de Asuntos Jurídicos y Políticos sobre el Proyecto de Protocolo Adicional a la Convención Americana sobre Derechos Humanos en Materia de Derechos Económicos, Culturales y Sociales, OEA/Ser. G, CP/doc. 1938/88, 17 octubre de 1988.

149 Informe de la Comisión de Asuntos Jurídicos y Políticos sobre el proyecto de Protocolo Adicional a la Americana sobre Derechos Humanos en materia de derechos económicos, culturales y sociales, OEA/Ser. G, CP/doc. 1938/88, 17 octubre de 1988, p. 45

150 Cfr. Artículo 5 del Convenio 87 sobre la libertad sindical y la protección del derecho de sindicación, 1948 (núm. 87), entrada en vigor: 04 julio 1950; Adopción: San Francisco, 31ª reunión CIT 09 julio 1948.

151 Convenio 87 sobre la libertad sindical y la protección del derecho de sindicación, 1948 (núm. 87), entrada en vigor: 04 julio 1950; Adopción: San Francisco, 31ª reunión CIT 09 julio 1948.
Asimismo, la Corte nota que el Comité de Libertad Sindical de la OIT cuyo mandato es el de determinar si una situación concreta se ajusta a los principios de libertad sindical y de negociación colectiva, ha emitido varias decisiones en las que se reflejan obligaciones en similar sentido. *Cfr*. OIT, La libertad sindical Recopilación de decisiones y principios del Comité de Libertad Sindical del Consejo de Administración de la OIT, quinta edición 2006, párrs. 389, 391, 466, 495, 512, 860, 861 y 984.

152 Convenio 87 sobre la libertad sindical y la protección del derecho de sindicación, 1948 (núm. 87), entrada en vigor: 04 julio 1950; Adopción: San Francisco, 31ª reunión CIT 09 julio 1948.
Igualmente, la Corte nota que varias decisiones del Comité de Libertad Sindical de la OIT reflejan obligaciones en similar sentido. *Cfr*. OIT. Resolución del Comité de Libertad Sindical en el Caso No. 1569 "Quejas contra el Gobierno de Panamá presentadas por la Confederación Internacional de Organizaciones Sindicales Libres (CIOSL), el Sindicato de Trabajadores del Instituto de Recursos Hidráulicos y Electrificación (SITIRHE) y Sindicato de Trabajadores del Instituto Nacional de Telecomunicaciones (SITINTEL)", párr. 143.3; *Cfr. Caso Baena Ricardo y otros Vs. Panamá. Fondo, Reparaciones y Costas*. Sentencia de 2 de febrero de 2001. Serie C No. 72, párrs. 162, 170 a 172; OIT, *La libertad sindical Recopilación de decisiones y principios del Comité de Libertad Sindical del Consejo de Administración de la OIT*, quinta edición 2006, párrs. 147, 130, 178, 190 y 391.

103. Por otra parte, el Tribunal recuerda que, en razón de lo dispuesto por el artículo 19.6 del Protocolo, únicamente podría aplicarse el sistema de peticiones individuales a los derechos contenidos en los artículos 8.1.a y 13. Así, la Corte solo tendría competencia para conocer de los casos en los que los sindicatos, las federaciones y las confederaciones acudan ante el sistema interamericano buscando la protección de los derechos que les son reconocidos en el artículo 8.1.a cuando se alegue que estos fueron violados por una acción imputable directamente a un Estado Parte del Protocolo. De acuerdo a lo anterior, la titularidad de derechos y el acceso al sistema interamericano estarían limitados a las organizaciones sindicales constituidas u operantes en los Estados que hayan ratificado el Protocolo, por cuanto las obligaciones allí dispuestas no pueden hacerse extensivas a los Estados que no hayan expresado su voluntad de asumirlas.

104. La Corte considera relevante referirse asimismo al derecho a la huelga establecido en el artículo 8.1.b del Protocolo. La Corte no es competente para conocer de casos en los que dicho derecho se alegue vulnerado, por cuanto, como se mencionó, el artículo 19.6 del Protocolo, únicamente le otorga competencia sobre los derechos sindicales contenidos en el artículo 8.1.a. No obstante lo anterior, la Corte recuerda que, de acuerdo con lo establecido en el artículo 1 del Protocolo de San Salvador, los Estados Parte deben adoptar las medidas necesarias a fin de lograr en forma progresiva la efectividad plena de este derecho.

105. En virtud de lo anteriormente expuesto, la Corte ha concluido la titularidad de los derechos establecidos en el artículo 8.1.a del Protocolo de los sindicatos, las federaciones y las confederaciones, lo cual les permite presentarse ante el sistema interamericano en defensa de sus propios derechos. Ahora bien, en este punto la Corte considera relevante recordar que en razón de lo dispuesto por el artículo 44 de la Convención Americana, los sindicatos, las federaciones y las confederaciones legalmente reconocidos en uno o más Estados Parte de la Convención, formen o no parte del Protocolo de San Salvador, pueden presentar peticiones individuales ante la Comisión Interamericana en representación de sus asociados, en caso de una presunta violación de los derechos de sus miembros por un Estado Parte de la Convención Americana.

VII
EJERCICIO DE LOS DERECHOS DE LAS PERSONAS NATURALES A TRAVÉS DE PERSONAS JURÍDICAS

106. La Corte ha establecido en esta Opinión Consultiva que las personas jurídicas no son titulares de derechos ante el sistema interamericano (*supra* párr. 70), salvo en las dos situaciones particulares descritas en el capítulo anterior. Por esta razón, si bien las preguntas número 4 y 5 propuestas por el Estado de Panamá (*supra* párr. 3) se relacionan exclusivamente con derechos de las personas jurídicas, esta Corte constata que el Estado de Panamá también está interesado en que se analice "la protección de derechos humanos de las personas físicas por medio de organizaciones no gubernamentales o personas jurídicas" (*supra* párr. 1). Con este fin, en primer lugar, la Corte reiterará su jurisprudencia sobre la materia. En segundo lugar, estudiará el carácter inherente al ser humano de algunos de los derechos humanos reconocidos en la Convención Americana, así como algunos de los derechos que puedan ser reconocidos a una persona natural a través de su participación en una persona jurídica.

107. Como se indicó anteriormente, este Tribunal ha reiterado que si bien la figura de las personas jurídicas no ha sido reconocida expresamente por la Convención Americana, esto no restringe la posibilidad de que bajo determinados supuestos el individuo que ejerza sus derechos a través de ellas pueda acudir al sistema interamericano para hacer valer sus

derechos fundamentales, aun cuando los mismos estén cubiertos por una figura o ficción jurídica creada por el mismo sistema jurídico[153].

108. En efecto, este Tribunal resalta la existencia de ciertos derechos que son inherentes y exclusivos al ser humano, de manera que su ejercicio sólo se puede realizar de forma personal, lo cual los excluiría de un potencial análisis en el marco de un caso en el que se alegue la violación de derechos cuya titularidad reside igualmente en las personas físicas pero el ejercicio de los cuales se hiciera a través de una persona jurídica. Al respecto, desde el Preámbulo de la Convención Americana, el sistema interamericano ha establecido que de los derechos reconocidos a los seres humanos se deriva el carácter esencial de los mismos. Por ello, estos derechos "no nacen del hecho de ser nacional de determinado Estado, sino que tienen como fundamento los atributos de la persona humana"[154]. La existencia de los derechos reconocidos en la Convención corresponde con la naturaleza propia de los seres humanos como sujetos de derechos. Esta afirmación encuentra su fundamento en diferentes postulados de la Convención Americana, los cuales plantean el sentido fundamental de esa inmanencia. Así, mientras el artículo 5 de la Convención menciona la importancia de entender la dignidad humana como un elemento intrínseco del ser humano, el artículo 29 del mismo instrumento predica que "[n]inguna disposición de la […] Convención puede ser interpretada en el sentido de […] c) excluir otros derechos y garantías que son inherentes al ser humano".

109. Al respecto, la Corte considera que la inherencia e inalienabilidad se refieren al atributo que se predica de un derecho debido a su conexión inescindible con la naturaleza del ser humano[155]. En efecto, este Tribunal estima que hay derechos cuyo ejercicio únicamente puede ser llevado a cabo personalmente por la persona física titular de los mismos, porque dicho goce implica la existencia de un vínculo entre la naturaleza humana y el derecho mismo[156]. Así por ejemplo, la Corte ha sostenido que "para efectos de la interpretación del artículo 4.1 [de la Convención], la definición de persona está anclada a las menciones que se hacen en el tratado respecto a la 'concepción' y al 'ser humano', términos cuyo alcance debe valorarse a partir de la literatura científica"[157].

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153 *Cfr. Caso Cantos Vs. Argentina*, párr. 29, y *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 146.

154 Preámbulo de la Convención Americana sobre Derechos Humanos.

155 Al respecto, ver: Sentencia C-284/15 de la Corte Constitucional de Colombia, párr. 5.3.3.5.

156 En similar sentido, el Tribunal Constitucional del Perú ha manifestado que "[s]iendo constitucionalmente legítimo el reconocimiento de derechos fundamentales sobre las personas jurídicas, conviene puntualizar que tal consideración tampoco significa ni debe interpretarse como que todos los atributos, facultades y libertades reconocidas sobre la persona natural sean los mismos que corresponden a la persona jurídica". EXP. N.° 4972-2006-PA/TC, La Libertad, CORPORACIÓN MEIER S.A.C. Y PERSOLAR S.A.C.
Igualmente, la Suprema Corte de México señaló que "[s]i bien el vocablo "persona" contenido en el artículo 10. de la Constitución Política de los Estados Unidos Mexicanos comprende a las personas morales, la titularidad de los derechos fundamentales dependerá necesariamente de la naturaleza del derecho en cuestión y, en su caso, de la función o actividad de aquéllas. En esa medida, el juzgador deberá determinar, en cada caso concreto, si un derecho les corresponde o no pues, si bien existen derechos que sin mayor problema argumentativo pueden atribuírseles, por ejemplo, los de propiedad, de acceso a la justicia o de debido proceso, existen otros que, evidentemente, corresponden sólo a las personas físicas, al referirse a aspectos de índole humana como son los derechos fundamentales a la salud, a la familia o a la integridad física". Suprema Corte de Justicia de la Nación, CONTRADICCIÓN DE TESIS 360/2013, Fecha de resolución: sesionado el 21/04/2014.
La Corte Constitucional de Colombia también señaló que "[p]ara los efectos relacionados con la titularidad de la acción de tutela se debe entender que existen derechos fundamentales que se predican exclusivamente de la persona humana, como el derecho a la vida y la exclusión de la pena de muerte (artículo 11); prohibición de desaparición forzada, torturas, tratos o penas crueles, inhumanos o degradantes (artículo 12); el derecho a la intimidad familiar (artículo 15); entre otros. Pero otros derechos ya no son exclusivos de los individuos aisladamente considerados, sino también en cuanto se encuentran insertos en grupos y organizaciones, cuya finalidad sea específicamente la de defender determinados ámbitos de libertad o realizar los intereses comunes. En consecuencia, en principio, es necesario tutelar los derechos constitucionales fundamentales de las personas jurídicas, no per se, sino que en tanto que vehículo para garantizar los derechos constitucionales fundamentales de las personas naturales, en caso concreto, a criterio razonable del Juez de Tutela". Sentencia No. T- 411/92 de la Corte Constitucional de Colombia.

157 *Caso Artavia Murillo y Otros ("Fecundación In Vitro") Vs. Costa Rica*, párr. 176.

110. Lo anterior está en armonía con la conclusión a la cual llegó esta Corte frente a la imposibilidad de las personas jurídicas de acudir de manera directa ante el sistema interamericano (*supra* párr. 70), aparte de las dos situaciones particulares descritas anteriormente (*supra* párrs. 72 y 105), y que se relaciona con la idea de que los derechos humanos consagrados en la Convención están dispuestos para la protección de personas naturales y no de personas jurídicas. Sin embargo, es preciso aclarar que cada derecho implica un análisis distinto en cuanto a su contenido y forma de realización. Así, mientras algunos derechos se relacionan directamente con las funciones vitales de los seres humanos o con las funciones físicas o psicológicas del cuerpo humano, tales como el derecho a la vida, la libertad personal o la integridad personal, otros se vinculan con la relación entre los seres humanos y la sociedad. Ejemplos de esta última relación serían los derechos a la propiedad privada, asociación, nacionalidad, entre otros. Estos últimos serían el tipo de derechos que podrían ser objeto del análisis mencionado en los párrafos precedentes.

111. A partir de lo expuesto anteriormente, la Corte ha considerado necesario hacer una distinción para efectos de establecer cuáles situaciones podrán ser analizadas por este Tribunal en el marco de la Convención Americana[158], cuando en los casos se alegue que el derecho ha sido ejercido a través de una persona jurídica. De manera general, ha sostenido que en muchas situaciones, "los derechos y las obligaciones atribuidos a las personas morales se resuelven en derechos y obligaciones de las personas físicas que las constituyen o que actúan en su nombre o representación"[159]. Así, los derechos que las personas jurídicas gozan en sede interna en los Estados Parte de la Convención Americana (*supra* párr. 64), en algunos casos, no les son exclusivos. Por el contrario, el reconocimiento de los derechos a las personas jurídicas puede implicar directa o indirectamente la protección de los derechos humanos de las personas naturales asociadas.

112. En este sentido, para efectos de admitir cuáles de estas situaciones podrán ser analizadas bajo el marco de la Convención Americana, la Corte recuerda que ha examinado la presunta violación de derechos de sujetos en su calidad de accionistas[160] y de trabajadores[161], en el entendido de que dichas presuntas afectaciones están dentro del alcance de su competencia. Así, por ejemplo, en casos como *Ivcher Bronstein Vs. Perú, Chaparro Álvarez y Lapo Íñiguez Vs. Ecuador, Perozo y otros Vs. Venezuela, y Granier y otros Vs. Venezuela*, se realizó dicho análisis respecto a actos que afectaron a las personas jurídicas de las cuales eran socios[162]. Hasta el momento, este Tribunal sólo ha conocido de casos en que el ejercicio del derecho fue realizado a través de personas jurídicas respecto al derecho a la propiedad y al derecho a la libertad de expresión.

113. Respecto al derecho a la propiedad privada[163], la jurisprudencia de la Corte ha abordado dos situaciones diferentes. La primera, relativa a los casos en los que ha reconocido

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158 *Cfr. Caso Cantos Vs. Argentina. Excepciones Preliminare*s, párr.29, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 146.

159 *Caso Cantos Vs. Argentina. Excepciones Preliminare*s, párr. 27, y *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 54.

160 *Cfr. Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas.* Sentencia de 6 de febrero de 2001. Serie C No. 74, párrs. 123, 125, 138 y 156, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 19.

161 *Cfr. Caso Baena Ricardo y otros Vs. Panamá. Fondo, Reparaciones y Costas.* Sentencia de 2 de febrero de 2001. Serie C No.72, párrs. 109, 110, y 130, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 19.

162 *Cfr. Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas*, párrs. 119 a 131, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 146.

163 *Cfr. Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas*, párrs. 119 a 131, y *Caso Chaparro Álvarez y Lapo Íñiguez. Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 21 de noviembre de 2007. Serie C No. 170, párrs. 173 y 218.
Artículo 21 de la Convención "Derecho a la Propiedad. 1. Toda persona tiene derecho al uso y goce de sus bienes. La ley puede subordinar tal uso y goce al interés social.
2. Ninguna persona puede ser privada de sus bienes, excepto mediante el pago de indemnización justa, por razones de utilidad pública o de interés social y en los casos y según las formas establecidas por la ley.
3. Tanto la usura como cualquier otra forma de explotación del hombre por el hombre, deben ser prohibidas por la ley".

el derecho de propiedad colectiva del cual son titulares las comunidades indígenas y tribales como lo hizo por primera vez en el *Caso Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador* (*supra* párr. 74), posteriormente, en la sentencia *Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros Vs. Panamá*, y de manera más reciente, en los casos *Comunidad Garífuna Triunfo De La Cruz Y Sus Miembros Vs. Honduras*, y *Caso Comunidad Garífuna De Punta Piedra Y Sus Miembros Vs. Honduras* (*supra* párr. 76).

114. La segunda situación en la que la Corte se ha pronunciado sobre el derecho a la propiedad privada ha sido para diferenciar los derechos de los accionistas de una empresa de los de la empresa misma, señalando que las leyes internas otorgan a los accionistas determinados derechos directos, como los de recibir los dividendos acordados, asistir y votar en las juntas generales y recibir parte de los activos de la compañía en el momento de su liquidación, entre otros[164]. En ese sentido, ha establecido que para determinar si ha existido una vulneración al derecho de propiedad de los socios es necesario que se encuentre probada claramente la afectación que sobre sus derechos ha recaído[165]. Así por ejemplo, se ha abstenido de analizar la alegada violación al derecho a la propiedad sobre bienes que formaban parte del patrimonio de la empresa, puesto que diferenció entre el patrimonio de la misma y el de sus socios y accionistas[166], que en el caso en particular correspondían al capital accionario del cual eran propietarios[167]. Además, este Tribunal ha manifestado que debe ser demostrado cómo el daño o afectación de los bienes de propiedad de la persona jurídica podrían llegar a implicar, a su vez, una afectación a los derechos de los accionistas o socios[168].

115. Igualmente, en jurisprudencia reciente, esta Corte ha analizado el derecho a la libertad de expresión[169] y su materialización a través de una persona jurídica. En el caso *Granier y otros (Radio Caracas Televisión) contra Venezuela*, el Tribunal sostuvo que los medios de comunicación son, generalmente, asociaciones de personas que se han reunido para ejercer de manera sostenida su libertad de expresión, por lo que es inusual en la actualidad que un medio de comunicación no esté a nombre de una persona jurídica, toda vez que la producción y distribución del bien informativo requieren de una estructura organizativa y financiera que responda a las exigencias de la demanda informativa[170]. De manera semejante, así como las organizaciones sindicales constituyen instrumentos para el ejercicio del derecho de asociación de los trabajadores y los partidos políticos son vehículos para el ejercicio de los derechos políticos de los ciudadanos, los medios de comunicación son mecanismos que sirven al

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164 *Cfr. Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas*, párr. 127, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 338.

165 *Cfr. Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas*, párr. 127, *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 338.

166 *Cfr. Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párrs. 338 y 352.

167 *Cfr. Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 352.

168 *Cfr. Caso Perozo y otros Vs. Venezuela*, párr. 402, y *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 356.

169 Artículo 13 de la Convención Americana: "Libertad de Pensamiento y de Expresión. 1. Toda persona tiene derecho a la libertad de pensamiento y de expresión. Este derecho comprende la libertad de buscar, recibir y difundir informaciones e ideas de toda índole, sin consideración de fronteras, ya sea oralmente, por escrito o en forma impresa o artística, o por cualquier otro procedimiento de su elección.
2. El ejercicio del derecho previsto en el inciso precedente no puede estar sujeto a previa censura sino a responsabilidades ulteriores, las que deben estar expresamente fijadas por la ley y ser necesarias para asegurar:
a) el respeto a los derechos o a la reputación de los demás, o
b) la protección de la seguridad nacional, el orden público o la salud o la moral públicas.
3. No se puede restringir el derecho de expresión por vías o medios indirectos, tales como el abuso de controles oficiales o particulares de papel para periódicos, de frecuencias radioeléctricas, o de enseres y aparatos usados en la difusión de información o por cualesquiera otros medios encaminados a impedir la comunicación y la circulación de ideas y opiniones.
4. Los espectáculos públicos pueden ser sometidos por la ley a censura previa con el exclusivo objeto de regular el acceso a ellos para la protección moral de la infancia y la adolescencia, sin perjuicio de lo establecido en el inciso 2.
5. Estará prohibida por la ley toda propaganda en favor de la guerra y toda apología del odio nacional, racial o religioso que constituyan incitaciones a la violencia o cualquier otra acción ilegal similar contra cualquier persona o grupo de personas, por ningún motivo, inclusive los de raza, color, religión, idioma u origen nacional".

170 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 148.

ejercicio del derecho a la libertad de expresión de quienes los utilizan como medio de difusión de sus ideas o informaciones[171].

116. Asimismo, este Tribunal consideró que la línea editorial de un canal de televisión puede ser considerada como un reflejo de las opiniones políticas de sus directivos y trabajadores en la medida en que estos se involucren y determinen el contenido de la información transmitida[172]. Así, puede entenderse que la postura crítica de un canal es un reflejo de la postura crítica que sostienen sus directivos y trabajadores involucrados en determinar el tipo de información que es transmitida. Lo anterior debido a que, como ya se indicó previamente, los medios de comunicación son en diversas oportunidades los mecanismos mediante los cuales las personas ejercen su derecho a la libertad de expresión, lo cual puede implicar la expresión de contenidos tales como opiniones o posturas políticas[173].

117. Consecuentemente, este Tribunal indicó que las restricciones a la libertad de expresión frecuentemente se materializan a través de acciones estatales o de particulares que afectan, no solo a la persona jurídica que constituye un medio de comunicación, sino también a la pluralidad de personas naturales, tales como sus accionistas o los periodistas que allí trabajan, que realizan actos de comunicación a través de la misma y cuyos derechos también pueden verse vulnerados[174]. En el citado caso, la Corte estableció que para determinar si la afectación a la persona jurídica (medio de comunicación en ese caso) había generado un impacto negativo, cierto y sustancial al derecho a la libertad de expresión de las personas naturales, era necesario analizar el papel que cumplían las presuntas víctimas dentro del respectivo medio de comunicación y, en particular, la forma en que contribuían con la misión comunicacional del canal[175].

118. Como se observa de los dos derechos descritos, la Corte ha realizado un análisis de cada situación para determinar si efectivamente la persona física ejerció su derecho a través de la ficción de la persona jurídica. En primer lugar, este Tribunal ha diferenciado el alcance de los derechos de cada tipo de persona, como lo hizo con la distinción entre el patrimonio de la persona jurídica del patrimonio de sus socios o accionistas. Asimismo, la Corte ha reconocido el derecho a la propiedad colectiva de las comunidades indígenas. En segundo lugar, este Tribunal ha demostrado en casos en concreto el vínculo entre el ejercicio del derecho por parte de la persona física y la forma en que lo realiza a través de la persona jurídica.

119. Al respecto, cabe señalar que, independientemente de la especificidad de cada caso, este Tribunal considera que el ejercicio del derecho a través de una persona jurídica debe involucrar una relación esencial y directa entre la persona natural que requiere protección por parte del sistema interamericano y la persona jurídica a través de la cual se produjo la violación, por cuanto no es suficiente con un simple vínculo entre ambas personas para concluir que efectivamente se están protegiendo los derechos de personas físicas y no de las personas jurídicas. En efecto, se debe probar más allá de la simple participación de la persona natural en las actividades propias de la persona jurídica, de forma que dicha participación se relacione de manera sustancial con los derechos alegados como vulnerados. Además, la Corte, al amparo de lo previsto en el artículo 29.a de la Convención, considera que la mera existencia y acción de la persona jurídica en la que participa la persona natural, presunta víctima de la violación que se alegue, no puede constituir un obstáculo para que le sea sometido, conozca y resuelva el caso correspondiente. De otra manera, se estaría interpretando el artículo 1.2 del mismo texto convencional, como permitiendo "a alguno de los Estados Partes, grupo o persona, suprimir el goce y ejercicio de los derechos y libertades reconocidos en la Convención o limitarlos en mayor medida que la prevista en ella".

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171 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 148.
172 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 224.
173 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 224.
174 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 151.
175 *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela*, párr. 151.

120. Teniendo en cuenta lo anterior, la Corte considera que debido a las múltiples formas que pueden surgir de la figura de personas jurídicas, tales como empresas o sociedades comerciales, partidos políticos, asociaciones religiosas u organizaciones no gubernamentales, no es viable establecer una fórmula única que sirva para reconocer la existencia del ejercicio de derechos de personas naturales a través de su participación en una persona jurídica, de manera como lo ha realizado con el derecho a la propiedad y a la libertad de expresión. Por ello, la Corte determinará la manera de probar el vínculo cuando analice la alegada violación de uno de los derechos presuntamente vulnerados en un caso contencioso concreto.

VIII
POSIBLE AGOTAMIENTO DE LOS RECURSOS INTERNOS POR PERSONAS JURÍDICAS

121. Hasta ahora, la Corte ha determinado en esta Opinión Consultiva que las personas jurídicas no son titulares de derechos en el sistema interamericano (*supra* párr. 70). Asimismo, el Tribunal ha establecido que tanto las comunidades indígenas como las organizaciones sindicales (*supra* párr. 72 y 105) constituyen situaciones particulares. Ahora compete a la Corte examinar, de acuerdo a las preguntas 3, 6, 7 y 8 planteadas por el Estado de Panamá, si a través del agotamiento de los recursos internos por parte de personas jurídicas, a título propio o en representación de sus miembros (socios, accionistas, directivos, trabajadores, etc.), se cumple con el requisito de admisibilidad señalado en el artículo 46.1.a de la Convención. Para ello, la Corte realizará sus consideraciones teniendo en cuenta: i) la naturaleza del requisito de agotamiento de los recursos internos en el sistema interamericano, y ii) la idoneidad y efectividad de los recursos de jurisdicción interna que deben ser agotados de acuerdo los principios del derecho internacional generalmente reconocidos.

A. Naturaleza del requisito de agotamiento de los recursos internos en el sistema interamericano

122. El requisito de agotamiento de los recursos internos es una manifestación del principio de la colaboración o complementariedad del derecho internacional público. Al respecto, esta Corte ha establecido que la responsabilidad estatal bajo la Convención Americana sólo puede ser exigida a nivel internacional después de que el Estado haya tenido la oportunidad de determinar, en su caso, una violación de un derecho y reparar el daño ocasionado por sus propios medios. Lo anterior se asienta en el principio de complementariedad que informa transversalmente el sistema interamericano, el cual es, tal como lo expresa el Preámbulo de la Convención Americana, "coadyuvante o complementario de la [protección] que ofrece el derecho interno de los Estados americanos"[176]. Así, el Estado es el principal garante de los derechos humanos de las personas, de manera que, si se produce un acto violatorio de dichos derechos, es el propio Estado quien tiene el deber de resolver el asunto a nivel interno y, en su caso, reparar, antes de tener que responder ante instancias internacionales como el sistema interamericano, lo cual deriva del carácter coadyuvante o complementario que reviste el proceso internacional frente a los sistemas nacionales de garantías de los derechos humanos. El referido carácter complementario de la jurisdicción internacional significa que el sistema de protección instaurado por la Convención Americana no sustituye a las jurisdicciones nacionales, sino que las complementa[177]. En este sentido, la forma de constatar que el Estado, como primer llamado a proteger y garantizar los derechos humanos, tuvo conocimiento de las

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[176] Convención Americana sobre Derechos Humanos, Preámbulo. San José, Costa Rica, 1969. *Cfr*. *Caso Tarazona Arrieta y Otros Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia del 15 de octubre de 2014. Serie C No. 286 párr. 137.

[177] *Cfr*. *Caso Acevedo Jaramillo y otros Vs. Perú. Interpretación de la Sentencia de Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 24 de noviembre de 2006. Serie C No. 157, párr. 66, y *Caso García Ibarra y Otros Vs. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia del 17 de noviembre de 2015. Serie C No. 306, párr. 103.

violaciones y la posibilidad de actuar al respecto, es precisamente a través de la regla sobre el agotamiento de los recursos internos.

123. Precisamente, el requisito de agotamiento de los recursos internos implica que los peticionarios pongan en conocimiento del Estado las alegadas violaciones, "pues busca [dispensar al mismo] de responder ante un órgano internacional por actos que se le imputen, antes de haber tenido la ocasión de remediarlos con sus propios medios"[178]. En el sistema interamericano, este requisito se encuentra contenido en el artículo 46.1.a) de la Convención Americana. Según esta norma, "[p]ara que una petición o comunicación […] sea admitida por la Comisión, se requerirá […] que se hayan interpuesto y agotado los recursos de jurisdicción interna, conforme a los principios del Derecho Internacional generalmente reconocidos"[179].

124. De manera reiterada, esta Corte ha fijado algunos criterios procesales y materiales que deben ser cumplidos en relación con la excepción de falta de agotamiento de recursos internos[180]. En primer lugar, una objeción al ejercicio de su jurisdicción basada en la supuesta falta de agotamiento de los recursos internos debe ser presentada en el momento procesal oportuno, esto es, durante el procedimiento de admisibilidad ante la Comisión[181]. En segundo lugar, el Estado que presenta esta excepción debe especificar los recursos internos que aún no se han agotado, y demostrar que estos recursos se encontraban disponibles y eran adecuados, idóneos y efectivos[182]. Finalmente, este Tribunal ha manifestado que no corresponde ni a la Corte ni a la Comisión identificar *ex officio* cuáles son los recursos internos pendientes de agotamiento[183].

125. Otro aspecto relevante en el análisis sobre el agotamiento de los recursos internos son las excepciones contenidas en el artículo 46.2 de la Convención. Esta norma constituye una excepción a la regla general establecida en el artículo 46.1 del mismo instrumento, según la cual el agotamiento de los recursos internos es un requisito indispensable para la presentación de peticiones individuales ante el sistema interamericano. De este modo, el requisito de agotamiento de los recursos aplica cuando en el "sistema nacional están efectivamente disponibles recursos que son adecuados y eficaces para remediar la presunta violación"[184]. Cuando esto no es así, por la inexistencia o ineficacia de los recursos[185], el artículo 46.2 de la Convención prevé tres excepciones que eximen a las presuntas víctimas del cumplimiento de este requisito, a saber: i) cuando no exista en la legislación interna del Estado de que se trata el debido proceso legal para la protección del derecho o derechos que se alega han sido violados; ii) cuando no se haya permitido al presunto lesionado en sus derechos el acceso a los recursos de la jurisdicción interna, o haya sido impedido de agotarlos, y iii) cuando haya retardo injustificado en la decisión sobre los mencionados recursos.

126. La Corte también ha determinado que en algunas circunstancias el análisis del agotamiento de los recursos internos puede estar relacionado con el fondo del asunto, especialmente en lo que concierne a los artículos 8 y 25 de la Convención. La Corte ha

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178 *Asunto de Viviana Gallardo y otras*, Decisión del 13 de noviembre de 1981, No. G 101/81. Serie A, párr. 26, y *Caso López Lone y Otros Vs. Honduras. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 5 de octubre de 2015. Serie C No. 302, párr. 20.

179 Artículo 46.1.a) de la Convención Americana

180 *Cfr. Caso Garibaldi Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia del 23 de septiembre de 2009. Serie C No.203, párr. 46.

181 *Caso Velásquez Rodríguez Vs. Honduras. Excepciones Preliminares.* Sentencia de 26 de junio de 1987. Serie C No.01, párr. 88, y *Caso Wong Ho Wing Vs. Perú. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 30 de Junio de 2015. Serie C No. 297, párr. 21.

182 *Caso Velásquez Rodríguez Vs. Honduras. Excepciones Preliminares*, párr. 88, y *Caso López Lone y Otros Vs. Honduras*, párr. 21.

183 *Caso Reverón Trujillo Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 30 de Junio de 2009. Serie C No. 197, párr.23, y *Caso López Lone y Otros Vs. Honduras*, párr. 21.

184 CIDH. Informe No. 74/14, Petición 1294-05. Admisibilidad. Mário de Almeida Coelho Filho y Familia. Brasil. 15 de agosto de 2014, párr. 29.

185 *Caso Velásquez Rodríguez Vs. Honduras. Excepciones Preliminares*, párr. 94.

sostenido que "cuando se invocan ciertas excepciones a la regla de no agotamiento de los recursos internos, como son la inefectividad de tales recursos o la inexistencia del debido proceso legal, no sólo se está alegando que el agraviado no está obligado a interponer tales recursos, sino que indirectamente se está imputando al Estado involucrado una nueva violación a las obligaciones contraídas por la Convención". Al respecto, es preciso aclarar que el examen que realiza la Comisión en la etapa inicial de admisibilidad supone el análisis de las excepciones contenidas en el artículo 46.2 de la Convención como normas con contenido autónomo "*vis à vis* las normas sustantivas de la Convención Americana"[186]. Esto significa que si bien el análisis realizado por la Comisión en la etapa de admisibilidad puede tener una relación directa con las posibles violaciones a los artículos 8 y 25 de la Convención, el estándar de apreciación es distinto en ambas etapas[187]. En consecuencia, "resulta necesario diferenciar la figura del retardo injustificado a que se refiere el artículo 46.2 de la Convención, aplicable en la etapa de admisibilidad de una petición, del estándar de plazo razonable, aplicable al análisis de posibles violaciones al artículo 8.1 de la Convención, en el estudio del fondo de la controversia"[188].

127. Como conclusión preliminar, este Tribunal reitera la importancia de la regla de agotamiento de recursos internos como una expresión de la facultad que tienen los Estados de enfrentar y solucionar las violaciones a los derechos humanos por sus propios medios, previo al sometimiento de un caso ante el sistema interamericano y en consonancia con sus obligaciones internacionales. Igualmente, recuerda lo manifestado a lo largo de su jurisprudencia en cuanto a los requisitos procesales y materiales que deben ser cumplidos por parte de aquellos Estados que aleguen esta excepción preliminar. Asimismo, considera importante enfatizar la importancia de los criterios de disponibilidad, idoneidad y efectividad que han sido mencionados de manera reiterada en la jurisprudencia de la Corte frente al requisito de agotamiento de recursos internos[189].

B. Idoneidad y efectividad de los recursos de jurisdicción interna que deben ser agotados

128. El artículo 46.1.a) dispone que para que una petición sea admitida por la Comisión se deben haber interpuesto y agotado los recursos en sede interna "conforme a los principios del Derecho Internacional generalmente reconocidos". Este Tribunal ha sostenido que la remisión del artículo 46.1.a) de la Convención a los principios del derecho internacional generalmente reconocidos, "no se refieren sólo a la existencia formal de tales recursos, sino también a que éstos sean adecuados y efectivos, como resulta de las excepciones contempladas en el artículo 46.2"[190].

129. En este sentido, la Corte ha incluido en su la jurisprudencia el análisis los criterios de "efectividad" e "idoneidad" de los recursos. En términos generales, que un recurso sea idóneo significa que la función de esos recursos, dentro del sistema del derecho interno, sea adecuada para proteger los derechos vulnerados[191]. Este Tribunal ha sostenido que "[e]n todos los ordenamientos internos existen múltiples recursos, pero no todos son aplicables en todas las circunstancias"[192].

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186 CIDH. Informe No. 124/10, Petición11.990. Admisibilidad. Óscar Orlando Bueno Bonnet y Otros. Colombia. 23 de octubre de 2010, párr. 37.

187 CIDH. Informe No. 124/10, Petición 11.990. Admisibilidad. Óscar Orlando Bueno Bonnet y Otros. Colombia. 23 de octubre de 2010, párr. 37.

188 CIDH. Informe No.74/14, Petición 1294-05.Admisibilidad. Mário de Almeida Coelho Filho y Familia.Brasil. 15 de agosto de 2014, párr. 40.

189 *Cfr. Caso Velásquez Rodríguez Vs. Honduras. Fondo.* Sentencia de 29 de julio de 1988. Serie C No.04, párrs. 64, 66 y 67, y *Caso López Lone y Otros Vs. Honduras*, párr. 21.

190 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 63.

191 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 64.

192 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 64.

130. De otra parte, la eficacia se predica cuando el recurso es capaz de producir el resultado para el que ha sido concebido[193]. Por ejemplo, "[el recurso] de exhibición personal puede volverse ineficaz si se le subordina a exigencias procesales que lo hagan inaplicable, si, de hecho, carece de virtualidad para obligar a las autoridades, resulta peligroso para los interesados intentarlo o no se aplica imparcialmente"[194].

131. Igualmente, la Corte ha dicho que "para que exista un recurso efectivo no basta con que esté previsto por la Constitución o la ley o con que sea formalmente admisible, sino que se requiere que sea realmente idóneo para establecer si se ha incurrido en una violación a los derechos humanos y proveer lo necesario para remediarla". De modo tal que "no pueden considerarse efectivos aquellos recursos que, por las condiciones generales del país o incluso por las circunstancias particulares de un caso dado, resulten ilusorios"[195].

132. Ahora bien, la Comisión manifestó en sus observaciones que su posición actual sobre la admisibilidad de las peticiones en que los recursos presentados hayan sido interpuestos por personas jurídicas, es que "si bien en principio los recursos internos deben ser agotados por parte de la persona natural alegada como víctima ante el sistema interamericano, pueden existir circunstancias en las cuales dichos recursos a favor de las personas naturales no existen, no están disponibles o no resultan procedentes frente a la acción estatal concreta dirigida contra la persona jurídica. En consideración de la Comisión, [el análisis sobre el] agotamiento de los recursos internos debe efectuarse caso por caso"[196].

133. En este punto, la Corte expondrá su posición acorde con lo establecido en el artículo 46.1.a) de la Convención. En primer lugar, este Tribunal constata que el artículo 46.1.a) no hace ninguna distinción entre personas naturales o personas jurídicas, puesto que se concentra exclusivamente en el agotamiento de los recursos. Al respecto, este Tribunal ha sostenido que según la regla del efecto útil, la norma está encaminada a producir un efecto y no puede interpretarse en el sentido de que no produzca ninguno o su resultado sea manifiestamente absurdo o irrazonable[197]. Por ello, la Corte no puede interpretar el artículo 46.1.a) de modo que limite el acceso al sistema interamericano por parte de posibles víctimas y se genere una desprotección de las mismas. En este sentido, la Corte considera que resulta desproporcionado obligar a una presunta víctima a interponer recursos inexistentes, cuando se comprueba que el recurso idóneo y efectivo era el agotado por parte de la persona jurídica.

134. En segundo lugar, la Corte considera que los principios de idoneidad y efectividad son fundamentales en el análisis de admisibilidad. Así, en el marco de la situación planteada, si se comprueba que el recurso agotado por la persona jurídica protege los derechos individuales de las personas naturales que pretenden acudir ante el sistema interamericano, el mismo podrá ser entendido como un recurso idóneo y efectivo. En otras palabras, si a través de un recurso en sede interna que fue resuelto a favor de una persona jurídica se protegieran los derechos de las personas individuales, la Corte no encuentra razón alguna para entender que dicho recurso no pueda llegar a ser idóneo y efectivo, según el análisis de cada caso.

135. En tercer lugar, este Tribunal estima que el agotamiento de los recursos internos supone un análisis independiente del referente a la titularidad de derechos por parte de personas jurídicas. El estudio sobre el cumplimiento de este requisito debe centrarse en que se hayan presentado los recursos idóneos y efectivos en el ámbito interno, los cuales, en algunos casos, serán recursos cuya legitimación activa esté en cabeza de la persona jurídica. Así por

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193 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 66. CIDH. Informe No. 50/13, Petición 1491-06. Admisibilidad. Familia Guzmán Cruz. México. 12 de julio de 2013, párr. 38.

194 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 66.

195 *Caso Reverón Trujillo Vs. Venezuela*, párr. 61.

196 Observaciones de la Comisión Interamericana de Derechos Humanos a la Solicitud de Opinión presentada por el Estado de Panamá (expediente de fondo, folio 2424).

197 *Caso Velásquez Rodríguez Vs. Honduras. Fondo*, párr. 63 y 64.

ejemplo, el Relator Especial para la Libertad de Expresión de la Comisión sostuvo durante la audiencia pública[198] que "en muchos casos en los que se ve afectada la libertad de expresión, la única persona legitimada por activa para interponer los recursos internos idóneos es el medio de comunicación a través de su representante legal". Por lo general, "no existe otro recurso efectivo que pueda ser empleado por una persona natural contra una decisión dirigida formalmente a un medio de comunicación". Por ello, "exigir como condición de procedibilidad de una petición ante el sistema que la persona natural afectada sea quien plantee los recursos internos cuando no tiene legitimidad activa para ello y a sabiendas de que por tal razón va a ser rechazado, sería ir en contra del principio de economía procesal e imponer barreras desproporcionadas de acceso al sistema interamericano".

136. En concreto, esta Corte considera que se deben tener por agotados los recursos internos en cumplimiento del artículo 46.1.a) de la Convención cuando: i) se compruebe que se presentaron los recursos disponibles, idóneos y efectivos para la protección de sus derechos, independientemente de que dichos recursos hayan sido presentados y resueltos a favor de una persona jurídica, y ii) se demuestre que existe una coincidencia entre las pretensiones que la persona jurídica alegó en los procedimientos internos y las presuntas violaciones que se argumenten ante el sistema interamericano. Al respecto, el Relator para la Libertad de Expresión manifestó que "lo que se busca es que exista una coincidencia material entre las reclamaciones formuladas en el proceso que fue agotado a nivel interno y aquellas presentadas ante la [Comisión], con el objeto de asegurarse que las autoridades nacionales conocieron sobre la supuesta violación de un derecho protegido y, de ser apropiado, tuvieron la oportunidad de solucionarla antes de que sea conocida por una instancia internacional"[199].

137. Adicionalmente, la Corte resalta que en estos casos la carga de la prueba sobre sobre la efectividad e idoneidad del recurso la tienen los Estados cuando presentan la excepción de falta de agotamiento de recursos internos. De manera que deberán ser los Estados los que demuestren que, por ejemplo, existía un recurso más idóneo a aquel presentado por la persona jurídica.

138. Bajo el acatamiento de estos requisitos, se respeta el núcleo esencial de la regla de agotamiento de recursos internos. Esto es, permitirle al Estado conocer de manera previa las peticiones planteadas ante el sistema interamericano para que sea él quien enfrente las violaciones a los derechos humanos. Asimismo, es preciso resaltar que el análisis que se realice sobre el cumplimiento de las reglas de admisibilidad contenidas en el artículo 46.1 en este tipo de casos, es independiente del análisis sobre el fondo de la petición, especialmente en lo que se refiere a los artículos 1.1, 8 y 25 de la Convención Americana. Así, cuando se dé por cumplido el agotamiento de los recursos internos a través de un recurso interpuesto por una persona jurídica, no se pretende imponer una obligación adicional a los Estados en el sentido de modificar su legislación interna para otorgar legitimación activa a las personas naturales. Este tipo de consideraciones se relacionan con el fondo del caso y deberán ser analizadas según el contenido de los derechos individuales reconocidos por la Convención.

139. Teniendo en cuenta lo anterior, la Corte concluye que la interposición de recursos por parte de personas jurídicas no implica *per se* que no se hayan agotado los recursos internos por parte de las personas físicas titulares de los derechos convencionales, por lo que el cumplimiento de este requisito deberá ser analizado en cada caso. En efecto, la Corte reitera su jurisprudencia según la cual "no es necesario el agotamiento de la vía interna respecto de

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198 Observaciones escritas presentadas por el Relator Especial para la Libertad de Expresión durante la audiencia pública (expediente de fondo, folio 3216).

199 Observaciones escritas presentadas por el Relator Especial para la Libertad de Expresión durante la audiencia pública (expediente de fondo, folio 3216).

todos o cualquiera de los recursos disponibles sino que, de acuerdo a jurisprudencia de este Tribunal, 'los recursos que deben ser agotados son aquellos que resultan adecuados en la situación particular de la violación de derechos humanos alegada'"[200]. En este sentido, este Tribunal estima que el artículo 46.1.a) implica un análisis que debe concentrarse en la idoneidad y efectividad del recurso, independientemente de si el recurso fue interpuesto por una persona natural o una jurídica.

140. Considerando todo lo expuesto precedentemente y, en especial, que el artículo 1 de la Convención establece las obligaciones del Estado tanto de respetar los derechos de todo ser humano bajo su jurisdicción como de garantizarle su libre y pleno ejercicio, la Corte concluye que la existencia y acción de una persona jurídica a través de la cual actúa la persona natural, presunta víctima de la violación del derecho humano de que se trate, no debería constituir un obstáculo, impedimento o excusa para que el Estado deje de cumplir con las referidas obligaciones.

IX
OPINIÓN

Por las razones expuestas, en interpretación del artículo 1.2 de la Convención Americana sobre Derechos Humanos en relación con los artículos 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46 y 62.3 del mismo instrumento, así como del artículo 8.1.a y b del Protocolo de San Salvador,

LA CORTE,

DECIDE

por unanimidad, que

1. Es competente para emitir la presente Opinión Consultiva.

Y ES DE OPINIÓN

por unanimidad, que

2. El artículo 1.2 de la Convención Americana sólo consagra derechos a favor de personas físicas, por lo que las personas jurídicas no son titulares de los derechos consagrados en dicho tratado, en los términos establecidos en los párrafos 37 a 70 de esta Opinión Consultiva.

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[200] *Caso Escher y otros Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 6 de julio de 2009. Serie C No. 200, párr. 38, y *Caso Galindo Cárdenas y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 02 de octubre de 2015. Serie C No. 301, párr. 33.

por unanimidad, que

3. Las comunidades indígenas y tribales son titulares de los derechos protegidos en la Convención y, por tanto, pueden acceder ante el sistema interamericano, en los términos establecidos en los párrafos 72 a 84 de la presente Opinión Consultiva.

Por seis votos a favor y uno en contra, que

4. El artículo 8.1.a del Protocolo de San Salvador otorga titularidad de derechos a los sindicatos, las federaciones y las confederaciones, lo cual les permite presentarse ante el sistema interamericano en defensa de sus propios derechos en el marco de lo establecido en dicho artículo, en los términos establecidos en los párrafos 85 a 105 de la presente Opinión Consultiva.

Disiente el Juez Alberto Pérez Pérez

Por seis votos a favor y uno en contra, que

5. Las personas físicas en algunos casos pueden llegar a ejercer sus derechos a través de personas jurídicas, de manera que en dichas situaciones podrán acudir ante el Sistema Interamericano para presentar las presuntas violaciones a sus derechos, en los términos establecidos en los párrafos 106 a 120 de esta Opinión Consultiva.

Disiente el Juez Alberto Pérez Pérez

Por seis votos a favor y uno en contra, que

6. Las personas físicas bajo ciertos supuestos pueden agotar los recursos internos mediante recursos interpuestos por las personas jurídicas, en los términos establecidos en los párrafos 121 y 140 de esta Opinión Consultiva.

Disiente el Juez Alberto Pérez Pérez

El Juez Roberto F. Caldas hizo conocer a la Corte su Voto concurrente, el cual acompaña esta Opinión Consultiva.

El Juez Alberto Pérez Pérez hizo conocer a la Corte su Voto parcialmente disidente, el cual acompaña esta Opinión Consultiva.

Opinión Consultiva de la Corte Interamericana de Derechos Humanos OC-22/16. Solicitada por la República de Panamá.

Roberto F. Caldas
Presidente

Eduardo Ferrer Mac-Gregor Poisot

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Pablo Saavedra Alessandri
Secretario

Comuníquese y ejecútese,

Roberto F. Caldas
Presidente

Pablo Saavedra Alessandri
Secretario

VOTO CONCURRENTE DEL JUEZ ROBERTO F. CALDAS
CORTE INTERAMERICANA DE DERECHOS HUMANOS
OPINIÓN CONSULTIVA OC-22

1. Con el fin de sumar a la respuesta dada por la Corte Interamericana de Derechos Humanos en ocasión de la Opinión Consultiva 22, solicitada por el Estado de Panamá el 28 de abril de 2014, es necesario hacer algunas consideraciones acerca del alcance del artículo 21 de la Convención Americana sobre Derechos Humanos, en este voto concurrente. A pesar de esta Corte ya haber desarrollado un valioso análisis en cuanto a la imposibilidad de acceso al Sistema Interamericano de Derechos Humanos por personas jurídicas, se hace necesario formular algunas consideraciones acerca del alcance de la protección garantizada al derecho a la propiedad en el ámbito del sistema interamericano de derechos humanos.

2. Inicialmente, es importante observar algo que puede ser entendido como una "baja receptividad" del derecho a la propiedad privada en el sistema interamericano de derechos humanos. En este sentido, desde el inicio, es un hecho notable que este fue uno de los derechos más discutidos en el momento de la propuesta del proyecto original de la Convención Americana por la respectiva Comisión, aún en 1969:[1]

> "La discusión de este artículo, que consagra el derecho a la propiedad privada, fue tal vez uno de los más extensamente debatidos en el seno de la Comisión. Las delegaciones manifestaron, desde el primer momento, la existencia de tres corrientes ideológicas que podrían resumirse en esta forma: una tendencia a suprimir del texto del proyecto toda referencia al derecho de propiedad, a semejanza del Pacto de los Derechos Civiles y Políticos de las Naciones Unidas; otra tendencia a consagrar el texto del proyecto tal y como fue presentado, y una tercera posición conciliadora, que reforzará la función social de la propiedad.
>
> Después de un prolongado cambio de opiniones sobre este apasionante tema, prevaleció el criterio mayoritario de incorporar el derecho de propiedad en el texto de la Convención tal como aparece en el proyecto, agregando al primero de sus dos párrafos la expresión de que, tanto la usura como cualquier otra forma de explotación del hombre por el hombre serán prohibidas por la ley."

3. Las divergencias sólo fueron superadas, insertando este derecho en el rol de derechos protegidos por la Convención Americana, mediante la inclusión de un concepto genérico de derecho a la propiedad privada como "derecho al uso y goce de bienes" y la relativización del derecho delante del "interés social" y de la "utilidad pública".

4. Esta resistencia a la incorporación del derecho a la propiedad privada es observada también en los sistemas universal y europeo de derechos humanos. A pesar de que el derecho a la propiedad privada haya sido establecido por la Declaración Universal de los Derechos Humanos en su artículo 17, éste acabó no siendo contemplado por el Pacto Internacional de

[1] OEA/Ser.K/XVI/1.2. Conferencia Especializada Interamericana sobre Derechos Humanos. San José, Costa Rica. 7-22 de noviembre de 1969. Actas y Documentos. Informe del Relator de la Comisión I, Juan Isaac Lovato, 19 de noviembre de 1969, pág. 301.

Derechos Civiles y Políticos (PIDCP) o por el Pacto Internacional de Derechos Económicos, Sociales y Culturales (PIDESC). En lo que se refiere al sistema europeo de derechos humanos, el derecho acabó por ser excluido de la versión final de la Convención Europea de Derechos Humanos, siendo incluido sólo en 1952, por el I Protocolo Adicional,[2] de forma considerablemente restricta, inclusive dando al Estado amplios poderes para restringir el goce de tal derecho.

5. A pesar del sistema interamericano haber innovado en este sentido, incorporando el derecho a la propiedad privada en la Convención Americana, existen claras limitaciones a ese derecho. La primera corresponde, como anteriormente dicho, a la relativización del derecho, decurrente del propio dispositivo que lo establece. Este trae en sus incisos previsiones de restricción al goce del derecho a la propiedad privada teniendo en cuenta el interés social y la utilidad pública, inclusive estableciendo la necesidad de pago de justa indemnización en situaciones de privación del derecho:

> *Artículo 21. Derecho a la Propiedad Privada*
>
> *1. Toda persona tiene derecho al uso y goce de sus bienes. La ley puede subordinar tal uso y goce al interés social.*
>
> *2. Ninguna persona puede ser privada de sus bienes, excepto mediante el pago de indemnización justa, por razones de utilidad pública o de interés social y en los casos y según las formas establecidas por la ley.*
>
> *3. Tanto la usura como cualquier otra forma de explotación del hombre por el hombre, deben ser prohibidas por la ley.*

6. Con eso, cabe señalar que a pesar de que la propiedad privada constituya uno de los derechos protegidos por la Convención Americana, se trata de un derecho con claras limitaciones a nivel internacional. La garantía amplia y generalizada de este derecho podría acabar convirtiendo a esta Corte de Derechos Humanos en un tribunal mucho más demandado por causas empresariales o de corporaciones, a través de sus socios o asociados que aleguen pérdida patrimonial o de propiedad, desvirtuando, así, el objetivo y la razón de ser de tales instituciones: juzgar derechos humanos, los más fundamentales.

7. Para que eso no ocurra, es necesario limitar el alcance del referido derecho en el ámbito interamericano, definiendo los bienes que pueden, o no, ser disputados ante el sistema interamericano de derechos humanos. No siendo expresa la Convención Americana en este sentido, la Corte podría haber aprovechado la oportunidad para explicitar en qué tipo de situaciones el derecho a la propiedad puede constituir objeto de disputa ante el sistema interamericano.

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[2] Protocolo Adicional a la Convención Europea de Derechos Humanos (Paris, 20/03/1952). *"ARTÍCULO 1° Protección de la propiedad. Toda persona física o moral tiene derecho al respeto de sus bienes. Nadie podrá ser privado de su propiedad más que por causa de utilidad pública y en las condiciones previstas por la ley y los principios generales del derecho internacional. Las disposiciones precedentes se entienden sin perjuicio del derecho que poseen los Estados de poner en vigor las leyes que juzguen necesarias para la reglamentación del uso de los bienes de acuerdo con el interés general o para garantizar el pago de los impuestos u otras contribuciones o de las multas".*

8. A pesar de indispensable la posibilidad de defensa – inclusive judicial – de todos los bienes legalmente garantizados al individuo con base en el derecho a la propiedad privada, esta actuación jurisdiccional no corresponde a tribunales de derechos humanos. Es decir, cabría a los ordenamientos jurídicos internos y al respectivo sistema judicial de cada Estado la garantía de la defensa del derecho a la propiedad de forma universal; aquí, ante el Sistema Interamericano, solamente aquella parte de la propiedad más nuclear.

9. A la Corte y al sistema interamericano, por otro lado, restaría la protección judicial de bienes especialmente protegidos por la legislación interna de muchos Estados, como es el caso de bienes inembargables e inalienables. La especial protección dedicada a estos bienes se debe al hecho de estos constituir el llamado "mínimo existencial", cuyo concepto está atado al principio de la dignidad (artículo 11 de la Convención Americana), correspondiente a las necesidades más básicas y esenciales de la persona y de su familia.

10. El surgimiento del ideal de "mínimo existencial" ganó fuerza a partir de la II Posguerra, en la doctrina de Otto Bachof, sustentando que la dignidad humana no se limita a la garantía de la libertad, pero también engloba, necesariamente, los recursos materiales indispensables para el mantenimiento de una vida digna. Poco tiempo después de la formulación de Bachof, el Tribunal Federal Administrativo de Alemania (*Bundesverwaltungsgericht*) reconoció al individuo como titular de derechos y obligaciones en el aspecto de mantenimiento de sus condiciones de existencia.[3]

11. En otras palabras, debe ser garantizada la actuación de la Corte en defensa del derecho a la propiedad en caso de que restricciones a este derecho amenacen necesidades básicas indispensables para el mantenimiento de la existencia digna. Considerando que atentaría a los derechos humanos privar al individuo de parcela patrimonial mínima indispensable, sólo esos casos recaerían en la esfera de competencia de la Corte.

12. La definición de lo que es, de hecho, abarcado por la noción de mínimo existencial es determinada por el contexto socioeconómico particular de cada Estado, por lo que cabe especialmente a los ordenamientos jurídicos internos la protección del conjunto de bienes que garanticen al propietario el mantenimiento de su existencia no sólo física, como social, política y cultural digna.

13. A pesar de reconocer la importancia y absoluta necesidad de la protección judicial del derecho a la propiedad, esta Corte no puede tomar para sí, o aceptar que le otorguen, la responsabilidad de decidir sobre las más diversas cuestiones relativas al derecho a la propiedad. Si así lo hiciese, acabaría por desviarse de su función primaria, la protección de derechos humanos, aquellos más esenciales de la persona. Por eso, ya se debería delimitar el alcance del artículo 21 de la Convención Americana, restringido la admisibilidad de casos ante al sistema interamericano de derechos humanos a ese núcleo inembargable o inalienable de bienes.

14. Para que casos relativos al derecho a la propiedad puedan ser conocidos por los órganos que componen el sistema interamericano de derechos humanos, estos deben: (i) estar limitados a los bienes necesarios a la vida digna del individuo o (ii) representar un bien

[3] SARLET, Ingo Wolfgang. "Dignidad (de la persona) humana, mínimo existencial y justicia constitucional". Revista CEJUR TJCS, 2013.

vital para el desarrollo de actividad profesional, siempre y cuando sea necesario para garantizar la vida digna de la persona.

15. No se puede hablar en dignidad de la persona jurídica en campo de derechos humanos. Por eso la vía judicial común nacional, y no la internacional de los derechos humanos, es la que estará accesible para conocer de lesiones a los derechos de persona jurídica.

16. Concluyo, por lo tanto, que la intención del presente voto no es proponer la creación de un rol taxativo de bienes intangibles; la definición debe siempre dialogar con la realidad socioeconómica y con la visión nacional de lo que representa el interés general, traído en el conjunto normativo democráticamente producido. Propone, esto sí, establecer el principio de que no son todas las propiedades que merecen protección por parte del sistema interamericano, pues ciertamente excluye propiedades superfluas, suntuarias, lujosas, es decir, que van más allá de las necesidades elementales de las personas, aquellas garantizadoras del mínimo existencial y da la vida digna.

Roberto F. Caldas

Juez

Pablo Saavedra Alessandri

Secretario

VOTO PARCIALMENTE DISIDENTE DEL
JUEZ ALBERTO PÉREZ PÉREZ
OPINIÓN CONSULTIVA OC–22/16 SOLICITADA POR LA REPÚBLICA DE PANAMÁ

1. He votado en contra de varios de los puntos resolutivos de esta opinión consultiva y de los razonamientos en que ellos se fundan, por las razones que paso a exponer.

I. CONSIDERACIONES GENERALES

2. La principal objeción a la presente opinión consultiva aprobada por la Corte por mayoría radica en que no está enfocada desde el punto de vista del derecho internacional de los derechos humanos (como deben estarlo todos sus pronunciamientos), sino desde el punto de vista del derecho internacional tradicional. Las normas de fuente internacional cuyo contenido consiste en la consagración y protección de los derechos humanos fundamentales difieren de las normas tradicionales de derecho internacional en muchos aspectos, y en particular en lo tocante a su interpretación, regida por el principio *pro persona* que, en el sistema interamericano, está afirmado y desarrollado en el artículo 29 de la Convención Americana sobre Derechos Humanos.

3. De haberse enfocado como parte del derecho internacional de los derechos humanos, pocas palabras habrían bastado para contestar la primera y principal de las preguntas formuladas por Panamá, diciendo, concisa, clara y contundentemente, que cuando el artículo 1.2 de la Convención dice que *"Para los efectos de esta Convención, persona es todo ser humano"* quiere decir precisa y exactamente eso: que persona es todo ser humano, y que "Toda persona" –es decir, todo ser humano– tiene derecho al reconocimiento de su personalidad jurídica", como lo declara el artículo 3, titulado "Derecho al Reconocimiento de la Personalidad Jurídica".

4. Como consecuencia lógica de esa concisa, clara y contundente afirmación inicial, la respuesta a las siguientes preguntas de Panamá debería haberse formulado también de manera concisa, clara y contundente (ver *infra*, cap. II). Lamentablemente, la mayoría de la Corte optó por un enfoque de carácter general que, a pesar de su extensión, estuvo lejos de abarcar todos los puntos que habría correspondido incluir en un enfoque de esa naturaleza (ver *infra*, cap. III).

II. LAS CONSULTAS ESPECÍFICAS DE PANAMÁ Y LA RESPUESTA QUE SE DEBIO DAR

5. Las consultas específicas formuladas por Panamá fueron muy claras:

> "1. ¿El Artículo 1, Párrafo Segundo, de la Convención Americana sobre Derechos Humanos, restringe la protección interamericana de los derechos humanos a las personas físicas y excluye del ámbito de protección de la Convención a las personas jurídicas?
>
> 2. ¿El Artículo 1.2 de la Convención, puede proteger también los derechos de personas jurídicas como cooperativas, sindicatos, asociaciones, sociedades, en cuanto compuestos por personas físicas asociadas a esas entidades?

3. ¿Pueden las personas jurídicas acudir a los procedimientos de la jurisdicción interna y agotar los recursos de la jurisdicción interna en defensa de los derechos de las personas físicas titulares de esas personas jurídicas?

4. ¿Qué derechos humanos pueden serle reconocidos a las personas jurídicas o colectivas (no gubernamentales) en el marco de la Declaración Americana sobre Derechos y Deberes del Hombre, de la Convención Americana sobre Derechos Humanos y de sus Protocolos o instrumentos internacionales complementarios?

5. En el marco de la Convención Americana, además de las personas físicas, ¿tienen las personas jurídicas compuestas por seres humanos derechos a la libertad de asociación del Artículo 16, a la intimidad y vida privada del Artículo 11, a la libertad de expresión del Artículo 13, a la propiedad privada del Artículo 21, a las garantías judiciales, al debido proceso y a la protección de sus derechos de los Artículos 8 y 25, a la igualdad y no discriminación de los Artículos 1 y 24, todos de la Convención Americana?

6. ¿Puede una empresa o sociedad privada, cooperativa, sociedad civil o sociedad comercial, un sindicato (persona jurídica), un medio de comunicación (persona jurídica), una organización indígena (persona jurídica), en defensa de sus derechos y/o de sus miembros, agotar los recursos de la jurisdicción interna y acudir a la Comisión Interamericana de Derechos Humanos en nombre de sus miembros (personas físicas asociadas o dueñas de la empresa o sociedad), o debe hacerlo cada miembro o socio en su condición de persona física?

7. ¿Si una persona jurídica en defensa de sus derechos y de los derechos de sus miembros (personas físicas asociados o socios de la misma), acude a la jurisdicción interna y agota sus procedimientos jurisdiccionales, pueden sus miembros o asociados acudir directamente ante la jurisdicción internacional de la Comisión Interamericana en la defensa de sus derechos como personas físicas afectadas?

8. En el marco de la Convención Americana sobre Derechos Humanos, ¿las personas físicas deben agotar ellas mismas los recursos de la jurisdicción interna para acudir a la Comisión Interamericana de Derechos Humanos en defensa de sus derechos humanos, o pueden hacerlo las personas jurídicas en las que participan?

6. La respuesta a la *primera consulta específica* –que es la fundamental– está dada por el texto absolutamente claro e inequívoco del artículo 1.2. Como ya se expresó en el párrafo 3 del presente voto, "cuando el artículo 1.2 de la Convención dice que *"Para los efectos de esta Convención, persona es todo ser humano"* quiere decir precisa y exactamente eso: que persona es todo ser humano, y que "Toda persona" –es decir, todo ser humano– tiene derecho al reconocimiento de su personalidad jurídica", como lo declara el artículo 3, titulado "Derecho al Reconocimiento de la Personalidad Jurídica". Por lo tanto, los derechos que la Convención Americana reconoce a las personas[1] son derechos de los seres humanos y no de otro tipo, clase o índole de entidad.

7. El sistema de protección establecido por la Convención solo comprende a los seres humanos, porque así ha sido concebido. Ello no excluye que en otros sistemas, internacionales o internos, se reconozcan derechos a otras entidades (artículo 29 de la Convención Americana). Pero no se tratará de derechos humanos fundamentales, que solo pueden pertenecer a la persona humana, sino de otra índole de derechos.

8. La respuesta a la *consulta específica 2* debió ser contundentemente negativa: El Artículo 1.2 de la Convención no protege los derechos de personas jurídicas como cooperativas, sindicatos, asociaciones, sociedades, en cuanto compuestos por personas físicas asociadas a esas entidades. Distinto es el tema de la protección de los derechos de las personas físicas "asociadas a esas entidades" o integrantes de ellas, que la Corte ha resuelto en su jurisprudencia en el sentido de que "si bien la figura de las personas jurídicas no ha sido reconocida expresamente

[1] Ver *infra,* en el texto propuesto por mí para el capítulo V de la Opinión Consultiva, que se transcribe íntegramente en el párrafo 20 del presente voto, párrs. 15-17 (Convención Americana) y 22 (Declaración Americana de los Derechos y Deberes del Hombre.

por la Convención Americana, como sí lo hace el Protocolo no. 1 a la Convención Europea de Derechos Humanos, esto no restringe la posibilidad [de] que bajo determinados supuestos el individuo pueda acudir al Sistema Interamericano de Protección de los Derechos Humanos para hacer valer sus derechos fundamentales, aun cuando los mismos estén cubiertos por una figura o ficción jurídica creada por el mismo sistema del Derecho. No obstante, vale hacer una distinción para efectos de admitir cuáles situaciones podrán ser analizadas por este Tribunal, bajo el marco de la Convención Americana. En este sentido, ya esta Corte ha analizado la posible violación de derechos de sujetos en su calidad de accionistas"[2].

9. La respuesta a la *consulta específica 3* debió ser igualmente clara y concisa. Las personas jurídicas pueden utilizar todos los procedimientos y recursos previstos en el derecho interno, pero ello no constituye en sí una forma de "agotar los recursos de la jurisdicción interna en defensa de los derechos de las personas físicas titulares de esas personas jurídicas". En los casos en que un individuo acuda al Sistema Interamericano de Protección de los Derechos Humanos "para hacer valer sus derechos fundamentales, aun cuando los mismos estén cubiertos por una figura o ficción jurídica creada por el mismo sistema del Derecho", habrá que considerar en cada caso si los recursos internos así interpuestos fueron suficientes para cumplir con los requisitos de la Convención. En el caso Cantos Vs. Argentina, la Corte comprobó que "todos los recursos administrativos y judiciales, salvo una denuncia penal y un amparo interpuestos en 1972, al inicio de los hechos denunciados, fueron presentados directamente por 'derecho propio y en nombre de sus empresas' por el señor Cantos" y, en razón de ello, concluyó que "la supuesta violación de los derechos de la Convención del señor Cantos" podía ser analizada por la Corte "en la etapa de fondo correspondiente" [3].

10. La respuesta a la *consulta específica 4* –"¿Qué derechos humanos pueden serle reconocidos a las personas jurídicas o colectivas (no gubernamentales) en el marco de la Declaración Americana sobre Derechos y Deberes del Hombre, de la Convención Americana sobre Derechos Humanos y de sus Protocolos o instrumentos internacionales complementarios?"– debió ser también concisa, clara y contundente: Ninguno.

11. La respuesta a la *consulta específica 5* –"En el marco de la Convención Americana, además de las personas físicas, ¿tienen las personas jurídicas compuestas por seres humanos derechos a la libertad de asociación del Artículo 16, a la intimidad y vida privada del Artículo 11, a la libertad de expresión del Artículo 13, a la propiedad privada del Artículo 21, a las garantías judiciales, al debido proceso y a la protección de sus derechos de los Artículos 8 y 25, a la igualdad y no discriminación de los Artículos 1 y 24, todos de la Convención Americana?"– debió ser también clara y contundente. Las personas jurídicas no tienen ninguno de los derechos a que se refiere esta consulta, porque no son titulares de ninguno de los derechos incluidos en el sistema de protección de la Convención Americana.

12. La respuesta a la *consulta específica 6* –"¿Puede una empresa o sociedad privada, cooperativa, sociedad civil o sociedad comercial, un sindicato (persona jurídica), un medio de comunicación (persona jurídica), una organización indígena (persona jurídica), en defensa de sus derechos y/o de sus miembros, agotar los recursos de la jurisdicción interna y acudir a la Comisión Interamericana de

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[2] *Caso Cantos Vs. Argentina. Excepciones Preliminares.* Sentencia de 7 de septiembre de 2001. Serie C No. 85, párr. 29; *Caso Ivcher Bronstein Vs. Perú. Fondo, Reparaciones y Costas*. Sentencia de 6 de febrero de 2001. Serie C No. 74, párrs. 123, 125, 138 y 156.

[3] *Cfr. Caso Cantos Vs. Argentina,* citado, párr. 30.

Derechos Humanos en nombre de sus miembros (personas físicas asociadas o dueñas de la empresa o sociedad), o debe hacerlo cada miembro o socio en su condición de persona física?"– debió distinguir entre las diversas situaciones planteadas, a partir de la afirmación general de que las personas jurídicas no son titulares de derechos fundamentales protegidos por la Convención Americana:

a) Una empresa o sociedad privada, una cooperativa, una sociedad civil o comercial o un medio de comunicación (persona jurídica) no pueden agotar los recursos de la jurisdicción interna y acudir a la Comisión Interamericana de Derechos Humanos en nombre de sus miembros (personas físicas asociadas o dueñas de la empresa o sociedad), sino que quien debe hacerlo es cada miembro o socio en su condición de persona física que, como tal, es titular de derechos fundamentales protegidos por la Convención.

b) Los casos especiales de los sindicatos y de las comunidades indígenas o tribales (no de "una organización indígena (persona jurídica)") merecen un tratamiento separado (ver *infra*, caps. V y VI).

13. La respuesta a las *consultas específicas 7* –"¿Si una persona jurídica en defensa de sus derechos y de los derechos de sus miembros (personas físicas asociados o socios de la misma), acude a la jurisdicción interna y agota sus procedimientos jurisdiccionales, pueden sus miembros o asociados acudir directamente ante la jurisdicción internacional de la Comisión Interamericana en la defensa de sus derechos como personas físicas afectadas?"– *y 8* –"En el marco de la Convención Americana sobre Derechos Humanos, ¿las personas físicas deben agotar ellas mismas los recursos de la jurisdicción interna para acudir a la Comisión Interamericana de Derechos Humanos en defensa de sus derechos humanos, o pueden hacerlo las personas jurídicas en las que participan?"– debió fundarse en el principio *pro persona* y seguir los lineamientos generales de la respuesta a la consulta específica 3.

III. PROBLEMAS Y OMISIONES DEBIDOS AL ENFOQUE UTILIZADO

14. La opción por el enfoque general, que sin embargo no fue completa, llevó a una serie de problemas y omisiones que se habrían evitado dando respuesta concreta a las consultas específicas de Panamá.

15. Un primer problema consiste en que, aparentando abarcar todo lo relacionado con el tema, de hecho la Corte omitió considerar algunos aspectos fundamentales. En particular, no analizó la situación de la enorme cantidad de personas jurídicas creadas en Panamá, sobre las que no corresponde que la Corte emita un juicio de valor, pero cuya existencia y cuyas actividades *off shore* no puede ignorar. El enfoque general llevó asimismo a pretender dar una definición general de "persona jurídica" que no tuvo en cuenta la definición que da el propio Código Civil de Panamá: "Es persona jurídica una entidad moral o *persona ficticia*, de carácter político, público, religioso, industrial o comercial, representada por persona o personas naturales, capaz de ejercer derechos y de contraer obligaciones." (Art. 38, párr. 3; cursiva añadida). La realidad muestra que hay muchas personas jurídicas que no tienen "miembros", sino dueños, frecuentemente ocultos, a quienes sirven como instrumentos para lograr resultados que no podrían obtener actuando individualmente y de manera no encubierta.

16. Otro problema consiste en que no se ha dado una respuesta concreta a las preguntas específicas referidas a los supuestos derechos fundamentales de "asociaciones, sociedades" y de "una empresa o sociedad privada, cooperativa,

sociedad civil o sociedad comercial" o "medio de comunicación" (persona jurídica"). Este aspecto ha sido abordado *supra*, párrs. 8 y 12.

17. Las referencias al derecho interno de diversos países no tiene en cuenta, entre otras cosas, la esencial diferencia con la Ley Fundamental de Bonn, cuyo art. 19.3 dispone que "Los derechos fundamentales rigen también para las personas jurídicas con sede en el país, en tanto por su propia naturaleza sean aplicables a las mismas."

18. A pesar del carácter general que se trató de dar a la respuesta a las consultas específicas formuladas por Panamá, no se tuvo en cuenta más que el derecho de países latinoamericanos, olvidando que –como se indica con razón en el párr. 19 de la opinión consultiva– el ámbito de aplicación de las opiniones consultivas, incluida la legitimación para solicitarlas, comprende a todos los Estados miembros de la OEA. Una consideración general del tema de la relación entre personas jurídicas y derechos fundamentales no puede dejar de abordar la peculiar interpretación que la Suprema Corte de los Estados Unidos de América ha dado a la palabra "persona" empleada en la Enmienda XIV a su Constitución[4].La jurisprudencia de la Suprema Corte estadounidense ha interpretado que también una persona jurídica, y en particular una *corporation* (aproximadamente equivalente a una sociedad anónima, y muchas veces empleado en el sentido de empresa) tiene los mismos derechos fundamentales que una persona natural, y como parte de su derecho a la libertad de expresión puede participar libremente en las campañas políticas electorales, en particular mediante contribuciones pecuniarias[5].

IV. INTENTO FALLIDO DE BUSCAR CONSENSO (CAPÍTULO V DE LA OPINIÓN CONSULTIVA)

19. En un intento por buscar el consenso, elaboré y presenté un texto sustitutivo del capítulo V que estaba a consideración de la Corte, en el cual procuré incluir una formulación que fuera aceptable para los demás jueces (en la medida en que recogía varios de los puntos fundamentales del texto que se consideraba) pero que al mismo tiempo tuviera la claridad, concisión y contundencia que a mi juicio debía tener la respuesta a las consultas específicas de Panamá.

20. El texto de mi propuesta fue el siguiente:

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[4] El párrafo 1 de la Enmienda XIV dispone lo siguiente: "Todas las personas nacidas o naturalizadas en los Estados Unidos y sometidas a su jurisdicción son ciudadanos de los Estados Unidos y de los Estados en que residen. *Ningún Estado podrá* dictar ni dar efecto a cualquier ley que limite los privilegios o inmunidades de los ciudadanos de los Estados Unidos; tampoco podrá Estado alguno privar a cualquier persona de la vida, la libertad o la propiedad sin el debido proceso legal; ni *negar a cualquier persona que se encuentre dentro de sus límites jurisdiccionales la igual protección de las leyes*". (Subrayado añadido.)

[5] Véanse, por ejemplo, los casos *Santa Clara County v. Southern Pacific Railroad Company*, 118 US 394 (1886) y (después de una serie de sentencias que desde 1976 avanzaban en el mismo sentido) *Citizens United v. Federal Election Commission*, No. 08-205, 558 U.S. 310 (2010).

"V.

EL ARTÍCULO 1.2 DE LA CONVENCIÓN AMERICANA SÓLO COMPRENDE A LAS PERSONAS NATURALES O FÍSICAS

1. La primera y principal pregunta formulada por el Gobierno de Panamá es la siguiente:

> ¿El Artículo 1, Párrafo Segundo, de la Convención Americana sobre Derechos Humanos, restringe la protección interamericana de los derechos humanos a las personas físicas y excluye del ámbito de protección de la Convención a las personas jurídicas?

2. El artículo 1.2 de la Convención Americana dispone lo siguiente:

> "*Para los efectos de esta Convención, persona es todo ser humano.*"

En consecuencia, no cabe duda de que las personas jurídicas no están comprendidas en "el ámbito de protección de la Convención" y que "la protección interamericana de los derechos humanos" sólo comprende a las personas físicas o naturales.

3. La disposición es tan clara que no parecería necesario extenderse sobre los distintos criterios interpretativos previstos en los artículos 31[1] y 32[2] de la Convención de Viena sobre el Derecho de los Tratados, la cual recoge la regla general y consuetudinaria de interpretación de los tratados internacionales[3].

4. No obstante, como la finalidad de las opiniones consultivas es arrojar la mayor claridad y certeza posible sobre las interpretaciones contenidas en ellas, la Corte aplicará la regla general de interpretación de los tratados (art. 31.1 de la Convención de Viena), que impone analizar el sentido corriente de los términos empleados en el art. 1.2, interpretados de buena fe, teniendo en cuenta el objeto y fin del tratado y el contexto de los términos empleados, así como lo dispuesto en el art.31.4, según el cual "Se dará a un término un sentido especial si consta que tal fue la intención de las partes". Posteriormente la Corte utilizará, en lo pertinente, los medios de interpretación complementarios establecidos en el artículo 32 de la

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[1] Artículo 31. Regla general de interpretación.
1. Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin.
2. Para los efectos de la interpretación de un tratado, el contexto comprenderá, además del texto, incluidos su preámbulo y anexos:
a) todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado:
b) todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado;
3. Juntamente con el contexto, habrá de tenerse en cuenta:
a) todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones:
b) toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado:
c) toda norma pertinente de derecho internacional aplicable en las relaciones entre las partes.
4. Se dará a un término un sentido especial si consta que tal fue la intención de las partes.

[2] Artículo 32. Medios de interpretación complementarios. Se podrán acudir a medios de interpretación complementarios, en particular a los trabajos preparatorios del tratado y a las circunstancias de su celebración, para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación dada de conformidad con el artículo 31:
a) deje ambiguo u oscuro el sentido; o
b) conduzca a un resultado manifiestamente absurdo o irrazonable.

[3] *Cfr.* entre otros, Corte Internacional de Justicia, *Caso relativo a la soberanía sobre Pulau Ligitan y Pulau Sipadan (Indonesia contra Malasia)*, Sentencia de 17 de diciembre de 2002, párr. 37, y Corte Internacional de Justicia, *Caso Avena y otros nacionales mexicanos (México contra los Estados Unidos de América)*, Sentencia de 31 de marzo de 2004, párr. 83.

Convención de Viena, en particular, los trabajos preparatorios de la Convención Americana.

5. Todo ello llevará a confirmar la afirmación hecha al comienzo de este capítulo: no cabe duda de que las personas jurídicas no están comprendidas en "el ámbito de protección de la Convención" y que "la protección interamericana de los derechos humanos" sólo comprende a las personas físicas o naturales.

A. Sentido corriente de los términos del artículo 1.2 y sentido especial atribuido a ellos en la Convención

6. El sentido corriente de los términos del artículo 1.2 es meridianamente claro. La Corte reitera que ya ha establecido que el artículo 1.2 de la Convención establece que los derechos reconocidos en dicho instrumento corresponden a personas, es decir, a seres humanos[4]. En particular, cabe resaltar que la Convención Americana no dejó abierta la interpretación sobre cómo debe entenderse el término "persona", por cuanto el artículo 1.2 precisamente busca establecer una definición al mismo, lo cual demuestra la intención de las partes en darle un sentido especial al término en el marco del tratado, como lo establece el artículo 31.4 de la Convención de Viena. En este sentido, este Tribunal ha entendido que los dos términos del artículo 1.2 de la Convención deben entenderse como sinónimos[5].

7. "Ser humano" es todo individuo de la especie humana. "Persona" es todo individuo de la especie humana. Por lo tanto, las personas jurídicas no están comprendidas en "el ámbito de protección de la Convención" y "la protección interamericana de los derechos humanos" sólo comprende a las personas físicas o naturales. No es necesario transcribir las definiciones del diccionario de la lengua española[6], ni los de los idiomas de los otros textos oficiales de la Convención Americana[7]. Todas ellas son concordantes en el sentido indicado.

8. Así lo ha interpretado la Corte Interamericana desde el primer caso[8] en que se planteó la cuestión de si las personas jurídicas podrían ser objeto de protección en el sistema interamericano. Esa conclusión, que se confirmará en la presente opinión consultiva, es perfectamente acorde con el principio de buena fe, y –como se verá en los párrafos siguientes– resulta plenamente confirmada por el análisis del contexto y del objeto y fin de la Convención[9].

B. Objeto y fin del tratado – interpretación teleológica

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[4] *Caso Usón Ramírez Vs. Venezuela. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 20 de noviembre de 2009. Serie C No. 207, párr. 45, y *Caso Granier y otros (Radio Caracas Televisión) Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 22 de junio de 2015. Serie C No. 293, párr. 19.

[5] *Cfr*. *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 noviembre de 2012 Serie C No. 257, párr. 219. El artículo 1.2 ha sido analizado por la Corte en casos en los que se ha solicitado la violación de derechos en perjuicio de personas jurídicas, lo cual ha sido rechazado por el Tribunal porque no han sido reconocidas como titulares de derechos consagrados en la Convención Americana. *Cfr. Caso Cantos Vs. Argentina. Excepciones Preliminares.* Sentencia de 7 de septiembre de 2001. Serie C No. 85, párr. 29, y *Caso Perozo y otros Vs. Venezuela. Excepciones Preliminares, Fondo, Reparaciones y Costas.* Sentencia de 28 de enero de 2009. Serie C No. 195, párr. 398.

[6] http://lema.rae.es/drae/?val=ser+humano.

[7] Inglés: Diccionario de la Universidad de Oxford, disponible en: http://www.oxforddictionaries.com/definition/english/human-being?q=human+being; portugués: diccionario "VOX", "humano"; francés: Diccionario Larousse, disponible en http://www.larousse.fr/dictionnaires/francais/humain/40608?q=humain#40515.

[8] *Cantos Vs. Argentina, Excepciones Preliminares*. Sentencia de 7 de septiembre de 2001. Serie C No. 85, párr. 29.

[9] *Cfr. Propuesta de Modificación a la Constitución Política de Costa Rica Relacionada con la Naturalización.* Opinión Consultiva OC-4/84 del 19 de enero de 1984. Serie A No. 4, párr. 23. .

9. La Corte ha indicado que en una interpretación teleológica se analiza el propósito de las normas involucradas, para lo cual es pertinente analizar el objeto y fin del tratado mismo y, de ser pertinente, analizar los propósitos del sistema regional de protección[10].

10. No puede caber duda alguna de que el objeto y fin de la Convención Americana es la protección del ser humano y sus derechos. Ya desde su Preámbulo, esta proclama enfáticamente que su propósito es "consolidar en este Continente, dentro del cuadro de las instituciones democráticas, un régimen de libertad personal y de justicia social, fundado en el respeto de los derechos esenciales del hombre"; reconoce "que los derechos esenciales del hombre no nacen del hecho de ser nacional de determinado Estado, sino que tienen como fundamento los atributos de la persona humana, razón por la cual justifican una protección internacional, de naturaleza convencional coadyuvante o complementaria de la que ofrece el derecho interno de los Estados americanos; y reitera que, "con arreglo a la Declaración Universal de los Derechos Humanos, sólo puede realizarse el ideal del ser humano libre, exento del temor y de la miseria, si se crean condiciones que permitan a cada persona gozar de sus derechos económicos, sociales y culturales, tanto como de sus derechos civiles y políticos".

11. Por ello, la Corte ha afirmado que el objeto y fin de la Convención Americana es "la protección de los derechos fundamentales de los seres humanos"[11], y que fue diseñada para proteger los derechos humanos de las personas independientemente de su nacionalidad, frente a su propio Estado o a cualquier otro[12].

12. Como se indicó, el objeto y fin de la Convención es "la protección de los derechos fundamentales de los seres humanos", lo cual demuestra que ella fue creada con la intención de proteger exclusivamente a aquellos. La interpretación teleológica de la norma confirma la conclusión a la cual se arribó teniendo en cuenta el sentido corriente de los términos, según la cual las personas jurídicas están excluidas de la protección otorgada por la Convención Americana. Uno de los principios fundamentales en materia de interpretación de las normas sobre derechos humanos es el principio *pro persona*, que impone efectuar la interpretación más favorable para el efectivo goce y ejercicio de los derechos y libertades fundamentales.

13. Asimismo, las pautas de interpretación contenidas en el artículo 29 de la Convención[13] implican que "[n]inguna disposición de dicho tratado puede ser

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[10] *Caso González y otras ("Campo Algodonero") Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas.* Sentencia de 16 de noviembre de 2009. Serie C No. 205, párr. 59, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 noviembre de 2012. Serie C No. 257, párr. 257.

[11] *El Efecto de las Reservas sobre la Entrada en Vigencia de la Convención Americana sobre Derechos Humanos*. Opinión Consultiva OC-2/82 del 24 de septiembre de 1982. Serie A No. 2, párr. 29, y *Derechos y garantías de niñas y niños en el contexto de la migración y/o en necesidad de protección internacional*. Opinión Consultiva OC-21/14 de 19 de agosto de 2014. Serie A No. 21, párr. 53.

[12] *Cfr. El Efecto de las Reservas sobre la Entrada en Vigencia de la Convención Americana sobre Derechos Humanos***. Opinión Consultiva OC-2/82 del 24 de septiembre de 1982. Serie A No. 2, párr. 29**.

[13] Artículo 29. Normas de Interpretación

Ninguna disposición de la presente Convención puede ser interpretada en el sentido de:

a) permitir a alguno de los Estados Partes, grupo o persona, suprimir el goce y ejercicio de los derechos y libertades reconocidos en la Convención o limitarlos en mayor medida que la prevista en ella;

b) limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Partes o de acuerdo con otra convención en que sea parte uno de dichos Estados;

c) excluir otros derechos y garantías que son inherentes al ser humano o que se derivan de la forma democrática representativa de gobierno, y

d) excluir o limitar el efecto que puedan producir la Declaración Americana de Derechos y Deberes del Hombre y otros actos internacionales de la misma naturaleza.

interpretada en el sentido de […] limitar el goce y ejercicio de cualquier derecho o libertad que pueda estar reconocido de acuerdo con las leyes de cualquiera de los Estados Parte o de acuerdo con otra convención en que sea parte uno de dichos Estados", o bien de "excluir o limitar el efecto que puedan producir la Declaración Americana de los Derechos y Deberes del Hombre y otros actos internacionales de la misma naturaleza".

C. El contexto – interpretación sistemática

14. Según el art. 31.2 de la Convención de Viena, el contexto está compuesto fundamentalmente por el texto del tratado, "incluidos su preámbulo y anexos". Según el art. 31.2 de la Convención de Viena, el contexto comprende además "todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado" y "todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado"; y según el art. 31.3, "Juntamente con el contexto, habrá de tenerse en cuenta" asimismo "todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones", "toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado", y "toda norma pertinente de derecho internacional aplicable en las relaciones entre las partes." Como no existen tales acuerdos, instrumentos, prácticas o normas pertinentes, la Corte considerará solo el texto del tratado, incluido su preámbulo.

i) El texto de la Convención Americana

15. Comenzando con el texto de la Convención Americana, prácticamente en todos los artículos en que se consagran derechos el sujeto a quien se atribuyen esos derechos es "toda persona", es decir, todo ser humano: artículos 1.1, 3, 4.1, 4.6, 5.1, 5.2, 7.1, 7.4, 7.5, 7.6, 8.1, 8.2 (dos veces), 10, 11.1, 11.3, 12.1, 13.1, 14.1, 16, 18, 20.1, 20.2, 21.1, 22.1, 22.2, 22.7, 24, 25.1 y 25.2. Otros artículos atribuyen los derechos a "todas las personas" (expresión equivalente a la anterior): artículos 16.1 y 24. Otros artículos se refieren a la totalidad de las personas comprendidas en una categoría: "todo niño" (artículo 19), "todos los ciudadanos" (art. 23.1), "el hombre y la mujer" (art. 17.2), "los contrayentes" (art. 17.3), "los cónyuges" (art. 17.4).

16. Lo mismo ocurre con los artículos que establecen preceptos prohibitivos para la protección de determinados derechos fundamentales, en los que el sujeto protegido se designa como "nadie", que según el DRAE significa "ninguna persona", o bien directamente como "ninguna persona": artículos 5.2, 7.2, 7.3, 7.7, 9, 11.2, 12.2, 20.3, 21.2, 22.5.

17. En ninguno de los artículos mencionados se emplea expresión alguna que conceda a las personas jurídicas la titularidad de alguno de los derechos que consagran, ni que permita inferir una desviación con respecto a lo establecido en el artículo 1.2 de la Convención.

ii) El sistema interamericano

18. Asimismo, de conformidad con el criterio sistemático, las normas deben ser interpretadas como parte de un todo cuyo significado y alcance deben fijarse en función del sistema jurídico al cual pertenecen[14]. El Tribunal ha considerado que al interpretar un tratado debe tomarse en cuenta el sistema

[14] *Cfr. Caso González y otras ("Campo Algodonero") Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas*. Sentencia de 16 de noviembre de 2009. Serie C No. 205, párr. 43, y *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 noviembre de 2012 Serie C No. 257, párr. 191.

dentro del cual se inscribe, que en el caso está constituido por el sistema interamericano de protección de los derechos humanos.

19. Dentro de ese sistema ocupa un lugar prominente la Declaración Americana de los Derechos y Deberes del Hombre cuyo análisis permite verificar si la interpretación dada a una norma o término en concreto es coherente con el sentido de las demás disposiciones.

20. La Declaración Americana comienza con los siguientes considerandos:

> Que los pueblos americanos han dignificado la persona humana y que sus constituciones nacionales reconocen que las instituciones jurídicas y políticas, rectoras de la vida en sociedad, tienen como fin principal la protección de los derechos esenciales del hombre y la creación de circunstancias que le permitan progresar espiritual y materialmente y alcanzar la felicidad;
>
> Que, en repetidas ocasiones, los Estados americanos han reconocido que los derechos esenciales del hombre no nacen del hecho de ser nacional de determinado Estado sino que tienen como fundamento los atributos de la persona humana;
>
> Que la protección internacional de los derechos del hombre debe ser guía principalísima del derecho americano en evolución;
>
> Que la consagración americana de los derechos esenciales del hombre unida a las garantías ofrecidas por el régimen interno de los Estados, establece el sistema inicial de protección que los Estados americanos consideran adecuado a las actuales circunstancias sociales y jurídicas, no sin reconocer que deberán fortalecerlo cada vez más en el campo internacional, a medida que esas circunstancias vayan siendo más propicias.

21. Las expresiones transcritas demuestran que la Declaración Americana fue proclamada con la intención de centrar la protección y titularidad de los derechos en el ser humano. Lo anterior se infiere de la constante referencia a palabras tales como "hombre"[15] o "persona humana", los cuales denotan que no se estaba teniendo en cuenta la figura de las personas jurídicas a la hora de redactar dichos instrumentos. Sobre la Declaración Americana, el Consejo Interamericano de Jurisconsultos sobre la Conferencia de Bogotá manifestó que "[e]s evidente que la Declaración de Bogotá no crea una obligación jurídica contractual, pero también lo es el hecho de que ella señala una orientación bien definida en el sentido de la protección internacional de los derechos fundamentales de la persona humana"[16].

22. El texto de la Declaración Americana es análogo al de la posterior Convención Americana a este respecto. El titular de la protección es "todo ser humano" (art. I), cada hombre (art. XVIII), "toda persona" (arts. III, IV, V, VI, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXVII), "todas las personas" (art. II), "toda mujer en estado de gravidez" (art. VII), "toda persona que trabaja" (art. XIV), "toda persona, legalmente capacitada" (art. XX), "todo individuo que haya sido privado de su libertad" (art. XXV), "nadie" (art. XXV), "todo acusado" o "toda persona acusada de un delito" (XXVI). Otro tanto ocurre con los artículos relativos a deberes, que los atribuyen a "toda persona" (arts. XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII, XXXVIII).

23. En ninguno de los artículos mencionados se emplea expresión alguna que conceda a las personas jurídicas la titularidad de alguno de los derechos que consagran o de los deberes que imponen, ni que permita inferir un apartamiento del principio de que, a los efectos del sistema interamericano, persona es todo ser humano.

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[15] Al respecto, la Corte resalta que la utilización de la palabra "hombre" en la Declaración Americana y en la Convención Americana debe entenderse como equivalente a "ser humano", según la primera acepción del DRAE ("Ser animado racional, varón o mujer").

[16] Comité Jurídico Interamericano, Recomendaciones e informes, 1949-1953 (1955), p. 107.

iii) Otros sistemas de protección de los derechos humanos y el derecho comparado

24. Este Tribunal ha considerado útil, en algunas oportunidades[17], analizar otros sistemas de protección de los derechos humanos con la finalidad de constatar sus semejanzas o diferencias con el sistema interamericano para ayudar a determinar el alcance o sentido que se le ha dado a una norma similar o a detectar las particularidades del tratado. En el presente caso, la Corte se referirá sucintamente a los sistemas europeo, africano y universal, y también hará referencia a las normas de derecho interno en la materia.

a) Sistema europeo

25. El Convenio Europeo emplea en sus artículos la expresión "toda persona", pero no contiene una definición del término "persona", lo cual es una diferencia sustancial con la Convención Americana. En su preámbulo tampoco hay expresiones análogas a las contenidas en el preámbulo de la Convención Americana o en los considerandos de la Declaración Americana, pues solo se destaca el valor de los derechos humanos como un medio para asegurar la justicia y la paz en Europa[18]. Por otro lado, en el artículo 1 del Protocolo Adicional No. 1, relativo a la protección de la propiedad, se dispone que "Toda persona física o jurídica tiene derecho al respeto de sus bienes". A su vez, el artículo 34 del Convenio Europeo, relativo a las demandas individuales (texto revisado en virtud del Protocolo N°11), se dispone que "El Tribunal podrá conocer de una demanda presentada por cualquier persona física, organización no gubernamental o grupo de particulares que se considere víctima de una violación".

26. Fundándose en las disposiciones indicadas, e incluso extendiendo el alcance de su aplicación, el Tribunal Europeo ha conocido de demandas de diversos tipos de personas jurídicas que alegaban haber sido víctimas de la violación de uno de sus derechos (y no sólo del derecho de propiedad).

27. No obstante, esa jurisprudencia europea no resulta aplicable al sistema establecido por la Convención Americana, en virtud de las diferencias sustanciales existentes entre las disposiciones pertinentes de uno y otro sistema. Ya se indicó que en el sistema europeo no hay una norma equivalente al art. 1.2 de la Convención Americana; y el artículo 34 del Convenio Europeo, que superficialmente podría parecer análogo al art. 44 de la Convención Americana, difiere sustancialmente de este porque que exige que quien presente una petición sea una persona "que se pretenda víctima de una violación por una de las partes contrayentes de los derechos reconocidos en la Convención".

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[17] Así, por ejemplo en la opinión consultiva sobre La Colegiación Obligatoria de Periodistas, la Corte comparó el artículo 13 de la Convención Americana, referente al derecho a la libertad de expresión con los artículos análogos del Convenio Europeo (artículo 10) y del Pacto Internacional de Derechos Civiles y Políticos (artículo 19). La Colegiación Obligatoria de Periodistas (Arts. 13 y 29 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-5/85 del 13 de noviembre de 1985. Serie A No. 5, párrs. 45 a 50. En similar sentido, en el caso *Atala Riffo* la Corte analizó la diferencia entre los alcances de los artículos 11 y 17 de la Convención Americana y el artículo 8 del Convenio Europeo. *Caso Atala Riffo y Niñas Vs. Chile. Fondo, Reparaciones y Costas.* Sentencia del 24 de febrero de 2012. Serie C No. 239, párr. 175.

[18] El Preámbulo del Convenio establece lo siguiente: "Reafirmando su profunda adhesión a estas libertades fundamentales que constituyen las bases mismas de la justicia y de la paz en el mundo, y cuyo mantenimiento reposa esencialmente, de una parte, en un régimen político verdaderamente democrático, y, de otra, en una concepción y un respeto comunes de los derechos humanos de los cuales dependen;
Resueltos, en cuanto Gobiernos de Estados europeos animados por un mismo espíritu y en posesión de un patrimonio común de ideales y de tradiciones políticas, de respeto a la libertad y de primacía del Derecho, a tomar las primeras medidas adecuadas para asegurar la garantía colectiva de algunos de los derechos enunciados en la Declaración Universal".

28. De allí deriva la diferencia sustancial entre los dos sistemas de protección, pues en el sistema interamericano se ha diferenciado entre peticionario y presunta víctima. El artículo 44 de la Convención hace referencia exclusivamente a la legitimación activa, pero no a la calidad de víctima o presunta víctima. La Corte ha determinado que "es claro que el artículo 44 de la Convención permite que cualquier grupo de personas formule denuncias o quejas por violación de los derechos consagrados por la Convención. Esta amplia facultad de denuncia es un rasgo característico del sistema de protección [interamericano] de los derechos humanos"[19]. En consecuencia, de la referencia que hace el artículo 44 a "Cualquier persona o grupo de personas o entidad no gubernamental" o no es posible inferir que las personas jurídicas puedan ser presuntas víctimas, sino que se refiere a su legitimación activa, en el sentido de que las entidades no gubernamentales o grupos de particulares están facultados para presentar peticiones individuales ante Comisión Interamericana a favor de presuntas víctimas, incluso en casos en que no cuenten con el consentimiento de las mismas[20].

b) Sistema africano

29. Respecto a la Carta Africana sobre los Derechos Humanos y de los Pueblos (en adelante "la Carta Africana"), la Corte observa que esta no contiene una definición sobre el término "persona". Tampoco se encontró una interpretación oficial realizada por parte de sus órganos judiciales, sobre si el término "pueblos"[21] al que hace referencia la Carta podría llegar a cobijar a personas jurídicas. Por ello, no es posible determinar de manera concluyente si las personas jurídicas en el sistema africano son titulares de derechos y pueden ser consideradas víctimas de manera directa.

30. Al igual que en el sistema interamericano, la Carta Africana confiere a las personas jurídicas la legitimación para presentar a la Comisión Africana comunicaciones en las que denuncien violaciones de los derechos humanos contenidos en la Carta Africana[22] a nombre de terceros. Se trata, entonces, de un enfoque de *actio popularis*, de acuerdo con el cual no se requiere que el autor de la comunicación conozca a la víctima de la violación que alega o tenga algún vínculo con ella[23], siempre y cuando la comunicación cumpla con los requisitos de forma que exige el artículo 56 de la Carta Africana.

c) Sistema universal

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[19] *Castillo Petruzzi y Otros Vs. Perú. Excepciones Preliminares*. Sentencia del 4 de septiembre de 1998. Serie C No.41, párr. 77.

[20] Al respecto, la Corte en el caso Acevedo Jaramillo manifestó que "la denuncia puede ser presentada por una persona distinta a la presunta víctima, así como también puede ser presentada por 'un grupo de personas'". *Caso Acevedo Jaramillo y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia del 7 de febrero de 2006. Serie C No. 144, párr. 137. Asimismo, en el caso Saramaka indicó que "[e]l artículo 44 de la Convención permite a todo grupo de personas presentar denuncias o quejas de violaciones de los derechos establecidos en la Convención. Esta amplia facultad para presentar una petición es una característica particular del sistema interamericano para la protección de los derechos humanos. Asimismo, toda persona o grupo de personas que no sean las presuntas víctimas pueden presentar una petición". *Caso del Pueblo Saramaka vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia del 28 de noviembre de 2007. Serie C No. 172, párr. 22.

[21] Al respecto, la Carta Africana hace referencia a varios derechos de los "pueblos" como los titulares del derecho, por ejemplo el derecho a la igualdad (artículo 19), a la existencia y autodeterminación (artículo 20); a disponer libremente de sus riquezas y recursos naturales (artículo 21), al desarrollo (artículo 22); a la paz y a la seguridad (artículo 23) o a un entorno general satisfactorio favorable a su desarrollo (artículo 24).

[22] Sección 4, Regla 93(1) de las Reglas de Procedimiento de la Comisión Africana, 2010. Dice esta regla, en lo pertinente: "A Communication submitted under Article 55 of the African Charter may be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person."

[23] Comisión Africana de Derechos Humanos y de los Pueblos, *Caso Artículo 19 Vs. El Estado de Eritrea,* No. 275/03. Comunicación del 30 de mayo de 2007, párr. 65.

31. El artículo 1 del Protocolo facultativo del Pacto Internacional de Derechos Civiles y Políticos (en adelante el "PIDCP") dispone lo siguiente: "Todo Estado Parte en el Pacto que llegue a ser parte en el presente Protocolo reconoce la competencia del Comité para recibir y considerar comunicaciones de individuos que se hallen bajo la jurisdicción de ese Estado y que aleguen ser víctimas de una violación, por ese Estado Parte, de cualquiera de los derechos enunciados en el Pacto". No están comprendidas las personas jurídicas. El Comité de Derechos Humanos (en adelante "CDH" o "el Comité") ha establecido que, de acuerdo con la disposición citada, solamente los individuos pueden presentar comunicaciones ante dicho órgano[24]. Asimismo, en la Observación general número 31 del CDH se establece que "[l]os beneficiarios de los derechos reconocidos por el Pacto son los individuos"[25]. En varias resoluciones el Comité de Derechos Humanos ha reiterado que, "independientemente de que pareciera que los alegatos tengan relación con cuestiones del Pacto"[26], las personas jurídicas no cuentan con legitimación activa ante dicho órgano y asimismo que quien presenta la comunicación debe ser al mismo tiempo la víctima de la violación de derechos alegada[27].

32. Distinta es la situación a la luz de la Convención Internacional sobre la Eliminación de todas las formas de Discriminación Racial (CERD), la cual hace referencia expresa a derechos de los cuales serían titulares "grupos de personas o instituciones"[28]. En desarrollo de lo anterior, el Comité para la Eliminación de la Discriminación Racial ha establecido que las personas jurídicas pueden denunciar violaciones que afecten sus derechos, siempre y cuando éstas hayan sido perjudicadas y puedan considerarse víctimas del caso[29]. En este sentido, el Comité para la Eliminación de la Discriminación Racial ha reconocido la legitimación de las personas jurídicas para presentar denuncias de violaciones a sus propios derechos y también de violaciones a los derechos de sus miembros, accionistas y propietarios, tanto de manera individual como colectiva[30].

33. La posibilidad de presentación de comunicaciones en que cualquier persona que esté bajo la jurisdicción de un Estado Parte en el Pacto Internacional de Derechos Económicos, Sociales y Culturales (en adelante "PIDESC") alegue ser víctima de una violación de cualquiera de los DESC enunciados en el Pacto no estaba prevista en el texto original del Pacto. Existe recién desde la entrada en vigor del Protocolo Facultativo de dicho, que tuvo lugar el 5 de mayo de 2013, y son muy escasos los Estados que lo han ratificado. Por lo tanto, no existe aún una práctica que resulte pertinente para la presente opinión consultiva. Según el art. 2, "Las comunicaciones podrán ser presentadas por personas o grupos de personas

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[24] CDH, *V.S. Vs. Bielorrusia*, No. 1749/2008. 31 de octubre de 2011, párr. 7.3.

[25] CDH, *Observación general No. 31*. 26 de mayo de 2004, párr. 9.

[26] CDH, *A newspaper publishing Company Vs. Trinidad y Tobago*, No. 360/1989. 14 de julio de 1989, párr. 3.2; *A publication Company and A printing Company Vs. Trinidad y Tobago*, No. 361/1989. 14 de julio de 1989; *J.R.T. y el Partido W.G. Vs. Canadá*, No. 104/1981. 6 de abril de 1983.

[27] CDH, *A Group of Association For the Defence of The Rights of Disabled and Handicapped Persons in Italy Vs. Italia*, No. 163/1984. 10 de Abril de 1984, párr. 6.2.

[28] Por ejemplo, el artículo 2.1.a de la Convención establece que: "1. Los Estados partes condenan la discriminación racial y se comprometen a seguir, por todos los medios apropiados y sin dilaciones, una política encaminada a eliminar la discriminación racial en todas sus formas y a promover el entendimiento entre todas las razas, y con tal objeto: a) Cada Estado parte se compromete a no incurrir en ningún acto o práctica de discriminación racial *contra personas, grupos de personas o instituciones* y a velar por que todas las autoridades públicas e instituciones públicas, nacionales y locales, actúen en conformidad con esta obligación". (Cursiva añadida.)

[29] CERD, *The Documentation and Advisory Centre on Racial Discrimination (DACRD) Vs. Dinamarca*, No. 28/2003. Declarado inadmisible el 26 de agosto de 2003 y CERD, *Caso Comunidad Judía de Oslo y Otros Vs. Noruega,* No. 30/2003. 15 de agosto de 2005, párr. 7.4.

[30] CERD, *TBB-Turkish Union in Berlin/Brandenburg Vs. Alemania*, No. 48/2010. 26 de febrero de 2013, párrs. 11.2 y 11.3.

que se hallen bajo la jurisdicción del Estado Parte y que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de los derechos enunciados en la Convención, o en nombre de esas personas o grupos de personas". Ni en el Pacto ni en el Protocolo Facultativo existe una disposición análoga al art. 1.2 de la Convención Americana. Tampoco existen disposiciones que otorguen derechos a personas jurídicas.

34. Tampoco existen disposiciones de esa índole en la Convención sobre la Eliminación de todas las formas de Discriminación contra la Mujer (en adelante "CEDAW"). El artículo 2 del Protocolo Facultativo de la CEDAW también prevé la posibilidad de que se presenten comunicaciones en términos idénticos a los mencionados en el párrafo anterior, es decir, por personas o grupos de personas que aleguen ser víctimas[31]. Hasta la fecha no se han presentado comunicaciones de personas jurídicas ante el Comité para la Eliminación de la Discriminación contra la Mujer.

d) Conclusión sobre los tribunales y organismos internacionales

35. La Corte constata que *sólo se reconocen derechos a las personas jurídicas en los sistemas en que ello se establece a texto expreso*: el sistema europeo (*supra,* párrs. 25 a 28) y la Convención Internacional sobre la Eliminación de todas las formas de Discriminación Racial (CERD) (*supra,* párr. 32). *La Convención Americana no tiene ningún texto análogo, y en cambio es el único tratado sobre derechos humanos que contiene una disposición como el art. 1.2*.

iv) Reconocimiento de derechos a personas jurídicas en el derecho interno

36. En el derecho interno de numerosos países que han aceptado la competencia de la Corte se reconocen a las personas jurídicas derechos fundamentales, que pueden coincidir con los consagrados en la Convención Americana. Según la información analizada por este Tribunal, los derechos que comúnmente[32] se les reconocen a las personas jurídicas son los de propiedad[33], libertad de expresión[34], petición[35] y asociación[36]. Esos derechos

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[31] "Las comunicaciones podrán ser presentadas por personas o grupos de personas que se hallen bajo la jurisdicción del Estado Parte y que aleguen ser víctimas de una violación por ese Estado Parte de cualquiera de los derechos enunciados en la Convención, o en nombre de esas personas o grupos de personas. Cuando se presente una comunicación en nombre de personas o grupos de personas, se requerirá su consentimiento, a menos que el autor pueda justificar el actuar en su nombre sin tal consentimiento".

[32] Otros derechos que la Corte constató que se le reconocen a personas jurídicas en la región son, *inter alia*: a las garantías judiciales, al debido proceso, legalidad, de audiencia, a la seguridad jurídica, a la información pública , de reunión, a la inviolabilidad de la correspondencia y demás formas de comunicación privada, a la inviolabilidad de domicilio, a solicitar la rectificación, actualización, inclusión o supresión de los datos personales que le corresponda, a la personalidad, al libre desarrollo de la personalidad, a la libertad de enseñanza , a la libertad religiosa o de creencias, a la libertad de contratación, a la libertad de trabajo, a libertad de empresa, comercio e industria, a la libre competencia, a fundar medios de comunicación, a fundar centros educativos, a la igualdad, al buen nombre, a la honra , y al habeas data.

[33] Al respecto ver: artículo 16 Constitución de Barbados; artículos 14 y 56 de la Constitución de Bolivia; Sentencia No. T-396/93 16 de septiembre 1993 de la Corte Constitucional de Colombia; Sentencia: 00128 Expediente: 98-000128-0004-CI Fecha: 16/12/1998 Emitido por: Sala Primera de la Corte Suprema de Costa Rica; artículo 2 de la Constitución y Sala de lo Constitucional de la Corte Suprema de Justicia, Proceso de Amparo 948-2008, sentencia de 9 de marzo de 2011 de El Salvador; artículo 39 de la Constitución de Guatemala; artículo 55 de la Constitución de Haití; Suprema Corte de Justicia de la Nación de México Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21/04/2014; artículos 103 y 14 de la Constitución de Nicaragua; Exp. n.° 4972-2006-pa/tc, La libertad, Corporación Meier S.A.C. y Persolar S.A.C. del Tribunal Constitucional del Perú; artículo 47 de la Constitución de Panamá, y artículo 34 de la Constitución de Surinam; Tribunal Constitucional de República Dominicana, Sentencia TC/0242/13. Expediente núm. TC-05-2012-0143, relativo al recurso de revisión en materia de amparo incoado por Residencial La Esmeralda, contra la Sentencia núm. 192-2012, dictada por la Primera Sala del Tribunal Superior Administrativo, 26 de octubre de 2012

no siempre se garantizan para todo tipo de personas jurídicas, dado a que algunos de los mencionados están orientados a proteger sólo a personas jurídicas de determinados tipos como los sindicatos[37], los partidos políticos[38], los pueblos indígenas[39], las comunidades afrodescendientes[40] o instituciones o grupos específicos[41]. [*Yo preferiría eliminar la mayoría de las notas al pie, habida cuenta de que este reconocimiento interno no es pertinente para la interpretación de la Convención Americana*]

37. Asimismo, la Corte nota que en gran parte de los países de la región a las personas jurídicas se les otorga la posibilidad de interponer una acción de amparo o recursos análogos en defensa de los derechos que les son reconocidos[42].

38. Sin embargo, el reconocimiento en el derecho interno de ciertos derechos de las personas jurídicas, o de algunas de ellas, no es determinante para la interpretación de la Convención Americana. La posición que los Estados hayan adoptado en su derecho interno no habilita para modificar el sentido y el alcance del artículo 1.2 de la Convención Americana.

39. Por otra parte, este Tribunal observa que tres de los seis Estados que presentaron observaciones escritas –Argentina[43], Colombia[44] y Guatemala[45]–

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http://www.tribunalconstitucional.gob.do/sites/default/files/documentos/Sentencia%20TC%200242-13%20C.pdf.

[34] Al respecto ver: artículo 35 de la Constitución de Guatemala; Sentencia No. T-396/93 16 de septiembre 1993 de la Corte Constitucional de Colombia; Exp. n.° 4972-2006-pa/tc, La libertad, Corporación Meier S.A.C. y Persolar S.A.C. del Tribunal Constitucional del Perú, y artículo 26 de la Constitución de Paraguay.

[35] Sentencia No. T-396/93 16 de septiembre 1993 de la Corte Constitucional de Colombia, Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Proceso de amparo 103-2006, sentencia de 7 de noviembre de 2008; artículo 80 de la Constitución de Honduras; Suprema Corte de Justicia de la Nación de México Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21/04/2014, Exp. n.° 4972-2006-pa/tc, La libertad, Corporación Meier S.A.C. y Persolar S.A.C. del Tribunal Constitucional del Perú; artículo 41 de la Constitución de Panamá, y artículo 40 de la Constitución de Paraguay.

[36] Artículo 34 de la Constitución de Guatemala; Sentencia No. T-396/93 16 de septiembre 1993 de la Corte Constitucional de Colombia; **Sentencia: 15060 Expediente: 08-007986-0007-CO Fecha: 08/09/2010 Emitido por: Sala Constitucional de la Corte Suprema de** Costa Rica; Sala de lo Constitucional de la Corte Suprema de Justicia de El Salvador, Proceso Constitucional 23-R-96, Ramírez y Marcelino vrs. Concejo Municipal de San Juan Opico, sentencia de 8 de octubre de 1998; artículo 31 de la Constitución de Haití; Suprema Corte de Justicia de la Nación de México Contradicción de Tesis 360/2013, Fecha de resolución: sesionado el 21/04/2014, y Exp. n.° 4972-2006-pa/tc, La libertad, Corporación Meier S.A.C. y Persolar S.A.C. del Tribunal Constitucional del Perú.

[37] Bolivia, Brasil, Honduras, Nicaragua, Panamá, Surinam.

[38] Argentina, Brasil, Colombia, Haití, Honduras, Panamá

[39] Bolivia, Brasil, Colombia, Nicaragua, Panamá, Paraguay

[40] Bolivia, Nicaragua

[41] En Perú: universidades, institutos superiores y demás centros educativos. En Chile: iglesias, confesiones e instituciones religiosas. En Nicaragua: centros educativos privados de orientación religiosa, así como universidades y centros de educación técnica superior; medios de comunicación social y respecto de ciertas importaciones y prohibición de censura previa; asimismo, en Nicaragua se otorga el derecho a organizaciones de "campesinos y demás sectores productivos" a participar mediante sus propias en la definición de políticas de transformación agraria. En Panamá se le reconoce derechos a la Universidad Oficial de Panamá

[42] Argentina, Bolivia, Brasil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, México, Perú, Paraguay, República Dominicana y Uruguay.

[43] Argentina manifestó que "el artículo 1 (2) excluye toda posibilidad de que una persona jurídica se presente como víctima ante los órganos de protección del Sistema Interamericano. Se trata de una disposición que ha sido concebida con el claro sentido de restringir el acceso al Sistema exclusivamente a las personas físicas" Observaciones escritas del Estado argentino (expediente de fondo, folio 1918).

[44] Colombia afirmó que "a la luz del derecho internacional vigente para la región americana, la idea de otorgarle derechos humanos a las personas jurídicas derivados de los instrumentos internacionales que componen el SIDH no es admisible por resultar contraria a los preceptos legales que rigen el Sistema mismo". Observaciones escritas del Estado colombiano (expediente de fondo, folio 1863).

[45] Guatemala indicó que "de ninguna manera pueden ser reconocidos derechos humanos a las personas jurídicas o colectivas dentro del Marco de la Declaración Americana sobre Derechos y Deberes

manifestaron enfáticamente su posición, según la cual el artículo 1.2 de la Convención no confiere titularidad de derechos a las personas jurídicas. Además, México[46] se sumó a esta posición durante su participación en la audiencia pública de la presente solicitud. Estos cuatro Estados reconocen derechos a las personas jurídicas en su sistema interno.

D. Medios complementarios de interpretación

40. Según el artículo 32 de la Convención de Viena, los medios complementarios de interpretación, en especial los trabajos preparatorios del tratado, son utilizables, en particular, para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación dada de conformidad con el artículo 31 "deje ambiguo u oscuro el sentido" o "conduzca a un resultado manifiestamente absurdo o irrazonable". En el presente caso no existe ambigüedad u oscuridad ni resultado manifiestamente absurdo o irrazonable, de modo que la utilización de los trabajos preparatorios se dirige a confirmar la interpretación fundada en el sentido corriente de los términos y el análisis del contexto y del objeto y fin de la Convención Americana.

41. Y efectivamente el examen de los escuetos trabajos preparatorios confirma el sentido en que se ha venido interpretando el artículo 1.2 de la Convención, dado que en ellos se utilizaron los términos "persona" y "ser humano" sin la intención de hacer una diferencia entre estas dos expresiones[47]: "persona es todo ser humano". Los trabajos preparatorios demuestran que el texto del párrafo 2 del artículo 1 fue propuesto desde el inicio (con la sola diferencia de que entonces era el párrafo 3, pues el párrafo 2 era un texto análogo al actual art. 2) y que solo hubo "un breve cambio de opiniones", al cabo del cual fue "aprobado por unanimidad"[48].

E. Conclusión final

42. *La aplicación de los criterios y medios de interpretación previstos en la Convención de Viena ha confirmado la interpretación del artículo 1.2 de la Convención Americana según la cual las personas jurídicas no están comprendidas en "el ámbito de protección de la Convención" y "la protección interamericana de los derechos humanos" sólo comprende a las personas físicas o naturales (supra, párr. 2). Las personas jurídicas no pueden ser consideradas como presuntas víctimas en el marco de los procesos contenciosos ante el sistema interamericano."*

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del Hombre, de la Convención Americana […] y de sus Protocolos o instrumentos internacionales complementarios". Observaciones escritas del Estado guatemalteco (expediente de fondo, folio 1538).

[46] México señaló que "el artículo 1.2 […] señala que para los efectos de la Convención Americana persona es todo ser humano, lo expresado literalmente en el artículo 1.2 tiene efectos que van mucho más allá del ejercicio de interpretación, ya que constituye una manifestación expresa de la voluntad de las partes signatarias a la Convención Americana para definir el término persona, única y exclusivamente podría significar todo ser humano". Observaciones orales del Estado mexicano en la audiencia pública de la presente opinión consultiva..

[47] *Caso Artavia Murillo y otros (Fecundación in vitro) Vs. Costa Rica. Excepciones Preliminares, Fondo, Reparaciones y Costas*. Sentencia de 28 noviembre de 2012 Serie C No. 257, párr. 219.

[48] En los trabajos preparatorios consta lo siguiente:" El PRESIDENTE p[uso] a consideración el párrafo 3 del artículo 1, el cual, después de un breve cambio de opiniones, es aprobado por unanimidad, en la forma siguiente: 3. Para los efectos de esta Convención, persona es todo ser humano". Convención Acta de la segunda sesión de la Comisión I, Doc. 36, 11 de noviembre de 1969, p. 157.

21. La propuesta que antecede no fue considerada por la Corte. A pesar de la fundamentación oral que hice acerca de su pertinencia y de la conveniencia de que las opiniones consultivas fuesen aprobadas sin votos disidentes, la mayoría de la Corte entendió que no se podía dedicar más tiempo al examen del proyecto de opinión consultiva, aunque asimismo resolvió terminar nuestras sesiones un día antes de lo previsto. En los seis años que duró mi mandato como juez de la Corte Interamericana, nunca me había encontrado frente a una situación como esta. Siempre que se formularon posiciones contrapuestas, se dedicó el tiempo necesario a la argumentación en un sentido o en el otro, y o bien se llegó a una solución de consenso, o bien se adoptó por mayoría una decisión razonada en un sentido y los jueces que mantenían opiniones divergentes pudieron expresarlas en sus votos, si así lo desearon. Jamás se adoptó una decisión mayoritaria fundada solo en la alegación de falta de tiempo y no en la opción razonada en favor de una de las argumentaciones contrapuestas.

V. NO SE PUEDE OPINAR SOBRE SINDICATOS SIN TENER EN CUENTA A LA OIT

22. La opinión consultiva hace una interpretación de las disposiciones del Protocolo de San Salvador relativas a sindicatos y derechos sindicales. Establece, en el punto 4 de su parte dispositiva, que "El artículo 8.1.a del Protocolo de San Salvador otorga titularidad de derechos a los sindicatos, las federaciones y las confederaciones, lo cual les permite presentarse ante el sistema interamericano en defensa de sus propios derechos en el marco de lo establecido en dicho artículo, en los términos establecidos en los párrafos 85 y 105 de la presente Opinión Consultiva."

23. El párrafo 85 recuerda la fecha de aprobación del Protocolo de San Salvador e indica cuántos Estados han ratificado dicho Protocolo hasta la fecha. Asimismo transcribe el Artículo 8.1.a), que dispone: "el derecho de los trabajadores a organizar sindicatos y a afiliarse al de su elección, para la protección y promoción de sus intereses. Como proyección de este derecho, los Estados partes permitirán a los sindicatos formar federaciones y confederaciones nacionales y asociarse a las ya existentes, así como formar organizaciones sindicales internacionales y asociarse a la de su elección. Los Estados partes también permitirán que los sindicatos, federaciones y confederaciones funcionen libremente".

24. El párrafo 105 dice lo siguiente: "En virtud de lo anteriormente expuesto, la Corte ha concluido la titularidad de los derechos establecidos en el artículo 8.1.a del Protocolo de los sindicatos, las federaciones y las confederaciones, lo cual les permite presentarse ante el sistema interamericano en defensa de sus propios derechos. Ahora bien, en este punto la Corte considera relevante recordar que en razón de lo dispuesto por el artículo 44 de la Convención Americana, los sindicatos, las federaciones y las confederaciones legalmente reconocidos en uno o más Estados Parte de la Convención, formen o no parte del Protocolo de San Salvador, pueden presentar peticiones individuales ante la Comisión Interamericana en representación de sus asociados, en caso de una presunta violación de los derechos de sus miembros por un Estado Parte de la Convención Americana."

25. Ninguno de los párrafos indicados contiene una verdadera fundamentación del punto dispositivo 4. Resulta temerario aventurarse a dar una interpretación de disposiciones que hasta ahora la Corte no ha tenido oportunidad de considerar en ejercicio de su competencia contenciosa. Asimismo, tratándose de un tema respecto del cual la organización internacional

con competencia específica en la materia es la Organización Internacional del Trabajo (OIT), se debió haber examinado y expuesto la posición de dicha organización. Nada de eso se hizo. Peor aún, se citó el Convenio N° 87 de OIT relativo a la Libertad Sindical y a la Protección del Derecho de Sindicación, sin tener en cuenta que –como lo hice notar en las deliberaciones a este respecto– dicho Convenio no reconoce la personería jurídica de los sindicatos y las federaciones o confederaciones de sindicatos, sino que en su artículo 7 dispone que "La adquisición de la personalidad jurídica por las organizaciones de trabajadores y empleadores, sus federaciones y confederaciones, no puede estar sujeta a condiciones cuya naturaleza limite la aplicación de las disposiciones de los artículos 2,3 y 4 de este Convenio". Tampoco se aceptó considerar si la personería jurídica en sentido tradicional es necesaria para el ejercicio de los derechos sindicales de los trabajadores, ni la distinción entre personería sindical o gremial (que se reconoce al sindicato que en su ámbito territorial y personal de actuación sea la más representativa) y personería jurídica (que pueden tener –o no– todos los sindicatos existentes en una misma rama de actividad). Esa distinción se hace nítidamente, por ejemplo, en el derecho argentino [6] .

VI. EL CASO DE LAS COMUNIDADES INDÍGENAS

26. La rica e innovadora jurisprudencia de la Corte Interamericana en materia de comunidades indígenas y tribales, y en particular el reconocimiento del derecho a la propiedad colectiva de la tierra ancestral, puede interpretarse como un reconocimiento de los derechos fundamentales de los seres humanos que integran dichas comunidades, y no como un derecho fundamental de las comunidades mismas. Si bien algunas sentencias recientes parecen inclinarse en el segundo sentido, no me parece que se trate de un criterio jurisprudencial específicamente fundamentado y consolidado definitivamente como para incluir en una opinión consultiva. Ello es así, en particular, habida cuenta de que entre las consultas específicas de Panamá no se hace referencia a las comunidades indígenas, sino sobre "una organización indígena (persona jurídica)", y ello en relación con el agotamiento de los recursos internos "en nombre de sus miembros".

VII. CONCLUSIONES

27. Las razones expuestas con amplitud en el texto que antecede justifican el voto negativo que emití respecto de varios de los puntos resolutivos. En cambio, voté a favor del punto resolutivo 1, a pesar de discrepar con la fundamentación contenida en los párrafos 37 a 70, porque en el debate se logró que su texto tuviera la claridad, la concisión y la contundencia necesarias según el razonamiento expuesto en este voto.

[6] Ley N° 23.551, sancionada el 23 de marzo de 1988 y promulgada el 14 de abril de 1988. El artículo 14 bis de la Constitución de la República dispone, en lo pertinente, lo siguiente:

> "El trabajo en sus diversas formas gozará de la protección de las leyes, las que asegurarán al trabajador: […] organización sindical libre y democrática, reconocida por la simple inscripción en un registro especial.
> Queda garantizado a los gremios: concertar convenios colectivos de trabajo; recurrir a la conciliación y al arbitraje; el derecho de huelga. Los representantes gremiales gozarán de las garantías necesarias para el cumplimiento de su gestión sindical y las relacionadas con la estabilidad de su empleo."

Alberto Pérez Pérez

Juez

Pablo Saavedra Alessandri

Secretario

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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English of the attached excerpts of the Advisory Opinion OC-22/16 of February 26, 2016.

Laura Musich, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 11th day of April, 2019.

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